

SUSTAINING THE MEANS OF SUSTAINABILITY: THE NEED FOR ACCEPTING WAKAF (WAQF) ASSETS IN MALAYSIAN PROPERTY MARKET

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Abstract

The socio-economic equity and justice in terms of education, employment, shelter, health care, safety and more, for all, now and then form the spirit of sustainability. No historical event can represent this but the private Muslim charitable perpetuities (i.e. wakaf/waqf). wakaf is the means of human sustainability which needs to be self-reliant.

To be independent and self-reliant, the wakaf institution needs to keep its assets income-generating. Unfortunately, in Malaysia thousands of acres of waqf lands and properties are idle, underdeveloped, or underperforming, due to their unequal treatment by law and market forces, in the property market. To overcome this problem, access to land market and access to credit market is needed. Since the present legal constraints prevent from such markets, this paper proposes a framework for the marketability of waqf properties, as permitted by Islamic law and is achievable through the reformed concepts of Malaysian Land Administration System and its components. Thus, for the recognition by market forces, two types of markets, based on fair market price and rental rates, are visualized: (a) sale and purchase market for properties held as investment assets and that purchased through the income of the capital of waqf; (b) leasing market, whereby long term leases, equivalent to that of leasehold alienation, will be effected. To implement these proposals, few amendments to some of existing laws are offered.

Keywords: Wakaf, Waqf, Property Real Estate, Market, Creation of, Sale & Purchase, Leasing

1.0 Introduction

Sustainability is a composite of policy goals, understood in the terms of its indicators such as the socio-economic equity and justice comprising education, employment, shelter, health care, safety and more, for all, now and then. To achieve these goals, in addition to programs sponsored by public and private sectors, a role is assigned or undertaken by individuals and non-governmental organizations, called the Third Sector. Thus, the third sector is one of the major means of sustainability.

To be an effective means of sustainability, the third sector needs to be self-reliant and self-sustaining first. Now, it often relies on the hand-out of public and private sectors, which at times, may dry up and thus would result in the collapse thereof, or, due to financial constraints, would be unable to achieve its aims and objectives. On top of that, it is possible it would be forced to work according to the demands of the interest groups, thus, alienating them from their objective course of action. However, as a step towards self-sustenance, the trend seems to be changing, as the third sector, now, considers itself fit to acquire, subdivide and develop land, construct housing, provide infrastructure and operate and maintain infrastructure such as wells or public toilets and solid waste collection services. They can also develop building material supply centers and other community-based economic enterprises. This is a strategic thinking on part of civil society to have strategic financial management, financing strategy for financial sustainability, and diversified funding. All these are and should be conceived to apply to the institution of wakaf in Malaysia.

1.1 The Institution of Wakaf as a Means of Sustainability

The institution of wakaf refers to the private Muslim charitable perpetuities (i.e. wakaf/waqf), a Muslim not-for-profit institution akin to the modern NGOs. This institution has been instrumental in the sustainable social and economic development of given societies, and until 18th century, it operated in a fully autonomous and self-sustaining manner in handling various projects of social and economic import.

Social and economic sustainability is the objective of waqf. Even though waqf can be for family or a charitable purpose, a family waqf is ultimately turned into charitable. A charitable *waqf* is established when its income is dedicated for the welfare of a specific class of individuals or a project. They include the poor, needy, old, sick, widows, orphans, travelers etc. or any one or anything provided the distribution of the income from the invested funds and property is beneficial to the well being of the society at large (Mohammad Tahir Sabit, 2004, p.19). These objectives have historical background. Waqf has directly helped the underprivileged groups of the society in the area of education, healthcare, shelter, employment and other necessary components of socio economic and political activities. Indirectly it has provided an opportunity for supply and demand of consumer goods, used by the institutions and individuals sponsored by the waqf institution, and have lessened the burden of the given government, when the institution of waqf provided services that are typical to a national government (Shaykh Salih Abdullah Kamil, 1994).

The institution of waqf has contributed to the sustainable welfare of the community effectively without interference from the executives. Three reasons need to be noted: firstly, the government had no power to interfere with management of its affairs except in the appointment and disqualification of the trustees. Secondly, the institutions and organizations that were supported by waqf were not linked to government. Thirdly, the finance of the projects under its control was generated by the properties dedicated as waqf. The latter was possible through the legal framework which enabled waqf to retain and invest real estate and other non-perishable valuables in revenue generating enterprises and to distribute the income on the disadvantaged groups of the given community.

The self-sustainability of waqf institutions is perceived in the self-financing of the welfare projects by the institutions of waqf. This is a goal to which Muslim jurists have remained steadfast through out past centuries. They recognized real estate as one of the best assets to be dedicated as waqf. This is evident even today, as in every Muslim territory, the institutions of waqf have a substantial share in overall national wealth of real estate.¹ This legal accommodation, in addition to independent decision making power of waqf institutions, has empowered Muslim philanthropists to contribute to the sustainable welfare of their communities in their lifetime and the generations that have followed. Many of their endowment trusts have survived the adverse political realities which still continue to be a source of social and economic sustainability to many.

Following the above established principle, the institutions of waqf in Malaysia develop wakaf lands in commercial, housing estates, plantations etc., in hope that they will have a handsome return.² The Selangor administrators, by 1987, had developed 1,285.4488 hectares, and many other development projects have been completed in other states, such as Johor, Malacca, Negeri Sembilan and Penang. In addition to this, various states in Malaysia have issued waqf shares the proceeds of which is estimated in millions that are used to purchase land and construct buildings.

