

**AN IDEAL FINANCIAL MECHANISM FOR THE DEVELOPMENT
OF THE WAQF PROPERTIES IN MALAYSIA**

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For our families and those who care for others.

I declare that this thesis entitled “title *of the thesis*” is the result of my own research except as cited in the references. The thesis has not been accepted for any degree and is not concurrently submitted in candidature of any other degree.

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Abstract

The object of this study was to find an Ideal Financial Mechanism for the development of Waqf properties in Malaysia. The problem is that waqf properties are thought to be inalienable because they have to remain as waqf in perpetuity, which make the waqf institutions not to use them as collateral for fear of losing them to the financiers and the financiers are not willing to accept due to legal constraints arising from the same concept of inalienability and perpetuity.

To achieve its objective, this study proposes to substitute the concept of perpetuity of the physical being of the subject matter of waqf with one that recognizes the perpetuity of dedication, through assigning value to the object of waqf and amortizing it, so that not only various rights can be accepted as the object of waqf but also make the object alienable. This also opens the door for liquid assets (e.g. cash waqf), so that financing development activities would be carried out by the waqf institutions with ease.

At the same time, in addition to cash waqf and in spite of the concept of inalienability of waqf, this study identifies and refines various financial mechanisms, which comprises traditional, and contemporary, including institutional in form of credit based modes, joint ventures, corporate financing such as equities and bonds (securitization) and lastly self-financing through a combination of hibr, istibdal, saham waqf etc.

The imperial study indicates that local waqf institutions in Johor, Malacca and Negiri Sembilan still need to catch up with a trend in other Muslim countries. The modes of istibdal, saham waqf and benevolent loans are popular among them. This study, however, finds that none of these is really an ideal financial mechanism for the development of waqf properties with exception of cash waqf.

ABSTRAK

Objektif kajian ini ialah untuk mengkaji mekanisma pembiayaan yang ideal dalam pembangunan harta tanah wakaf di Malaysia. Masalah yang timbul ialah harta tanah wakaf dianggap tidak boleh dipindah milik kerana ia mesti kekal sebagai wakaf secara berkekalan. Ini menyebabkan institusi wakaf tidak dapat menggunakan harta tanah ini sebagai sandaran kerana dikhuatiri harta tanah ini jatuh ke tangan pihak pembiaya. Pihak pembiaya pula tidak bersedia untuk menerima harta tanah wakaf sebagai sandaran kerana sifatnya yang berkonsepkan ketidakbolehdipindahmilikan dan keberkekalan.

Untuk mencapai objektif ini, kajian ini mencadangkan supaya konsep keberkekalan dalam entiti fizikal objek wakaf kepada konsep yang mengiktiraf keberkekalan dedikasi menerusi penjelmaan nilai kepada objek wakaf dan mengabadikan nilai ini supaya bukan sahaja pelbagai hak boleh diterima sebagai objek wakaf tetapi membolehkan juga objek berkenaan dipindah milik. Ini juga membuka pintu kepada aset cair (e.g. wakaf tunai), supaya aktiviti-aktiviti pembiayaan pembangunan dapat dijalankan oleh institusi wakaf dengan lebih mudah.

Di samping wakaf tunai dan meskipun wujud konsep ketidakbolehpindahan wakaf, kajian ini mengenal pasti dan megalusi pelbagai mekanisma pembiayaan yang mengandungi mod tradisional, kontemporari, termasuk insituti dalam bentuk kredit, usaha sama, pembiayaan korporat seperti ekuiti dan bon (pensekuritian) dan akhirnya pembiayaan sendiri menerusi kombinasi hikr, istibdal, saham wakaf, dan lain-lain.

Kajian empiric menunjukkan bahawa institusi wakaf tempatan di Johor, Melaka, dan Negri Sembilan masih perlu untuk mengikuti jejak langkah Negara-negara lain dalam tren pembiayaan wakaf. Mod istibdal, saham wakaf dan pinjaman qard al-hasan adalah popular di antara cara-cara pembiayaan wakaf. Kajian ini walau

bagaimanapun, mendapati bahawa tiada satu pun dari cara-cara pembiayaan di atas mekanisma yang ideal dalam pembiayaan pembangunan wakaf, kecuali wakaf tunai.

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LIST OF ABBREVIATIONS

BBA	-	<i>Bay' Bithaman al-Ajil</i>
BOT	-	Build on Transfer
CIMB	-	
HF	-	Hedge Fund
IA	-	Investment
IDB	-	Islamic Development Bank
JAIJ	-	Jabatan Agama Islam Johor
JAIM	-	Jabatan Agama Islam Melaka
JAKIM	-	Jabatan Agama Kebajikan Islam Malaysia
MAIJ	-	Majlis Agama Islam Johor
MAIM	-	Majlis Agama Islam Melaka
MAIN	-	Majlis Agama Islam Negeri
MAINS	-	Majlis Agama Islam Negeri Sembilan
R	-	Revenue
RA	-	Reserve Account
RM	-	Ringit Malaysia, Malaysian currency unit
VC	-	Value Capital
MCL	-	Malay Customary Land
MRCB	-	
QT(M)	-	Qualified Title

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CHAPTER ONE

INTRODUCTION

1.1 Background

Waqf is a religious endowment, of a revenue-generating property, as regulated by Islamic law. The revenues are used for the welfare of the society including social, spiritual, and economical objectives, the revenue of which is distributed among the poor and the needy, mosques, schools, graveyards, orphans, widows, old folks, and so on. The list of the beneficiaries is not exhaustive; as long as the donor determines the need of a group or individual for any Shari'ah compliant purpose the donation would be considered valid.

Waqf today can play an important role as the needs of the Muslim Ummah are complex and growing. The potential of the institution of waqf is great; it can assist the government in countless state-responsibilities. Nevertheless, and unfortunately the great potential of the institution of waqf has not been, yet, fully realized by Muslims including their government around world.

There are still a great number of Muslims who think that waqf requires immovable property to be donated. The governments in many countries still have not been liberated from the colonial mindset as they still consider waqf a problematic institution that has been inherited by them from the old times. Both have not only

wasted the potential of this time-proven institution of great benevolence, but also excluded their society from the vast benefit of this blissful institution.

The limitation of waqf to immovable property has excluded many good-hearted pious individuals from donations. At the same time, this limitation cost waqf properties to be idle or difficult to redevelop them as they lack cash and the fixed properties not convertible to liquid funds. The institutions of waqf, therefore, are dependent on the government for development finance. This is so because private sector, due to this limitation and also few others relating to the same criteria, are unwilling to finance the development of waqf properties.

The lack of interest in the development of waqf property is also the result of the lack of visionary bureaucrats and Religious scholars. As the economic activities during the last two centuries has advanced tremendously, the jurisprudence of waqf transactions is frozen in the middle ages. In other words, there is the negative ijthadi concept developed by the classical ulama on one hand, and the lack of ijthadi endeavour among the contemporary scholars on the other. This means that the blame for the unavailability of development financing for the idle and underdeveloped waqf properties should not be placed on the layman Muslims or their government alone, but also on the lack of creativity of Muslim jurists and Mufties during the last two centuries. Indeed this inactivity of Muslim jurists should be recognised as the major impediment to the idleness of waqf properties.

The good news is that in many Arab countries during the last three decades a major effort is made by some scholars with the intent to change the status quo. Several rules have been identified as to be not in the interest of waqf and therefore has been changed. This new interest in the ijthad enabled these scholars to develop or extend the conventional financial products to the development of waqf properties. *Alhamdu lillah* this effort has brought fruits, and due to this effort, the institution of waqf in these countries possess a great wealth of funds that not only developed the idle lands, but also made the waqf institutions to invest the returns of the developed land in various economic activities. In other words, this renewed interest in the revival waqf institution, made the waqf institution contribute to national economic growth on one

hand and in certain cases made the citizenary of these countries not only fund charitable activities nationally, but also internationally.

1.2 Problem Statement

In Malaysia, waqf property administration, management and development is in the hand of Majlis Agama Islam of every state. Majlis Agama Islam therefore is part of the government and in many cases the mutawalis are nothing more than bureaucrats. The mutawalis are not well trained in property management as well fiqh and this had added to the problem of idle waqf lands.

Unlike Arab countries, the Malaysian ulama still follow the rigid Hanafi and Shafie rules applicable to waqf. Financing schemes specially designed for financing waqf properties in other countries are unheard of. Hence, almost all waqf properties are fixed and naturally the waqf institutions are cash-strapped.

The above two factors has made the majority of waqf properties either underdeveloped or idle, and almost all development activities are presumed to be taken by the government or its related bodies. As a result, the development of idle lands is slow due to budgetary restraints together with geopolitical concerns of the government. The question is whether or not there exists a mechanism that can help in the development of waqf properties?

1.3 The Aim of the Study

This study is undertaken for the purpose of finding the best suitable financial mechanism for the development of waqf properties, independent of government sponsorship through private sector and other means.

1.4 The Objective of the Study

The objectives of this study can be summarized in the following:-

1. To identify the best Shariah compliant financial framework for the development of waqf properties.
2. To propose a new ideal financial mechanism for the development of waqf properties.

1.5 The Importance of the Study

This study is undertaken for the purpose of finding the best suitable financial mechanism for the development of waqf properties. In line with this aim of the study, it is hoped that final findings of the work will assist the various administrative and legal organs of the government, the academia, developers, financial institutions and the general reader interested in the fiqh of waqf, its finance and development.

1.6 Scope of Study

This study is focused on the concept of waqf, its effect on the development of the waqf properties, the examination of various financial methods proposed to be suitable to the nature of waqf. Additionally this study will look at the practice of some methods for the development of such land in the states of Johor, Malacca, and Negeri Semblian. The study will not examine the role of government in the development of waqf properties, the legal regime prevailing in the abovementioned states. Neither the study will embark on the administrative and physical problems of the said land.

1.7 Methodology

To achieve the aim and objectives of the study, qualitative and quantitative methods are applied to this study. The research method is one of discovery and one which grounds a theory in reality. Almost one third of the study is in descriptive form, which is of a conclusive nature as the data is analyzed as soon it is received and written in order to capture all aspects of the topic as much as possible.

The study is undertaken to define words, review concepts and theories of waqf, its finance, and development *in situ* that is its original form; also the study attempts to find out weaknesses in the abovementioned concepts and develop alternative conceptions and theories in order to compensate the prevailing weaknesses. The study therefore includes a comprehensive literature review and findings.

Literature review involves collecting information relevant to the study from previous publications, books, magazines, newspaper, research paper, papers, internet homepages and all other secondary data that are useful for the study. Basically the literature review is in form of triangulation which involves the convergence of data from multiple sources and works of multiple writers and investigators. All discussions in chapter two and three are descriptive while a portion of chapter four is of this nature.

In addition to qualitative analysis a quantitative research is applied which plays a minor role in determining the usefulness of the methods of finance discovered during literature review. The aim of this approach is not to test the conceptual findings but to ascertain their recurrence and practice.

A survey of the financial institutions, government and private companies would be an ideal way to test the findings of the literature review, but this is not applicable in our case, as this study is focused only on the financial methods practiced by the Institutions of waqf i.e. Majlis Agama Islam Negeri, especially that in the States of Johor, Malacca, and Negeri Sembilan. This study in this context is

based on the questionnaires distributed to the officers in charge of the waqf properties in the said states. The finding of this study is the result of a basic quantitative analysis of the obtained data indicating the most popular methods of financing applied in the development of waqf property.

1.8 Chapter Layout

This study is divided into five chapters. Each of the chapter has its own objective and purpose. Overall, the discussion explores the validity of the financial concepts in the relation to the classic and modern theory of waqf properties. As the topic involves the search for an ideal mode of financing, certain concepts are analyzed throughout chapter two, three and four. The following is the simplified layout of chapters of this study.

1.8.1 Chapter One: Introduction

This is an introduction to this study, statement problem, objective, aim, importance, and scope of this work. All this are placed here in order to make the reader take interest in this study.

1.8.2 Chapter Two: Literature Review: the Concept of Waqf

Second chapter is focused on the theoretical aspect of this study which consists of the concept of waqf, its characteristics, its impact, negative or otherwise, on the development of waqf property in general and also specifically on the validity of the financial modes of finance.

1.8.3 Chapter Three: Literature Review, Recognized Modes of Financing

This chapter also deals with theoretical aspects of the financial instruments designed and devised by classical and contemporary jurists. It consists of the various types of such instruments, their concepts and usefulness, and a conclusion.

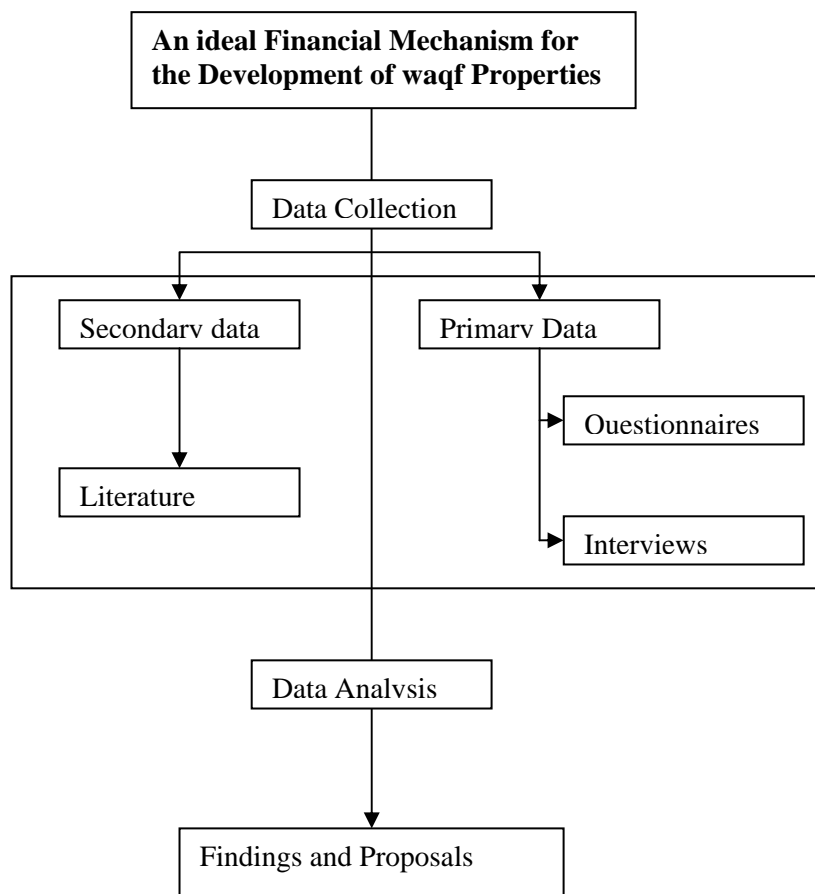
1.8.4 Chapter Four: Case study and Analysis

It would be ideal to have separate discussion on the background of the case study and the analysis of the data obtained pertaining to the case study. For the sake of ease however both the background of the subject area and the analysis of the data are discussed in one chapter. This chapter is aimed to confirm or reject some concepts relevant to finance discussed in chapter two and chapter three, all in search of finding an ideal mode of finance for the development of waqf properties.

1.8.5 Chapter Five: Findings and Conclusion

Chapter five is the summary of findings of the study. These findings are based on theoretical discussion as well the empirical study conducted in the states of Johor, Malacca and Negeri Sembilan.

Flowchart of the Methodology of the Study



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CHAPTER TWO

THE CONCEPT OF WAQF

2.1 Introduction

Waqf, which literally means “religious endowment”, is recognized by the Islamic law as religious, pious or charitable donation. It has been a source of development such as the building of mosques, madrasah, educational institutions, libraries, travellers lodges, and inns. Its benefits are not restricted to the Muslim community alone¹ rather goes beyond religious, cultural, racial and sectarian boundaries.

As many waqf properties are barren or underdeveloped, due to the lack of funds, and the institutions of waqf still struggle with finding suitable financial mechanism for its development, the need for a comprehensive analysis of the concept of waqf together with available financial instrument is an ideal way of finding solution to the above problem. To this end, the subject matter, the main characteristics, and other existing conceptions of the waqf are key to the identification of appropriate financing modes and instrumental in the development of a new model for funding the development of waqf properties. This is so because waqf needs liquid funds on one hand and flexibility to use the subject of matter as collateral for loans, on the other. For instance, as long as one upholds the concept of perpetuity and inalienability, or accepting immovable property as the only subject matter of waqf, he will bar waqf institutions from raising funds of their own, and also prevent them from seeking development finance from other bodies, because the

¹ Amitabh Mukerji, 1990, 1991: 109

concept of perpetuity and inalienability prohibit putting waqf properties as collateral to financing loans, and joint ventures.

In line with the above background, the availability of financial instruments and their compliance with the nature of waqf is discussed in chapter three. This chapter, however, will offer only a brief discussion on the meaning, definition, and classification of waqf. It also offers an elaborate analysis of characteristics or attributes of waqf; their negative effects and then a proposal of a substitute theory and the model for the administration of the waqf funds are mentioned later.

2.2 Meaning of Waqf

The familiar term, for trusts, in the texts of Shariah, is *sadaqah* and *habs*. Nevertheless, jurists also use the term *waqf*, which is sometimes written as wakaf or wakap in South East Asia. In Northern Africa, the jurists still use the word *habs* or *tasbil* for the same concept.² The Shi'i scholars however differentiate between *waqf* and *habs*; both are charitable but have slightly different implications.³

2.3 Classical Concepts and Definitions

Literally, both *waqf*⁴ and *habs* mean to hold, confine, prohibit, detain, prevent, or restrain. Legally, they mean “to protect something, by preventing it from becoming the property of a third person”⁵, which is explained below

² See Mohammad Tahir Sabit The Concept And Objective of Waqf, [2004], 1 *Shariah Law Reports*, 10.

³ See Yahya bin Sa'id al-Hilli, *al-Jami' li al-Shara'i'*, Qum: Musassah al-Shuhada' al-'Ilmiyyah, 1405 A.H., p. 368. Al-Hilli uses *habs* in donation of perishable property for a specific charitable purpose for a limited period where the property reverts to the owner in case the purpose is no longer practical. *Waqf*, however, does not go back to founder of *waqf* or his heirs: p. 369. Though it is some how confusing for Hilli exemplifies *habs* with house, animal, and slaves which he also repeats them among others under *waqf*. It seems that one shall have to look at the words used by the donor at the time of making the gift in order to infer his intention. At best *habs* may imply the temporary type of donation that exists for a limited time and for a specific objective while *waqf* would apply to the permanent form of trust that is amortized and irrevocable.

⁴ The basis for accepting waqf in Islamic law is inferred from the practice and words of the Prophet (pbuh). The building of two mosques by the Prophet, namely, the Masjid Quba' and Masjid al-Nabawi indicates religious waqf. The donation of the Mukhainiq of his orchards to the Prophet (pbuh) after his death, and their dedication for charity by the Prophet later on, is an example of charitable waqf. This second type of waqf is also inferred from the express words of

The classical definition of the waqf in Islamic law is given by Imam Abu Hanifah saying “the appropriation of any particular thing in such a way that the founder’s right in it shall continue and the advantage of it go to some charitable object.” This definition however is not preferred by his disciples, Abu Yusof and Mouhammad, as well as jurists in Shafi’i, Hanbali and Imami schools.⁶

According to Abu Yusof, *waqf* is the detention of a thing (*‘ain*) in the implied ownership of Allah in such a way that its benefit, revenue and profit may be applied for the benefit of human beings, and the dedications, once made, is absolute, so that it can neither be sold nor given nor inherited⁷. Rephrasing the definition of classic jurists, *waqf* is irrevocable gift of a corporeal property (*‘ain*) for the benefit of donor’s family or someone else or something, in perpetuity, as a charity promised and executed normally during the life-time of the donor, which is not capable of transfer, gift, and transmission thereafter. Accordingly, three main characteristics of waqf are irrevocability, perpetuity and inalienability discussed below.

2.4 The Characteristics of Waqf

Occasionally, all three main characteristics of waqf and often the two of them (i.e. perpetuity and inalienability) as understood from the definition of waqf according to the classical jurists prevent waqf properties from productively developing them. This will be discussed below after establishing their recognition under Islamic law, statutory rules and principles of common law.

the Prophet to sayidina Umar (r) who following the Prophet wished to donate his property too. The Prophet told him to the effect: ‘if you like, you can keep the property, and give its fruits to charity.’

⁵ Al-Sarakhsi, *al-Mabsut*, Cairo, 1956, vol. 12, p. 27, translation by Mohd. Zain b. Haji Othman, Islamic Law with special Reference to the Institution of Waqf, Kuala Lumpur: Prime Minister’s Department, Religious Affairs Division, 1982, p. 21. See the definition of *waqf* in al-Hilli, *al-Jami’*, p.369.

⁶ Muhammad Abu Zahrah, *Muhadarat fi al-Waqf*, np: Dar al-Fikr-alArabi, second Edition, pp. 39-40, 62-69, for Shafi’ies views see al-Sharbini, *Mughni al-Muhtaj*, kitab al-waqf, for Hanbalies, see ibn Qudamah, *al-Mughni*, vol. 6 p. 185. Note: an opinion of Ahmad ibn Hanbal and the majority of the Malikis seem to agree with the view of Imam Abu Hanifah except for the latter that gives option to the donor to revoke the trust whenever he so wishes.

⁷ S. Athar Husaini & S. Khalid Rashid, 1973 : 109

2.4.1 Irrevocability

Irrevocability means the lack of power of the settler and donor to revoke his donation at any time; the declaration by the donor is binding. According to Abu Yusuf, *waqf* is effective and binding as soon as the declaration is made by the donor without any need for delivery of possession to the beneficiary. To him, the property is transferred from the ownership of the settler to the ‘ownership’ of Allah and hence irrevocable.⁸ This opinion is accepted by the majority of the jurists in the four schools of Islamic law.⁹ Hence, except in the case of *waqf* by will and on death bed, which takes effect solely upon the death of the founder, the declaration must be intended to take effect immediately and the donor has no power to revoke it thereafter.

In Malaysia, both statutes and case law uphold the irrevocability of *waqf* declarations. Various statutory provisions provide that *waqf* declarations are irrevocable especially when the title to the property is registered in the name of Majlis Agama Islam Negeri. The respective Enactments of the States expressly make it non-transferable, subject to few conditions provided therein. For instance section 4 of the Selangor Enactment reads:

(1) A wakaf shall immediately come into effect once all the requirements and conditions of the wakaf had been fulfilled, unless it is expressly provided that it shall commence only after the death of the waqif.

(2) A wakaf which has come into effect cannot be sold or transferred by the waqif or be inherited by any person.

In *Haji Salleh Bin Haji Ismail & Anor V Haji Abdullah Bin Haji Mohamed Salleh & Ors* [1935] 1 MLJ 26, Whitley, J. upheld the opinion of Muslim jurist as he wrote “The ownership of the thing immobilised is transferred to God; which means that such object ceases, for men, to be subject to the right of the private property, and that it henceforth belongs neither to the founder nor to the beneficiary. (*Minhaj et Talibin*, p. 232).”

⁸ Al-Sarakhsi, *al-Mabsut*, vol. 12, p 41.

⁹ Kasani, *Badai' al-Sana'i' al-Sana'i'*, vol. 6, pp. 346-347.

In *Re Dato Bentara Luar Decd Haji Yahya Bin Yusof & Anor V. Hassan Bin Othman & Anor* [1982] 2 MLJ 264, 1 LNS 16, where the issue of revocability by the *waqif* was contented, Salleh Abas FJ, as he then was, ruled that:

“Wakaf is not like a marriage which requires consummation. A valid wakaf, like the one under appeal, *takes effect immediately from the moment of its creation* [emphasis added]. The ownership of the wakaf property is in law immediately vested in God Almighty. The legal requirement that the property must be registered in the name of the beneficiary or the mutawalli is only for the purpose of its administration. We cannot see anything wrong or objectionably that this wakaf land was registered in the Dato's name, and continued to be so registered, because there being no mutawalli appointed, he must be taken to assume the role of the mutawalli. Further, the subsequent subdivision of the wakaf land and the transfer of a subdivided portion of it to a third person do not in any way indicate or prove that the Dato' never intended to create the wakaf. The wakaf created by him had already taken effect. His conduct in subdividing and charging the wakaf property may appear to be inconsistent with the wakaf, but this conduct cannot disprove the existence of the wakaf or its validity although it might well amount to breaches by the Dato' of his duties as its mutawalli. This issue is irrelevant in the present appeal because we are not called upon to decide whether the Dato' was acting against the interests of the beneficiaries or not.”

Thus, following the aforesaid decision by the federal court, a mere declaration of *waqf* is sufficient to constitute *waqf* and subsequent conduct of the *waqif* or the land office has no effect. The *waqf* exists valid despite the subsequent conduct of the *waqif* contradicting the existence of *waqf*. This clearly indicates irrevocability of the *waqf*.

In *G Rethinasamy Lwn Majlis Ugama Islam, Pulau Pinang Dan Satu Yang Lain* [1993] 2 MLJ 166 it was held that “[t]he defendants were able to prove that part A was wakaf land by user and the land was not subject to the National Land Code 1965. That part did not belong to LKC and LKC could not sell it to the plaintiff. The land administrator too had no power to vest that part in the plaintiff.”

The above statutory laws and principles recognized by civil courts, as a whole, are a step towards the realization of perpetuity of *waqf*.

2.4.2 Perpetuity

Few issues need to be clarified before discussing the views of ulama on the concept of perpetuity. First the meaning of perpetuity and second its relation with irrevocability, and inalienability.

The Arabic term for perpetuity is *ta'bid*; three meanings may be associated to the said term: first, that once the declaration of *waqf* is made by the donor, a legally binding *waqf* is automatically effected, which shall exist until the Day of Judgement. Second, that *waqf* cannot be limited by time and, thus, it is not temporary in nature. Third meaning of the term is that the property, which forms the subject of *waqf*, should exist as such forever. Perpetuity can include irrevocability, as is the case in the first meaning. The first and second meanings indicate perpetuity as understood by other jurists, and the third meaning will stand for inalienability of the subject matter. The contemporary tendency is, however, to treat irrevocability, perpetuity and inalienability differently. Following this trend, therefore, we understand that the classic opinion on perpetuity is similar to the third meaning, that is the perpetuity of dedication needs perpetuity of the subject matter.

Perpetuity and irrevocability, at first, may appear the same. But, perpetuity is different from irrevocability because irrevocability means that the donor will have no power to revoke his declaration after the dedication is made. This does not, necessarily, imply perpetuity all the times, for in case of temporary *waqf*, it may be revoked even though the *waqf* does not exist for ever. In classic fiqh, Imam Abu Yusof recognised temporary *waqfs* but refused to accept revocation of the *waqf* by the donor.¹⁰ In other word, irrevocability can exist without perpetuity of the dedication. Similarly, it is possible that the proceeds of a temporal *waqf* may be fossilised even though the subject matter reverts to the settler; thus, the concept of

¹⁰ See Munzer Kahf, *Towards the Revival of Awaqf: A Few Fiqhi Issues to Reconsider*, a Seminar Paper presented at the Harvard Forum on Islamic Finance and Economics, 1999, Harvard University, p.1, available on Kahf net; al-Sarakhsi, *al-Mabsut*, vol. 12, p 27.

perpetual and temporary waqf is not necessarily the same. The relationship between perpetuity and inalienability is also apparently the same. Nevertheless, where the subject matter of *waqf* is movable or of temporary nature, inalienability of such property will be maintained but not its perpetuity.