The writer believes that the waqf is a means of sustainable welfare that can help governments lessen their burden in this area. Considering the large income from waqf properties and the distribution of 50-90 % of its income on the disadvantaged groups, the prospects of contribution of these funds to the national economic sustainability is substantial. Such contribution is not only available to Muslims in macro projects they also benefit non-Muslim citizens (Kamarudin Ngah 1992). Nevertheless, the

¹ Only in Malaysia the size of known wakaf landed property, estimated in 2002, is 20,735.61 acres (JAKIM, 2000), not including the Concession of the Cenderong Concession in Terengganu comprising 64000 acres (Pawanchek 2005) and those which were not registered at the time. Jasni MD Zain, (2006) has illustrated that the Malacca figures which stood at 843.36 acres under Jakim's estimate was inaccurate by 2006 when the size of the registered waqf land in Malacca was recorded at 1458.28 acres. This finding may be generalized presuming that wakaf lands are more than the above figure.

² This can be inferred from Selangor's development projects. The value of 1.3 acre developed into a commercial building is given at RM 5 million: pengalaman Majlis Agama Islam Selangor (MAIS) dalam memajukan Tanah Waqf dan Baitulmal, p. 9. MAIS report 1987-88. Also see the Annual Financial Report of Maim, 1992

bulk of the waqf properties at the moment form land and buildings that need accommodating legal framework and unconstrained access to land market; both, unfortunately, are missing in many jurisdictions which are a threat to the sustenance of waqf properties.

2.0 Obstacles to the self-sustainability of the wakaf institution

Despite being a self-sustaining charitable investment trust, wakf faces many legal, financial, and political problems in the effective and profitable development of its vast size of lands. The majority of legal problems are there because waqf is a religious concept that needs legal recognition and enforcement. The religious concept of waqf is based on the old theories without serious revision thereof, thus resulting in a legal framework that is also based on the very old interpretation of the religious texts. Some Muslim jurists of the past recognize three fundamental characteristics of waqf: irrevocability, perpetuity, and inalienability. Malaysian law follows the same principles and hence limits not only the marketability of waqf lands but also prevents them to have access to credit market and investment funds. Barred from raising development finance on its own, waqf property either remain undeveloped or heavily dependent on government funding. In addition to the lack of political will, development finance may be lost due to federalist principles. Again due to these problems, waqf land is left barren sometime, and encroached upon both by public and private persons. This section will only concentrate on the legal constrains that are evident in Malaysian Land Administration System and law. The legal constrains on the productive utilization of waqf lands are then discussed in relation to land tenure, its formalization, security, transfer of title, land market, access to credit and valuation.

2.1 The Constrains of Malaysian Land Administration System on Wakaf Properties

Land administration is a basic tool that supports land management and operates within the framework established by land policy and the legal, social, and environmental background of a particular jurisdiction. It is a system implemented by the state to record and manages rights in land. A land administration system may include the management of public land; recording and registration of private rights in land; recording, registration and publicizing of the grants or transfers of those rights in land through, for example, sale, gift, encumbrance, subdivision, consolidation, and so on; management of the fiscal aspects related to rights in land, including land tax, historical sales data, valuation for a range of purposes, including the assessment of fees and taxes, and compensation for state acquisition of private rights in land, and so forth; and control of the use of land, including land-use zoning and support for the development application/approval process (World Bank, Tony Burns, 2007; UNECE, 2005; UNECE, 1996). Following this, an integrated land administration system would require a data base from the departments of land administration, survey, valuation, and planning.

The Malaysian land administration is not different from the description given above. It refers to those matters which deal with land tenure and licenses, registration, dealings, offences and penalties and tax and land revenues, land information system etc. In Malaysia, only land administration and survey and mapping are integrated under one ministry while valuation and planning are not. All land policy and administration matters are dealt with by the Department of Land Administration, both on federal and States level. In principle, one would assume that the administration of waqf lands should fall in the system or there should be a parallel system that registers titles, rights and dealings the same as established under the National Land Code, 1965. This however is not the case. To illustrate this point the legal framework that requires registration of titles, and their transfer or transmission, as well as the operating land markets under this system are discussed in the following section.

2.1.1 Waqf Properties in the Legal Framework of Malaysian Land Administration System

A legal framework defines land-rights, which in the context of the Malaysian Land Administration System is modeled on the colonial model, thus, it does not apply to wakaf lands generally. The Malaysian land law is complex comprising written and unwritten laws including common law and Islamic law. The major legislations are the Malaysian National Land Code, 1965, (NLC), based on

Australian Torrens System, the Strata Titles Act, 1985 and the Land Acquisition Act, 1966. The Sarawak Land Code (Cap 81) and the Sabah Land Ordinance (Cap 68) are applied in these territories respectively. While the Sarawak Code is based on Torrens System, the Sabah Ordinance is not, and therefore indefeasibility of title is not available under the Ordinance, thus adverse possession against private land is possible (Teo Keong Sood et al, 1995). All these legislations are to a great extent reflective of Western land tenure system, to which all land tenure rights and interests, in Malaysia, are subjected with exception of wakaf lands. Section 4 of the NLC provides that the Code shall not apply to wakaf and baitul mal land. All States in Malaysia, therefore, have their own legislations whereby wakaf properties are inadequately regulated. This complexity of law can be seen further in the next sections.

2.1.1.1 The Formalization and Security of Land Rights

Ownership of all rights and interest in land are alienated by the State, or recognized by the State. They are registered and recognized to be transferable or disposable. Under Malaysian law (s. 40 of NLC; Lee Mei Pheng et al, 2002), all lands are State lands against which no adverse position is possible (s. 48, NLC). In Sabah adverse possession is still operative and squatters in West Malaysia and Sarawak may be compensated in a sort. Private land and interest therein can be owned by natural and artificial persons, through alienation by the State (ss. 42, 43, NLC), which should be registered (ss 87, 88 NLC). Once registered, the register document of title is conclusive (s 89) and indefeasible under s 92 of NLC, subject to the provisions of s 340. This title then can be subject to dealings by the proprietor of the land which may be in the form of transfer i.e. sale, lease, charge, disposal by will and so forth. All dealing must also be registered and the issue title effected thereby should be indefeasible under s 340 of the Code provided the title is not obtained as a result of fraud, misrepresentation, forgery and abuse of power under the same section. Therefore, upon formalization of titles their security is strongly emphasized through not absolute and not guaranteed by the State. There is no security of title against a third party who is a bona fedi purchaser without notice and for a consideration (s.340, NLC). There also is no fund to compensate the landowner against such incidents.

Wakaf land titles are still partially formal and partially informal. They can be registered under NLC even though Section 4 of the NLC provides that the Code shall not apply to wakaf and baitul mal land except in so far as it is expressly provided otherwise. Nevertheless, wakaf lands, through alienation or transfer, are registered in the name of Majlis Agama Islam according to section 215 of the NLC, but the Majlis has no proprietary rights in the land; it is only the administrator, not even a trustee, of the said lands (Re Dato Bentara Luar Decd Haji Yahya Bin Yusof & Anor V. Hassan Bin Othman & Anor [1982] 2 MLJ 264, 1 LNS 16). There are no specific instruments for such transfer and also there are no specific rules to guide the Majlis or the Land Administrator. Yet, there might still be some wakaf lands that are not formalized but due to the effect of section 4 of the Code the status of such land will not be affected by the lack of registration as the relevant law on this point is Islamic law which recognizes unregistered transfers of land. This was explicitly mentioned in Re Dato Bentara Luar Decd Haji Yahya Bin Yusof & Anor V. Hassan Bin Othman & Anor [1982] 2 MLJ 264, 1 LNS 16, and other old cases.

There is a parallel registration system but not independent and not fully developed. Every dedicated land to wakaf must go necessarily through registration in the Majlis first and then in the land office under the present legal setup prescribed by the NLC. A land so dedicated can be legally transferred after the procedures under NLC in the land office are fulfilled. Only then the title would be secure and not open to abuse. Apart from registration of the title, no effort is made by the Majlis to modernize its register so that future transaction can be recorded and development planned. In addition to these issues, a link between the National and State economic planning units and wakaf institution is broken resulting wakaf lands effectively lagging behind the State development planning as the wakaf institutions often loose to benefit from the expertise of the planner.

The title in wakaf land is too secure. While the transfer of private land to wakaf land is facilitated through s 215, the transfer of such land by the Majlis Agama Islam to another person is not provided under NLC and it is not permitted under State laws. This is so because the legal framework for the

administration of wakaf lands in Malaysia is based on the traditional classical view of Muslim jurists and therefore once dedication of wakaf is effected it is irrevocably perpetual, incapable of any assignment, conveyance, or transfer. (See for example section 4 of the Selangor *Wakaf* Enactment 1999, s. 91 of Kedah Administration of Muslim Law Enactment 1962, section 62 of Administration of Islamic Law (Federal Territories) Act, 1999, and the Council of the religion of Islam and Malay Custom, Administration of Kelantan, Enactment, 1994.³ Also, refer to Haji Salleh Bin Haji Ismail & Anor [1935], Re Dato Bentara Luar [1982]). As such extra security is provided to the waqf titles. One may consider this a blessing on one hand and a hurdle to the development of wakaf land on the other. It is a blessing because it makes a strong case for the formalization and security of title of wakaf land; nevertheless, this also works against the interest of these lands. The extra security of title due to the concept of perpetuity of wakaf title makes the title to become frozen. It cannot be transferred: sold, charged and transmitted under current legal framework, though, under Shariah law it can be leased or rented both on short and long term (see Figure 1). Consequently, due to the non-transferability of the title, wakaf land cannot have access to land and credit markets, as will be discussed in due course.

2.1.1.2 The Types of Land Rights

Ownership of land-rights can be freehold or leasehold. This applies, today, to state lands disposed through alienation (s 42, NLC). After alienation such rights are also transferred in perpetuity and subject to a time frame depending on the nature of title to the land that is whether it is freehold, leasehold, lease, tenancy, trusts, or Temporary Occupation License (TOL). A freehold title is held indefinitely while leasehold is for duration of years not exceeding 99 years (s 76, NLC, 1956). Lease, sublease (s 5, NLC), tenancy, sub-tenancy (s 213, NLC), and trust (s. 333, NLC) titles are temporary; the same applies to TOL (ss. 66-67, NLC). The owner or his/her successors will hold the title for the specified period of years. A freehold title in land will revert to State upon the breach of a condition, non payment of rent, death of the proprietor who has no successor, abandonment and surrender of title by the proprietor. The same applies to leasehold land but the title in this type of land also reverts to State upon the expiry of the term specified in the title document. (s 46, NLC).

Land rights are also classified as the paramount and subsidiary (Salleh Buang, 2001). The paramount rights are defined in section 44 of the Code; that is the exclusive use and enjoyment of the land, the right to the support of the land in its natural state by any adjacent land and rights of access to foreshore, river and public place. Use and enjoyment of the land may be understood to mean its utilization, renting or leasing, selling or transferring ownership, giving it away, using it as collateral for a loan, making bequeath to intended beneficiaries, and let it lie idle. The subsidiary rights are spelled in section 45 which include the right to extract, move or use rock material and to fell, clear, destroy or use forest produce.

No right in land is absolute. All rights and interests are subject to express and implied conditions. Nevertheless, some rights are strong and others are weak from the perspective of marketability and access to credit, as will be explained later. The NLC imposes certain conditions. It divides land into Malay Reservation Land, mining, forest etc. or farmland, industrial land, and building land. These conditions, in addition to the time limits, affect the marketability of the land due to the restriction in interest and transferability of the title. Based on the time restriction, the weakest of all titles is the tenancies not exceeding three years, temporary occupation licenses (TOL), and adverse position (Lee Mei Pheng et al, 2002).