Scanning the early works of classic jurists, it is clear that the majority of Muslim jurists agree on the perpetuity of *waqf*,¹¹ that it should exist for ever if possible. Real estate (e.g. land) is the ideal subject matter of *waqf* which according to al-Termidhi¹² is upheld by the consensus of *ulama*. In cases of animals and buildings, jurists are not in agreement on the validity of all these properties. The disagreement is attributed to the permission given by texts or can be legally so presumed. In other words, the rule in *waqf* declarations is that the *waqf* property must be perpetual except those permitted by text. For instance, it is said that trees and buildings are movable by nature (according to Hanafis and Shafi'ies) but they presume it to be perpetual due to its longer period of annexation to land. To comply with the rule of perpetuity, it is proposed that the income of trees be saved and invested on re-plantation of the same trees. This group of jurists do not allow cash and food waqf. In the same way, according to Abu Hanifah and Muhammad, animals except horses are not perpetual. Yet they can be the object of waqf declaration.

The Hanafis made perpetuity a condition for waqf to be valid. In other words, "If it purports to be made for a limited period or for a temporary purpose, it is void"¹³. The Shafi'is are thought to hold the same.¹⁴ Hence, only in the Shafi'i and Hanafi schools whenever the term *waqf* is used, permanence will be presumed as a matter of law, and the ultimate benefit will go to the poor, though unnamed.¹⁵ The rule of perpetuity of *waqf*, therefore, is interpreted by later jurists to forbid temporal declaration of waqf and also insist that the subject of the *waqf* should be capable of perpetual existence. Hence, only in some exceptional cases, and by necessity, *waqf* should comprise movable property which should under no circumstance be capable of transfer and transmission.

¹¹ *Al-fatawa al-Hindiyah*, Kitab al-Waqf; al-Sharbini, *Mughni al-Muhtaj*, vol. 2, p 485; al-Bujairami, *Hashiyah*, Kitab al-Waqf, vol. 2, p 62

¹² Al-Termadhi, *Sunan al-Termadhi*, al-Ahkam An Rasul Allah fi al-Waqf; Hadith No. 1296.

¹³ *Al-Fatawa al-Hindiyah*, Kitab al-Waqf, Shraituh; S. Ather Husaini & S. Khalid Rashid, 1973:112.

¹⁴ Al-Subki, *Takmalah to al-Nawawi's al-Majmu'*, vol 15, Dar-al-Fikr, p. 320

¹⁵ *Al-fatawa al-Hindiyah*, Kitab al-Waqf ; S. Ather Husaini & S. Khalid Rashid, 1973:112.

In this context, two types of legislations exist in Malaysia: the well-drafted reformed legislations such as those of Selangor and Johor¹⁶, discussed later, and the old or the traditional legislations such as those of Kedah, Terengganu and other States.

In the old legislations, the idea of perpetuity is enshrined in the concept of waqf. Section 2 of the Administration of Islamic Law (Federal territories) Act 1999, in defining the term waqf, expressly mentions the term *perpetuity*. It provides that "*wakaf* 'am" means a *dedication in perpetuity of the capital and income of property* [emphasis is added] for religious or charitable purposes recognized by Islamic Law, and the property so dedicated". Similar provisions are found in the Enactments on the administration of Islamic Law of Kedah and Terengganu and other states.

It is clear that perpetuity of dedication is intended but the perpetuity of the subject matter may be subjected to a variety of interpretations. Following the provisions on the inalienability and non-transferability of the subject matter of waqf,¹⁷ if read together with the decision of the court in *Re Dato Bentara Luar Decd Haji Yahya Bin Yusof & Anor V. Hassan Bin Othman & Anor* [1982] 2 MLJ 264, one would presume that both the perpetuity of dedication and its subject matter are intended by the lawgiver. However, looking at the definition of the term property under section 2 of Kedah Administration of Muslim Law Enactment, 1962, the same may not be true. Section 2 of the said Enactment specifically states that "property includes all estates, interests, easements and rights, whether equitable or legal, in, to or arising out of property and things in actions;". This is so, because interests and rights to and in a property are not capable of perpetuity by the very nature of such rights and interests. The literal interpretation of this passage requires that one can donate usufruct and proprietary rights, and by doing this such rights would be the property of *waqf*. This however contradicts the practice of Malaysians. Yet, this argument may be rebutted for the language of the statute is an old version modelled on English land law. The presumption is that the drafters of the statute were not familiar with complexities of Islamic law.

¹⁶ The states of N. Sembilan and Malacca were in the midst of legislating new Waqf Enactments which were not yet available at the time of writing this report.

¹⁷ See for example Section 4 (2) of Selangor Enactment 1999, s. 91 of Kedah Administration of Muslim Law Enactment 1962, s 62 of Council of the religion of Islam and Malay Custom, Administration of Kelantan, Enactment, 1994 and s 62 of Administration of Islamic Law (Federal Territories) Act, 1999

The Kelantan Enactment 1994 is almost the same as the old ones in relation to perpetuity. Section 2 of the Enactment defines wakaf as “a dedication *in perpetuity* [emphasis is added] of the capital and income of *any property* [emphasis is added] for religious or charitable purposes recognized by Hukum Syarak, including the properties so dedicated”. The Kelantan Enactment seems to suffer from some inconsistency. It does not define the term property, it however may include both movable and immovable, rights and interests as supported by section 62 (4). Since moveable property *per se* is incapable of perpetuity, one is kept wondering the true intention of the lawmaker. This legislative usage of the term perpetuity in the aforementioned legislations shows that the drafters of the law have remained loyal to the old and dominant thought of the Muslim jurists.

2.4.3 Inalienability

The concept of inalienability is rooted in the hadith of the Prophet (pbuh).¹⁸ Once the declaration is made and is valid according to the established rules of Islamic law, the subject matter of the *waqf* ‘passes out of the ownership of the *waqif* and it cannot be alienated or transferred either by the *waqif* or the *mutawalli* nor do their heirs can take it by way of inheritance’.¹⁹ According to this rule, jurists also prohibit the administrator from mortgaging or pledging the *waqf* property as security for a loan, simply because this will cause the *waqf* useless. So, if the administrator mortgages²⁰ a house under *waqf* and the mortgagor dwells in it, the latter should pay the customary rent, as a measure to safeguard the *waqf*.²¹ Following this rule, the mortgage in the modern sense, whereby the bank can sell a property, would not be permissible.

In Malaysia the rule of inalienability is upheld by all statutes. Section 4 (2) of Selangor Enactment 1999, and s. 91 of Kedah Administration of Muslim Law Enactment 1962 as well as s 62 of Council of the religion of Islam and Malay

¹⁸ See the Hadith of Umar (r) where the Prophet said the property should not be sold, given as gift, and inherited.

¹⁹ Faiz Badruddin, 1919: 555

²⁰ Appropriate word would be pledge for mortgage under common law is different from the Islamic version of mortgage (*rahn*). It is like pawning where the possession and rights are passed to the pledge.

²¹ S . Ather Husaini & S. Khalid Rashid, 1973: 159

Custom, Administration of Kelantan, Enactment, 1994 and s 62 of Administration of Islamic Law (Federal Territories) Act, 1999 provide that all properties vest in the Majlis and prohibits any conveyance, assignment, or transfer whatever' affecting *waqf*.²² Nevertheless the Kelantan Enactment (s 62 (2)) seems to be surprisingly different as it empowers the 'Majlis to administer, transfer, charge,²³ enter into joint venture, invest the money and property of the wakaf am whether movable or immovable for the purpose of developing and increasing the income of the properties in so far as it is allowed by the *hukm Syarak*'. This seems to be an exceptional rule which will be discussed later.

The above three characteristics of *waqf* are upheld by the majority of Legal scholars in all generations including today. Though these attributes are helpful in preservation of *waqf* property to an extent, one should not ignore the rigidity of the concept in modern context and yet their negative effect on the productive utilisation of the subject properties. These negative effects are explained below.

2.5 The Immediate Negative Effect of the Concept

Despite the sincerity of the previous scholars to the preservation of *waqf* and upholding the wishes of the *waqif* to the fullest, the two characteristics of *waqf*, that is perpetuity and inalienability, affect the development of *waqf* property negatively and, in turn, cause stagnation of the Islamic charities. This negative effect may be seen in the lack of liquid assets on the one hand and conflict with some laws on the other; the latter being a further cause to other legal and financial constraints.

²² One may note that the question of inalienability under statutory laws is doubtful at this time. Despite the pronouncement of the abovementioned sections, the provisions of National Land Code (NLC) except with a statutory mode of registration, especially under surrender and transfer prevent the grant of title in perpetuity. This is so because the State under mode of surrender may grant leasehold title and under mode of transfer the possibility is that the title to the property might also be leasehold. On top of all, the manner of transfer of title under NLC repudiates the very basic nature of *waqf* properties in Malaysia, for the law (NLC) vests ownership of property in the Majlis despite the fact that all State legislations concerning *waqf* emphasize that the Majlis is the trustee (*mutawalli/nazir*) of the *waqf* properties: see detail on various mode of transfers in Siti Mashitoh Mahamood, Harmonisation of the Malaysian National Land Code 1965 and the Shariah of *Waqf* : Recommendations for Amendments' in *On Harmonisation of Shari'ah and Civil Law 2, Towards a Methodology of Harmonisation*, Conference Papers, IIUM, 2005. p. 194

²³ Charge may be equated to *rahn* under Islamic law. If so this provision may be read together with the recent group fatwa by international scholars in Kuwait which prohibited charge of *waqf* properties but allowed exceptions: *Muntada Qadaya al-Waqf*, p. 413

It is pertinent to note that revocation of *waqf* is not allowed by jurists except for Imam Abu Hanifah and temporary *waqf* is not permitted by all save Imam Abu Yusof and Maliki jurists.²⁴ Both prohibitions assist the concept of irrevocability. Irrevocability may have some close effect as that of perpetuity and inalienability, but its effect on *waqf* properties is more positive.

The positive effect of the irrevocability may be explained by its capability of freezing any dealings relating to the transfer of title or rights by the *waqif* in the subject matter of *waqf*. This freeze safeguards the dedication in various ways.

First, where the settler or the *waqif* is the *mutawalli* himself, the rule of irrevocability remove confusion among the heirs and officials of court, for it would be certain that the settler has not revoked his declaration. This will prevent the heirs of the *waqif* from arguing against the existence of *waqf* where the settler-mutawalli has entered certain activities contradicting the nature of *waqf*. The rule of irrevocability certainly proved its usefulness in *Re Dato Bentara Luar Decd Haji Yahya Bin Yusof & Anor V. Hassan Bin Othman & Anor* [1982] 2 MLJ 264, 1 LNS 16, mentioned above, where the court interpreted the activities of the settler-mutawalli to be a breach of his duties as *mutawalli*.

Second, irrevocability bestows long-term powers on *mutawalli* and therefore making his dealings in the *waqf* property non-risky for an investor in the development of the *waqf* property. The permissibility of revocation of the declaration of *waqf*, otherwise, would cast uncertainty of joint venture and, as a result, would cause the *waqf* property not to be effectively and productively utilized.²⁵

The negative effect of irrevocability is limited to the settler; that is when the *waqif* himself is in need of help and assistance. Irrevocability may affect, only occasionally, the development of *waqf* property such as where the donated property does not serve its objective or where it is underutilised due to certain circumstances during the lifetime of the donor. Should the *waqif*, in this case, be allowed to revoke his gift so that the property could be released from *waqf* and used for his personal

²⁴ See further details at p

²⁵ Abdullah bin Musa al-Ammar, "Istithmar Amwal" in *al-Fiqhiyyah al-Awwal, Iltizam Shar'i ... wa Hulul al-Mutajaddidah*, 2003, p 207

benefit or sold, then, the proceeds be reapplied as a charitable *waqf*? Only a minority of jurists would permit revocation.

In the first case, the reason to allow revocation of the declaration by the *waqif* may not be persuasive enough, as one may argue that there should be a clause in *waqf* declaration allowing the *mutawalli* to sell the property in special cases (e.g. when the land is unproductive). Where there is no such clause in the document, jurists allow the *mutawalli* to opt for the process of *ibdal* and *istibdal*²⁶, charging of revenue (*rahn*), as well as seeking court leave in order to remedy the underutilisation and non-productivity.²⁷

It is therefore thought that irrevocability has limited effect which does not require indiscriminate repeal. Only when the settler is in need as practiced in Sudan²⁸, and the revocation does not cause adverse effect on others including *mutawalli*, or it is in the interest of public, the rule of irrevocability should be relaxed by amending the existing law, and by empowering the court to declare revocation, which eventually would be recognized as the only conclusive evidence, of being revoked, against the perpetuity of the *waqf*.

Perpetuity has positive effect on the safeguard of the *waqf* property, for due to the concept of perpetuity *waqf* will remain to continue, as perpetuity, indirectly, imposes a duty on the administrator of *waqf* properties to develop and maintain it. Nevertheless, one must note that *waqf* property does not have revenues all the times.

A shortcoming inherent in the concept of perpetuity is non-liquidity of the assets. Very often the majority of the *waqf* institutions have a large number of real estate but little cash on their hand, thus insufficient to develop the land or even to maintain the real estate.²⁹ The reason for this is that the majority of the *waqf* property are real estate which by nature is incapable of conversion to cash and then to use it for the finance of the development of the abandoned or underdeveloped property.

²⁶ id, p 209

²⁷ In Malaysia several states have taken the steps to remedy the situation when the property of *waqf* is in state of decay, underdevelopment, ruin, and neglect, by allowing the Majlis to utilize the mechanism of *ibdal* and *istibdal*: see for instance ss 2, 19, 20 of Wakaf (State of Selangor) Enactment, 1999.

²⁸ Hasan Abdullah al-Amin, "al-Waqf fi Fiqh al-Islami", p. 129.

²⁹ Anas al-Zarqa, "al-Wasail al-Hadithah litamwil wa al-Istithmar," in *Idara wa Tathmir Mumtalakat al-Awqaf*, Jeddah: IDB, [1994], pp. 184, 185.

Yet, due to the perpetual existence of *waqf* property, the administrator cannot finance the revival and development of *waqf* property, by selling the property. In addition, the rule of perpetuity also bars *waqf* to seek aggressively financing its development projects from other sources. Since the sell of *waqf* property is prohibited in general, the mortgage of such property follows the rule. Freeze of these two facilities makes the administrator of *waqf* helpless as is happening in many *waqf* institutions.

Pre-modern jurists especially in the Hanafi and Hanbali schools have devised several schemes to counter the negative effect of perpetuity by allowing the exchange of estates or sell (*ibdal* and *istibdal*). This method of finance, however, has the peril of losing some assets at the least, and being abused, as in the past, some administrators in collaboration with judges transferred *waqf* properties to their name, therefore, losing the property totally.³⁰ Apart from this possibility, the method of barter and selling one property in order to purchase another seems practical but difficult as it takes a long period of time to replace the given *waqf* property with a comparable one, because this will need the assessment of the valuers, suitability of location, bargain and consent of the owner of the targeted land, leave of court for selling the *waqf* property and eventually performance of the formalities under the present land law of the country.³¹ Some of these may not be a hindrance but a delay, others, however, may prove to be harder to fulfill without running the risk of losing some significance of the existing *waqf* property. Most importantly the idea of *istibdal* can help only if one replaces one piece of land with another, as, most of times, selling the property and using it for finance would result in termination of the *waqf*, which is against the wishes of the settler. Where the parcel of a *waqf* land cannot be sold, and hence its development alone not economically feasible, the proposed method will prove to be useless.

Further, the perpetual character of *waqf*, as propagated by jurists for generations, makes the administrators of *waqf* property cashless in a different way. The traditional perception of *waqf* has left an impression on the minds of public that they can participate in this great instrument of sustainable social welfare scheme only

³⁰ Ibn Abidin, Raddul Muhtar Shrh Durrul Mukhtar (Hashiyah Ibn Abidin), vol 4, p. 386

³¹ This fear is confirmed by a field research conducted by Mohd. Khairani Md. Midah, mengkaji Aplikasi Mekanisme Istibdal dalm Pembangunan Tanah Wakaf di Negri Johor, Kes Kjaia Kota Tinggi dan Pontian, (PSM thesis) Universiti Teknologi Malaysia 2003, which will be discussed later.

if they have immobile property which by nature is expensive and exclusively available to the rich classes of Muslim communities. This causes landless individuals not to contribute to this tremendous institution of social benevolence, therefore and as a result, *waqf* remains as a gift to the specific group of individuals. All those who can contribute, not significantly though, are barred from participation in the welfare of the community. This enables a few who own land and other type of immoveable properties to donate. In addition to this, since the price of the land is high many property owners would be reluctant to part with their hard earned asset. A further shortcoming in this sense is the prohibition of temporal *waqf*. This method of donation could have lessen the above problem, as those land and property owners who did not wish to part with their assets permanently, could have donated their property briefly, the income of which could be either spent or most prudently invested, and then the return of the investment could be used for charitable purposes. Consequent to the prohibition of non perpetual and temporal *waqf*, the majority of Muslim philanthropists are excluded from contributing to the welfare of community which ultimately makes the institution of *waqf* cashless.

In sum, the concept of perpetuity stops flow of cash to *waqf* institution and prevents the existing assets from liquidity; the latter being enforced further by the other concept of *waqf* called the inalienability of the property.

The effect of inalienability is somehow akin to that of perpetuity, but they differ in that the former prevents new funds from flowing and fossilises the existing one, the latter freezes the property from being a commodity that can be developed and transacted freely. Inalienability affects *waqf* property in a way that it cannot be the subject of any sale disposition, mortgage, gift, inheritance or any alienation whatsoever.³² While selling the property may end up the termination of *waqf* this method should not be encouraged. But charge or *rahn* which may be at the interest of the *waqf*, generally, is also not used simply because jurists disallowed it and the present legal system³³ is not conducive to the development of the said properties.

³² S. Ather Husaini & S. Khalid Rashid, 1973:113

³³ It is pertinent to note that charge is the creature of Malaysian National Code, and it being a uniform code of land law that applies to all transactions irrespective of the contract being under conventional or Islamic law: *Bank Kerjasama Rakyat Malaysia Bhd V Emcee Corporation Sdn Bhd* [2003] 2 MLJ 408. The effect of charge is that eventually the land may be transferred to the creditor. This is the same as *al-rahn* under Islamic law and for this reason the conference of

Under present land laws and banking system the financiers requires collateral as a precondition for granting finance or loan. A collateral refers to security for loan, that is, if the borrower is unable to pay the debt the bank will be able to take possession of the security, and after court order, as required in many common law jurisdictions, sell the subject property. This is not possible in the case of the *waqf* property for *waqf* is inalienable; therefore, this prevents the administrator to deliver title to the lender. In return the bank or finance companies, including Islamic ones, are unwilling to extend loans for the development of *waqf* properties, which as a result makes the *waqf* property not developed.

Having regard to the above difficulties arising from the traditional concept of *waqf*, it is proposed that there is need for a change. This needs the reexamination of the concept of *waqf* first and a proposal for its substitution.

2.6 Reviewing the Classical Concept of Waqf

The traditional concept of *waqf* as clothed in the three attributes of irrevocability, perpetuity and inalienability are the main obstacles to the development of *waqf* land and, therefore, its contribution to the welfare of society at par with other modern charitable foundations.

In order to remove these obstacles, there is need for rethinking of the present concept of *waqf*, either through studying the existing minority opinions or finding new solutions. In the following discussion, an effort is made to compile these minority opinions with the purpose of finding new alternatives as well as repudiating arguments that favour the traditional concept of *waqf*.

The concept of perpetuity and irrevocability is nowhere being established in the Qur'an, *sunnah*, and *ijma'*. These two attributes of *waqf* are only deduced by Muslim jurists from the Prophet's *hadith* and supported by Qur'anic texts about *sadaqah* and *infaq*.³⁴ However, these texts do not render immutability of the perpetuity and irrevocability of a *waqf*.

Ulama in Kuwait considered it unlawful if the property of the *waqf* has been given as security for a loan.

³⁴ Tawanu, (Qur'an, Sunnah, Muslim reported from Abu Hurairah from the Prophet (s) who said that

Irrevocability of waqf is not unanimously agreed upon. According to Imam Abu Hanifah, the declaration of waqf is not binding on him. For him³⁵, the ownership of the donor exists in the subject of the waqf, therefore the donor has the power of revocation. The Maliki school³⁶ is of the same view. Imam Abu Hanifah contended that one owns his property till he dies therefore waqf is like a loan (ariyah) which is subject to termination where the lender of the property may demand it any time. The same, the donor in waqf declaration may revoke his gift any time except when effected after the death of the settler or when the land is donated for mosque.³⁷ This opinion of the founder of Hanafi school is interpreted as that he did not recognise waqf, which is true as far as we understand waqf now. Imam Abu Yusuf is said to have had followed his teacher at a time but when he travelled to Mecca he came to know about the *awqaf* of the companions of the Prophet; henceforth, he changed his mind by recognising *waqf* as a distinct form of transfer of property.³⁸ This opinion of Imam Abu Hanifah does not contradict the hadith of Umar (r) for that hadith clearly gives option whether to make the waqf perpetual or otherwise. Such choice, therefore, does not clearly mention irrevocability of waqf. It is to be noted that despite the opposition from the majority of jurists of the four schools, the opinion of Imam Abu Hanifah is recognised today in Egypt³⁹ and Sudan; hence the donor has the option to take back his property, if he needs it.⁴⁰ One may say that the current legal opinion in those countries is in favour of restricted revocability of the waqf. Restricted revocability may prove its significance where the subject matter is difficult to develop, or being redundant, or could serve other purpose effectively. In such a case, the mutawalli may request the court for amendment⁴¹ to the condition of the waqif, hence, enabling the mutawalli to use the property as he sees it fit and appropriate. This legal permission of revocability is similar to that of temporal waqf (discussed below), and both make the rule of perpetuity of waqf weaker.

after a man dies, his deeds are ended except three (things that will benefit him): continuous alms and charity; also Ahmad reports from Abi Amamah al-Bahili, from the Prophet (s) who said that *there are four the reward of which continues after death, ... the person who gives something in charity, its reward goes to him as the thing exists.*

³⁵ Al Sarakhsi, *al-Mabsut*, vol. 12, p 27

³⁶ Al-Qurafi, *al-Dhakhirah*, vol. 6, p 322

³⁷ Al-Sarakhsi, *al-Mabsut*, vol. 12, pp 27-28

³⁸ Id., vol. 12, p. 28

³⁹ S. 11, Ahkam al-Waqf, law No. 48, 1946, (Egypt)

⁴⁰ Hasan Abdullah al-Amin, "al-Waqf fi Fiqh al-Islami", p. 129.

⁴¹ It may not be necessary to require the certificate of court, as required by the Sudanese law. As long the amendments are clear and written that would suffice.

Perpetuity in the majority of the traditional works indicates the infinity of dedication and also of the subject matter. A minority however seems not to agree. This minority view may be supported but only in the context of non-perpetuity of the subject matter.

The subject matter of waqf is presumed to be perpetual, and hence the donation of land and other immovable property remains to be the dominant feature of waqf especially among the Hanafis and Shafi'ies. Nevertheless, the rule of perpetuity is not supported by the fact that jurist recognised temporary waqfs and allowed, under certain circumstances, movable property such as trees, plantation, animal, books, and even cash⁴² in all schools of law, which by nature are not permanent and not perpetual.

If one is to read the hadith of Umar, concerning *habs* which is a form of sadaqah jariyah, together with other hadiths of sadaqah it will become clear that a sadaqah that recurs after the death of the donor is as good as *habs* as long as the donation keeps benefiting Muslims (as long as it exists: *madam jarat*). This hadith according to Kahf⁴³ establishes the permissibility of a temporal waqf. In other words, a waqf can be perpetual as well as temporal following the various hadiths of the Prophet (p.b.u.h.). Temporal waqf is allowed by Imam Abu Yusuf⁴⁴ and Malikis⁴⁵, and recognised by Egyptian law of waqf.⁴⁶ Kahf considers the prohibition of temporal *waqf* as a lack of respect for the will and wishes of the owner of the property, without any support from Islamic law.⁴⁷ Just like the power of revocation, this also rebuts the claim of an absolute perpetuity.

The Fatawa in Almagiri⁴⁸, stated that 'according to all⁴⁹ perpetuity is also among the conditions of waqf, and therefore *waqf* without perpetuity is invalid'. Faiz

⁴² Sayed Khalid Rashid, "Current Waqf Experiences and The Future of Waqf Institution", 5 *Awqaf* [2003] at 16; Shawqi Ahmad Dunya, "al-Waqf al-Naqdi: Madkhal li Taf'il Dawr al-Waqf fi Hayatina al-Mu'asirah", in 3 *al-Awqaf* [2002] p 57 at 66-70; Hussain Hussain Shihatahm "Istithmar Amwal al-Waqf", *Muntada*, p 157. Al-Qurafi, al-Dhakhirah, vol. 6, p 312-3. According to al-Qurafi, Imam Shafie and Ahmad allowed the abovementioned because anything that can be used and utilized recurrently is suitable for purpose of waqf.

⁴³ Munzer Kahf, *Suwar Mustajida min al-Waqf*, 2004, pp 5-6

⁴⁴ Al Sarakhsi, *al-Mabsut*, vol. 12, p 41

⁴⁵ Ibn Arafah, in *Sharh Hudud Ibn Arfah*, madah waqf : <http://feqh.al-islam.com/default.asp>

⁴⁶ S. 16, Law No. 48.

⁴⁷ Monzer Kahf, Towards the Revival of Awqaf:, p 2.

⁴⁸ *Al-Fatawa al-Hindiyah*, Kitab al-Waqf, Shara'ituh

⁴⁹ The text of the *fatawa* mentions the term 'kul' which could mean all in the madhhab. Even this is

thought that according to the 'majority of jurists waqf purported to be made only for a limited period of time is void according to all schools of law'.⁵⁰ These rulings of Alamgiri and Faiz, in terms of dedication or subject matter, are obviously not the reflection of *Ijma'* in all schools. Al-Qurafi rejected this view of Hanafis for there are reports of many types of properties being given as *waqf*⁵¹, yet, the very nature of them lack the capacity of being perpetual. In addition to the acceptance of movable property, in all schools, Abu Yusuf and Malikis recognise temporary waqfs and usufruct in principle. Imam Zufar has allowed cash without any condition. The majority of Malikis⁵² allowed cash and food stuff⁵³ to be the object of waqf though some held to be *makruh*.⁵⁴ The Hanbalis⁵⁵ are deemed to have not allowed cash but according to Ibn Taymiyah the various rulings on the invalidity of cash, as the subject matter of *waqf*, are based on the opinions of al-Khiraqi and those who followed him. There is no opinion of Imam Ahmad on the point, and hence according to Ibn Taymiyah cash may be a valid subject of waqf.⁵⁶ At present countries which validate cash waqf are Egypt, Iraq, Syria, Iran, Turkey, India, Pakistan, Burma, and Singapore.⁵⁷ The permission of all these object as the subject matter of waqf rebuts the claim of *ijma'* either by the Hanafis or others.

Additionally, it must be noted that jurists allowed *ibdal* and *istibdal* of *waqf* property which contradicts the rule of perpetuity. Under this context one is permitted to barter one piece of land with another or sell one piece and then purchase another piece of land with the purchase price of the former. Likewise one is allowed to sell a part of a piece of waqf land in order to finance the development of the reminder.