As section 4 of the National Land Code excludes wakaf lands from the ambit of the Code, rights and interests in wakaf land are indirectly constrained. Wakaf titles, be it registered or not, are perpetual. As such it is not clear whether the transfer or alienation of a leasehold land can form a valid wakaf. What is the nature of interest in a land leased by wakaf intuitions for the benefit of wakaf is not clear. Nether the State legislations or case law expressly provide for. The natural implication of the

³ For further details see Mohammad Tahir Sabit and Abdul Hamid Mar Iman, 2006. Obstacles of the Current Concept of Waqf to the Development of Waqf Properties and the Recommended Alternative. Malaysian Journal of Real Estate, Volume 1 issue 1 27-38.

paramount rights is not true in case of wakaf lands. Wakaf lands are not trust lands as understood under western systems (section 5, NLC); hence, by law, the trustees of wakaf, except in the case of Kelantan, have no power to transfer or transmit or even to charge them. It is the duty of the wakaf institution to keep wakaf land productive and income generating. Thus the question of making it a gift or let it lie idle does not arise. The restriction in interest applies to wakaf land too. Once categorized as wakaf land, irrespective of being so formally or otherwise, it has more restricted market than Malay Reservation Land, for the same reason that it cannot be transferred to a non-wakaf entity.

2.1.2 Land Markets and the Wakaf Properties in the Malaysian Land Administration System

Malaysia is considered one of those non-western countries that have effective land market (Williamson et al, 2007). Its land administration facilitates freehold, leasehold titles, recognizes charges and liens. There also exists a highly advanced land commodities in form of equity and credit asset backed securities. This, however, is true in the case of non-wakaf lands. As can be seen, wakaf land has no access to the Malaysian land market as it is not included in the main infrastructure of Land Administration System, and there is no cohesive and consolidated legal framework, and financial system. This will be shown in the paragraphs below.

A land market is said to exist when land rights are exchanged for consideration (Robert Mahoney et al, 2007). A land market can be basic, advance and highly advance. It can be formal and informal. The formal land market is one that is incorporated by the government in the Land Administration System, a legal framework and a financial system. The Land Administration System will manage property rights, the legal systems will define them, and the property institution will generally measure market operations (see Williamson et al, 2007).

A wakaf property not only needs advanced land market but also formalized. At the moment, it is questionable whether or not wakaf lands are fully capable to be offered in the basic land market, as the main infrastructure of land administration i.e. the National Land Code, excludes wakaf law, the legal framework provided by the State laws for the wakaf land indicate only that it can be used and enjoyed, leased and rented and put to crop sharing (see Figure 1). Other forms of dealings such as disposal by sale, charge and bequeath, are not applicable, for they will not be registered, and

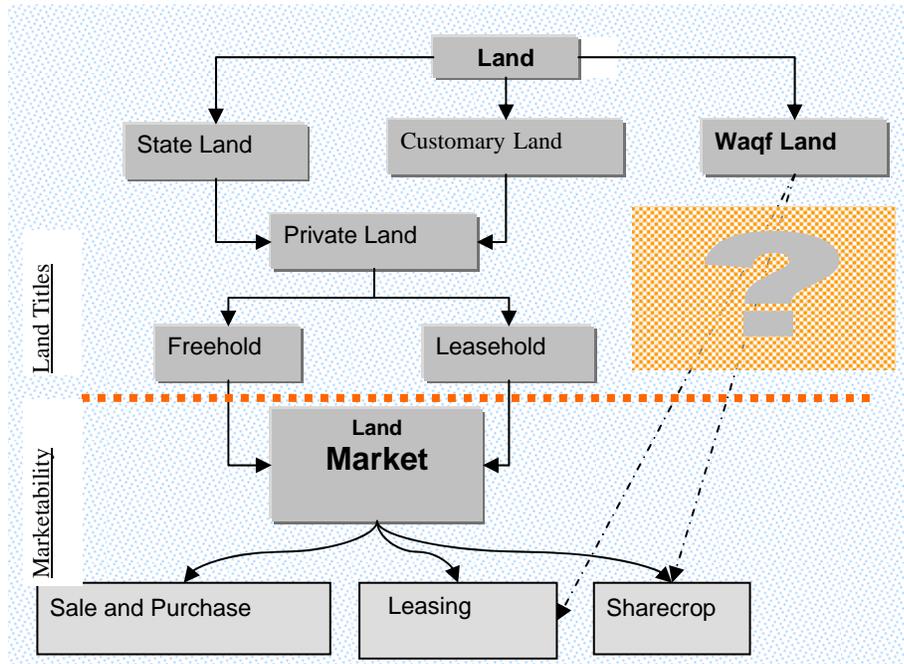


Figure 1: Wakaf Land Titles and Marketability as viewed by Some Muslim Jurists and the Malaysian Land Administration System

recognized by courts. As such one may even discount the possibility of an informal land market, for a land market to exist there must be a legal framework to define the rights of parties and a land administration to recognize them. Only then the land market can function with confidence and security (Williamson, 2000). A market confidence in wakaf properties is possible when the land administration system is capable to fully protect the rights of landholders and the landholders have the freedom to enter transactions. Less than that a reform is needed (See Malcolm Childress et al, 2004). It is clear that the Malaysian legal framework does not give such freedom to wakaf landholders and does not protect them if such a transaction is ever entered.

Wakaf land is not a commodity in sale and purchase land market, while in leasing and rental markets, it is treated discriminatively; they are rented often below market price (Jasni, M.Z, 2006). There are instances where the land is leased to a Chinese man for RM 250 and the Chinese man has rented it out to another for over RM2500.

2.1.3 Access to Credit Market

Access to credit is possible when the infrastructure, law and the property institution recognize and protect a particular dealing in terms of sale and purchase, lease and charge or mortgage. Once the title to a land is secure, it will be collateralized and thus will give the poor access to credit (De Soto, 2000, Williamson et al, 2007), because there would be less risk when the borrowers default on their loan. The bank would be able to foreclose the charge and mortgage. In the case of wakaf land however this is not true.