Furthermore, some Hanbali jurists especially Ibn Taymiyah allowed mosques to be sold and exchanged if that is beneficial to the community.⁵⁸ Some Shafi'i jurists allowed the dedication of dog for purposes of *waqf*. This according to al-Subki⁵⁹ is

not correct because according to al-Sarakhsi Imam Abu Yusuf allows temporary waqf.

⁵⁰ Faiz Badruddin, 1919:550.

⁵¹ al-Qurafi, *al-Dhakhirah*, vol. 6, p 313.

⁵² *Jawahir al-Aklil*, vol 2, p 306; al-Qurafi, *al-Dhakhirah*, vol. 6, p 313

⁵³ *Ashal al-Madarik*, vol 2 p 221

⁵⁴ Al-Attar, *Mawahib al-Jalil*, vol. 6, p.22

⁵⁵ Ibn Qudamah *al-Mughni*, vol. 5, p. 373

⁵⁶ Ibn Taymiyah, *Majmu' al-Fatawa*, vol. 31, p. 234.

⁵⁷ Sayed Khalid Rashid, "Current Waqf Experiences and The Future of Waqf Institution", at 16.

⁵⁸ Ibn Taymiyah, *Majmu' al-Fatawa*, vol 31, p. 215-244

⁵⁹ Al-Subki, *Takmalah al-Majmu' Sharh al-Muhadhdhab*, Dar al-Fikr, vol 15, p. 320 (kitab al-Waqf)

permissible not on the ground of it being dog but because of its use and benefit (manfa'ah). *Manfa'ah* or getting a benefit is considered the objective of *waqf*, and therefore as long as a benefit can be received, or as long as something can be used recurrently that can be the subject matter of *waqf*.⁶⁰ Something that has recurring benefit may and may not last in perpetuity. Since the objective of *waqf* is the reception of some benefit, the object or the subject matter becomes secondary, and since the object is the usage or benefit, on final analysis, one can argue that the concept of perpetuity according to this writer is non-existent, for once a benefit is received it is diminished, and once the object is diminished the *waqf* is also diminished. Thus according to al-Subki's understanding *waqf* can only have a recurring benefit not necessarily perpetual one. At the end one can say *waqf* can be perpetual and otherwise; it can be perpetual as in terms of land, and temporal, as in case of animals, buildings, cash, and usufruct and so on.

Allowing trees, buildings, food stuff, animals, books and others is in fact the recognition of temporal *waqf* if one considers the *waqf* to reflect its subject matter even though such is justified by the hadith of the Prophet (p.b.u.h.) for these hadiths would ultimately justify non perpetual and temporal *waqf* too. If one considers such items exceptional examples of *waqf* then that would be unjustified; it is not fair to consider one hadith inferior than another at a time where public interest and common logic would dictate otherwise. Following this line of reasoning one can conclude that perpetuity of the subject matter should not be the core characteristic of *waqf*. Hence, a philanthropic donation may be in any form: in perpetuity, temporal, real, usufruct, and rights or interests, the proceeds of which should be either used on the beneficiaries, if the subject matter is capable of revenue, or be amortised and invested, and even in case it is not capable of perpetuity and amortisation, there is no reason for blocking its validity as *waqf*.

It is true that the conclusion of Faiz and Alamgiri are apparently supported by the reported *waqf* of the sayidina Umar (r) that the land should not be sold, given as gift or inherited. On a first look this would require perpetuity. That report, however, must be read all-together with the other wording of the hadith that said 'if you wish you can detain the corpus and let its benefits go to welfare'. The hadith in this way

⁶⁰ This is a view which is mentioned by al-Qurafi above.

gives liberty (which implies the permission of other forms of *waqf* too) to the owner of the property to give his property in *waqf* as understood. Now that can be considered a special case and both the permission of the Prophet (pbuh) and the action of sayidina Umar can only prove the rule of permissibility that one may give a donation in perpetuity. It does not prohibit another form of *waqf*. To say that other than the prescribed way is not valid, such an assertion is not founded on any *dalil* and explicit legal text except human reason and analogy. While analogical reasoning is suppressed at the interest of the community, and there is no definitive text to the effect of illegality of temporal *waqf*, one has to allow both temporal and perpetual *waqfs*.⁶¹ This should be done in the light of juristic principle that the rule is permissibility until there is evidence against its validity. Considering this established principle of jurists one should then choose liberal approach in cases where the text is for permissibility and choose rigidity if the text proscribed the action. Since *waqf* is for the benefit of ummah and there is no restriction on kind-hearted individual to donate, it is surprising why the traditional jurists should prohibit temporal *waqf*.

There is no consensus of companions of the Prophet (*sahabah*) on perpetuity of *waqf* or *habs*. The validity of *waqf* in the specific form of sayidina Umar (r) may have been confirmed by such an *ijma'*, but, as it is about one form and the *ijma'* is *sakuti* (silent consensus), one cannot exclude other forms of *waqf*. The permission of temporal *waqf* definitely rejects the view of jurists who claim perpetuity of the *waqf*. As far the report of al-Termadhi⁶² who held that the declaration of land, as *waqf* property, is held valid by the consensus (*ijma'*), it does not mean an *ijma'* on perpetuity. Qadi Shuraih⁶³, Sha'bi and even Ibn Abass, and Ibn Mas'ud did not recognise *waqf*, at all.⁶⁴ Imam Abu Hanifah considered *waqf* as a loan during the lifetime of the settler, and hence revocable. The rejection of the opinion of the Abu Hanifah by Abu Yusuf as contended by Malikis and Hanafis due to the argument of Imam Malik does not mean the proof of perpetuity for they themselves accept temporal *waqf*. This power of revocation and accepting temporal *waqf*, therefore removes the alleged perpetuity of dedication, not mentioning the perpetuity of the

⁶¹ See Sami Muhammad al-Salahat, *al-Tajrubah al-Waqfiyah li dawlah al-Amarat al-Arabiyah al-Muttahiddah*, Amarah al-Shariqah Namudhajan, (1996-2002), No. 5, *al-Awqaf*, October 2003 at p. 63

⁶² Sunan Termadhi, vol. 2, p. 417

⁶³ Al-Qurafi, *al-Dhakhirah*, vol. 6, p 313.

⁶⁴ Al-Sarakhsi, *al-Mabsut*, al- kitab al-Waqf Mabsut, , vol. 12, pp 28-29

subject matter. In Malaysia the idea of perpetuity of the subject matter seems to have lost its ground in Selangor and Johor too.

The Selangor Enactment No. 7 of 1999 (*Waqf* (State of Selangor) Enactment 1999) deserves to be called a relatively advanced law of *Waqf* in Malaysia. Section 2 of this law defines property as to “include any movable or immovable property and any interest in any right, interest, title, claim, chose in action, whether present or future or which is otherwise of value in accordance with *Hukm Syarak*”;. The same section defines *waqf* as “the dedication of any property form which its usufruct or benefit may be used for any charitable purpose whether as *waqf am* or *waqf khas* according to *Hukm Syarak*, but does not include a trust which defined under Trustee Act 1949”;. This definition of *waqf* and its property seems to be in line with the opinion of al-Subki and the opinion of the Maliki School. The state has recognized the *mawquf* to be any property (mal) as long as it is valuable in the eyes of Shariah. This is so far the clearest and most advance legal tool for the development of *waqf* property and institution in the aforesaid state. The term *hukum Syarak* here if applied broadly⁶⁵ would include those properties which have value in the eyes of Shariah. This would include any property recognized by the early or present or future ulama as legal and lawful. This by the very text of the section abolishes the concept of perpetuity of subject matter of the *waqf*. Selangor, in addition has provision of *istibdal* and cash precedes which are similar to that in Johor.

In Johor where under *Kaedah Kaedah Waqf* , 1983, section 17 recognized both perpetual and temporary waqfs. Under the same section, except Masjid and that for Masjid, all *waqf* could be either perpetual or temporary the latter including *waqf ahli* which should not go beyond two generations or 60 years after the date on which the waqif passes away. Under section 13 of the *Kaedah Kaedah Waqf* 1983, the maquf or the subject matter of the waqf can be equity shares, cash for share in a *waqf*

⁶⁵ ‘*Hukum Syarak*’, in a narrow sense, may include the *hukm* found in the hadith of prophet (p.b.u.h.) and the juristic deductions, or inductions in all four schools of law, including the Shafii school. In any event, it is not clear which rule should be followed for even the shafii school jurists allowed both property and its usufruct that is the interest or right in, and to the property, also cash money as reported by al-Subki, in his *Takmalah* to al-Nawawi’s *al-Majmu’* (vol. 15, p.. The result is that, by law, it is in the discretion of the Majlis to accept or reject the type of property dedicated so. But it seems that the Majlis would not use its discretion unless there is a fetwa to confirm the minority opinion or views in other schools of law. This is apparently different in Johor and Selangor where the concept of perpetuity of the subject matter is discarded.⁶⁵ be said to be the same as the Kedah enactment

called *saham waqf*. This recognition of equity and cash to be converted into shares (*saham*) in immovable property, as the subject matter of *waqf*, is a step in the development of a more dynamic approach to the concept of *waqf* which is a clear deportation from the traditional concept of perpetuity limited to land and the like, even though *saham waqf* still needs review. *Saham waqf* at the moment are not doing well, and at the same time it reverts to the traditional subject matter i.e. land or buildings something that is not considered commodity and cannot be transacted in under normal circumstances. This is to say perhaps instead of *saham waqf* the acceptance of cash would be a better alternative.

Just like irrevocability and perpetuity are not unanimously held by jurists, inalienability may also be disputed. The early jurists, where it was necessary for the purposes of a *waqf*, allowed the Qadi to authorize a sale or vary the rules of management of the *waqf* even such was expressly forbidden by the founder of the *waqf*, whose words were permitted to be altered by the Qadi, in the capacity of a custodian of all *waqfs*. Further, it was ruled that a *waqif* may authorize contracting debts for repairs of the property or for payment of taxes, when there is no income or means of paying them out of the *waqf*, and mortgaging the dedicated land or its produce by way of security for debts so contracted, selling part of the dedicated land for the abovementioned purposes. Even if the *waqif* is silent, Hanafi jurists still allow *istibdal*, and in the Hanbali School of law the permission of *rahan* and its use for enhancement of *waqf* revenue is liberally upheld. This in turn repudiates the view of those who proposed inalienability of title in *waqf* properties; that is to say in some cases *waqf* property may be sold or charged.

The new property acquired, either by direct exchange or investment of the proceeds of the sale becomes *waqf* subject to the same terms and conditions as the original *waqf*. It is contended that since a new corpus is substituted for the old one, the continuity of the *waqf* is maintained.⁶⁶ While this may be true, in case the *waqf* property is substituted by another, but the same cannot be said about properties which are sold in order to pay the debts incurred by the mutawalli.

⁶⁶ Ibid: 113

Charge is permissible based on analogy. In other words, if the original *waqf* property can be sold in some exceptional cases, it may also be charged.⁶⁷ The Hanafies allowed *rahn* or charge, in some instances, provided the lender occupies it and pays the rental to the *waqf*.⁶⁸ This requires the *waqf* to be productive in first place which is not the case in many countries. Recently the highest organ of the Saudi judiciary allowed the revenue (*ghalah*) and not the capital of the *waqf* (*asl*) to be charged. Hence, the Saudi Law provides for charge of buildings constructed on *waqf* land but not the land itself. That is where the *waqf* land is barren and has no revenue the nazir can apply to the court together submitting the development plan, for leave to charge the buildings to be constructed on the land in future.

The rule of inalienability, apparently, is strictly followed all over Malaysia except Kelantan. The letter of law in all state enactments makes *waqf* property not transferable and not transmittable.⁶⁹ But the rule of inalienability is relaxed in Johor and Selangor, where *istibdal* is recognised. Section 9 (1) of Johor law authorises the department of *waqf* to conduct *istibdal*, with permission from the Majlis, and according to subsection 2 of the same section the proceeds of the *istibdal* can be movable and immovable property. The principle subject matter is clearly transferred to another individual or legal person, and the proceeds of the transactions are kept as *waqf*. Compare to Johor and Selangor, section 62 (2) of the Kelantan Enactment is express. It provides that the Majlis can ‘administer, transfer, charge, enter into joint venture, invest the money and property of the *waqf* am whether movable or immovable for the purpose of developing and increasing the income of the properties in so far as it is allowed by the *hukm Syarak*’. Subsection (2) eliminates the effect of subsection (1) of the same section (i.e. the rule of inalienability). This subsection is considerable a departure from the conventional view of Shafi’i school to others therefore accommodating *istibdal*, and *rahn*, even though it is merely in the interest of the *waqf*. It is apparent that the Kelantan law goes beyond the Saudi judicial view, as it allowed sale and charge altogether without qualification.

⁶⁷ Al-Kasani, *Bada’i’ al-Sana’i*, vol. 6, p 137, Ibn Qudamah, *al-Mughni*, vol. 4, p 221; al-Insaf, vol. 5, p. 14

⁶⁸ Ibn Abidin, *Raddul Muhtar*, vol. 5, 310; al-Qaradaghi, “Duyun al-Waqf”, in *Muntada*, 2004, p. 66,.

⁶⁹ ss. 91(Kedah), 62 (FT), 4 (2).

2.7 Reviewing the Definition

Munzer Kahf defined *waqf* as holding a *Maal* (an asset) and preventing its consumption for the purpose of repeatedly extracting its usufruct for the benefit of an objective representing righteousness and philanthropy.⁷⁰ He uses the term *maal* (an asset) which is 'continuously usufruct-giving' 'as long as its principal is preserved'.⁷¹ He qualifies his statement that the 'Preservation of principal may result from its own nature as in land or from arrangements and conditions prescribed by the *Waqf* founder'.⁷² Therefore according to Kahf the definition covers the traditional concept of assets of *waqf* which are perpetual and that the *waqf* of which 'remains as long as the asset lasts, i.e., for the beneficial life of the assets'. This is a point agreed by the four Schools of *Fiqh*, he argues. He also contends that his 'definition covers the kind of *Waqf* that is made temporary by the will and conditions of its founder which is discussed and approved in the Maliki School only.' He includes several 'new form of *waqf* that were not discussed in the classical literature, such as the *Waqf* of financial rights and *Waqf* of usufruct'. This he achieves by using different term *maal*, which can include 'both financial rights, such as publication right of a manuscript, and usufruct, such as usufruct of a rented asset' 'according to the majority of *Fuqaha* and as expressly mentioned in the contemporary collective *Fatawa*, especially, those of the OIC *Fiqh* Academy'.⁷³ Kahf still remains loyal to the idea of quasi perpetuity of the subject matter of *waqf*. He emphasizes on 'the idea of abstention from consumption in order to keep the asset available for repeated extraction of usufruct'. Such a thought is inferred from various writings of some early jurists in the four schools. Restatement and refinement of that thoughts seem to be a giant leap towards the reconstruction of the concept of *waqf*, as it will leave behind the traditional concept of perpetuity fossilized in land generally and buildings, agricultural machinery, war equipments, books and other chattels. All these are substituted with term *maal* which according to the jurists is general comprising movable and immobile property as well rights and usufructs which are not only not perpetual in terms of the life of the property but also by the nature of the property are temporary and time restricted. Yet he adheres to the idea of 'detain the principle and let the

⁷⁰ Munzer Kahf, *Financing The Development Of Awqaf Property*, p. 4

⁷¹ Ibid.

⁷² Ibid.

⁷³ Id. p. 5.

benefit of it flow'⁷⁴, for he recognizes that the property should be 'available to repeated extraction of usufruct'. This interpretation of *waqf* is in line with the various types of *hubus* (trusts) practiced during the lifetime of the Prophet (s) and the four righteous Caliphs which imply that the subject matter of *waqf* should not be interpreted rigidly. Extending, furthermore, the scope of *waqf* will result in attraction of a variety of means and funds; therefore, enabling the contemporary Islamic trust institutions to finance the development of stagnant properties themselves and contribute to the welfare of the society generously. This by itself is a matter of need and of public interest and therefore would justify the reinterpretation of the *waqf* and its subject matter. Kahf asserts that he did not make 'reference to ownership, so that we avoid the well known difference of opinion among *Fuqaha* with regard to who owns a *Waqf* property.'⁷⁵ These researchers agree with his contents of the definition. Nevertheless, it is added that such a definition seems to circle around the same parameters of classical writing, with a difference that Kahf has amalgamated the various opinions without identifying the spirit of the hadiths and the various practices of the companions, and views of the classical interpretations. To supplement the definition of Kahf, it is thought that *waqf* should be identified as *the 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.*

We avoid the term perpetual dedication, and choose the term dedication of valuable, for the reason not to confuse this definition with that of old. Dedication could be of any kind: it can be perpetual if the subject matter is land and that is attached to it and the settler has expressed the intention of not being revocable save when the interest of the *waqf* requires so. We do not wholly agree with the idea of revocation if the settler needs the property, for if there is such a need the proceeds should be spent on the settler too, as such is not against the nature of *waqf*. The only requirement in such an instance would be to change the condition, by the institution or court, so that the settler can be entitled to its benefits. *Waqf* can be temporary, that is for a month, after which the subject matter can be reverted to the *waqif*. The usufruct or benefits received from such a *waqf* however should be valued and amortised. This type of *waqf* will also include the benefits of immovable irrespective

⁷⁴ The translation of the Hadith of the Prophet as reported by al-Nasai'i

⁷⁵ Kahf, Financing The Development Of Awqaf Property, p. 5

of being chattels, interests, and rights. *Waqf* will also include cash, and other forms of properties that are not covered by the early jurists clearly. This form of *waqf* would comprise equities, financial rights in equities, intellectual properties, such as good will, trade marks, copyrights, and so on.

2.8 The New Proposed Concept of Waqf

The definition of *waqf* as *the 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*, in fact, is the recognition of a substitute to the traditional concept of perpetuity and inalienability of *waqf*. The purpose of this research is not to totally reject perpetuity or inalienability; it is rather that the perpetuity of *waqf* should not be seen in the perpetuity of its *subject matter* but its *dedication*.

The distinction between the perpetuity of the *subject matter* of *waqf* and the perpetuity of *dedication* is based on the view of Zufar, concerning cash *waqf*, as interpreted by Ibn Abidin in terms of perpetuity. Though his view on perpetuity⁷⁶ in the traditional sense is not significant here, but his thought on cash *waqf* is used as a springboard for floating the new concept.

To Ibn Abidin, *dirham* and *dinar* are not perishables and hence good to be made the object of *waqf*, provided the cash is invested in trade whereby the capital plus profit is returned to *waqf*.⁷⁷ This, he justified on the ground of the value of cash, not its particular looks and physical survival as time passes. It is the value of cash which is determined in amount and then thought to exist in perpetuity.⁷⁸ The recognition of value instead of the physical form of *dirham* and *dinar* in fact is the recognition of perpetuity of *dedication* and not its *subject matter*. That is, *the dedication should be perpetual and not necessarily the subject matter of the dedication*. The *subject matter* of a *waqf* may change hand physically, but as long as its value is kept (amortised or reserved according to current accounting practice), the

⁷⁶ Ibn Abidin agrees with the idea of perpetuity of *waqf* according to the rule of analogy. He however admits that analogy is disregarded when it clashes with custom, meaning that if custom allows things incapable of perpetuity, and being declared as *waqf*, such declaration would be valid.

⁷⁷ Ibn Abidin *Radd al-Muhtar sharh Dur al-Mukhtar*, kitab al-waqf, vol.. 4, pp 363-364

⁷⁸ *ibid*

wishes of the donor or settler would be honoured. Hence, soon after the dedication is declared by the *waqif*, the subject matter should be valued and that value must be considered the subject matter of *waqf*, be amortized and reserved all the times. Just like in the case of cash which may change hands, the physical being of the subject matter should be capable of transfer and dealings. With this the spirit of the *hadith* can be upheld and the rest, as al-Salahat contends, can be decided based on the interest of the community, the nature of *waqf*, the need and the demand of time and circumstances.⁷⁹

It is presumed that the perpetuity of the subject matter of the *waqf* was recognised by the majority of jurists not on the merits of the subject matter but because the perpetuity of *waqf*, otherwise, was not conceivable. It is this reason why the declaration of land, as *waqf* property, is held valid by the consensus (ijma') of those who recognised *waqf*,⁸⁰ as reported by al-Termadhi.⁸¹

The substitution of the perpetuity of subject matter with the perpetuity of dedication is supported by the permissibility of istibdal, sale and charge of *waqf* properties. This eventually also eliminates the conception of inalienability as it is based on the rule of perpetuity. Since perpetuity of the subject matter is substituted by the perpetuity of dedication the rule of inalienability loses its ground.

Perpetuity of dedication is true and may be said to comply with opinions of all schools even Imam Abu Hanifah as he allowed revocation of the dedication and the Maliki school including Abu Yusuf who permitted temporary *waqf*. The perpetuity of the dedication, and not the subject matter, goes beyond the boundaries of immovable, movable, cash and usufruct; and for that purpose, *waqf* can be perpetual and temporary. Perpetuity of dedication surpasses the superficial idea of perpetuity and temporality⁸², as once a dedication is made the proceeds of such *waqf* shall remain infinitely even though the object of the dedication is non-existent or change hands in consideration for other valuables. This can be seen from the permissibility of movable and perishables.

⁷⁹ See al-Salahat, al-Tajrubah al-Waqfiyah li dawlah al-Amarat al-Arabiyah, 58, 63

⁸⁰ But Shuraih is said to have denied the validity of *waqf*.

⁸¹ Sunan Termadhi, vol. 2, p. 417

⁸² Cf. Munzer Kahf, *Towards the Revival of Awqaf*, p. 2 (Available on Kahf net).

To hold as such, many problems concerning the *waqf* properties would be settled.

As proposed by Kahf new forms of subject matter, in addition to realty, such as chattels, tools, cash, labor, usufruct, equities and shares, and services can be accepted even though such a donation is for shorter period of time.⁸³ Perpetuity in such a case would merely mean that the appropriation of the income of *waqf* to charity must be intended to be perpetual, even though the specific subject matter of charity does not have the character of permanency or perpetuity.⁸⁴ The subject matter should be seen as transitional entity showing the value of the donation. The subject matter should be capable of transfer as long as its proceeds are kept, invested in other property. In this way it is proposed that the issue of perpetuity is safeguarded. In order to make the donated items perpetual, and thus conform to the generally accepted concept of *waqf*, one only needs to amortize the value of such donations,⁸⁵ as practiced by companies. This perhaps is the reason why Modern Muslim jurists have added company shares, stocks, and cash money to the list of items which may be given as a donation according to the principles of *waqf*.⁸⁶

This interpretation is needed because *waqf* not only needs the real property but also labor as well as an imple amount of cash in order to pay for the work done on maintenance, change or exchange of the *waqf* property and also equipments for development and management of the real property.⁸⁷ The institution of *waqf* will greatly benefit, if the public is asked to contribute to *waqf* in terms of cash. An amount the value of which is kept in the account and the cash is invested either on internal finance of other *waqf* properties or outside on legally valid and economically profitable transactions.

We emphasise on following the letter of the hadith as far as the subject matter of the *waqf* is land provided the founder make it a condition and it is a land that continues to be capable of revenue. Otherwise, we uphold the spirit of the hadith and

⁸³ Kahf, Suwar al-Mustajidah li al-Waqf, pp 13-24; Kahf, al-Waqf al-Islami, Tatawurruhu, Idaratuhu, Tanmiyatuh, Beirut: Dar al-Fikr, 2000, pp 188-189

⁸⁴ ibid

⁸⁵ The value of the subject matter will be kept in a special fund which is then amortized. Only the income of such fund would be distributed among the beneficiaries.

⁸⁶ Nunzer Kahf, *Waqf: A Quick Overview*, p. 2.

⁸⁷ Anas al-Zarqa: "al Wasail al-Hadithah", p. 184.

hence choose to mention that the value of the subject matter should be determined and amortised. This does not mean that market value of the land should be determined and latter on if its value is appreciated it should be considered revenue. Rather it is proposed that land should be valued, its value be recorded for purpose of determination of losses in future. In other words, when based on need it is decided to sell the land, and the price of the land is depreciated, the losses can be compensated. This may be possible if a hedge fund is established after valuation of land at the outset of the *waqf* and contributed to from the revenue of the same *waqf*. In case, there are no losses or the market value of the land is appreciated, the current market price should substitute the old value of the land. The determination of value of the subject matter, in things other than land, is crucial for upholding the wishes of the *waqif*. As long the *waqif* expresses that the goods, or its usufruct or services of the settler are *waqf*, the institution of *waqf* has the duty to attribute value to it. That value should be amortized and just as in case of landed *waqf*, the valued *waqf* should have its proceeds, a portion of which may be reserved and the balance distributed on the beneficiaries. Donations which involve time and the provision of service not for cash will have the actual temporary nature, and for this purpose it would be difficult but not impossible to assign value thereto. This is to say, once the institution of *waqf* recognizes value based amortization, every thing donated and every effort is made should be valued and then amortized. In terms of efforts and consumables, the equivalent value should be deducted from other *awqaf* and credited to the account the new accounts.

The benefit of this idea is a switch from non-liquid capital to liquid capital; that the subject matter of *waqf*, just like in the case of cash which may change hands, can be sold and charged, if (1) the disposal is in the interest of the *waqf*, (2) complies with general principles of Shari'ah and (3) is suitable to the nature of *waqf*. Provided always, their value be kept as *waqf*, for the same purpose, in perpetuity. This conforms to the spirit of the *hadith*, and as al-Salahat contends, should be decided according to the interest of community, nature, or need of *waqf*, and the demand of time and circumstances.⁸⁸

⁸⁸ Sami Muhammad Al-Salahat, *al-Tajribah al-Waqfiyah li dawlah al-Amarat al-Arabiyyah*, Amarah al-Shariqah Namudhajan, (1996-2002), 5 *al-Awqaf* [2003], pp 58, 63

2.9 A Proposed Model for the Operation of Value-based Concept of Waqf

The recognition of perpetual dedication as discussed above in fact is the recognition of a value based concept of waqf. This means that under this new approach emphasis must be made on the safeguard of the value of the dedication rather than the physical being of the subject matter.

The value of the dedication must be considered the principal capital and must be registered in the principal account. The physical form of the subject matter of the waqf should be treated as a transitional entity representing the value of the object of *waqf*. This is intended for the purpose of creating liquidity in the assets of *waqf* without harming the perpetuity of *waqf*.

Based on this proposal, the following objects will still be the subject matter of waqf. Nevertheless, their value should be determined and amortized. They are as follows:

- (i) land, trees, and buildings (title together with usufruct);
- (ii) the revenue of land and buildings for a specified time;
- (iii) goods and chattels capable of revenue such as cars, tools, equipments etc;
- (iv) equities and shares in companies;
- (v) rights and warrants in companies;
- (vi) saham waqf;
- (vii) cash;
- (viii) goods to be used for a particular purpose such as textbooks, health equipment; and
- (ix) services provided by individuals.

The above list may be divided into two categories: things which are capable of generating revenue and otherwise; each of which must be treated differently.

2.9.1 Revenue-generating Waqf

All income-generating *waqf* objects irrespective of perpetuities or otherwise, should be valued in cash and this cash value should be considered the principal capital of *waqf*, hereafter referred to as value capital (VC). The VC should be considered perpetual and, therefore, be maintained all the time. All efforts should be made to safeguard the VC through its revenue generated by its investment. Also, this value-capital should be invested all the time in order to guarantee its perpetuity.

a.) A Model for Safeguarding the Value Capital (VC)

In order to guarantee the perpetuity of VC there should be an investment and revenue accounts parallel to VC account. All capital in VC should be invested and its revenue should be collected. The revenue then can be divided into distributable cash and expenses. The former would be given to the beneficiaries of the waqf while the amount marked for expenses would be kept in the reserve account (RA). An amount from the RA can be withdrawn and placed in a larger fund to be called hedge fund (HF). HF should consist of an accumulated cash contributed from RAs of various principal capital accounts i.e. VCs. It should act as a cooperative of waqf funds that help each other as and when there is a need for. HF is established mainly for the purpose of compensating losses in one of principal capital accounts.

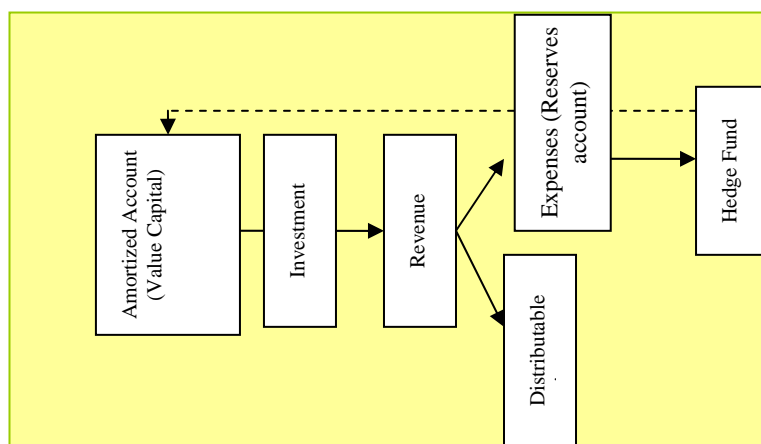


Figure 2.1: Model for value based waqf

The reserve account (RA) is not only to service losses but also to spend on normal wear and tear and other damage. At a time, the object may need replacement, or repair. If the accumulated funds in the reserve account are equal to or greater than the cost, depending on the life-span of the object and the amount it generates, an amount equal to the costs of repair and replacement be withdrawn from the reserve account. Otherwise, the deficit can be compensated by HF. But where there is no sufficient funds in HF a portion of funds can be diverted from accounts with surplus, or in case there is no surplus, a portion from those accounts which have the capability of reaching the value of the particular *waqf* object. In this case, the original *waqf* object may become borrower or joint-*waqf* (*waqf al-mushtarak*), if the amount is not paid back to the transferring account. Converting individual *waqf* to a *mushtarak* should be the last option.

The RA and HF should go in tandem with the life of the *waqf* object. This is proposed for the sake of the *waqif* as well as the *mawquf* and the larger interest of the community. If a good person donates one ringgit and eventually it is multiplied by the *waqf* institutions, the *sadaqah jariyah* of the *waqif* is multiplied. At time it will save *mawquf* that was donated by the *waqif*, and other time it will assist other *waqf* properties. In case there is no such eventuality, the multiplication of funds and henceforth their income is benefiting the *ummah*.

In case of land, a distinction should be made between the value of land at the time of dedication and its substitution (*istibdal*). When the market value of the object is determined and latter on its value is appreciated, the additional or appreciated portion should form the value of the capital not its revenue. The same rule should apply to depreciation of the value before it is sold. Where the land is sold and the recorded value depreciates later due to risky investment, funds from reserved accounts be transferred to compensate the losses.

In other cases, all goods should be regarded as *waqf*, and the institution of *waqf* should be under duty to record their value. That value should be amortized and just as in case of landed *waqf*, the non-landed *waqf* should have recurrent proceeds (i.e. investment revenue) distributed on beneficiaries, after a portion of which is reserved.

The recognition of value-based *waqf* and eventually the difference between the value and assets may expose landed *waqf* to unforeseen risks of misappropriation. This is unavoidable even if the *status quo* is preserved. As far as the value-based concept is concerned, the writer proposes two fold measures against misappropriation and mismanagement. First, the disposal of the assets should not be the first option of the manager. If there is no other way, such disposal should be subjected to the collective decision of the *waqf* institution, and a leave from a court of competent jurisdiction. Second, the accounts of the *waqf* funds be made transferent and should be annually audited by independent auditors.

Additional measures may be taken by subjecting the management, accountants, and auditors to professional liabilities, as well as personal accountability similar to that applicable to normal companies and trust corporations. Of course, currently *waqf* and its affairs are within the jurisdiction of Syariah Courts, whose powers are limited. This can be rectified by incorporating separate *waqf* management bodies under companies Act, 1965, and thus subjected to the jurisdiction of civil courts assisted by judges of Syariah courts. Alternatively, a chapter outlining the duties and powers of the *waqf* manager, should be inserted in the *waqf* laws of the states, whereby and according to such provisions of the amended law, the Syariah courts, helped by professional assessors, are empowered to hear cases of negligence and misappropriation according to the principles of Shariah and best practices of accounting and management.

b.) Model for Investing the Value Capital (VC) and Hedge Funds (HF)

Each amount in the principal capital account i.e. value capital (VC) and the accumulated cash in the hedge fund (HF) must be invested either internally i.e. financing the development of other *waqf* properties or externally, provided the investment is legal and economically profitable as highlighted in figure 2.2. All accounts should have an account for investment (IA) and revenue (R) as mentioned early. While revenue in the RA for VC can be divided into two i.e. distributable (DA) and expenses a portion of which is reserved and placed in the HF, the revenue

of HF need not necessarily divided as such. Only when an amount is needed that can be withdrawn from RA. (See Fig. 2.2).

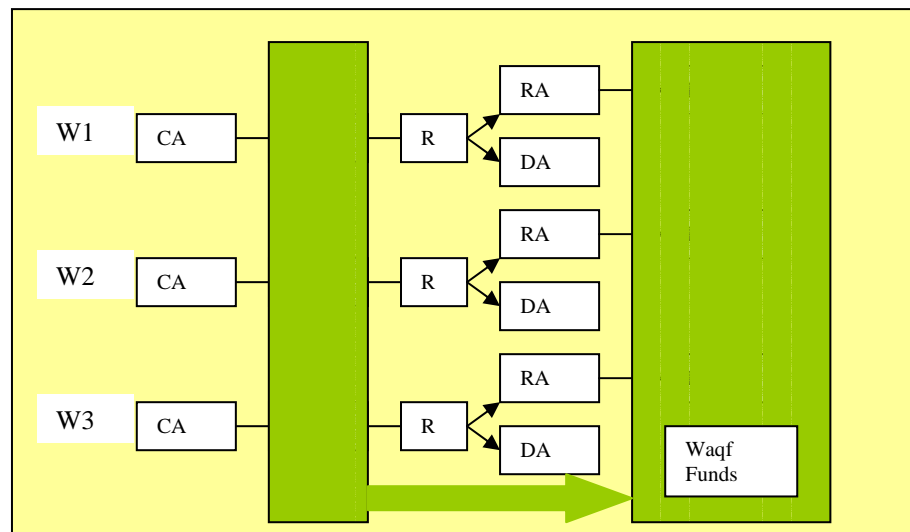


Figure 2.2: A Model of Waqf Investment Accounts

The reserves account can be kept merely to have records of the amount subtracted from the revenues of the *waqf* property, their annual income, and expenses. The actual amount should form part of the general waqf funds together with that in the hedge fund that is managed by professional fund managers. There must be some flexibility which enables the fund managers and the mutawalli to withdraw certain amount for expenses and covering losses. Such a withdrawal, however, should not damage the prospect of growth and good investment. This is in case the reserve account has sufficient funds otherwise the other contingency measures, as mentioned above, be applied.

Where the object of *waqf* (*waqf* property), which is the asset of the principal account, does not need service, repair, replacement, and so on, or such a need has not arisen in the course of time, and the reserve account exceeds the value of the principal value of the *waqf* property, the access can be transferred to the principle account (i.e. value-capital) thereby raising the principle capital of *waqf*, and hence added to the name of the *waqif*, the revenue of which can be subjected to the same measures as the original capital value.

2.9.2 Non-revenue-generating Waqf

While it is easy to think of value-capital and reserve account in case of land and other revenue-generating goods, it is however, difficult in the case of goods donated for recurrent use or direct consumption, usufruct and services provided by individuals. By following the value-based concept of *waqf*, each item donated and each service provided by a volunteer should, as a duty of the nazir, be measured by their value, which is recorded and then invested.

As time has changed, and the original one-man-management has been replaced by professional institutional-management, the time is ripe to think of new measures to suit such change. In the institutional-management of *waqf*, therefore, nothing should go without record and value requisition. Such a value should be treated as any normal object that is subject to appreciation or depreciation as time passes by.

Each time an equipment is donated, a principal value capital account be assigned to it, and its value should be recorded there. In order to realise the value, a minimal fee should, based on a sound calculation, be charged on its use by the public or who needs to use it. These fees should be credited to the principal value capital account, invested by the institution, and the revenue of which should be divided into expenses and reserves. The reserved amount be invested and then treated as mentioned above.

Similar formula can be applied to the time and experience of the volunteers. Their services should not be taken for granted. The services they provide have market value, and that can be either paid by the public at a minimum fee, or bought by reserve accounts. A practice of some organisations that spend cash on the services of professionals is not encouraged, for in a value-based system, one has to treat all *waqfs* fairly. For this reason, the donation of the rich to pay to service providers would also require an account of their own, subjected to the requirements mentioned above.

2.10 Conclusion

In the classical term, *waqf* is an irrevocable perpetual gift of a corporeal property (ayn) for the benefit of donor's family or someone else or something as a charity promised and executed normally during the life time of the donor which is not capable of transfer, gift, and transmission thereafter.

Perpetuity of *waqf* is popularly presumed to be held unanimously by all Muslim jurists and its inalienability derived from the Hadith of the Prophet. Irrevocability though neither a matter of legal texts, nor upheld unanimously by all Muslim jurists is added to the characteristics of *waqf*. Ironically the latter is less harmful to the preservation of *waqf* than the perpetuity and inalienability of the subject matter of *waqf*.

This Study rebuts the popular thought and takes *waqf* to a new ground by making a distinction between the perpetuity of the physical being of the object and its 'dedication'. Dedication is considered perpetual by assigning a value to it but its physical form is subjected to transfers. New *waqf* can be declared in the non-traditional way. Old *waqfs*, however, may still remain subject to the old conditions as long the greater interests of the *waqf* are not threatened by these conditions.

The recognition of the perpetuity of dedication and assigning value thereto has led to the recognition of collateral issues. That is the replacement of physical subject matter by its value necessitates the validity of accepting any valuable thing as the medium of *waqf*. Cash, equities, goods, and services are treated the same as land and other immovable properties. To each of them a value is assigned, recorded and, to be invested as the case may be. By this, the door of rigidity is closed and thereby also the controversy over the validity of such things is made obsolete.

The value based concept of *waqf* is open to losses and misappropriation. A model for countering this eventuality and also for the management of funds obtained through value based system is proposed.

It is hoped that value-based capital *waqf* would eliminate once and for all the problem of non-liquidity of the *waqf* assets, which will encourage the public to contribute to the enrichment of *waqf* institutions by having large funds that not only settle *waqf* problems but also contribute to the welfare and development of Muslims at large (see Fig. 2.2).

Wallahu A'lam.

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CHAPTER THREE

RECOGNIZED MODES OF FINANCING FOR THE DEVELOPMENT OF WAQF PROPERTIES

3.1 Introduction

The main points discussed in chapter two which are relevant to the discussion in this chapter were the concepts of perpetuity and inalienability of the subject matter of the waqf. The analysis of the concepts showed that the subject matter of waqf not only it could include liquid and illiquid assets but also it need not be perpetual or inalienable. Should this conclusion be accepted, various obstacles to the development of waqf would be removed as the trustee of waqf property would be able to obtain development financing in a manner the same as any other development body could resort to. It is still early, however, to think that the proposals in chapter two would be accepted by the waqf institutions, which also do not answer completely the question whether or not there is an ideal Shariah compliant financial mechanism for the development of waqf properties. This question is tackled in this chapter directly with a view of accepting the traditional thinking of perpetuity and inalienability of the subject matter.

Pursuant to the concept of perpetuity and inalienability of the subject matter of waqf, the institutions of waqf are powerless to transact in the waqf property in a manner that result into transfer of title or rights and interests perpetually. Jurists have jealously guarded the transfer of title but in respect of rights some scholars are flexible, in a sense that they allowed the transfer of rights and interest in waqf property (e.g. leasing, loaning), as long as such is not unending. The judicial rigidity as viewed by Muslim

scholars about the transfer of title is however limited to the principal capital of waqf but not its revenue. A brief discussion of this point will suffice.

Waqf revenues

Jurists in hanafi¹ and maliki² schools agree that whenever the capital of waqf requires revivification, the administrator of waqf should spend on it from the revues of the said waqf. It is beyond any doubt that such a revue when spent on the redevelopment of waqf property is lost, therefore the rule of perpetuity and inalienability is not applicable thereto.

Waqf capital

Waqf capital refers to any property which has been dedicated by the donor for a specific purpose and the benefit of someone or something. Capital of the waqf in this sense consists of both movable and immovable property including cash. All legal rules and judicial pronouncements of ulama concerning the inalienability and perpetuity of waqf property refer to the capital of waqf. It is this waqf property that is the centre of controversy on one hand and the main object of preservation and safeguard on the other. The authors of this work follow similar course and thus the discussion of this chapter apply to the capital of the waqf property. Following this vein, this discussion is based on the presumption of the literal application of perpetuity and inalienability even though it is believed that the concept of inalienability and perpetuity of waqf need rethinking and renewal. For the sake of keeping waqf property safe the jurists in Islamic law have recognized some powers and duties of the trustee (nazir/mutawalli) of the waqf peroperty which will be discussed below.

¹ Al-Kasani, *Badai' al-Sana'I'*, vol. VI, p 330.

² Al-Qurafi, *al-Dhakhirah*, vol. VII, 329

The Powers and Duties of Trustees (Mutawalli / Nazir)

The trustees of waqf funds and properties have some powers and the duty to observe them. It is the duty³ of the trustee to safeguard the capital, and revenue of the waqf, rent it according market practice, receive its revenue, sue the defaulters, and keep its certificate and documents. Some of these powers are the power to sue offenders or transgressors who encroached on waqf property, the power to set off loans and the power to recovery through *sulh* or negotiation, mediation and arbitration.

Jurist viewed that it is the duty of the nazir or trustee to sue the trespassers and unlawful occupiers of waqf properties. If the trustee can not prove his claim in the court of law, or the transgressor agrees to pay compensation for the usurped property, in case the trustee is unable to recover it otherwise, then he has the power to settle the dispute through mediation, negotiation, and arbitration. The trustee then should consider the recovered sum as the original and the balance should be treated lost. In other words, the trustee should consider the sum as the original waqf, and buy similar interests, to which all the conditions of waqf will apply.⁴ It is to be noted that it would be a breach of duty where the trustee does not sue the defaulter of loan within limitation period. Limitation period under s. 6 of Limitation Act is 6 years; under Islamic law the term is 33 years according to article 1662 of the Mejellee.

The above duties of the trustees demand that none of transaction in the waqf properties should involve borrowing lending and charging waqf properties. Nevertheless, Few pre-modern jurists in various schools as well as contemporary ulama however tend to recognize the importance of loans and charges in the context of financing and therefore are inclined to recognize both.

Jurists recognized borrowing⁵ for daily operational use⁶, improvement and renewal for good revenue,⁷ provided it is needed or for the interest of waqf, and there is

³ Qaradaghi, Duyun al-Waqf, in Muntada, p.51

⁴ Al-Sediq Muhammad al-Darir, Duyun al-Waqf, p. 30

⁵ Hilal al Ra'y is reported to have thought that waqf has no legal personality and therefore no loan can be taken for waqf. Other jurists however allow mutawalli to take loan for waqf and pay the loan from the income of waqf: Ibn Abidin, *al-Uqud al-Durriyyah fi Tanqih Fatawa al-Hamidi*, Kitab al-waqf, Ahkam al-nuzar; al-Sediq Muhamthimad al-Darir, *Duyun al-Waqf*, p. 25.

no other alternative, such as revenue, and the court permits it.⁸ Malikis and Hanbalis,⁹ and some contemporary jurists agree too.¹⁰ The Sudanese, Egyptian and Kuwaiti laws have almost similar provisions.¹¹ Some jurists also allowed lending,¹² subject to some conditions¹³ in order to safeguard waqf property.

The general rule in Hanafi¹⁴ Maliki, Shafie and Hanbali schools is that whatever can be sold can be charged too. Similarly the person who can charge a property must have the power to sell¹⁵ and donate it. Consequently, waqf property cannot be sold and hence cannot be charged,¹⁶ as charge exposes the given property to unforeseen risk.¹⁷ A-Darir thought that Malikis nevertheless do not object to charging the revenue of the waqf property¹⁸. This rule is followed in Saudi and Kuwait,¹⁹ and Kelantan Malaysia.²⁰ Al-Qaradaghi thinks that the selling of waqf properties if needed to do so, is permitted by some jurists, and therefore, charge on waqf property should also be allowed if a need to

⁶ Ghiyath al-Din, Abu Muhammad al Baghdadi, *Majma al Damanat*, vol. 6 p.50 (bab al-waqf), as on www.almeshkat.net/books; Mahmud al-Bukhari ibn Maah, *Al-Muhit al-Burhani*, kitab al-Waqf fasl fi tasarruf al-qayim as on www.almeshkat.net/books; Al-Khatib al-Sharbini, *Mughni al-Muhtaj*, vol. 2, p. 394;

⁷ al Baghdadi, *Majma' al-Damanat*, vol. 6 p. 43 (bab al-waqf); Al-Mardawi, *al-Insaf*, Vol. 14 (ktab al-waqf).

⁸ Ibn Abidin, *Radd al-Muhtar*, vol. 3, p. 580; Ibn Humam, *Fath al-Qadir*, vol. 6, 240; ibn Maah, *Al-Muhit al-Burhani*, kitab al-Waqf fasl fi tasarruf al-qayim, and mutafarriqat. See further al Baghdadi, *Majma al-Damanat*, vol. 6, p. 66; Munzer Kahf *Financing The Development Of Awqaf Property*, ; Ali Muhiyuddin al-Qaradaghi, "Duyun al-Waqf", in Muntada, p. 51-53; Al-Ramli, *Nihayah al-Muhtaj*, vol. 5, p. 297;

⁹ Ahmad bin Muhamad al-Sawi, *Hashiyah Al-Sawi*, kitab al-waqf; Muhammad Arafah al-Dusuqi, *Hashiyah al-Dasuqi*, vol. 3, p. 89; Ibn Qudamah, *Sharh Muntaha al-Iradat*, vol. 2, p 414.

¹⁰ al-Sediq Muhammad al-Darir, "Duyun al-Waqf", p. 25; Qaradaghi, "Duyun al-Waqf", in Muntada, pp. 53-4.

¹¹ al-Darir, "Duyun al-Waqf", p. 28; Qaradaghi, "Duyun al-Waqf", in Muntada, p. 53.

¹² Ibn Humam, *Fath al-Qadir*, vol. 5, p 69 (hanafi jurist). al-Darir, "Duyun al-Waqf", p. 28-29; Qaradaghi, *Duyun al-Waqf*, in Muntada, p. 54; Al-Subki, *Fatawa al-Subki*, vol. 2, pp. 105 (Shafie jurist); al Baghdadi, *Majma al-Damanat*, vol. 6, pp. 43, 54, 58 (bab al-waqf); Al-Qarafi, *al-Dhakhirah*, vol. 6, p. 338.

¹³ Qaradaghi, "Duyun al-Waqf", in Muntada, 2003, p. 56-57.

¹⁴ Ali al-Qari, *Sharh al-Wiqayah*, kitab al-waqf

¹⁵ Al-Dusuqi, *Hashiyah al-Dasuqi ala al-Sharh al-Kabir*, bab al-rahn

¹⁶ Ibid. bab fi ahkam al-waqf, vol. 3, p. 87; Mawfaq al-Din Ibn Qudamah, *al-Kafi*, Kitab al-Bai', bab ma yasihhu rahnahu wa ma la yasihu; Kasani, *Badai'*, vol. 6, p.137; Ibn Abidin, *Hashiyah*, 4/428, Ibn Qudamah, *al-Mughni*, vol. 4 pp.125, 221; al-Shafie, *al-Um*, vol. 3, p.162; al-Khatib, *Mughni al-Muhtaj*, vol. 2, p. 121, al-Khatib, al-Sharbini, *al-Iqna'*, vol. 2, p 153 (bab al-Rahn); al-Mardawi, *al-Insaf*, vol. 5, p. 14.

¹⁷ See Qaradaghi, "Duyun al-Waqf", in Muntada, p. 53

¹⁸ al-Darir, "Duyun al-Waqf", p. 33.

¹⁹ Al-Mayman, "Duyun al-Waqf", al-Muntada, p. 93.

²⁰ S. 62 (4) Kelantan Enactment 1994

do so arises, or there is great benefit or when it can prevent a harm greater than charge.²¹ Al-Zuhaili agrees but adds that if borrowing is approved by court, charges should also need a leave of court.²² The writings of Nazih Hamad, and Anas al-Zarqa on current financial instruments, however indicate to permit deposit of title document with the financier without any qualification.²³

As said above, the restriction on the recognition of financial methods limits the chance of development of the waqf properties. Therefore, for the interest of the beneficiaries of waqf properties, the need for the existence of alternative financial mechanism is urgent. The more the financial instruments the more are the chance of development of the waqf properties.

In light of the power of the nazir to borrow, lend, and charge waqf property, this chapter is designed to discuss and analyze the various types of financial mechanism intended specifically for the development and upgrade of waqf properties. The discussion is divided into modes of finance recognized by the early jurists as well those accepted by contemporary. The early modes, of several types, are multipurpose and can stand on their own or be joined with other forms of financial instruments. Contemporary financial instruments are divided into institutional, finance through public, and self-financing. Each of them is subdivided in several subtopics. All of them are discussed and analyzed below.

3.2 The Recognized Modes of Financing for the Development of Waqf Properties

It needs, at the out set, to distinguish between development and financing the development of *waqf* estates.

²¹ Al-Qaradaghi, "Duyun al-Waqf", p. 65.

²² Al-ta'qibat wa al-munaqashat fi mawdu' duyun al-waqf, al-Muntada, p. 110.

²³ Nazih Hamad, "Asalib Istithmar al-Awqaf wa Ausas Idaratiha", in *Abhath Nadwa Nahw Dawr Tanmiwi*, p. 184; Anas al-Zarqa, "al-Wasa'l al-Hadithah liltamwil wa al-Istithmar", *Idarah wa Tathmir Mumtaakat al-Awqaf* (1983-4), Jeddah: IDB 1994, p. 196.

Development would refer to the making of a given property to generate income. Financing the development of *waqf* property would refer to finding the means (i.e. funds) and using such means to make the given *waqf* property capable of generating income, either through renovation, and reconstruction or just putting the property into a useful mode of utilization. In the second, the institution of *waqf* would need to spend some cash on repair, construction or reconstruction, and purchase of needed equipments, tools and services. In the case of development the waqf institution would need nothing to spend on the property, as the mere development of property may be achieved, generally with minimum returns, through the traditional ways proposed by classic jurists, such as *ijarah*, muzara'ah, musaqat and so on. This is the easiest way to make the estate productive and for this reason it is very much popular among the early jurists, to the extent that some jurists do not allow other types of development. These modes are still acceptable in rural and urban estates. But that is not the subject of this chapter. This chapter focuses on the means that would enable the waqf institutions to find capital either for daily operation or the construction and reconstruction to be carried out on waqf land.

In light of the above points, the following discussion is divided into two main parts: the classical modes of finance and those which have been recognized by modern jurists. The discussion on these points is the triangulation of various views of other writers which are evaluated on their merits, combined with a new analysis and then arranged in a manner that is easy to understand. To this end, the classic views are discussed first, followed by the institutional financing and lastly funding through bonds and saham waqf and cash waqfs.

3.2.1 Classical Modes

Due to the fact that many *waqf* properties are often either ruined or underdeveloped, Muslim jurists, from very early, were compelled to think about the productive development and utilization of the property. The conventional thought on this point is that the development of the *waqf* property should be financed utilizing the

physical properties. The important of these modes are hukr, ijaratain, and mirsad which will be discussed shortly. This however does not exclude the scarred discussion of jurists on the authority of the administrator of waqf (nazir) to borrow for development or operational purposes and also charge waqf property in order to develop or reconstruct the ruined waqf property.

Kahf apologizes for the classic view of ulama for not thinking beyond ‘exploitation of *Awqaf* properties, i.e., putting them to proper use as they were left and/or prescribed by the founder’; a founder was thought to have left ‘*Awqaf* property in a productive state, capable of producing a flow of services or net revenues for which it was established.’ ‘The idea of increasing the *Awqaf* principal and enlarging its productive capacity’, Kahf asserts, ‘was a remote idea, especially, that it does not usually fall within the framework put forward by the *Waqf* founder’.²⁴ Kahf may be correct when his reflections are restricted to the view of majority. This however may not be the case if one views the opinion of hanbali jurists, who gives unrestricted jurisdiction to the nazir not only in cases of necessity but also where he finds that reconstruction or development of waqf property is more beneficial to the waqf.²⁵ This author expresses the view that these classic modes are not ideal for current needs of waqf properties which will be discussed after discussing the modes first.

3.2.1.1 Creating New Waqf for the Benefit of the Old One

This is not a mode of finance but of strengthening the old waqf.²⁶ This mode is exemplified by the ‘drinking-water *Waqf* made by ‘Uthman (r) during the time of Prophet (pbuh).’ Motivated by the Prophet’s call for buying the well of Ruma and making it a *Waqf* for drinking, ‘Uthman (r) was able to buy one half of that well, from the former owner who accepted an offer from ‘Uthman (r) to buy the other half, which he did and added to the previous *Waqf* of one half of the well.’²⁷ This method of waqf is

²⁴ Monzer Kahf, *Financing The Development Of Awqaf Property*,
²⁵ al-Bahuti, *Kashshaf al-an Matn al-Iqna’* vol. 4, p. 267.

²⁶ Monzer Kahf called it as ‘financing waqf by creating a new waqf to be added to the old one’: *ibid*

²⁷ *ibid*

proposed to be useful for expanding mosques. It is known, for instance, that the mosque of the Prophet (pbuh) in Madinah was enlarged during the time of ‘Umar, ‘Uthman (r) and later in the Umayyad and Abbasid periods.²⁸ This is further exemplified by the addition of new *Awqaf* to older ones in schools, hospitals, orphanages, monasteries, universities, grave yards, etc or that of books and new copies of the Qur’an as added to older ones in libraries and mosques. Further, adding a *Waqf* of construction or a building and trees by a tenant of a *Waqf* land in which case they consider the validity of this *Waqf* because it is stabilized by being erected or planted on land that was already a *Waqf* property.²⁹

The last type of waqf is not merger of two waqfs; rather two independent waqfs which according to jurists would have different beneficiaries, and for better management one may add separate accounts. Kahf asserted that one can see in the classic ‘*Fiqhi*’ books a discussion of possible differences in beneficiaries between the old *Waqf* and the new one and that the *Fuqaha* saying that the revenues should be distributed in accordance with the proportion of the revenues of each *Waqf*.³⁰

The above type of waqf, in its original form and only to settle non-financial problem of waqf, would be extremely significant today not only in the above mentioned manner, but also resolving the existing much talked about problem of a waqf property that is small, isolated, and not economically significant even though there are sufficient resources to develop it. One can propose that the nazir of saham waqf can give priority to this type of waqf and buy the adjacent land and property if, after a proper feasibility study, the project is seen to be productive and healthy. The nazir then should keep two accounts for the same project, i.e. one for the old and one for the new waqf, and later on distribute the revenue according to the equity in the project. It is pertinent to note that sometimes one may not easily succeed in purchasing the said property, for the owners may refuse to sell the adjacent land. If this is the problem, perhaps and it is stressed, the nazer should utilize the existing law of compulsory land acquisition. After the feasibility study, the mutawalli should prepare a development plan and submit it to the land office

²⁸ ibid

²⁹ ibid

³⁰ ibid

for acquisition of the said adjacent land. This is possible under the law for waqf demonstrates one of the best examples of public interest. Under fiqh such method is also acceptable for when the second Caliph intended to extend the mosque, he acquired an adjacent property compulsorily. To utilize this method one needs to convince the State Authority to recognize the development of waqf property as one of the grounds for land acquisition under s. 3 of Land Acquisition Act, 1960.