Legal discussion, in Malaysia, on property assessment for collateralization purposes often circles around the above titles leaving behind customary rights and wakaf lands. The discussion is limited to the ranking of these titles. The best is termed the freehold title, which is presumed to have a better market value compared to a title that has a fixed period of time. As such, the market value of a piece of leasehold land, under certain circumstance, may be lower than that of a similar piece held under freehold title especially when a substantial period of lease is expired. Market forces are advised to look at the commencement of the lease, the time limit within which the leasehold is put as a security and the remaining years of the leasehold title. Lease exempt from registration that is for a period of less than three years, will have no market value for the purpose of collateral. Among this ranking, wakaf lands are not mentioned. This is true both in terms of ownership (sale and purchase) and land user rights (lease and sublease). Consequently, contrary to the theory that land titling increases access to credit (Malcolm Childress et al, 2004), Malaysian banks do not offer credit facility in exchange for collateralization of wakaf land, which results in wakaf lands that lack development investment facility and markets and hence remain underutilized.

Several reasons might be given for making wakaf lands excluded from access to credit: that is the burdening security of title and the rigid approach of Malaysian policy makers. Wakaf lands are not trust lands as understood under western systems (section 5, NLC); hence, by law, the trustees of wakaf, cannot collateralize wakaf land because they have no power to transfer or transmit or even to charge them. Even if the trustees intend to charge wakaf land, banks would not accept it because Malaysian banking law is prohibitive of loan without security and wakaf land is not a valid security. This can be seen from the position of the general law.

The law in general is not favourable to wakaf land. Under section 60, Banking and Financial Institutions Act 1989, all banks are prohibited from giving to any person any credit facility without security. By virtue of section 241 (3)(a) and section 301 (c) of NLC, waqf land cannot be charged, almost in all states, as it cannot be registered if the given dealing is against the prohibition imposed by any written law for the time being in force. Various State Enactments do prohibit transfer of titles, including charges, and the case law recognizes wakaf titles to be in perpetuity. Banks and other financial institutions, for the same reason and in light of section 4 (2)(e) or section 5 of the National Land Code 1965, or ultimately section 6 of the Civil Law Act 1956 that excludes land matters from English law, will see the restriction on title as an obstacle to the enforcement of their rights and interests in the wakaf land. It will be an investment risk, as during foreclosure the lending institution will be unable to sell the property. They may not be able to seek remedy under section 206 (3), that is outside the National Land Code 1965. These financial institutions will not be able to seek remedy

under the law of contracts according to the rules and principles of Common Law and Equity because wakaf is not subject to the provisions and rules of these laws. Consequently and due to these constraints, wakaf lands have no market price, no cadastre information system, thus, there exists no market for such a land in Malaysia.

2.1.4 Valuation

The lack of marketability of wakaf land may have negative effect on the valuation aspect of wakaf land too. In a functioning land market the register should provide information on current land prices, thus allowing better estimates of the market value of land to be made (UNECE, 1996). Since there is no market for wakaf lands the temptation is that there would be no need to value such lands. Presuming the existence of such a temptation, several legal and economic tensions are created thereby.

Two main tensions, created in the vacuum of a valuation formula, are perceived; namely prevention of wakaf lands from development through other means and a discriminative approach towards wakaf lands. Banks who wish to provide some other informal form of credit facility for the development of wakaf land would not be able to assess the amount of loan they intend to advance to wakaf intuitions because they will have no clue how to find the value of the land. The discriminative treatment of wakaf land can be understood from the provisions of the Federal Constitution and that of Land Acquisition Act, 1960. Under Article 13 of the Federal Constitution, adequate compensation for land compulsorily acquired by the State should be paid. This shall be true about wakaf land and property but the main law of land acquisition has discriminative formula for compensations offered to the dispossessed landowner.

The Land Acquisition Act 1960 under its first schedule explains the adequacy of compensation based on the market value of the scheduled land. Courts have interpreted this as open market that as when a willing vendor might reasonably expect to obtain from a willing purchaser, not under compulsion but dealing at arm's length. This therefore requires the best price to be paid to the dispossessed land owners. Both the vendor and purchaser must be assumed to be reasonable men who are willing to give and pay. Under the law, factors such as the size, shape, condition, and location as well as the use to which the land will be put, according to master plan, the potential value of the land, and the rise and fall of the demand for land at any point in time, should validly be considered by valuers. Nevertheless, the Act limits the value of land by the statutory restrictions e.g. farm land etc, though such is not true about a land being Malay reserve land, Malay holdings, and customary land. The Act enforces the demand factor of the scheduled land. This is in line with s 9A of the Act, however it acts against those lands which allegedly continue to be devoted to a purpose that in its nature has no general demand or market value (e.g. schools places of worship etc), which presumably applies to wakaf lands too. Under section 15 of the Land Acquisition Act, 1960 and its First Schedule, 1(2C), the land Administrator may make award by way of full or partial substitution for monetary compensation, or the valuer may value these lands based on the principle of reinstatement, that is a reasonable amount is paid as costs to the landowner for purchasing or using other land (see Rau, KVP, 2000). This principle, if it means anything to wakaf lands, is favouring only individual properties and thus rather discriminative.

To sum, the formalization of land titles, the facilitation of land markets, property valuation, and collateralization of land are linked, so much so that some of them may not properly function without the proper function of the other. Formalization and registration of land ownership and rights provide tenure security which facilitates secure land market as it provides reliable conveyancing. Reliable conveyancing of land from one owner to another creates access to credit and also credit security. Intrinsically, these need land valuation land collateralization. Combined and integrated, they provide a ladder to land development and economic prosperity, and for this reason all these should be available wakaf land too.

3.0 The Need for Reform Bias towards Wakaf Lands

The discussion in the above sections showed that wakaf lands are kept away from the main land administration system in terms of not only title registration and title security, and legal framework, but also, trading, marketability, equal market value and collateralization. This section is dedicated to need to reform Malaysian Land Administration System including all aforementioned components of the system. Why, what and how such reform should carried out is discussed below.

3.1 Why the Reform of Land Administration System for the Benefit of Wakaf Is Needed

Three main reasons may be given for the need to reform the present Land Administration and its relevant components.