This form of waqf, for purposes of finance, would be useful if the nazir has cash waqf funds, and join them in the development of the dead land belonging to waqf. This writer does not encourage the nazir to merge the two waqfs of similar objectives. This will be restriction on the finance. The nazir can add any type of waqf to the existing one, as long the accounts of the two waqfs are kept separately. The two waqf can be treated mushtarak if the objective of the two is the same, but if the objectives are different then they would not be mushtarak in the full sense of the word but may be thought mushtarak only for purposes of development and income-generating capability. In the latter sense it must be the duty of the nazir to keep all account accurately and separately.

3.2.1.2 Substitution (Ibdal and Istibdal) of Waqf

The term substitution stands for two Arabic words, ibdal and istibdal. The lexicons and jurists use them interchangeably. In past, only covenant writers of waqf have used the word ibadal to indicate the substitution of a piece of land with another piece, and used istibdal to show substitution of land with its value. The term is not specific to waqf, rather it is used in all dealings describing the power of disposition by the authorized person in the subject matter where his disposals are in accordance to the law and Shari'ah. The important areas of its application are in zakat, hajj, kifarah, sale and purchase, preemption, hire, waqf, etc. The majority of jurists do not allow this type of disposals if the original object is substituted by its value. The hanafis, however, are

exception, who allow substitution by value, for both the object and its value are properties and hence permissible.³¹

Substitution, therefore, may be divided into two primary forms: substitution of one waqf with a similar (ibdal), and the substitution of land with its cash value (istibdal).³² In modern transactions the combination of both is practiced too. This may be referred to as mixed or partial substitution.

a.) Substitution of Waqf Land by a Similar (Ibdal)

This mode of substitution may be defined as the exchange of a *Waqf* property for another that provides at least similar income or service without any change in the provisions laid down by the founder.³³ This may be true where the whole piece of land, a tool, or another object is substituted with another.

Substitution of (munaqalah / mu'awadah) of one waqf, with another according to Ibn Rushd (a maliki jurist) is permitted if it is ruined and there is no means to reconstruct; provided the exchange is with permission of court and be recorded and witnessed in the court.³⁴ The Shafi'ies do not allow a mosque even if it is ruined and its rebuilding is impossible, but has given different opinions in a land that does not produce or generate income. In the latter case some jurists of the school allowed the change and exchange of the given piece of land.³⁵ The condition of ibdal according to Shafi'i is that it should not contradict the conditions of the settler³⁶.

³¹ Mawsu'ah al-Kuwaiti, term 'ibdal' vol. 1.

³² This difference is recognized by Nazih Hamad, "Asalib Istithmar al-Awqaf wa daratuha", Abhath Nudwah Nahw Dawr Tanmiwi li al-Waqf, p 182; cf. Abu Zahrah, *al-Muhadarat fi al Waqf*, p. 161: *Ibdal* means to sell the property. *Istibdal* mean to sell one piece of land and buy with its purchase price another property

³³ See Kahf who merge ibdal and istibdal under one definition: also Ali Jum'ah Muhammad, al-Waqf wa Atharuh al-Tanmiwi, Abhath, p. 99 who define ibdal the extermination of waqf property from being waqf, and istibdal as the buying another property to substitute the original.

³⁴ *Al-Taj wa al-Iklil*, vol. VI, p 42

³⁵ *Mughnial-Muhtaj* vol. p. 392.

³⁶ Al-Subki, *Takmila al-Majmu'*, vol. 15, p. 345

According to Nazih Hamad, in principle, the majority of jurists³⁷ allow both ibdal and istibdal of one waqf with another, if they are conducted for need and benefit of waqf. Jurists however differ in flexibility and rigidity of their application, among whom the Hanafis are liberal as they allow substitution in both forms if that is needed, or in the interest of waqf or its beneficiaries, whether conducted by the waqif, nazir, or government, irrespective of whether the property is productive, ruined, immovable or chattel, as long the transaction is not below market price (does not involve ghabn fahish), for in such a case the transaction result in disposal of waqf property without value which is not permissible under law.³⁸

Kahf identifies increase of income and services the sole benefit of ibdal. The classical example of this, according to Kahf, is a school building in a sparsely populated area that can be exchanged with a school building in a densely populated area if the new owner of the former *Waqf* property happens to have an alternate usage for it.³⁹

The above example of Kahf in the context of Malaysia may be applicable to the vast majority of waqf lands reserved for graveyards in the city or near to cities and towns. The waqf institution can raise funds to buy a land of similar size or greater and then exchange it for the town lands which is dedicated to the graveyard. The latter then can be developed by waqf alone or in joint ventures with private sector in one of the permissible schemes suitable for the development of the waqf property.

b.) Substitution by Cash Value (Istibdal)

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.⁴⁰ This is

³⁷ The majority of malikis disallow istibdal. A small minority allows it; some shafiis disallow and others gives permission. The Hanbalis allow ibdal including mosque if ruined, and it is needed; the Hanafis allow ibdal liberally.

³⁸ Nazih Hamad, Nazih Hamad, *Asalib Istithmar al-Awqaf wa daratuha*, Abhath Nudwah Nahw Dawr Tanmiwi li al-Waqf, p 182.

³⁹ Kahf, *Financing the Development of Awqaf Property*, p18

⁴⁰ Kahf, *Tamwil al-Tanmiyah al Amwal Waqf*, p 36

what kahf called substitution⁴¹. Substitution of waqf by its cash value is not popular among many jurists with exception of the hanafis. It is reported that Imam Malik did not allow the sale of waqf estate at all.⁴² Nevertheless it is also reported that Rabi'ah from Malikies allowed the sale of waqf property, called *mu'awadah*, provided the proceeds of the sale are used to purchase another piece of land and then declared as waqf, the same as the previous.⁴³ Shafi'is, similarly, are very strict. Some jurists of the school allowed the change and exchange of the given piece of land.⁴⁴ According to some Shafi'is, however, a horse for jihad can be sold, and according to Ramli from the same school, the mosque if impossible to rebuild, can be broken, the items sold, and the proceeds be kept if there is hope for its reconstruction, otherwise the proceeds can be spent on another mosque,⁴⁵ According to Hanbalis, if the benefits of waqf are not obtainable, such as where a house is ruined, a land is turned barren, or a mosque, for some reason, is not used by people for prayers,⁴⁶ and cannot be developed due to lack of finance, the land can be sold provided the purchased land is considered *waqf* too in the same category as the first one, or the money is used to improve another waqf. For example a piece of waqf land may be sold in order to improve the remaining part of it.⁴⁷ The sale of mosque is an extreme case, yet to these jurists, if needed, can be sold. The Hanafi jurists have unanimously approved the process of *istibdal* in the following circumstances:

1. The donor makes provisions thereto.
2. The donor does not make any provision that is he negates or is silent about, but the property becomes stagnant as it does not produce anything, or its expenses and produces are equal. In the both cases *istibdal* is valid.
3. The donor provides for *istabtal* and the property is still productive, but its exchange is more profitable in general. In this case, *istibdal* is not valid according Ibn Nujaim and Ibn Abidin. Thus it is the discretion of the donor to

⁴¹ Kahf, Financing the Development of Awqaf Property, p18

⁴² *Al-Taj wa al-Iklil*, vol. VI, p 42; *al-Mi'yar*, vol. VII, p 258

⁴³ *Al-Bayan wa al-Tahsil*, vol. 12, 204

⁴⁴ *Mughnial-Muhtaj* vol. p. 392.

⁴⁵ *Al-Majmu*

⁴⁶ *Al-Subki*, vol. 15, 361

⁴⁷ *Muntaha al-Iradat*, vol. II, pp 514-515; *Al-Mughni*, vol. 6, p. 225.

make such condition. If the founder is silent, then change or exchange of the property is allowed only if it is necessary but not when doing so is more beneficial.

4. *Istibdal* shall be made by the state (court) in general philanthropic trusts; otherwise the power is vested in the administrator.⁴⁸

Ibn Nujaim and Ibn Abidin, however, prohibited the sale of waqf without substitution by another for the reason that it is open to abuse and misappropriation by the nazir.⁴⁹ Ali Jum'ah however thought that such a weakness is not fundamentally conceptual, but a defect attributed to the trustees.⁵⁰ The defects can be rectified by the fact that today waqf estates are managed by institutions in many countries. This coupled with the requirement of court permission alone can prove effective in preventing abuse and misappropriation of waqf properties by the nazir. In addition it is proposed that all waqf account should be audited by an independent body. This will further strengthen the safeguards necessary for preserving the waqf property.

This type of management is good for development, for development finance, and for generation of better revenues. Kahf however disagree on the benefit of this mode as a financial means for development. He considers the sale of antique hand-written manuscripts an example, the proceeds of which may be used to buy more books.⁵¹ This he thinks is an increase in the benefit of the waqf. Nazih Hamad, however, asserts that where different waqfs of similar or diverse objectives have small estates in the city, the development and management of which is not within the capability of waqf institution or its management is not economical, *istibdal* can be used. That is all of the small estates could be sold, the proceeds of which can be used to purchase another piece of land [perhaps in a strategic area] and building be erected on the land. Similarly the proceeds can be used for purchase of another estate [perhaps a building] with a higher capability of higher income. The new property can be a substitute for the sold estates, and income

⁴⁸ Ibn Abidin, *Radul Mukhtar*, vol. IV, p. 387.

⁴⁹ Ibn Nujaim, *Bahr Rai'q*, vol. 5, pp 222-223; Ibn Nujaim, *Radd al-Mutar wa Durr al-Muhtar*, vol. III, pp 387-389.

⁵⁰ Ali Jum'ah Muhammad, "al-Waqf wa Atharahu al-Tanmiwiyyah", *Abhath*, 102

⁵¹ Kahf, *Financing the Development of Awqaf Property*, pp 18

of the new property should be distributed according the capital generated by the old estates.⁵² This proposal is practiced in Singapore.⁵³ It is clear that according to Nazih Hamad the sale and substitution is instrument for development and in case the cash from the proceeds is used to buy land and construction of a new building, that part of the proceeds are also capable of development-finance.

Additionally, ibdal or istibdal can be used by the institutions of waqf in their development planning. This is that where a land is far from towns, and have no access to public roads, or that the land is small in size, the institution of waqf can use ibdal or istibdal of waqf lands in order to settle the physical problem hindering its development.

c.) **Mixed or Partial Substitution**

Mixed substitution means the sale of a portion of a land and making the proceeds or the purchase price a cash waqf used for financing the development of the remaining portion of the same piece of waqf land.

Kahf recognized partial substitution as a mode that essentially allows for providing liquidity that is needed for the operational activities of a *Waqf*. It is 'a means of financing, especially, in case of urban lands whereby the price of a part of the property may be sufficient to construct a building on the remaining land and therefore increase its revenues.'⁵⁴

The result of the discussion is that substitution in either form may be utilized in the following ways:

- a. selling of a part of the *waqf* property in order to develop the remaining parts of the same property;

⁵² Nazih Hamad, *Asalib al-Istithmar*, pp. 186-187

⁵³ Kahf, *Financing the Development of Awqaf Property*, p18

⁵⁴ Kahf, *Financing the Development of Awqaf Property*, p18

- b. selling a bundle of *waqfs* (i.e. properties) and buying new one in exchange, to be used for the same purposes of the sold properties;
- c. selling one *waqf* and buying another having a common purpose;
- d. Selling a handful of properties belonging to various *waqfs*, and buying a new property which has higher income, and the same revenue is distributed on all sold *waqfs* according to their value, or dividing the purchased property on original *waqfs* according to their value.

All the above is possible if one accepts the views of Hanafies, provided the donor allow exchange and change of the *waqf* property or it is so due to necessity which is also the view of Hanbalies, and an opinion in the Malikies and Shafi'ies with an exception of mosque.⁵⁵

3.2.1.3 Long Lease With Large Advance Lump Sum (*Hukr*)

Long lease or *hikr* or *hikr* is a proposal accepted and promoted by Hanafi jurists and has been approved by contemporary Arab jurists and Sharia advisers to financial institutions. In the context of joint venture Hikr can be used a ground for further financial arrangement as well as a vehicle of getting direct financing for the development of another property. Before embarking on the usefulness of Hikr in modern financial sense the reader is introduced to the concept of Hikr and its legality in Islamic law.

The term *hukr* means monopoly or exclusivity. Under this mode of lease, the lease has an exclusive right over the property for a long period that usually goes beyond the normal natural life span of human beings or it may be permanent. It is one of the financial rights that can be marketed, transferable and inheritable.⁵⁶ It is marketable as it can be sold, subleased, made gift inter-vivos or through will, donated and then

⁵⁵ Al-Amin "al-Waqf fi al-Fiqh al-Islami", in *Idarah wa Tathmir al-Mumtalakat al-Awqaf*, p. 135

⁵⁶ Ibn Abidin, *Hashiyah* vol. 4 p. 391. This shall be the last resort of development. In case amount is big, it shall be used to finance other developments: Anas al-Zarqa, p. 194.

transmitted or inherited.⁵⁷ Under this right building and plantation constructed or cultivated would be the property of the lessee.⁵⁸

This mode is invented by *fuqaha* in order to go around the prohibition of selling a *Waqf*. Instead of selling the *Waqf* property the *Nazer* can sell a right for a long lease, for a large lump sum paid in advance to be followed by a nominal periodical rent. The purchaser of the right of long lease can then develop the property using own resources and at own risks as long as she/he pays the periodical rent to the *Nazer*.⁵⁹

Long lease in this sense is used by *nazir* to obtain the equivalent of the value of the *waqf* property in the form of a lump sum, which according to Kahf ‘must be used for the *waqf* objectives, such as reconstructing a decayed mosque by selling an exclusivity right on an agricultural land that was a *waqf* for spending on the mosque. In other words the right in one *waqf* is sold for the benefit of another. Since the sale of the exclusivity right is not considered a sale of the *waqf* itself, the management is not required to put the price obtained in a similar property as in the case of substitution.’ The nominal value would be considered the income of the leased property while the lump sum acquired from the lease of the given property may be mobilized as liquid funds needed for another⁶⁰

This mode of transaction in the *waqf* property is neutral in itself, but is open to abuse if it is used exclusivity for operational expenses of the beneficiary, as it will substantially reduces future revenues of the *waqf*. However, if the lump sum price received from this transaction is used for buying a new productive asset as a *waqf*, the flow of revenues remains as it used to be or it may improve. Another short-coming of the utilization of this mode of transaction is the transfer of perpetual right to the leaseholder, but Kahf despite noticing a 99 year lease practiced in some countries⁶¹ does not consider this mode of finance detrimental to *waqf* even though the amount of periodical rent is small, as long the practice and the final utilization of the lump sum

⁵⁷ Kahf, Financing the Development of Awqaf Property, p19

⁵⁸ Anas p. 195

⁵⁹ Kahf, Financing the Development of Awqaf Property, p19

⁶⁰ Kahf, Financing the Development of Awqaf Property, p19

⁶¹ Ibid.

generated by selling of the exclusivity of right is used in the interest of waqf and not the beneficiaries.

Hikr as defined by classic jurists is not suitable to modern transactions in waqf property. As development is faster than the early times, perpetual grant of rights in waqf property is contrary to the interest of waqf. The limits on long lease of land (i.e. 100 years)⁶² as recognized by Shafiis are perhaps well suited to the current life span of 99 years in government alienation of state lands to individuals. This could be perhaps further modified by the economic life span of a development project. If the economic life span of a project is 30 years where the investor can get his capital plus reasonable profits then that limitation should be imposed on Hikr too. In other words the time for lease of waqf land shall depend on the economic life span of the development project. Where the project needs 30 years of maturity the lease shall follow and where the maturity of the project needs longer time, the lease shall follow too. Therefore, a long lease or Hikr shall be the option of the waqf institution in return for finance only if they study the project carefully. Based on such study they can award long leases to developers.

3.2.1.4 Lease with Dual Payment (Ijaratain)

This mode of finance is also called the contract of two leases: To lease the property renewable yearly and to demand a sum that is sufficient to revive or develop the property. The yearly renewal of lease is proposed to conform with the view of those jurists who do not allow extended or long tenancy.⁶³ This may be the disadvantage of the ijaratain in current financial market.

Ijaratain is very similar to hukr for this type of lease is exercised by the leaseholder for a long period of time. Under this form of lease the rent consists of two parts, one big lump sum advanced for the reconstruction of the *Waqf* property and the

⁶² *Al-Mawsu'ah al-Fiqhiyyah al-Kuwaitiyyah*, vol. 18, madah Hikr, Hukm al-Ijarah al-Tawilah.

⁶³ Most of jurists under normal circumstance allow tenancy for a year, two or three. In case of need some shafi'is thought it could be up to one hundred years:

second part is a small periodical payment paid annually for the period of the lease. Under hukr it is not a condition that the lump sum obtained from the leaseholder should be used on the reconstruction of the leased property; under ijaratain this is a condition that the advanced price must be used for the reconstruction of the leased property itself.⁶⁴

Hukr is a right attached to waqf property that could be transferred and transmitted⁶⁵ under ijaratain however it is considered personal and therefore it is not transferable or transmittable. The right in the development remains with the leaseholder in case of hukr, while in ijaratain the right remains with the *waqf*.⁶⁶

Ijaratain is perhaps less-practical compare to the hukr. In *hukr* one may ignore the minimal monthly rental of the property, for a period of 99 years, as the amount in lump sum obtained from the hukr may generate better income. Under ijaratain, the beneficiaries of the given waqf or any other as in case of hukr, do not substantially benefit from either the rental or the advanced sum; the amount of rental fixed for annual payment is small, and the lump sum obtained is spent on the reconstruction of the same premises. Considering the life span of the constructed building and the amount paid by the lease-holder this mode of finance does not look attractive. Additionally, the rental may not be sufficient to construct the building; and even if it is, the period of lease may not be equitable compare to the amount obtained. Further, it is feared that the premise may be rented less than market price, as it is before construction. After construction rental of similar buildings may be higher. Kahf, observing some of these issues, opines that ‘there should be no reason to consider either of hukr and ijaratain worse or better from the point of view of fairness as long as they are practical under fair market conditions.’⁶⁷

Kahf may be right. As long the interests of waqf or its beneficiaries are not affected by unfair terms of lease or the lump sum is not lost, both hukr and ijaratain are permissible modes of finance for the development of waqf property. Allowing both

⁶⁴ Kahf, *Financing the Development of Awqaf Property*, p 20

⁶⁵ Kahaf, *Tamwil Tanmiya Amwal al-waqf*, p 37.

⁶⁶

⁶⁷ Kahf, *Financing the Development of Awqaf Property*, p 21

modes would be allowing flexibility to the waqf institutions in choosing one of the two modes as circumstances demand it.

Ijaratain nevertheless, may work at the disadvantage of waqf institutions as the ownership rights are vested in the waqf institution. Hence, banks and other financier would be reluctant to advance finance to waqf institutions for concerns such as character, cashstake, capability, and collateral of the waqf institutions.

3.2.1.5 The Application of Hikr in Malaysian Capital Market

The modern application of Hikr lease may be seen in a variety of schemes:

- a. *Conventional lease*: this mode can be used to make the given land have income. Three parties are needed in order to make the land generate income: waqf institution, developer, and financier. The institution will lease the land to the developer, for a period of 99 years or less, if possible. The developer has to do feasibility study of a given project, seek finance, and if the project is viable, say it has quality, the borrower is strong, and the lease period is long, it is highly probable that the developer will get loan for the development project from the traditional lending institutions. Here, Hikr is applied in its old form; where the institution of waqf has no other rights except the collection of monthly rental. This mode is helpful only in the development of the land and obtaining cash that can be used for finance of another property. This type of transaction, under normal circumstances, is not encouraged, for one can see that profits are diverted from waqf institution to the development company.
- b. *Capital for joint venture*: here, the lump sum obtained through Hikr is used for joint ventures. An acceptable mode of this application is to have a limited liability company set up and controlled by waqf institution. This limited liability company can enter into a business with a development company who may join hands with or without bank participation. The two together with bank can form another limited liability company whose capital can come from the waqf company via land price and the developer plus the bank via funds and skills. The

nominal rental fees may still be paid by the development company. The lump-sum value of land of the waqf institution, the expertise of the development company and the cash advanced by financier banks may be considered capital for joint venture. Under this arrangement the limited liability company would be a single asset and project company (holding a single piece of land) who has lease for a limited period of time. This company will be in charge of the project. Where the banks and other financial institution refuse to enter into a joint venture, the development company can raise finance putting the leased asset as a security. If accepted by financier the interest of the financier would be secure for the life span of the lease. On expiry of the lease the land can revert to the waqf institution either free or in exchange for nominal price.

The waqf institution can invest the lump sum obtained from Development Company on the development of the same by being a partner in the project. With this the disadvantages of Hikr that it does not benefit waqf substantially will be avoided. At the same time, since the land is leased on the basis of Hikr, the ownership of waqf land by the development company does not arise. Hence the waqf institution and the development company would be partners in the building constructed on the land. Both should share the equity as well as entitlement to the dividends.

3.2.1.6 Mersad

The administrator or the judge allows the tenant to develop the land and the incurred expenses shall be a loan on the *waqf*, payable by the *waqf* on installment. The building or plantation shall be the property of the *waqf* but the developer would have proprietary rights which shall be transferable and inheritable, provided the transfer to another party is done with the approval of the court or the consent of the administrator of the *waqf*.⁶⁸ Anas al-Zarqa proposed that this could be done based on the contract of *istisna'* or deficient partnership.⁶⁹ Mersad is, therefore, perhaps, the catalyst for change

⁶⁸ Mustafa al-Zarqa, *Nazariyyah al-Iltizam*, pp. 48-51.

⁶⁹ Kahf, *Financing the Development of Awqaf Property*, p 22

on which much of the modern modes of finance are based. An example of bare mersad may be the practice in Sudan where the developer constructs a building, and then rents it out according to the market value.⁷⁰

3.2.2 Modern Schemes: Institutional Finance

All instruments irrespective of being credit based, joint venture, securitization, or self-financing are come under modern modes of financial modes. Nevertheless, each of these instruments is discussed separately in the following sections.

3.2.2.1 Credit-based financing

Debt-based financing refers to the funding obtained by waqf institution through the Islamic modes of financing i.e. sale and purchase, sale by order and leasing agreements. This is called debt-based financing because the sum owed to the financing company would be a debt payable by the waqf institution in lump sum or on installment.

The sale and lease contracts may stand alone or be combined with each other depending on the arrangement made by the parties. Either way, the concept, the legality and practical significance of the transactions of sale by installment (murabahah and bay' bi thaman al-ajil), forward sale (Istisna) and lease called ijarah will be discussed below.

a.) Build and Transfer _ Murabahah / BBA (Bay' Bi Thaman Al-Ajil)

Murabahah is a mark up sale capable of being a spot sale or on installment. Today, it is associated with a credit sale settled on installments, called *bay' bi thaman al-ajil* (BBA).⁷¹ In murabahah transactions, there must be one who orders the financier to

⁷⁰ Al-Amin "al-Waqf fi al-Fiqh al-Islami", in *Idarah wa Tathmir al-Mumtalahat al-Awqaf*, p. 135

⁷¹ Saiful Azhar Rosly, *Critical Issues on Islamic Banking and Financial Markets*, Islamic Economics, Banking and Finance, Investments, Takaful and Financial Planning, Kuala Lumpur: Dinamas, 2005, pp 88-89, 91.

purchase (*amir bi al-shara*) and another to execute the order (*ma'mur*). Upon procurement and delivery of the objects ordered by the purchaser, the financier will sell the assets to the purchaser at a price which ensures a reasonable rate of profit to the financier.⁷²

The OIC council for fatwa has accepted this financial instrument, if the sale takes place after the object comes within the possession of the seller (*mamur*); the seller does not transfer risks to the purchaser before possession of the object, the purchaser has been given the option to reject the object based on defect, and all other conditions for the validity of a contract under Islamic law are complied with.⁷³

In Malaysia, *murabahah* is incorporated in sale with deferred payments (*al-Bay' bi Thaman al-Ajil* (BBA)).⁷⁴ Both are the same in terms of effect and payment though *murabahah* may also apply to spot sale. Since BBA is a sale at core, the practice of banks does not comply with the OIC fatwa mentioned above. Saiful Azhar⁷⁵ explains that there is no difference between the practice of a conventional and Islamic bank, as the purchasers buys the property first and then looks for finance. The transactions look more like a loan rather than a sale he contends. This presumption was confirmed by the case of *Dato' Haji Nik Mahmud bin Daud v Bank Islam Malaysia Berhad* [1996] 1 CLJ 737 where the presiding judge thought that there was no intention of the parties (customer and bank) to effect the transfer of the property, and that it was merely a device to facilitate the BBA transaction. This decision makes us think that BBA as practiced by some banks should be avoided in case of *waqf* properties.

Another element of concern is unsubstantiated mark up, as banks sell the property plus mark up together with a premium that reflects time value of the money. The shorter the period of payment the cheaper is the finance. A long term arrangement will increase the purchase price to triple of the spot sale value. This is also true about all debt based instruments including leasing (*tajir*), and the sale by order (*istisna'*).⁷⁶ This

⁷² See Taqi Uthmani,

⁷³ Fatwa No. 40-41, December 1988.

⁷⁴ Saiful Azhar Rosly, *Critical Issues on Islamic Banking*, pp 87-88.

⁷⁵ Saiful Azhar Rosly, *Critical Issues on Islamic Banking*, pp 88-89, 91.

⁷⁶ Sudin Haron, *A Comparative Study of Islamic Banking Practices*, <http://www.kaau.edu.sa/CENTERS/SPC/page-092.htm>. Date, 27/7/2006.

means that if the conditions set by OIC fatwa are met and the charges are less and fair, the institution of waqf can utilize this financial instrument in any development project.

Kahf believes that this instrument is practical when the waqf institution takes ‘the functions of an entrepreneur who manages the investment process and buys necessary equipment and materials through a murabahah contract’. Payment can be on delivery or deferred. ‘The management of Waqf becomes a debtor to the banking institution for the cost of the material purchased plus the financing markup which represents the price of the second sale contract in the Murabahah to the purchase orderer.’⁷⁷ The purchase price will be paid by the orderer of the goods over an agreed period of time. The project is owned by the waqf completely.⁷⁸

Kahf is silent on the issue of borrowing by waqf. This is not however an issue for such borrowings are in the interest of waqf and hence allowed. Issues such as the capacity of waqf to develop the land, the ownership of the site, and the possibility of security for the sum borrowed, need consideration. At the moment the majority of waqf institutions is perhaps not capable of entrepreneurship and thus cannot manage development project in many places. They have no resources to pay for operation and labor costs. The alternative is to order the development of the site, and the financier can be either the developers it or can contract it to another party. Once complete, the financier can sell it to waqf based on murabahah. This should make waqf the owner of the completed project, but in practice a Deed of Assignment is executed in favor of the financier, which is a problem. The Fiqh may support it, as such is in the interest of the waqf, but legally this may be doubtful, for under current law waqf land is inalienable. To avoid this, the Majlis can device a long lease granted to a newly formed single project based corporation, and thereby entering into a transaction with financier. Here, the newly formed company can sublease the land to another party within the period of the master lease. In case of security, the financier will have limited right in the land depending on the length of the lease.

⁷⁷ Munzer Kahf, *Financing the Development of Awqaf Property*, <http://www.kahf.net/English/finawqf.html>, pp. 22-23

⁷⁸ Munzer Kahf, *Tamwil al-Tanmiya*, <http://www.kahf.net/English/finawqf.html>, p 44.

Murabahah instrument is practical but its short term requires higher installments while longer term is expensive. Presuming the project is completed by a contracted developer,⁷⁹ at RM 4.8 million, and rented at RM 25040.00 per month.⁸⁰ The loan is 100% and the financier charges variable fees for its services, and profit. It is obvious that the price of the building after 30 years of repayment of loan will be three times of the costs of the building. In case the Waqf Corporation chooses to pay in a shorter period, the monthly installments will be higher than the income of the building. In either case the Waqf Corporation cannot pay the installments in full, whether or not the corporation deducts its fees and charges. This therefore, necessitates the reduction in finance which can be at 60 to 80 per cent, to enable the Waqf Corporation to pay installments. But, the question is whether or not it will be able to raise the remaining 20-40 per cent of the financing costs. This problem may be solved if murabahah can be used together with other forms of finance as will be discussed in due course.

b.) Forward Sale _Istisna' / Salam Mode

Istisna' refers to a contract where one offers and a manufacturer agrees to produce and deliver a certain quality of goods in a specified quantity on a given date in the future. For instance when IDB in its normal financial transactions uses istisna' contract with Construction Companies, it undertakes to provide a specific equipment or construction material according to certain specifications requested by the beneficiary, and then sell it to the beneficiary at a determined price to be paid over an agreed period.⁸¹ The beneficiary will be the purchaser of the goods. The price gets fixed in advance but needs not be paid at the time of the agreement. The price may be paid in

⁷⁹ Two other ways of practice may be possible: first when the waqf institution requires the bank to deliver a constructed building on its land, the banks can employ an istisna contract with development company and then sell the product to the waqf institution through mark up sale (murabahah) by installment. The second way is to order banks to purchase a constructed site belonging to a third party. Here there would be no need for istisna' contract.

⁸⁰ These figures are based on the costs of Bangunan Wakaf, Johor, which was built on proceeds of saham wakaf at 4.8 million and now is rented at RM 25040.00. per month

⁸¹ Sheikh Muhammad Mukhtar al-Salami,

installments in step with the progress of the work (a house, a building, or a factory) or partly at the front and the rest at the time of delivery.⁸²

Istisna' is somehow similar to the contract of salam another form of forward sale. Salam however applies to commodities, where the financier advances a sum as purchase price for agricultural commodities to be delivered in future. This may apply to waqf land if the land is used for agricultural activity.

Istisna' may be used (1) between waqf and developer, (2) between waqf and a financier and (3) between financier and developer for the development of waqf land. The first way is straight forward. The second involve waqf, the financier and a third party. The waqf institution enters into contract with financier, and the financier then enters into another istisna' contract with a construction company or developer. This is termed back-to-back or parallel istisna'. Taqi Uthmani contends that it is not necessary that the financier himself construct [the building]. He can enter into a parallel contract of Istisna with a third party, or may hire the services of a contractor (other than the client). In both cases, he can calculate his cost and fix the price of Istisna. The building will be the property of the financier. The waqf institution will buy the building from the financier after its completion.⁸³ An istisna' between financier and a developer follows a murabahah and ijarah contract. This can be said about Nazih Hammad and Kahf's proposal, that when the waqf institution allows financier to construct a building on the waqf land.⁸⁴ The financier then enters into an istisna' contract with a contractor to provide the same to the order of the bank that will be delivered on the bank's behalf to the Awqaf management.⁸⁵

Following the completion of the construction and delivery of the building, in either of the above ways, the financier delivers the said building to waqf, as in the case of back to back istisna' and murabaha followed by istisna', or leases the building to waqf institution under a contract of ijarah. The amount will be a debt on the Waqf

⁸² M. Umer Chapra, *The Major Modes Of Islamic Finance*, A paper prepared for presentation at the 6th Intensive Orientation Course on "Islamic Economics, Banking and Finance" held at the Islamic Foundation, Leicester, U.K., on 17th - 21st September 1998, p. 22; According to the OIC Islamic Fiqh Academy Resolution, the payment may be deferred by mutual agreement.

⁸³ Taqi Uthmani

⁸⁴ Nazih Hamad, "Asalib Istithmar al-Awqaf wa Ausas Idaratiha", in *Abhath Nadwa Nahw Dawr Tanmiwi*, p. 184.

⁸⁵ Kahf, *Financing the Development of Awqaf Property*,

management that should be settled from the returns of the expanded Waqf property and the financier will not have a right to interfere in the management of the same.⁸⁶ It can be paid on monthly (or annual) installments.⁸⁷ The installments should be less than the expected rentals from the building. On the payment of the last installment the ownership of the building will be transferred to the waqf institution. This is what has been practiced in Sudan and Mauritania. It is possible that the title remains with the financier till the last installment.⁸⁸

The sale by order (istisna') is considered an ideal financial instrument for waqf property, which must be applied.⁸⁹ The application of IDB model, however, is suitable for skillful waqf institutions with good cash flow.⁹⁰ For a cash-strapped institution the views of Taqi Uthmani, al-Zarqa, Nazih Hamad and Kahf are more practical, but if applied alone waqf either not able to pay installments or incur a higher liability.

This model is practical if the land belongs to waqf but leased to WH Corporation for a period of 30 years, and the building to the financier. The financier, after the completion of the building, may have two options: (1) transfer the building to Waqf Holding Corporation, and have a right to possession of the building, secured by a charge; (2) lease the building to the Corporation for a specified period and transferred to the corporation on payment of the last installment. The first requires a back to back istisna' or istisna' plus murabaha, and the second needs istisna' between financier and developer plus ijrah. The registered charge over the building must extend only up to the tenure of lease. The project should involve a single-asset-based development being transferable to a third party up to the expiry of the lease. Where the Corporation is unable to pay the installments, the financier has the right to possess the building until such a time the sum owed is paid. In such a case the waqf would be required to extend the

⁸⁶ Kahf, *Financing the Development of Awqaf Property*,?

⁸⁷ Taqi Uthmani

⁸⁸ Anas al-Zarqa, al-Wasa'il al-Hadithah liltamwil wa al-Istithmar, Idarah wa Tathmir Mumtaakat al-Awqaf (1983-4), Jeddah: IDB 1994, p. 197. Nazih Hamad, "Asalib Istithmar al-Awqaf wa Ausas Idaratiha", in *Abhath Nadwa Nahw Dawr Tanmiwi*, pp. 184-85

⁸⁹ Mamud Ahmad Mahdi, "Tajrabah al-Bank al-Islamic liltanmiyah fi Tathmir al-Awqaf al-Islami", in *Abhath Nadwah Nahwa Dawr Tanmiwi al-Waqf*, Jeddah: IDB, 1993, p. 88.

⁹⁰ It is noted that this scheme lacks a scheme according to which the bank can finance the purchase of the goods and material required by waqf institution. Based on this point, al-Mahdi points that istisna' is more to the mode of execution rather than financing. Al-Mahdi further questions the practicality of this solution for this presupposes the waqf institution to be able to implement the project and have enough cash flow to fund the development work. He reminds the reader that in many instances the waqf institution is cashless: see Mahmud Ahmad Mahdi, "Tajrabah", pp. 81

tenure of lease, so that the financier can cover his costs. The Waqf Corporation, being a trustee of waqf institution, will have to pay land and building income to waqf regularly during leasing time and after its expiry has to transfer the land and the building to the waqf.

c.) Leasing and Hire Purchase Mode (Ijarah Thumma Bay')

Ijarah means leasing. The lease of waqf land is enforceable unless the rental is below market except justified by necessity. The Hanafi jurists allow nzier to terminate the existing contract and lease the property to another willing party, if the rental is lower than market rate and the leaseholder does not agree to the desired revision of rent.⁹¹ The Malikis and Shafi'is do not recognize such option for the existing lease holder⁹² as they consider the contract a binding nullity. Contemporary ulama hold that the leasing contract of waqf property should include provisions for revisions, and the taxes to be payable by the leaseholder alone, and that the leaseholder should not use the premises for purposes against Shariah, law or against the interest of the society.⁹³ This is why leasing is considered a flexible type of financing compare to murabahah as the rate of rental can be adjusted according to the market movement.

The Maliki and Shafie schools allowed long leases even if they were for a period of 100 years.⁹⁴ Other jurist in Hanafi and Hanbalis schools allow leases not exceeding three years. The Hanafis, nevertheless, in addition to long leases such as hizr, ijaratain, mirsad and khulw, allow succeeding three year⁹⁵ contracts extending up to 50 years or more. Contemporary jurists however limit the period up to thirty years.⁹⁶ Ibn Nujaim did not allow the lease of waqf land near to a city for construction of housing estate used after completion for being rented out.⁹⁷ Sheikh Muhammad Mukhtar al-Sulami a former Tunisian mufti, disagreed on the ground that Ibn Nujaim perhaps based his view on the

⁹¹ Ibn Abidin, *Rad al-Muhtar*, vol 4, pp. 371, 404

⁹² Al-Dardiri, *Hashiyah al-Dusuqi*, vol. 4, p. 95; al-Sharbini, *Mughni alMuhtaj*, vol. 6, 395.

⁹³ Mahmud Ahmad al-Mahdi, p 87.

⁹⁴ Al-Sharbini, *Mughni al-Muhtaj*, vol. II, p 349; al-Qurafi, *al-Dhakirah*, vol. 6, p 346.

⁹⁵ Ibn Abidin, *Radd al-Muhtar*, vol. 3, 397.

⁹⁶ Mahmud Ahmad al-Mahdi, p. 88.

⁹⁷ Ibn Nujaim, *Bahral-Ra'iq*, vol. 5, p 223

custom of his time. Now, a land close to city might be more productive in term of development of buildings rather than agricultural produces.⁹⁸

Today, lease can be used by waqf institution to finance the development of the given land, and by financial institution to recover the credit extended to waqf institutions. Thus it is divided into build, lease and transfer mode of development (hire purchase al-ijarah thuma al-tamlik), and also sale, leaseback and transfer. Both are discussed below.

d.) Build, Lease, and Transfer (Ijarah Thumma Tamlik)

The modus operandi of Ijarah for the development of Waqf is proposed by Kahf. 'Nazer issues a permit, valid for a given number of years only, to the institutional financier allowing it to erect a building on the Waqf land. Then the Nazer leases the building for the same period during which it is owned by the financier, and [the nazer] uses it for the benefit of the Waqf objective, being a hospital or a school or an investment property such as rental offices or apartments.'⁹⁹ At the end of the permit period, the financier would have obtained its principal and desired profit, and thus transfer the building to waqf either through sale, gift, or mere disposal by way of abandonment.

The contract should be reviewable periodically in order to adjust the rentals.¹⁰⁰ 'Nazer runs the management and pays the periodical rent to the financier.'¹⁰¹ This model is practiced by IDB which finances industrial goods construction, including others fix assets, for a certain period of time during which the borrower pays biannual rentals, and at the end, the ownership of the assets is transferred to the beneficiary.¹⁰²

Whereas this instrument of leasing presupposes ownership of waqf in land, land revenue must be specified, and transfer of land to the financer needs to be registered.

⁹⁸ Sheikh Muhammad Mukhtar al-Sulami, *Istithmar Amwal al-Waqf*, in Muntada al-waqf

⁹⁹ Kahf, *Financing the Development of Awqaf Property*,

¹⁰⁰ Kahf, *Tamwil al- Tanmiyah al-Amwal al-Waqf*, p 45

¹⁰¹ Kahf, *Financing the Development of Awqaf Property*,

¹⁰² Kahf, *Financing the Development of Awqaf Property*,

Kahf is silent and both. This needs to be dealt with. To settle both issues, it is suggested that instead of permit, the land be leased to Waqf Holding and then to the financier, and then the building be leased to a waqf Holdings. This mode of financing is the same as *istisna'* that if used alone the waqf institution cannot pay installment fees even though it is for a long term basis.

Ijarah thumma al-bay' is the same as Hire Purchase, which can be undertaken under the Islamic Banking Act 1983, which allows banks to operate the real leasing business under one roof.¹⁰³ The Banking and Financial Institution Act 1992 of Malaysia, does not provide for, unless the bank establishes a leasing subsidiary registered under Companies Act, 1965. Similarly, the Hire Purchase Act 1967 will apply but then the lessor should pay for insurance, taxes, and maintenance. This side of Islamic hire purchase however is not covered by the Hire-Purchase Act 1967. To accommodate this Islamic requirement there is need for amendment of the said Act or the enactment of new legislation.¹⁰⁴

e.) Build Sale and Leaseback (Mersad)

This mode of financing is based on the long lease alone. Two methods are proposed. Al-Zaqa and Nazih Hamad have proposed that the leaseholder under the lease contract would be allowed to construct a building on the land. The building will be owned and occupied by the developer, provided the total amount of annual rental is sufficient to discharge purchase price of the building at the expiry of lease. The contract will include two issues: the long lease and the promise by the waqf institution to buy the building. The price of the building should be paid out of the annual rentals.¹⁰⁵ This mode is not explained well. It is however possible to describe it as lease, build, occupy and transfer. The leaseholder will be the developer/financer.

¹⁰³ Saiful Azhar, *Critical Issues*, pp 103-104

¹⁰⁴ Id., at pp. 105-106.

¹⁰⁵ Nazih Hamad, "Asalib Istithmar al-Awqaf wa Ausas Idaratiha", in *Abhath Nadwa Nahw Dawr Tanmiwi*, p. 186; Anas al-Zarqa, *Asalib*, p. 199.

The second method is explained differently. The administrator or the judge allows the tenant to develop the land and the incurred expenses shall be a loan on the *waqf*, payable by the *waqf* on installment. The building or plantation shall be the property of the *waqf* but the developer would have proprietary rights (e.g. leasee) which shall be transferable and inheritable, provided the transfer to another party is done with the approval of the court or the consent of the administrator of the *waqf*. The developer after the completion of the building would rent the building back and pay monthly market rental to *waqf*.¹⁰⁶ An example of *mersad* may be the practice in Sudan where the developer constructs a building, and then rents it out according to the market value.¹⁰⁷ Al-Amin has contended that this is done based on the contract of *istisna'*, and Anas al-Zarqa has added deficient partnership.¹⁰⁸

Following the *mersad* model, the *waqf* institution cannot evict the developer. This is not in line with modern circumstances and perhaps not attractive. The abovementioned right of the developer needs to be limited in time; the shorter period be based on proper study of the project, and market demand, while it should not exceed 30-40 years.

The purchase of building is possible through *istisna'*. This mode of finance is similar to the above mentioned debt based instruments and thus suitable for partial financing of the project. The *waqf* institution needs to use its development arm i.e. the Waqf Holdings Corporation as mentioned above. The *waqf* institution can manage the building or it can contract its management to a third party.

3.2.2.2 Institutional Financing: Joint Ventures

The *waqf* institution plays the role of a land owner and enters into a partnership with a financier or development company. The developer, however, should seek project funding, therefore, saving the *waqf* land from being used as security for loan. Should the

¹⁰⁶ Mustafa al-Zarqa, *Nazariyyah al-Itizam*, pp. 48-51.

¹⁰⁷ Hasan Abdullah Al-Amin "al-Waqf fi al-Fiqh al-Islami", in *Idarah wa Tathmir al-Mumtalakat al-Awqaf*, 1994, p. 135

¹⁰⁸ Id., at pp134-5; Anas al-Zarqa, *Asalib*, p. 197.

waqf land is needed for loan security, the charge can run along the life span of the lease granted by waqf institution to its development arm i.e. Waqf Holdings Corporation.

The manner in which the joint venture between the waqf institution and the development company can proceed is either through *mudarabah* or *musharakah* partnership.

a.) **Mudarabah**

Mudarabah is partnership in which the investor (*rab al-mal*) and the fund manager (*amil*) agree that the former provide capital and the latter manages it (by doing trading) and the profit would be shared according to a predetermined ratio. Once the capital is returned the partnership is dissolved. The Shafi'i and Maliki jurists allow *mudarabah* only in trading provided the investor does not interfere in the management.¹⁰⁹ Imam ibn Hanbal however allowed *mudarabah* between the owner of fishing net and a fisherman where the catch would be shared between them.¹¹⁰ This would mean that one provides assets and the other provides labor. In the context of waqf two models are proposed: *muzara'ah* based (Asset-based) and capital-based *mudarabah*, as discussed respectively. Both are can be supported by the opinions of Hanafis and Hanbalis.

- I. **Asset-based *mudarabah***: Anas al-Zarqa¹¹¹ has proposed that waqf institution can let a financier to construct a building on waqf land, and after completion, can rent the building to a third party. The institution and the developer can then share the rental. The institution of waqf has to divide its revenue from the building into two: one to increase its share in the building and second to distribute it among its beneficiaries. The developer should manage the project exclusively. Therefore, the

¹⁰⁹ Al-Sharbini, *Mughni al-Muhtaj*, vol. 2, p. 310.

¹¹⁰ Ibn Qudamah, *al-Mughni*, vol 14, kitab al-Shirkah, fasl fi ma in dafa'a rujul dabatahu; Al-Zarqa, "al-Wasail Hadithah", p. 197.

¹¹¹ Anas Al-Zarqa, "Al-Wasail Hadithah", pp. 196-7.

waqf will provide land, the same as in muzra'ah, and the manager will provide services and operational finance.¹¹²

- II. **Capital-based mudarabah:** According to Kahf, the mode of *Mudharabah* can be used when the *Nazer* assumes the role of entrepreneur. He can receive liquid funds from the financing institution to construct a building on the *Waqf* property. The management will exclusively be in the hands of the *Nazer* and the rate of profit sharing will be set in a way that compensates the *Waqf* for the effort of its management as well as the use of its land.¹¹³ The waqf institution does not count the land part of the capital but it is considered part of expenses so that the share of waqf can be extended.¹¹⁴

Both models are subjected to fiqhi and practical difficulties: from perspective fiqh, al-Zarqa's¹¹⁵ view is justified on the opinion of Imam Ahmad Ibn Hanbal as in case of fisherman and the owner of net.¹¹⁶ Ibn Qudamah, a Hanbali jurist, considered it to be a mudarabah case similar to muzara'ah.¹¹⁷ Other jurists apparently do not agree. Since the developer provides capital and services, the contract becomes a service-based or asset based thus not a mudarabah that is used for commercial transactions. Hence, Shafi'i and Maliki jurists would not allow it.¹¹⁸ Al-Sarakhsi considered this mode as bad ijarah amal (ijarah fiasidah) where the costs are not known.¹¹⁹ Al-Zarqa's proposal is identical to that of al-Sarakhsi, therefore, if the costs of the development are determined and the ratio of dividend are fixed according to the costs incurred, the Hanafi disagreement may not arise and hence al-Zarqa's proposal will be acceptable according to the views of Hanafi and Hanbali jurists.

¹¹² See Munzer Kahf, *Financing the Development of Awqaf Property*, also his *al-Waqf al-Islami*, Tatawwuruh, Idarahtuh, Tanmiyyatahu, Beirut: Dar al-Fikr al-Mu'asir, 2000, pp. 261-62.

¹¹³ Monzer Kahf, *Financing The Development Of Awqaf Property*,

¹¹⁴ Monzer Kahf, *al-Waqf al-Islami*, Tatawwuruh, Idarahtuh, Tanmiyyatahu, pp. 258-59

¹¹⁵ Al-Zarqa, "al-Wasail Hadithah", p. 197.

¹¹⁶ Ibn Qudamah, *al-Mughni*, vol 14, kitab al-Shikah, fasl fi wa in dafa'a rujul dabatahu ; la Al-Zarqa, "al-Wasail Hadithah", p. 197.

¹¹⁷ Ibn Qudamah, *al-Mughni*, vol 14, kitab al-Shirkah, fasl fi ma in dafa'a rujul dabatahu.

¹¹⁸ Al-Sharbini, *Mughni al-Muhtaj*, vol. 2, p. 310.

¹¹⁹ al-Sarakhsi, *al-Mabsut*, vol. p. 35. kitab al-Mudarabah

Monzer Kahf also seems to have followed Ibn Qudamah when he called this transaction “output sharing mode”. His model would be faced with similar disagreement from Shafie and Maliki ulama, as the waqf institution does not carry trading activity.

It is to be noted, however, that the restriction of *mudarabah* in trading is a juristic view, which is not accepted by Hanafi and Hanbali jurists, for they identify the transaction as a case of capital and services in general and not a trading activity alone. In simple words the Shafie and Maliki description of *mudarabah* applies to fund management activity as practiced today where the manager is free to invest the funds as he deems it profitable, while the Hanafi and Maliki definition of *mudarabah* is general that applies not only to fund management alone but also to joint venture investments, where the profits are realized from the real property lease payments according to a predetermined ratio.

Al-Zarqa’s and Kahf’s proposals are suitable for a single-asset joint venture between a financier and land owner in the property market. Since rental receivables are divided among the waqf and the financier, Mahmud Ahmad al-Mahdi observes that this mode can be applied to commercial projects in big cities as only then the waqf institution can have sufficient revenue from the development¹²⁰ to pay for the costs of the development.

b.) Partnership (Musharakah)

Musharakah is of two types: contractual and co-ownership. Both can be the basis for a joint-venture, and both are discussed respectively. Contractual Partnership (*Shirkah al-‘uqud*) refers to a contractual relationship between two or more persons who have willingly entered into an agreement for joint investment and sharing of profits and risks. In co-ownership two or more persons are caused to share one piece of property.

Musharakah was proposed, first, by the working committee formed by IDB for the development of waqf properties; that the institution of waqf and bank should join

¹²⁰ Mahmud Ahmad Mahdi, “Tajrabah”, p. 82.

where both should contribute to the development of waqf property. Later the waqf institution should try to purchase the property from the bank. The contribution of waqf would come (a) from the price of land, or (b) the land and minimum contribution to the other costs of the building. The bank would provide funds for the cost of the building. Where the waqf provides land alone, the revenue from the project should be divided into two: one, to pay for the costs provided by the bank, and second should be divided among the bank and the waqf institution as profit. Where the waqf provides land and cash the profits should be divided into two: a portion to pay to the waqf as rental for its land, and the balance of the profits be divided among waqf and bank according to their equity in the project.¹²¹ IDB has implemented this instrument in several multi million development projects. In one of the proposed projects the joint venture was limited to a period of 13 years alone.¹²²

Case (a) seems to be like a financial musharakah. It is possible that the bank will accept it. In case (b) waqf owns the land alone, and hence resembles a hybrid joint venture, based on co-ownership (shirka al-milk) and contractual partnership (shirkah al-aqd) as proposed by Kahf.

Anas al-Zarqa, proposing joint ownership in the land and building, thought that the price of the land and the building should be determined at the time of contract. The agreement should also stipulate that the building would be rented to a third party for a predetermined rental. Such a rental should be shared between the partners based on the same agreement. Al-Zarqa admits that through the agreement the developer becomes a co-owner of the waqf land which is not permitted by jurists. But he justifies this by the application of istibdal. He thinks that share in waqf land is substituted by the share in the building and since both are immovable properties the substitution is justified.¹²³ This is true when it is needed or is in the interest of the waqf but it may not be in the interest of waqf because the building is dependent on land and therefore inferior, and in bad time it may expose the waqf to sell the whole building. This risk however may be avoided if the

¹²¹ Id., at pp. 72-73.

¹²² Id., at pp. 77-79

¹²³ Anas Al-Zarqa, "Al-Wasail Hadithah", pp. 198-99.

waqf institution can use long lease first, and the owner of a long lease then can enter into joint venture with development financiers.

Al-Amin, Kahf¹²⁴ and Nazih Hamad do not allow joint ownership in waqf land and hence have proposed different models.

In alternative to the proposal by al-Zarqa, Nazih Hamad has proposed that the building would belong to the developer and the land would be the property of waqf. The building can be rented out once completed. The revenue from leasing would be distributed among waqf and the developer according to the value of the land and the building. He justifies this based on the fatwa of some Hanafi scholars concerning *kadak* and *kerdar*, both a type of proprietary rights that would allow the developer of waqf land to occupy it for unlimited time as long as he is not paid for his expenses in return for a fair annual rental.¹²⁵ This is not in the interest of waqf, for under this concept the nazir will not be able to evict the *kadak* holder.

It would seem that Nazih Hamad presumes that the mere provision of the site without sharing ownership would be sufficient enough to base the partnership. This will require a longer time which is considered detrimental to waqf. Similar proposal is made by Kahf.

Kahf justified it on the basis of co-ownership (*shirkah al-milk*).¹²⁶ The building can be built on waqf land by a developer at his own costs, or funds being given to nazir to construct the building. In each case the developer would be the agent for the other party, and the building should belong to the financier. The income from the development should be divided on the value of land, cash, and the management fees (fee for management are based on principles of *ijarah* or *mudarabah*). According to this principle the maintenance fees would be born by the financier as land is not exposed to depreciation Kahf's proposal can be the object of al-Mahdi's concern that since waqf's

¹²⁴ Hasan Abdullah al-Amin, "al-Waqf fi al-Fiqh al-Islami", in *Idarah wa Tathmir Mumtalahat al-Awqaf*, p. 137. Monzer Kahf, *al-Waqf al-Islami*, *Tatawwuruh*, *Idaratu*, *Tanmiyyatahu*, pp. 261-

¹²⁵ Nazih Hamad, Aslib Istithmar, Abhath Nudwah, pp. 185-6.

¹²⁶ One has to understand that Kahf view is not exclave to *shirka al-Aqd* for there is another agreement signed by the developer to develop the land.

contribution to the joint ventures would be minimum, including the rental for its land,¹²⁷ waqf may not be able to repurchase the share of the bank in the project in time. This is an element of risk and for this reason the financing institution may not be willing to fund the project as proposed by the jurists.

To avoid the legal constraints, in Malaysia, Musharakah needs to be carried out by Waqf Corporation to whom the land should be leased on long term. In terms of economics, this mode of financing is not better than the others, except the IDB proposal for operational musharakah where the costs are paid out of joint income. In other cases musharakah may be used only as a supplementary instrument of financing.

To sum, joint venture may be in the form of partnership or a limited liability company. In both partnership and Limited Liability Company the investors have co-ownership of project and entitlement to dividends. Partnership however, is risky due to unlimited liability of the partners, unless the waqf institutions form a single project based limited company, subsidiary to the Waqf Holdings Corporation, and thereby enters into partnership with other investors. Where the joint venture is in form of a limited liability company the need for the formation of a new company subsidiary to waqf corporation may not arise. There the waqf institution and the investors can form a limited liability company for the purpose of development of the given waqf land, where the liability of the directors will be limited to the project alone. In the newly formed limited liability company or the partnership the equity can be divided on 20/60 basis, or otherwise, depending on the contribution of parties and services rendered. Where a hundred percent finance is sought, the waqf institution is advised to lease a piece of land on Hikr basis, discussed latter, to its development arm corporation. The value of the land can be used as capital for the joint venture and the corporation as a vehicle for avoiding the current legal restraint on transferability of waqf land.