Land tenure is linked to human rights (UN Economic and Social Council, 2001) where the lack of recognition of such rights is treated equal to effective discrimination. Dedication of property as wakaf is the religious right and liberty of Muslims. Wakaf is an investment and regeneration of wealth, so that a sustainable charity for the sustenance of present and future generations of people can be effected. Anything damaging this concept must be treated a threat to the basic rights of the Muslim donors.

Article 1 of the First Protocol to the European Convention on Human Rights, 1950, provides: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions..." Western governments have developed, and are still modernising their land administration systems, cadastre or land registration systems according to this article. Article 13 of Malaysian Federal Constitution guarantees the sanctity of property which should apply to both natural and artificial persons including wakaf lands. Wakaf is considered an institution and should be considered one of legal persons that must be entitled under the aforementioned article to full enjoyment of its properties and likewise to the benefits of the ensued land administration system.

Current Land Administration especially its legal framework affects the development of wakaf lands and ultimately, in a way, affects the socio-economic sustainability of the nation. The need for a good land administration system is thus obvious. A good administration is one which is beneficial to individual and society at large; that records and disseminate information about the ownership, value and use of land and its associated resources'; develops and monitors land and mortgage markets, land market analysis, protects State lands, reduces land disputes, improvement of land and buildings and facilitates land reform (UNECE, 2005, UNECE, 1996).

Wakaf is a tool of sustainability which needs to be sustained and self-reliant. It should be enabled to seek alternative financial facilities for investment in its real estate. In addition to its trivial income, wakaf relies mostly on funding and handouts from private philanthropists, and that of the first (public), and second (private) sectors, networking, virtuous administration, and sound economic planning, prudent management and investment of the existing funds. but these alone do not suffice. A great number of valuable wakaf lands are still idle, underdeveloped, or underperforming, due to their unequal treatment by law and market forces, in the property market.

In addition to the above, there are other reasons for the reform of the components of Land Administration System. These reasons will be discussed separately.

3.1.1 The Security of Title or Formalization

The formalization of rights and titles provides order and stability in society including landowners and their partners, national and international investors and moneylenders, traders and dealers, and for Governments (UNECE, 1996).

Secured titles increases formal market activities (Malcolm Childress et al, 2004), as this is an investment incentive that leads to an increase in national investment and economic growth (World Bank, Byamugisha, Frank F.K, 1999; UNECE, 2005.). Contrary to the view of Barnes et al (2006) the security of title is fundamental to investment and productive utilisation of land, property conveyancing, including decisions on mortgages and investment, property assessment and valuation. All these facilitate a safe and certain foundation for the acquisition, enjoyment and disposal of rights in land (UNECE, 1996).

Secured land rights are termed as the 'the evolutionary theory of land rights (ETLR)'. ETLR is considered the key to development and the primary difference between rich and poor nations (De Soto, 1989 and De Soto, 2000), because modern market economies generate growth due to the widespread formal property rights, registered in a system governed by legal rules, afford indisputable proof of ownership and protection from uncertainty and fraud (de Soto, 1993). Evidence in its support exists (1987; Feder et al., 1988), and can be generalized (Feder and Nishio, 1998). The evidence of low local investment and foreign direct investment (FDI) activity in the former socialist counties of Eastern and Central Europe (Paul Munro-Faure 1997) and of low FDI in the Sub-Saharan African countries is understood in the light of inadequacies in the land tenure security and land transferability (Bachmann, 1996). Financial sector provides loans for development and investment where land rights are guaranteed because banks and lending institutions can secure their funds, by registration (UNECE, 2005).

3.1.2 Legal Framework

Formalization works if there is a preexisting proper legal framework that, according to the UN Guidelines (1996), defines the nature of land, the form and nature of ownership and the legally recognized forms of tenure, differentiates between real property and personal property, distinguishes between the ownership, possession and use of land and protects the rights of landlords, tenants and third parties, including those of mortgagees, indicates what rights less than full ownership, such as servitudes, should be recorded, and codifies all forms of statutory restriction that may apply to land. In addition, the law will also define the means and conditions whereby use rights can be changed to ownership rights, and how the ownership of these rights may be transferred.

3.1.3 Marketability and Land Markets

Land markets are the consequence of title security, the venue for investments and one of instrument of development. When titles and rights of the owners are registered they are formalized, and thereby land tenures are secured, and title security, followed by the recognition of its transferability, is one of major instruments that facilitate land market. Well-functioning land markets are considered to enable transfers of land to more productive households or firms and the distribution of underutilized land to efficient users (UNECE, 2003; Malcolm Childress, et al, 2004);

3.1.4 Collateralization and access to credit,

Credit market is the result of secure land tenure and well-defined legal framework (UN, 1996). Byamugisha, (1999) links land tenure and collateralization. 'when land tenure is secure and transferable, land owners can use it as a collateral and security for credit and thereby will have access to more and cheaper credit and thus would enable him to invest in the land so that to enhance its land productivity and create a new opportunity in financial markets'. Plaut (1985) thought that collateral is an integral part of all credit markets, as every loan involves some form of collateral, implicit or explicit, or else default would be automatic.

3.1.5 Valuation

Property valuation is necessary for a number of public and private functions in the land sector, including state disposal of land, compensation for state acquisition, taxation of land, and determination of the value of collateral assets. Determination of the value of collateral assets is critical to the health of the financial sector, because overvaluation can create large, hidden exposures in loan portfolios (UNECE, 1996; Childress et al, 2004). Valuation is needed because repayment capacity and the related amount of loan that can be borrowed are directly related to the net worth of the borrower (Bernanke et al, 1989).

3.1.6 The incompleteness of the Modern Land Administration Systems

As far it is relevant to this discussion, the Modern Western Land Administration Systems and those modeled after them suffer from two main weaknesses: (a) the incompleteness of the current formalization, and (b) lagging behind the reality of modern complex land markets which are discussed below.

- a. There are many rights, restrictions and responsibilities relating to land, which exist but have not been formalised by governments (the Bathurst Declaration, 1999). A good example is the recognition of indigenous aboriginal rights in land in Australia in the 1980s, and trusts. Thus the administration systems remain not yet ready for emerging interests' which makes their rebuilding and reengineering, to support emerging needs of government, business and society, highly desirable (Williamson I., 2007; Williamson I., et al, 2005; Williamson, I. et al, 1999). AGENDA 21 has recognized this, the Bogor Declaration, Indonesia, March 1996, emphasized on its resolution, and the Bathurst Declaration (1999), demanded the inclusion of indigenous land interests in the mainstream Land Administration Systems.
To an extent, country such as New Zealand, USA, Fiji, Papua New Guinea, and many parts of Africa have integrated native interests in their Land Administration Systems. For example Australia has now embarked on the integration of two vastly different land tenure systems, namely traditional Aboriginal land tenure and the Australian Torrens system (Williamson I., et al, 1999; Liz A. W., 2006).
- b. In western countries the current Land Administration Systems are inadaptable to complex Market reality. They adapt to the basic land market of ownership (freehold) lease, and sharecrop. It is not true about other activities involving the recent complex commodities such as Securities mortgage backed certificates, planning rights development vehicles, utilities, water rights, land information, time shares, unit and property trusts, resource rights, financial instruments, insurance products, options, carbon credits, salinity credits, corporate development instruments, and vertical villages. (Williamson I., 2007). To this end the UN efforts of cadastral restructuring (AGENDA 21) in terms of legal, technical, and institutional infrastructure (The Bathurst Declaration), are important to take note of. Further, the Bogor Declaration, Indonesia, March 1996 regarding improved access to credit, and land reform, and of the UN Guidelines for Eastern and Central Europe (1996), advising governments to make fundamental policy decisions about, among others, on complex of socio-economic and legal prescriptions that dictate how the land and the benefits from the land are to be allocated, need to be considered for the review and redesign of Land Administration System in developing countries, according to the demand of land markets.

3.2 What Needs to Be Reformed for Making Wakaf Lands Marketable

For wakaf land to be marketable review of Shariah principals as well as the revision of present legal framework is needed. To be precise, the following points need noting.

- a. Review the religious legal literature for purpose of formulating favourable legal framework to the making of wakaf lands marketable.
- b. Bring wakaf land titles to the mainstream infrastructure of Malaysian Land Administration.
- c. Minimise the security of title by making some wakaf lands transferable, and to make the title of the transferred wakaf land secure.
- d. Extend the existing lease market to wakaf lands.
- e. Record all dealings in wakaf lands in the main cadastre.
- f. Enable the institutions of wakf to have access to credit through making wakaf lands chargeable.
- g. Recognize wakaf land being capable of collateralization and thus provide opportunity to wakaf institutions to have access to credit market.
- h. Treat wakaf lands similar to normal lands for purpose of valuation according to the term of title, which is perpetual, leasehold, or merely a lease extending from three years to ninety nine.

It is pertinent to note that among the above the core issue is the discovery of a new framework deduced from the four schools of Islamic law. Once a favorable formula is deduced, the reform of legal framework and the main mechanism for the marketability of wakaf lands seems to be easy. To this end a brief discussion is offered below.

4.0 Marketability of wakaf land and Islamic Law

The unfortunate rigid position of Malaysian Land Administration may be understood in light of Abu Zahrah's (1962) definition, summing the predominant classical Hanafi and Shafie thought, as "the prevention of a benefit-generating estate from corporal disposal but using its usufruct and benefit in charity, intended so at the time of creation and thereafter."⁴ Jurists in the same and other schools as well as modern thinking may not agree to it. Munzer Qahf (2000, 2003) defined it as "the holding of

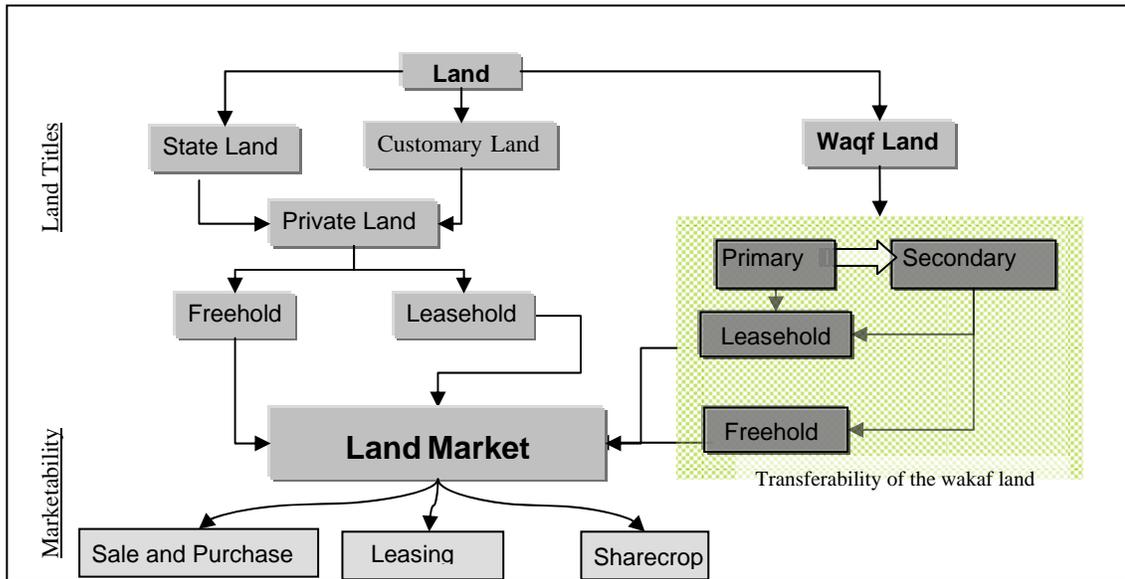


Figure 2: Wakaf Land Titles and their Marketability as proposed to be adapted in the Malaysian Land Administration System

certain property and preserving it for the confined benefit of certain philanthropy and prohibiting any use or disposition of it outside that specific objective." Mohammad Tahir Sabit (2006) has provided alternative view by defining it as *the perpetual dedication of a valuable, the value of which is amortized subsequently, and its proceeds or revenue are later spent on welfare of the named beneficiaries*. The two latter definitions do not share the concept of perpetuity of the wakaf property and following the non Hanafi or Shafie predominate views, that is a wakaf property can be transferable.