¹²⁷ Mahmud Ahmad Mahdi, *Tajrabah*, pp. 81-2

3.2.3 Modern Schemes: Corporate Financing (Securitization)

Corporate financing refers to the method of financing a development project through individual investors. Securitization refers to a tradable security the return of which is ownership and or a right to the income of assets. In the light of waqf property financing, it means a project-based financing and thus the securitization of the project only. Securitization of a project is permissible when the waqf institution is ready to be in charge of the project management. The institution solicits funds from the public together with an agency agreement so that it can manage the project on their behalf. Few instruments suitable to waqf properties are proposed by contemporary jurists the significant of which are mentioned below.

3.2.3.1 Public Issue: Equity Participation

The waqf institution through its representative, e.g. single project waqf holding corporation, must issue a prospectus that assigns the subsidiary as a project manager. The assets assigned to the waqf holding corporation and the project can be unitized, and each unit would be given a nominal value say RM 1 per unit, representing, not a debt, but a share in the physical assets of the project. Such units will offered to the public for subscription. The title in the prescribed unit would be transferred to the unit-holder upon subscription. The issue of the units will be then listed on the Stocks Exchange, where the units would be a tradable security.

Following the issue, and listing, the shares can be sold and purchased in the open market by the interested public. This provides liquidity in the said investment, and thereby the investors can sell their shares in the project easily. Listing also provides easy and simple mechanism to the waqf institution to increase its equity shares in the project. Other time it can be used to amortize the nominal value of the unit reflecting the realistic value of the shares. The institution can also classify some shares as waqf shares, that either be named so from the very beginning or at a later stage. Waqf shares in this sense are waqf of usufruct tied to the real state.

The capital raised through public issue will be spent on the project. The waqf holding corporation will be the manager of the project. Its task will be to manage the completion of the project and its expenses. Once the project is completed and starts to generate income, the said revenue will be spent on the costs, management, and maintenance fees. In other words the income of the project will be used for three things: (1) payment for the rental of land to waqf institution, (2) management fees to the waqf Holdings Corporation, and (3) actual costs for maintenance. (4) The balance, if any, will be then distributed on share-holders. This will represent the real profit as costs, overheads and operational expenses are deducted.

The advantage of securitized equity for the waqf institution is that it can control the terms of investment which will enable waqf to repurchase the shares easily.

Public issue can be implemented in two Shariah compliant modes of transactions. First *mudarabah*, and second *musharakah*. Each of them briefly discussed below.

a.) Mudarabah Equity

Kahf¹²⁸ proposed that a Shariah compliant *mudarabah* mode may be achieved if the *mudarabah* similar to *muzara'ah* mode of finance is applied. This was discussed early where it was proposed by this writer that if the uncertainty concerning the subject matter of the contract is removed, this mode would be agreeable to Hanafi and Hanbali schools of law. Following this model, Kahf proposed the following procedures:

- 1) A permit from the *Waqf Nazer* of shareholders to construct specific construction on the *Waqf* land.
- 2) An appeal from the *Waqf Nazer* as an entrepreneur/*Mudharib* to the public to buy output shares at a given price and conditions as follows:

¹²⁸ Monzer Kahf, *Financing The Development Of Awqaf Property*

- a) The existence of a permit from the *Waqf* to the share holders to erect the specific construction with all necessary conditions, specifications, etc.
 - b) An agency contract given to the *Waqf* management to utilize resources thus mobilized from the sale of output shares to establish the said project.
 - c) Appointing the *Waqf* as a *Mudhareb* to hold the fixed asset of the project after completion for management and investment.
 - d) An agreement on the ratio of distribution of gross output of the project after completion of construction and beginning of return giving period, between the owners of the construction, as *Rab al Maal*, and the *Waqf* as *Mudhareb*, according to an agreed upon ratio. This distribution does not specify any income to the land since the return on the *Waqf* land should be implicitly included in the share of the *Mudhareb*.
- 3) The *Nazer* takes charge of the construction by virtue of the power of attorney on behalf of the owners of output shares.
 - 4) After completion of construction, the *Nazer* receives it and starts investing and managing it as a *Mudhareb*.
 - 5) The *Nazer* actually distributes gross returns according to the agreement.

The characteristic of mudarabah shares is that unlike musharakah the dividends are calculated based on the gross income of the project and not the net value of the assets. The basis for such distribution would be the price of land, and the management costs and fees and the liquid capital provided by the shareholders.

b.) Musharakah Equity

The musharaka equity has the same procedures as that of mudarabah in issuing stocks to the members of the general public. The basic feature of musharakah which

distinguishes it from mudarabah is that in the former the dividends are determined based on the net value of the profit. This is because musharakah entitles shareholder to the asset and also to the income of the asset including net profit and capital appreciation. For this the management shall ascertain the market value of the assets and amortize the value of the shares. Another distinguishing feature of musharakah is that, unlike mudarabah shares where the maintenance fees were not deducted from the revenue before distribution, in musharakah all costs including management, land use, and maintenance are deducted first and the balance is then distributed according to the share in the equity.

3.2.3.2 Islamic Bonds (Sukuk)

Sukuk is an Islamic bond issued by Islamic banks and financial institutions. Sukuk have similar characteristics of a conventional bond, the difference being that it is asset-backed and represents proportionate beneficial ownership in the underlying asset. The return on the sukuk is derived from the yield generated by the client's asset.¹²⁹ Bonds are representing the ownership of usufruct (manfa'ah) and therefore compliant with the nature of waqf law.

The Malaysian Guidelines on the Offering of Islamic Securities, 2004 recognizes acceptable Syariah concepts and principles for Islamic securities. The primary principles for such securities are bai' wafa, bai' salam, bai' istijrar, bai' 'inah, bai' bithaman ajil (BBA), ijarah, ijarah thumma bai', istisna', mudharabah, murabahah and musyarakah. But the same as equities, bonds or sukuk cannot represent debt for purposes of tradable security in a secondary market. Though such a bond may be issued, as in the case of Malaysian BBA (murabahah) etc, such bonds are rejected by the majority and therefore it will be neither economically prudent nor suited to the nature of waqf development activities in light of fiqhi principles.

Following the established principles of fiqh, two asset-backed bonds namely muqaradah, and ijarah certificates are discussed below.

¹²⁹ Definition offered by Dubai Islamic Bank http://www.alislami.ae/en/corporatebanking_prdsukuk.htm Date: 8/8/06

a.) **Muqaradah or Mudarabah Bonds**

Muqaradah bonds¹³⁰ are based on the idea of *muqaradah* / *mudarabah* contract similar to the investment deposit contract in Islamic banks, but with the addition of securitization of their value, by backing them by assets. In *muqaradah* bonds, the nazir as *mudarib* (fund manager), accepts cash deposits against issuance of certificates given to the financier (*rab al-mal*), thus making him the shareholder in the project. But, unlike the *mudarabah* shares, bonds do not entitle the bondholder to the capital appreciation but instead give them the right to usufruct (benefit/*manfa'ah*) of the attached assets.

Under this mode of finance the *waqf* management utilizes the proceeds for the development of the *waqf* land as agreed upon with the investors. The distribution of profits should commence once the project is productive. But where the rentals are secured due to an existing lease agreement with a third party, the payment of profits may commence early on advance basis. The net return would be proportionate and periodical until the end of the *mudharabah* agreement which could be for short, medium and long term. It must be noted that the distribution of profit and repurchase of bond may be guaranteed by a third party who is not signatory to the contract of *muqarada* bonds, e.g. the government. In case the *waqf* institution is unable to pay the to the bond holders the government will pay the amount on a basis of benevolent loan.¹³¹

On maturity of the bond, say after 5 years, the *waqf* management would be required to return the principal cash to the bond holders and retrieve the bonds they had. *Muqaradah* bonds may also come to an end by either transferring the property into a *waqf* or buying it from the market by the *waqf* management.

¹³⁰ There is a wide range of literature on *muqaradah*, and *mudarabah* bonds. At a time it was controversial. It seems that they have been accepted generally, except that based on *murabahah* and *istisna*. See Walid Khairullah, *Sanadat al-Muqaradah Ma'a Halat Tatbiqih*, in *Idarah wa Tathmir*, p. 149, Hasan Abdullah, *al-Waqf fi al-Fiqh al-Islami*, *Idarah wa Tathmir*, p. 136; Nazih Hamad, *Asalib Istithmar*, *Abhath Nudwah*, p. 178 Monzer Kahf, *al-Waqf*, p 275. Some views of Kahf are incorporated here.

¹³¹ Nazih Hamad, *Asalib Istithmar*, pp. 187-189.

b. Ijarah Bonds

Sukuk can be structured on a bundle of ijarah transactions especially where the ability to trade on a secondary market is required.¹³² This can be used for waqf property developmental finance as well.

Under this model a sukuk certificate will be issued by waqf's incorporated company (Waqf Holding Corporation) to investors. The proceeds will be used by the said company to develop a rental generating real property or other cash generating asset. The incorporated company will then lease the asset, either to a third party or to waqf institution, for a period corresponding to the duration of the tenure of the Sukuk certificate. The asset would be held in trust for the sukuk holders either by the issuing company or a separate trustee. The payments to the bondholders may be fixed or calculated with reference to the inter bank offered rate plus a margin which represents the market rate for rental payments. The waqf institution will be under obligation to repurchase the bonds from the bondholders after maturity of the certificates.¹³³

The above models represent simplified facilities that can be easily understood and implemented in the current Malaysian Islamic financial market. They can be used with other modes of finance in order to minimize the costs of financing. However it would be more profitable if these instruments are used with one of the self financing methods. Few of these self-finance modes are discussed in the next section.

3.2.4 Self-finance

By self-finance we mean the cash or land contributed to the costs of development by the institution of waqf. There are several methods whereby the institution of waqf can reduce the costs of financing. These are the use of land, its securitization, and obtaining advanced rentals under the concept of hikr. In addition, the institution can also resort to substitution of one land with value to be used for the development of another resulting in

¹³² Lovells's *Client note on Islamic Finance, Shariah, Sukuk & Securitisation*, Internet edition, 2004.

¹³³ See *ibid.*

amalgamation of different waqfs. The intuition can also use cash waqf, saham waqf, usufruct waqf and waqf amal (probably by providing professional advice and supervision by professionals). Some of these are discussed early. Cash waqf is practiced in other countries but not in Malaysia. Therefore, the writer will discuss below only saham waqf as practiced in Malaysia.

3.2.4.1 Saham Waqf

Recently the idea of saham waqf has been made popular among some scholars and acted upon by waqf institutions. Certain properties were developed through this method. These sahams did receive good response from public, at the outset, but, looking at *Saham Malacca* one sees that the participation of public in type of waqf has declined.

One can think of several factors causing the decline; namely lack of continuous effort by waqf institutions, lack of publicity, and lack of understanding among public, and also the prevailing formality (i.e. ijab and qabul etc) as a precondition for participation. This could be perhaps improved by removing the said obstacles and in addition an effort to be made to devise ways similar to the present practice of zakat collection, on monthly basis, deducted from the monthly salaries of the employees in the public and private sectors. Supposing these methods bring positive results, and hence increase the assets of the waqf, contributions of this sort by itself, by public in this way do not necessarily guarantee successful development of the existing abandoned and underdeveloped real estate held by waqf institutions.

3.3 Conclusion

The above discussion shows that waqf development projects apart from government and semi governmental bodies can be financed through banks, developers, and also by waqf institutions by way of self financing. The fundamental point to be highlighted here is that all the above modes except self financing, need to be operated by

a body incorporated by the Majlis. The majlis would lease the land to the said corporation for a period of 99 years. The corporation will owe the Majlis a market price of the land plus annual rentals. The corporation can develop the land in either of the above mentioned modes. As time passes, and the corporation has to develop more lands to develop, it can form new limited liability companies with a single asset and a single project (holding a single piece of land) to avoid the risk of losing other properties. This company will be in charge of the project. Where the banks and other financial institution refuse to enter into a joint venture, the development company can raise finance putting the leased asset as a security. If accepted by financier, the rights of the financier would be secured by a 99 years lease, the same as the government alienation of leasehold titles. Throughout the lease period, the Majlis would be a shareholder and hence entitled to a share in the revenues of the project according to the invested amount. The corporation will be a leaseholder and would be able to sublease the property without legal restrictions.

The Majlis (waqf institution) can invest the lump sum credited to the corporation on the development of the same land by being a partner in the project. With this the disadvantages of Hikr that it does not benefit waqf substantially will be avoided. At the same time, since the land is leased on the basis of Hikr, the ownership of waqf land by other parties does not arise. Under law the building will follow the land according to the terms of the lease. In Fiqh, once land is leased, building belongs to the leaseholder and the land to its title-holder. Hence the waqf institution and others would be partners. Both would share the equity as well as entitlement to the dividends.

All the above modes of financing if taken alone or in combination with others, may prove to be difficult to get or expensive to take. An easy way out would seem to be dependence on government and baytul mal. But dependence on government results in delayed development and therefore loss of revenues. Thus an expensive finance may be better than delayed. Another alternative may seem to be self-financing. Though this is an ideal way to develop waqf land, for an organization which has limited resource, it is wise to do the job with some one else's funds.

A cheaper finance may be obtained if one shops with a variety of the financial instruments, for some of them have hidden advantages to the financial institutions. Despite availability of cheaper financing it is not advisable to use one of the instruments alone.

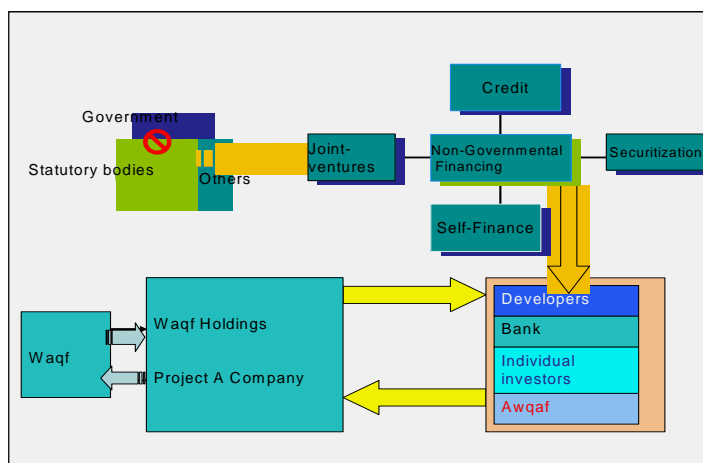


Figure 3.1: Hybrid Financial Mechanism for the Development of Waqf Properties

Having regard to the current market trends, only partial financing may be obtained from financial institutions_ at 60- 90 per cent. Some Islamic institutions do offer 100 per cent finance, but since Islamic banks unfortunately use conventional benchmarking for their charges and fees, this may result in high charges especially when the term is for a longer period of time. This would not be in the interest of the beneficiaries of the waqf. A prudent practice, therefore, will be to take short or medium term finance and try to get the balance through securitization if the project involves larger sum of funding, and self financing which would be cheaper and easy to pay.

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CHAPTER FOUR

CASE STUDY AND ANALYSIS

4.1 Introduction

This chapter discusses the study case and data analysis to address the objectives of the study. The study focuses on the administration of waqf lands and properties and the financial mechanism used by Majlis Agama Islam Johor (MAIJ), Majlis Agama Islam Melaka (MAIM), and Majlis Agama Islam Negeri Sembilan (MAINS) in the development of waqf properties. In particular, this chapter briefly mentions the role of the State Islamic Religious Council (henceforth referred to as 'MAIN'), which is in charge of the day-to-day administration, management and development of waqf properties in the three states.

Except for the Federal Territories, the administration and management of waqf properties is within the jurisdiction of the state governments, through their respective MAIN. As a matter of fact, MAIN is the sole trustee of all waqf properties and, in some state, all trusts established by Muslim donors.

The total area of waqf land registered with MAIN in various states and the Federal Territories, as at year 2002, was about 20,735.61 acres (see table 4.1), excluding the Concession of Tuanku Ja'far in Terengganu. The three states under study – Johor, Negeri Sembilan, and Melaka – have a total area of 8,557.96 acres of of waqf land. Based on the interviews with the officer-in-charge of waqf, it is

presumed that there are some additional waqf lands that are yet to be recorded and registered in these and other states.

Table 4.1: Total Waqf Land In Malaysia, 2002

No.	State	Total area (ac.)
1	Johor	5,928.00
2	Perak	5,122.00
3	Pahang	3,985.00
4	N.Sembilan	1,786.60
5	Selangor	1,063.25
6	Melaka	843.36
7	Kedah	843.34
8	Kelantan	304.66
9	Terengganu	247.44
10	Sarawak	236.93
11	Perlis	227.44
12	P.Pinang	89.26
13	Sabah	29.60
14	W. Persekutuan	27.54
		20,735.61

Sources: Research Department, JAKIM, 2002.

The discussion in this chapter begins with an overview of MAIN in the states of Johor, Melaka, and Negeri Sembilan, respectively. Subsequently, the discussion relating to the financial modes applied in waqf property development in these states will be presented. Finally, a brief comparative study of the three states with regard to the financial mechanism in the development of waqf land will be offered.

4.2 The Methodology

The information on waqf land development was obtained from official publication, seminar papers, and the official websites of the respective states. The information on the financial mechanism applied to the development of the waqf properties in these states was obtained through a questionnaire survey and conversations with the officer-in-charge of waqf properties.

However, due to data confidentiality, not all information required was available, except for the information on the modes of financing. Yet, due to the complexity of the Islamic financial system, some information was not clear.

4.3 Background of Case Study

Before we proceed with the discussion on the financial mechanism adopted by Johor, Melaka, and Negeri Sembilan, a background of development activities in these states is given. This includes the land bank and the type of development undertaken by these states.

4.3.1 Johor Waqf Properties

According to Section 4(1) of the Islamic Administration Enactment 1978, MAIN Johor (simply MAIJ or the Majlis) is the sole trustee of the waqf properties in the state. Waqf properties are managed by Yang Dipertua Jabatan Agama Johor under MAIJ. A special committee is appointed to administer and manage all affairs on waqf on state and district levels. The committee includes Pengelola Wakaf Negeri, Nazir Wakaf Negeri, Pegawai Wakaf Negeri, Nazir-nazir Wakaf Daerah, Pemeriksa-pemeriksa Wakaf Daerah.

Under section 43, 45(1) and 47 of the said Enactment, the Majlis has the power to take control and administer waqf properties by doing the registration and classification thereof, based on the purpose for which the waqf was created by the founder of the charity. It is empowered to manage waqf property according to the Syari'ah law, and enter into joint ventures with statutory and corporate bodies in the development, planning and management of waqf properties. A preference is given to organisations that have legal background and are able to know the importance of waqf properties. The Majlis also has the power to educate public about the importance of waqf and encourage the public to contribute to the growth of waqf in Malaysia

The state of Johor has both categories of fixed and liquid waqf properties, some of which were previously while others were newly created waqf properties and funds.

The fixed assets are mostly in the form of land. Johor's waqf land can be divided into two types, namely the general waqf (waqf am) and the special waqf (waqf khas). Waqf khas includes mosque, Madrasah and graveyard. The general waqf is created to support activities other than those mentioned under the special waqf which is for the welfare of Muslims in general. Among land uses under the general waqf are rental accommodation, shop-house, petrol station, and car park.

The contributors of waqf funds are individuals and government bodies. Individual waqf donations are dedicated either for special purposes such as mosque, schools, and grave yards, or general purposes. Other organisations also contribute in promoting waqf through what is termed as irsyad. Often, irsyad is created for special purposes such as for mosques, religious schools, and graveyards.

In Johor, the total area of waqf land is 5,928 acres. Table 4.2 shows the total area of waqf land in Johor according to its location in various districts and the purposes for which the waqf land is dedicated.

Table 4. 2: Number of Waqf Properties in Johor

District	Special Waqf			General Waqf	Total
	School	Graveyard	Mosque/madrash		
Johor Bahru	129	40	349	38	556
Muar	76	77	319	37	509
Kota Tinggi	40	39	69	12	160
Pontian	58	51	147	12	268
Mersing	23	16	25	16	80
Batu Pahat	91	88	270	50	499
Segamat	38	63	107	14	222
Kluang	43	31	95	14	183
Total	498	405	1381	193	2,477

Sources: Majlis Agama Islam Johor, March 2004.

Whereas the number of immoveable assets is 2477, according to Table 4.2, they include both waqf am and waqf khas. Out of this, the total of 193 properties

comprise waqf am and the rest is waqf khas that in turn consists of 498 schools, 405 graveyards, 1381 mosques and madrasah. While waqf khas is exclusive to mosque, school, madrasah and graveyard, waqf am, however, is consisting of shophouses, rental houses, vacant land etc.

The state of Johor has established saham waqf in 1983 and has so far contributed to the development of new properties which are utilised both commercially and for educational purposes. The MAINJ is keen to develop its properties in ways that can generate greater yield and contribute to the welfare of the Muslims effectively. Figures 1 through 4 below show the types of waqf development projects in the state of Johor, under the general waqf category.



Figure 4.1: Buildings and Agriculture Land (Source: Majlis Agama Islam Johor, 2005)



Figure 4.2: Rental Accommodation and Shop Houses (Sources: Majlis Agama Islam Johor, 2005)

As mentioned early the development of special waqf properties comprises the building of mosque, madrasah, school and graveyards. These properties form the majority of waqf due to the traditionally limited perception of the Muslims about the concept of waqf.

The development of general waqf properties is undertaken through building accommodation for rental, commercial properties, agricultural cultivation, etc. In fact, the development of general waqf properties could take in any form as long as they can generate good return for the community and follow the principles of Syari'ah.



Figure 4.3: Johor Bahru Orphan House (Source: Majlis Agama Islam Johor, 2005)



Figure 4.4: Sekolah Agama Parking Site at Bandar Baru UDA (Source: Majlis Agama Islam Johor, 2005)

The development under the special waqf category is carried out either through self-financing or through the government. For example, some schools are built on waqf lands belonging to the Majlis but are managed by the Education Department under the Ministry of Education. In this case, the construction and the running of the schools are funded by the government. Some mosques are also built on waqf lands belonging to the Majlis but are managed by the Jabatan Agama Islam

Johor (JAIJ). In this case, the construction and the running of the mosques are privately funded by JAIJ.

In 2006, MAIJ has also bought a property in Egypt, which is a six-storey apartment building converted into student's hostel for the Malaysian students pursuing education in Egypt.

4.3.2 Melaka Waqf Properties

Majlis Agama Islam Melaka (MAIM) is established under section 4 of Administration of the Religion of Islam (State of Melaka) Enactment 2002. According to section 77 (a) and (c) of the same Enactment Majlis Agama Islam Melaka is 'the sole trustee of all *wakaf*, whether *wakaf am* or *wakaf khas*' and 'all trusts of every description creating any charitable trust for the support and promotion of the religion of Islam or for the benefit of Muslims in accordance with *Hukum Syarak*'. For this, the Majlis is responsible for managing all waqf and trust properties in Melaka. The Majlis has established a special department in charge of and in control of such properties including the registration, administration, management, investment, etc.

According to Jabatan Agama Kebajikan Islam Malaysia (JAKIM), Melaka have 843.39 acre of waqf property under MAIM; out of which, 69.97 acre is registered as waqf am and the balance as waqf khas. Table 4.3 shows the total of waqf land as located in the three districts of Malacca namely Alor Gajah, Melaka Tengah and Jasin. (Table 4.3). It is to be noted that the above data is based on old figures. As was indicated by Ustaz Hj. Abdul Halim the Majlis has been keen to reorganise and update its data, it is possible that the actual number of waqf lands in this state could be twice the above.

Table 4.3: Waqf Land in Melaka

Land Use	Melaka Tengah (acres)	Alor Gajah (acres)	Jasin (acres)	Total (acres)
Mosque/Madrasah/School	108.8	146.47	112.4	367.67
Graveyard	144.73	124.92	136.07	405.72
Agriculture	10.19	20.35	17.66	48.2
Building/Housing	9.44	6.45	5.88	21.77
Total	272.44	298.19	272.01	843.36

Sources: Majlis Agama Islam Melaka

Table 4.3 indicates that in Melaka, too, waqf properties are divided into two categories, that is wakaf khas and wakaf am. Wakaf khas comprises of mosques, schools, and cemetery the remaining properties are categorised as waqf am. Whereas the graveyard has the highest number totalling 405.72 acres comprising 144.73 acres in Melaka Tengah, 124.92 acres in Alor Gajah and 136.07 acres in Jasin. This is followed by mosques etc comprising 108.8 acres in Melaka Tengah, 146.47 acres in Alor Gajah, and 112.4 acres in Jasin. Building and agricultural lands comprise 69.79 acres which are located in all three districts of Malacca.

MAIM also manages two waqf properties, namely special waqf Kampung Keling and special waqf Kampung Hulu, consisting of shop house, car park, and MAIM building. Some of waqf properties in Melaka are supervised by mosque management committee.

**Figure 4.5:** Rented house on Lot 220 Klebang Besar, Melaka Tengah

Source: Melaka Audit Department File, 2003.



Figure 4.6: Agricultural land on MCL 196 Lot 2858 Sebatu Sg. Rambai, Jasin
Source: Melaka Audit Department File, 2003.

The majlis is quite active in developing properties under its control. Today, There are various projects which were undertaken on waqf land in Malacca and were successfully completed. This comprises the construction of Mosques, Schools, rental house, shop-lots, agricultural lands, and orphanages. Six major projects that have monthly income or otherwise utilised by the beneficiaries are Rumah Pangsa al-Ehsan, Moon sighting centre of al-Khawarizmi, Ma'had Tafiz al-Qur'an, Sultan Salahuddin Abdul Aziz Shah al-Haj's orphanage, and others as mentioned below.

4.3.2.1 The al-Ehsan Flat

The al-Ehsan flat project has been constructed on wakaf am land, at the cost of RM 2.27 million on Lot 82 Tengker, Town V area around Melaka Tengah. This project was fully financed by Tabung Amanah Saham Waqf and zakat excess. The completed project comprises 40 residential units and 14 shop units, allocated to the poor and single mothers at lower rental between 300-400 for the shops and RM 50 for the houses.



Figure 7: Rumah Pangsa al-Ehsan on Lot 82 Tengker, Melaka Tengah
Source: Melaka Audit Department File, 2003)

4.3.2.2 The al-Khawarizmi Observatory

The Construction of Balai Cerapan Project (moon sighting centre) has been completed by the Pejabat Mufti Melaka on waqf am land. The state government has financed the construction of this project at the cost of RM 2.35 million. The project stands on a one-acre Tanjung Bidara waqf land. It was completed in 2002 and has commenced operation in 2003. The building is used for sighting moon, as an office of the State Mufti, and as a place of discussion.



Figure 4.8: The al-Hilal Observatory on Lot 2227 Sungai Baru Tengah, Tanjung Bidara
Source: Melaka Audit Department File, 2003

4.3.2.3 Tahfiz High School

The Maahad Tahfiz, Cenderah Jasin Complex was constructed by state government through the Jabatan Agama Islam Melaka, JAIM. This complex has two-block classrooms, two-block hostels for boys and girls and one 80-seat student hall. It was built on a 4.48-acre waqf khas land in Jasin, which was completed in December 1999, at cost of RM 2,493354.00, and started operation in early 2000.