A ninety percent of the provisions of Islamic law on the nature of wakaf are rational (ijtihadi). According to these provisions, the Hanafi and Shafie schools of thought prefer real estate to be the capital (subject matter) of wakaf and thereafter should not be transferable in any form. Other jurists are flexible by permitting cash as the capital of wakaf, and hence following the view of some Maliki and Hanafi jurists goods and commodity, bought in the course of ordinary trade, with wakaf capital can be transferred without restriction (Mohammad Tahir Sabit et al, 2006). This can extend to land trade too. Additionally, modern Muslim jurists in Saudi Arabia allow charging land revenue, which can also permit the transfer of any property bought with the income of the wakaf. Following these views, a distinction can be made between a land as the capital of wakaf, a land bought with cash where the cash is the capital of wakaf, and a land bought with the income and revenue of a land, which was

⁴ See Mohammad Tahir Sabit "The Concept And Objective of Waqf", [2004], 1 *Shariah Law Reports*, pp 10-17.

originally donated as the capital of wakaf. Thus only the first in the line according to the predominant views of jurists is not transferable (see Figure 2).

Accordingly, the legal framework can be revised and should contain provisions to the following effect:

- a. Recognizing wakaf as a corporate legal person capable of holding land
- b. Recognizing the classification of wakaf land in prime (capital) wakaf land, secondary wakaf land (land acquired through the income of wakaf, or used as a trade commodity subsequent to transactions required under cash wakaf dedications).
- c. Permitting registration of all these titles, and transferability thereof in the secondary wakaf land, while keeping the prime wakaf lands immune to transferability but open to leasing including long term, that have effect of alienated leasehold lands.
- d. Enforcement of lease transactions, not only the short term but long term as well as that can be up to 99 years.
- e. Recognizing these titles suitable for collateralization in the market
- f. Recognition of these leases in terms of their value, transferability and collateralization.
- g. Valuing the various types of wakaf lands not for what it is used now but as being capable of potential commercial use. In other words, any transactions that involve project financing, banks should accept its leases as security, and value the land in such a manner that commensurate with the potential value and benefits that is expected to be obtained.

To implement the above points, a uniform and comprehensive code of wakaf law is needed, and the relevant state and federal legislations i.e. the National Code, the Land Acquisition Act, and the State legislations specially the Administration of Islamic Law Enactments, need to be amended. An express reference to wakaf land should be made so that being wakaf may not be treated as a restriction.

5.0 Computability of Wakaf Land Market with Modern Land Administration System

Reforming the Malaysian Land Administration System should be the priority of the government especially when it is keen to develop wakaf further so that it can be a model internationally. One way is to make wakaf lands operate in the mainstream land market. This is compatible with modern land administration system and acceptable in contemporary complex land market.

The support of an efficient and effective functioning land market is the objective of building and maintaining a Land Administration System. This includes cadastral surveys to identify and subdivide land, land registry systems to support simple land trading (buying, selling, mortgaging and leasing land) and land information systems to facilitate access to the relevant information, including through an Internet enabled *egovernment* environment (UNECE, 1996; Williamson, Ian. 2007). Cadastre is the cornerstone of land markets (Ting, L. et al, 1999); it provides information on current land prices and a supporting framework for trading in complex commodities (Williamson et al, 2006). Wakaf market would require these facilities too for its functioning.

A land market is continually evolving, (Williamson, 2005). It must be straightforward and flexible which can be achieved not simply through buying and selling of the absolute ownership, but also through a variety of leasing and other less formal kinds of agreement (Paul Munro-Faure,1999). Restrictions on land sales and lease markets must be removed or significantly relaxed, credit markets must be developed (Malcolm Childress et al, 2004). Lease markets should be promoted, as they are a powerful sector of wider land market, where the relationship between landowners and tenants are often built on cultural, historic and legal traditions of a country (UNECE, 2003). As long there is a basis for collaboration between the parties, there is no harm to lease wakaf land and put further such leases to trade and dealing. Wakaf lands would add to the color of real-estate markets. As long as the rental markets function at a cost that is commensurate with the potential benefits to be obtained (Michael Carter, 2004) there is no reason why wakaf land should not enter into land market. After all, almost anything can be taken as security. The problem is with their acceptance (Lee et al, 2002).

General Conclusion

For decades, scholars are seeking to find a solution for the development of vacant wakaf lands. Time passed on this tide-ropewalk, and the problem is persisting.

This paper argued for inclusion of wakaf lands in Land Administration System, and to treat them equal to any other land in the sense of formalization, marketability, valuation, and collateralization, as far as such is in accordance to the principles of Islamic law. Under Malaysian law only titles, irrespective of being freehold or leasehold, and registerable interests such as that under long term leases have market value and therefore can be used as collaterals, though in a variable degree. To a large extent this can be extended to wakaf lands.

The Modern Malaysian Land Administration System needs to be reformed in order to adapt to the true nature of the wakaf land; that is it should be registered as wakaf, that it can be traded in market either in terms of use rights (lease) or ownership rights (sale and purchase) and other new marketable form, according to the nature of wakaf. To support this idea the legal framework must be revised and accordingly both State and Federal laws need to be amended.

These efforts are still relevant as the institution of wakaf is rich and promising aiding us to reach the Promised Land of a sustainable community.

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