Figure 4.9: Maahad Tahfiz Cenderah on QT(M) 54 Lot 1225, Jasin

(Source: Melaka Audit Department File, 2003)

4.3.2.4 Orphanage Home

The Tangga Batu orphanage home was a charity project constructed on a 1.3-acre waqf khas land at a cost of RM 2.57 million through public donation (sadaqah). It has two blocks of hostel for girls and boys, respectively, a canteen and a madrasah and can accommodate up to 120 children. The project was completed and has started operation in early 2002.

4.3.3 Negeri Sembilan Waqf Properties

Majlis Agama Islam Negeri Sembilan (MAINS) is established under section 4 of the Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003. According to section 89 of this Enactment, MAINS, just like other waqf institutions in other states, is the sole trustee of (a) all *wakaf*, whether *wakaf am* or *wakaf khas*; and (c) all trusts of every description creating any charitable trust for the support and promotion of the religion of Islam or for the benefit of Muslims in accordance with *Hukum Syarak*.

MAINS has 1,788.60 acres of waqf land, consisting of 1,727.35 acres under the special waqf and 61.25 acres under the general waqf. This indicates that the amount of land under the special waqf is greater than that under the general waqf. Under the special waqf, the graveyard use has the largest acreage with 1,266.56 acres followed by the mosque use with 330.74 acres, and the madrasah use with 130.08 acres of land. In contrast, there are only 65.52 acres of land for general use (see Figure 10).

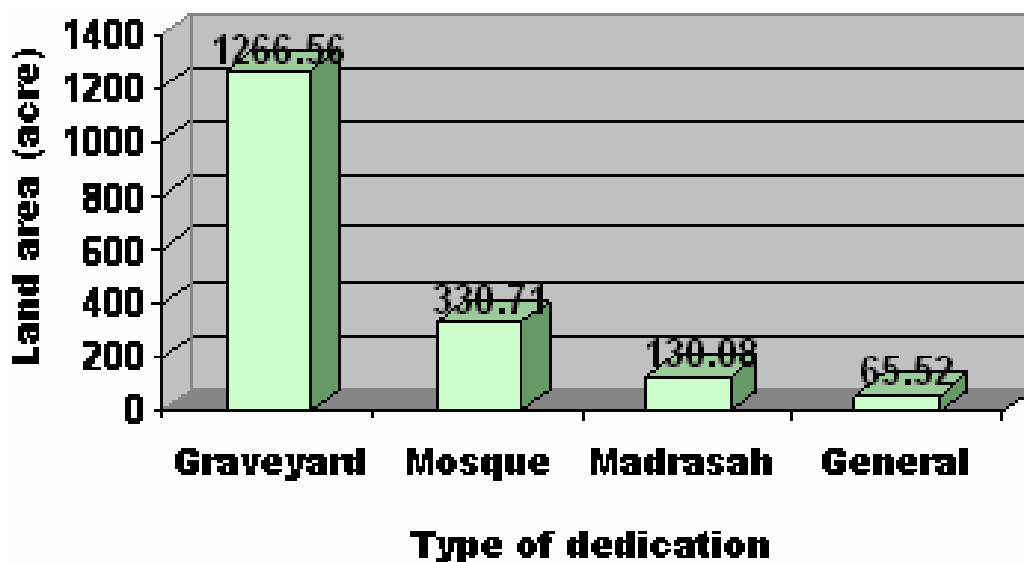


Figure 4.10: Composition of Waqf Land in Negeri Sembilan (Source: Islam Information Centre (JAKIM), 2003).

On district level, Kuala Pilah has the highest number of waqf land totalling 593.42 acres, followed Seremban and Jempol with each having 323.74 and 310.41 acres, respectively (Table 4.4).

As MAINS is the sole trustee of all waqf properties, it handles the development of waqf land in Negeri Sembilan. MAINS, however, has incorporated its development arm, which is the sole entity responsible for development of waqf lands in Negeri Sembilan. For example Kompleks Pekan Rabu project have been handled by MAINS Holding. MAINS Holdings Sdn Bhd, nevertheless, acts for MAINS and therefore also carries out non-waqf property development and management activities on behalf of the Majlis. This entity is incorporated under the Companies Act 1965 and is owned by MAINS. The main activities relating to waqf properties include the development of mosque, school, graveyard. Land which is categorised as general waqf are developed for shop lots and markets. The residential properties and agricultural land are also available for rental purposes. Other MAINS' activities include property management, for example, the management of Kompleks Pekan Rabu.

Table 4.4: Waqf Land in Negeri Sembilan

District	Total area (Acres)
Jelevu	124.29
Jempul	310.41
Kuala Pilah	593.42
Port Dickson	118.14
Rembau	201.75
Seremban	323.74
Tampin	117.12
	1,788.87

Source: Islam Information Centre (JAKIM), 2003.

4.4 Analysis on Modes of Waqf Financing

The financial mechanism recognised and adopted by the States of Johor, Melaka, and Negeri Sembilan includes the Islamic modes of financing suitable to the nature of waqf properties according to the prevailing concepts as adopted by the respective states. The modes include the source of financing and the potential adoption of Islamic financial mechanism for waqf properties in the given states.

4.4.1 Johor

In developing waqf properties, Johor has the guidelines for getting financing through Saham waqf scheme, rental etc. Saham waqf, nevertheless, is recognised and used as the major financial source as it is easy to be understood by the Muslims.

In the case of Johor, saham waqf refers to the cash contribution by members of the public for a minimum of RM 10.00 for which a certificate is issued by the Majlis to the donor. The cash proceeds and returns of the saham are converted to land and building. This means that the donated cash is converted to fixed properties by Majlis when it buys land or finances the development of certain project. Therefore, each of the saham is identified in terms of a share in a piece of land or building.

An example of development project by MAIJ is the five-storey waqf building at mile 6, Jalan Skudai, at Tampoi, Johor (Figure 11). The construction cost of the building was RM 4.82 million, and rented between RM 1,500 to RM 8,000 per floor, depending on the floor level. The rental income is distributed among the needy and the poor.



Figure 4.11: Waqf Building Constructed Through Saham Wakaf Johor

(Source: Majlis Agama Islam Johor, 2006).

MAIJ does not utilise institutional financing either for development or renovation. All development, renovation and other activities are financed internally through income from its waqf properties or through a benevolent loan from the baitulmal. So far, MAIJ has no project financed by the government; it also has no contact with Islamic banks for the said purposes. The reason for this is to avoid charging waqf land and hence safeguard the waqf title in the land. Baitulmal, however, is used as benevolent creditor

Other methods of waqf development financing recognised by MAIJ include istibdal and musyarakah joint-venture. In the case of istibdal, the existing waqf land is sold and the proceeds are used to purchase a new land of similar size and value and to invest the balance on the development of the amalgamated waqf land according to one of the syariah recognised modes of financing. As for musharakh, it is yet to be practiced, whereby MAIJ is in the midst of in-house discussion with its administration to adopt this approach.

There is no vacant land and there is no land attached to masjid, schools or graveyard that could be considered for development and redevelopment. The Majlis has no plans to redevelop the existing waqf properties.

4.4.2 Malacca

There is no specific concept being adopted as the main method for financing waqf development in Melaka. MAIM uses a combination of modes of development financing through saham wakaf, zakat, donations, MAIM Holdings, and government funding. In other words, MAIM gets the financing from various bodies such as the state government, *baitulmal*, self-financing, and statutory bodies. So far, many projects have been financed through the statutory bodies.

As the financial mechanism for the development and renovation of waqf properties, MAIM recognises and uses the concepts of musyarakah, mudharabah, al-Ijarah and saham waqf. MAIM also entered into joint development as they refer to as joint ventures with developers who are interested in the development of waqf properties. For examples, Taman Seri Serkam housing project was financed through a joint-venture between MAIM and MRCB. It is based on Build on Transfer (BOT) method on a ratio of 10:1.8. This project took seven years to finish, from 2000 - 2007. It is on murabahah cash-sales basis. Despite the joint-venture arrangement, the title to land is still under waqf.

MAIM also finances waqf development activities through saham wakaf and baitulmal. In the case of baitulmal, it acts as investor on the basis of mudarabah. Under this type of joint venture, the returns and profit accounts for baitulmal and waqf are kept separately. Sometimes, the property is owned by the baitulmal. The state of Malacca does recognise inter-state finance especially the baitul mal of another state, including cases where it is willing to invest in the development of waqf properties in Malacca. Under the saham wakaf mode, the proceeds and returns from the saham are converted into land and building. Therefore each of the saham is assigned to a share in a piece of land or the building as the case may be.

MAIM also adopts the istibdal mechanism for investment in waqf properties or investment thereof, where the existing waqf land is sold and the proceeds are used to purchase a new land of similar size and value and then invest the balance, if any, on the development of the amalgamated waqf land according to one of the syari'ah recognised modes of financing.

MAIM does not adopt commercial bank financing because it is more expensive. As an alternative to the bank financing, MAIM uses other methods in order to raise capital or financing for the management or development of its waqf properties, provided that such methods are in compliance with the Syari'ah principles.

Melaka has vacant land, and land which is developed is also considered for redevelopment. This includes the land belonging to mosques, schools and madrasah, and wakaf ahli. Overall, the waqf land in Melaka can be categorised as idle, rented, cultivated, and underdeveloped.

4.4.3 Negeri Sembilan

MAINS receives a sum of RM 100,000 annually from the state government for the development of waqf properties excluding the sum applied for the development of mosques. It adopts many principles in financing the development of waqf properties. The principal modes of financing are istisna', musharakah, mudarabah, ijarah, bai bithaman ajil, murabahah, cash proceeds from waqf certificates, bond or sukuk, and borrowing from the baitulmal through Qard-al-Hassan scheme. In practice, however, MAINS more often uses cash proceeds from saham, bonds and others for financing waqf project. None of the modes used by MAINS require the transfer of title to the financier.

Financing the development and renovation of waqf properties is carried out through the state government, statutory bodies and baitulmal under Qard-al-Hassan scheme. For instance, there are twenty-seven mosques which were developed through the government.

MAINS internally finances its development activities (including the maintenance and operational needs) through baitulmal, saham waqf, and other waqf funds derived from the special waqf and the general waqf. Baitul-mal acts as investor, a benevolent creditor and a donor. Baitulmal is known as investor for its

own property. In the case where Baitul-mal is an investor the accounts of Baitul-mal and waqf for returns and profit of the investment are kept separately.

Under the saham waqf mode, the proceeds and returns are invested, meaning that saham exists in terms of a specified cash that is used for building construction, according to one of the established modes of the Islamic financing. The cash proceeds of the saham, later, are converted to land and building and therefore each of the saham stands for a share in a piece of land.

MAINS also uses istibdal where the existing waqf land is sold and the proceeds are used either to purchase a new land of similar size and to invest the balance on the development of the amalgamated waqf land (waqf mushtarak) according to one of the recognised modes of Islamic finance, or invested on the development of other waqf land. MAINS sometime collects donations (sadaqah) from public and the proceeds are used for a given waqf property development project.

So far, MAINS does not finance waqf properties through banks and no attempts were made to contact banking institutions. MAINS also does not borrow from other states or the state government or enter into a joint-venture with them.

MAINS has vacant land which is idle, rented, cultivated or under development. They also have land adjacent of mosque, graveyard, and school that needs to be developed. In addition, MAINS is considering the redevelopment of some its waqf properties.

4.5 Comparative Analysis of the Financing Modes

Comparing the various financing modes recognised and applied by the states of Johor, Melaka, and Negeri Sembilan certain form of uniformity and the lack of it come to the forefront. Table 4.5 summarises the discussion under Section 4.4.

The recognition of financial modes varies from state to state, and the same applies to their practice. The recognition of a certain instrument does not necessarily mean that the same instrument would be practiced by the recognising state. This can be seen in table 4.5.1 below.

Table 4.5: The Recognised versus Applied Financing Modes for Waqf Properties

Method State	Modes Recognised*			Modes Practised*		
	MAIM	MAINS	MAIJ	MAIM	MAINS	MAIJ
Istina'		√				
Musyarakah	√	√		√		[√]
Mudharabah	√	√		√		
Ijarah	√	√		√		
Bai-Bithaman al-Ajil		√				
Murabahah		√		[√]		
Saham wakaf	√	√	√	√	√	√
Bonds		√			√	
Others**				√	√	[√]

Notes: * An angle bracket with a tick, [√], indicates that the state is presumed to have the intention or has practised the mode involved but not expressed by the respondents.

** Examples are istibdal and qard-al-hasan.

Table 4.5 also shows two types of financing: repayable and non repayable. Whereas in the first, the conceptual method of Musharaka, Mudarabah, and Ijarah is unanimously recognised by all the three states, only the states of Johor and Malacca indicate to have intention or have applied the musharkah mode of finance. Malacca in addition to the above seems to practice mudarabah, ijarah and murabahah as well.

Some official are not clear about Islamic financial products. As in case of Johor it was implicit that they do not recognise the concept of musharakah and other modes except saham wakaf, but in a discussion on joint venture it was indicated that the future joint venture may be based on musharakah alone. Similarly, in Malacca murabahah was recognised to be suitable for waqf development activities but it was marked that the state was not practicing it. Nevertheless, in discussion on the joint venture it has clearly indicated that the basis for the transaction was murabahah. The writer has taken this to be a confirmation of the practicality of this mode, though it is not a mode for joint venture but a credit based financial method alone.

- i) Istisna' and bai' bi thaman al-ajil seem to be recognised only by the state of Malacca but they are not practiced yet. Negeri Sembilan on the other hand indicated to practice none except saham wakaf.

Apart from the differences, some of the modes are unanimously agreed or presumed to be agreed by the given states.

- i.) In terms of popularity of some Islamic financial modes, it is clear that musharakah ranks the first as all three states recognises it.
- ii.) Saham wakaf (cash proceeds of) which was listed in the recognised and practiced modes of financing received unanimous recognition and also practiced, for all of the states apply it as a mode of finance for the development of their properties.
- iii.) While benevolent borrowing (qard hasan) and istibdal were not given under the list of recognised modes of financing, all three states have indicated to apply both of them.

Over all, saham wakaf, benevolent loan, and istibdal are the primaries financial methods for the development of waqf properties. This is followed by musharakah and others respectively.

To put the above data in a different perspective i.e. in terms of classification of the different modes of financial instruments, it is surprisingly clear that some of the modes proposed by modern and even classical jurists are neither recognised nor practiced yet (see table 4.6).

It is clear that istibdal has received unanimous recognition and practice, but ijaratain and hukr are yet to be recognised. Credit-based modes of financing such as murabahah and qard-al-hasan are recognised but not istisna' and ijarah, including both hizr and ijaratain or other forms such as mirsad and khulw. Despite the option given to the respondents to add other forms of financing, none have indicated the above. Nevertheless, qard-al-hasan is practised only in Johor and Negeri Sembilan. As for joint-ventures, musyarakah seems to be the choice but it is not practiced yet. Mudharabah is practised but it is restricted to dealings with baitulmal and yet to be universally adopted.

Table 4.6: Classified Financial Instruments as Practised

			MAIM	MAINS	MAIJ
Credit based financing	Build & Transfer	Murabahah Cash Sale	√		
		Bai' Bitahaman al-Ajil			
	Leasing	Contemporary			
		Build-Lease-Transfer			
		Build-Operate- Transfer			
		Hukr			
Joint-Ventures	Classic	Ijaratain			
		Mudharabah	√		
		Musyarakah			√
Financing through Public	Securitisation	Shares			
		Bonds		√	
	Donation	Saham wakaf	√	√	√
Self-financing		Saham wakaf	√	√	√
		Cash donations (sadaqah)		√	
		Istibdal	√	√	√

Source: The authors

Financing through public's money is practiced. There is only one mode of repayable mode of finance i.e. bonds. Other forms which are not repayable include saham wakaf, and charitable donations (sadaqah). In other words, both saham and donations after transfer becomes the property of waqf and therefore one could call it non-refundable funding because unlike murabah, istisna' etc the collected amount is not paid back to the contributor or investor and lender. This therefore can be considered a form of self-finance.

Among the instruments that can be classified as self-financing modes, both saham and istibdal are unanimously recognised and practised by the three states. Sadaqah is, however, recognised only in Malacca.

Table 4.7: Sources of Financing

States	Local Islamic Bank	Local Traditional Bank	International Bank	Government				Public	Self-Finance
				State	Federal	Statutory Bodies	Inter-organisational		
Sources									
MAIM				√		√	√	√	√
MAINS				√		√	√	√	√
MAIJ							√	√	√

Source: The authors

There are various sources of financing available to the institutions of waqf. In addition to the government financing, a development project can be financed through private investors, financial institutions, public funding and self-financing (see Table 4.7). While the government financing includes statal, federal, statutory bodies and inter-organisational, financial institutions comprise local conventioanal and Islamic banks, as well as foreign Islamic and traditional banks. Public funding refers to saham wakaf and others some of which are also termed as self-financing.

None of States seek finance from banks irrespective of being local or foreign and Islamic or traditional. While Melaka and Negeri Sembilan have indicated to have received financing from their respective state governments, Johor has not done so. Similar attitude is shown towards the statuary bodies. Nevertheless, all of them have obtained financing from baitulmal. Similarly, all of the states have one or another form of public financing as well as self-financing.

4.6 Conclusion

This chapter has discussed the administration, development, and the financing of waqf properties in three states. It shows that financial methods applied by these states include istisna', musyarkah, mudharabah and ijarah. None of the states has used banks for financing their development activities and, therefore, all development is financed either through, the state government, baitulmal, or corporate bodies -

public and private alike. All the three states have saham waqf and use istibdal either as a tool of development of waqf property or as an investment method.

Among instruments that are credit based, murabahah was the only product that is practiced. In the category of modes classified as joint-ventures, musyarakah was recognised and practiced. Both instruments however did not receive unanimous practice. All states prefer saham waqf and istibdal. This means, from the practical point of view, saham wakaf and istibdal should be the ideal mode of financing in the development of waqf properties.

Saham wakaf, qard-al-hasan, and istibdal as modes of self-financing have been the most commonly practised instruments. They may be justified on the basis of no-risk and non-repayment characteristics.

A point to be pondered upon, however, is that these modes may not be the answer to all problems. While saham wakaf seems to be the most attractive among all self-financing modes, our study discovered that saham is slow to accumulate and after conversion to immovable property the waqf institutions will still face financial constraints. It is for this reason that waqf institutions need to adopt and recognise cash waqf for there would be no need to convert it to fixed assets and, therefore, the liquidity for funds would be available to the Majlis.

To put it briefly, cash waqf would be the only ideal instrument of financing for the development of waqf properties.

An interesting finding in relation to the concept of waqf appears to be that the state of Malacca has raised donations through golf tournament and other activities. Such donations were termed sadaqah which has raised more than RM 500000 for the project of orphanage home in Malacca. This amount was either in terms of cash, service or physical endurance. The point to note is that raising cash funds through cash donation and services has tremendous potential for growth. Should the concept of waqf be liberalized as proposed in chapter two, the collected funds would be considered waqf. This will certainly boast raising finance for the development of waqf properties as it is an additional encouragement or spiritual incentive to the public to participate in many similar activities. This is possible and definitely it is in the interest of Muslims.

Supposing the idea of cash waqf holds among the practitioners, its tremendous potential is illustrated in the following formula, even though this could not be the only way to attract such funds:

$$\text{RM}10 \times 12 \times 5 = 600 \times 200,000 = 120,000,000$$

Or

$$\text{RM}10 \times 12 \times 5 = 600 \times 2,000,000 = 1,200,000,000$$

Whereas the amount RM10 if contributed by an individual annually for a period of five years, such a minimal contribution would not burden the donor, but if such is multiplied by two hundred thousands contributors, the accumulated donations after five years would amount to RM one hundred and twenty million or one billion and two hundred million at maximum depending on the efforts put by the waqf institutions.

The above amount would increase if the donated funds are invested prudently; say at average of 8% annual dividends. Currently CIMB is offering at 10-15 %. Since the funds are presumed not to have dues for a period of 5-10 years, the fast growth of the funds is realistic. It has, however, to be noted that such investments should follow the model discussed in chapter two, in order to safeguard the perpetuity of the cash waqf.

How to find potential contributors is easy. The institutions of waqf can utilise the government and private sector organisational networking to attract donors. While the finance section of the public and private sector can help in this, banks and the Imams of mosques on national level would attract clients and members of public through direct recruiting.

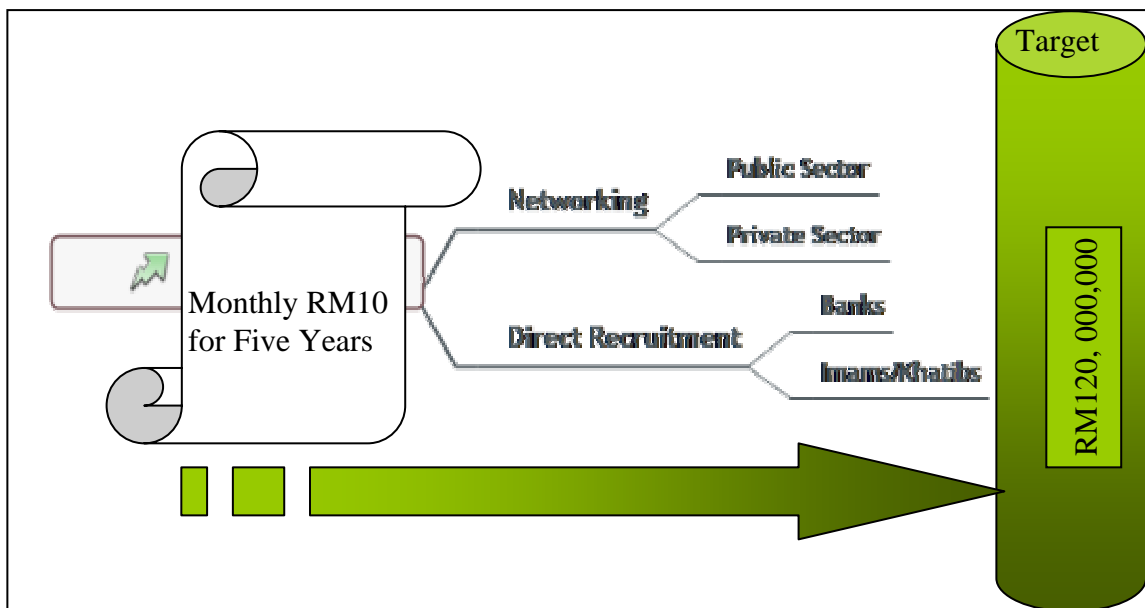


Figure 12: Target and promotional Strategy for Cash Waqf Scheme

The amount contributed to the cash waqf funds would be progressively invested, and if needed urgently, in the development of waqf lands and properties. A sound manner of investment, otherwise, is to let the funds generate profits annually. This may not be possible if the funds are out rightly used in waqf development projects. An ideal manner for the investment would be not touching the amounts for a period of ten years.

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CHAPTER FIVE

FINDINGS AND RECOMMENDATIONS

5.1 INTRODUCTION

This study has explored and elaborated the concept of waqf, its characteristics, and the impact of these characteristics on the financial mechanism in the development of waqf properties. The powers of nazir over waqf properties, the suitable financial modes for the nature of waqf, and the recognition and application of various financial instruments in the states of Johor, Malacca, and Negeri Sembilan were discussed earlier. All these issues formed the contents of chapter two, three and four.

This chapter deals primarily with the findings and conclusion of this study. An overview of the findings relating to the objective of this study is made together with the discussion on the study limitation, recommendations and suggestions for further studies.

5.2 FINDING OF STUDY

The findings of this study are divided into the general aspects relating to the object of the study, the conceptual framework, as well as the issues related to waqf development financing.

5.2.1 General Findings Relating to the Objectives of the Study

As mentioned in chapter one, two main objectives of this study were addressed in this report. They are:

- ◆ To identify the best Shariah Compliant financial framework for the development of waqf properties, and;
- ◆ To propose a new ideal financial mechanism for the development of waqf properties in Malaysia.

Chapter Two and three are interrelated as financial mechanism can not be understood fully without the understanding of the concept and characteristics of waqf first. Objective one was achieved through Chapter Three and partially through Chapter Two. Objective two was achieved through Chapters Two, Three and Four together. While Chapter Three has discussed all available modes of financing, the identification of an ideal mode is difficult without the understanding of its concept in Chapter Two. As the entire modes discussed in Chapter Three do not qualify for an ideal mode of financing, Chapter Two has helped to identify additional modes discussed in that chapter i.e. the acceptance of cash waqf and the manner in which it could be managed and invested. Similarly, Chapter Four has discussed the various modes of financing mentioned in the early chapters in light of their recognition and practice. The best and more unanimously approved and practiced financial mode was highlighted to be saham wakaf, qard-al-hasan and istibdal. Accordingly, any of these financial modes could be considered as an ideal mode for financing the development of waqf properties. However due to the limitation of these three modes, one could not claim that they are ideal for the financing of waqf property development. Hence, it is thought, as was discussed in chapter two, three and four, that the recognition of cash as valid form of waqf is necessary for it is perhaps the only defect free financial mode for the waqf institutions to develop their properties. This recommendation is explained in the next section.

5.2.2 Conceptual Framework and Issues Relating Thereto

As stated in Chapter Two, the traditional concept of waqf as understood by Shafi'e and Hanafi schools is restrictive and, therefore, affects negatively on the adoption of financial mechanism under the prevailing conditions of financial markets and becomes a hindrance to the desired development of waqf properties. The important point highlighted in this context is the concept of inalienability and perpetuity. Both have to be discarded under certain circumstances. The conception of perpetuity and inalienability of the subject matter of the waqf have to be substituted by the perpetuity of the dedication which is realised through amortisation of the value of the subject matter of waqf. This results in recognition of tangible and intangible properties as the subject matter of waqf which will include immoveable property as well as cash, services, rights, interest, both real and intellectual.

5.2.3 Financial Instruments Suitable to the Nature of Waqf Properties

The literature in Chapter Three revealed that there are a host of financial methods that have been devised especially for the development of waqf properties. These include both classical and contemporary modes. The classical modes are hibr, ijaratain, mirsad, and others. The contemporary methods are the extension of the old to new situations. The old mode of murabahah, both spot sale, and deferred (bai-bithaman ajil), istisna', ijarah, musyarakah, and mudharabah are tailored towards the nature of waqf properties. New modes such as securitisation, saham wakaf, and cash waqf are recognised by early jurists in different names. For instance, many jurist permitted cash waqf in the olden day, but to use it as an instrument of development will be justified if the old theory of adding new waqf or the conceptions of ibdal and istibdal are applied. Securitisation, also, which includes both equity and bonds, is structured on the basis of mudharabah, musyarakah, ijarah and hibr. This study has refined the above modes further.

It was the intention of this study to look for an ideal mode of financing waqf property development. Chapter Four which has highlighted the practice of the three states in the application of financial schemes, however, surprisingly disclosed that these states do not apply all of the old and contemporary modified methods. Only saham wakaf, qard-al-hasan (benevolent loan), and istibdal have achieved universal application while musyarakah and mudharabah are marginally practised in one or more of these states. This means that the waqf authorities in these states have a lot to catch up with countries such as Singapore, Kuwait, and other Arab states.

Even though saham wakaf seemed to be the best option for the development of waqf properties, its effect is limited as its usefulness for development purposes is on *ad hoc* basis. The accumulated funds are used once, because after they are used to purchase a land with or use it for construction cost, the said funds are converted to illiquid property that can be inalienable, and thus one would go back to the old story and the less interested audience. Further, the procedure for this scheme is laborious, and therefore it is still considered not to be an ideal mode of financing.

5.3 RECOMMENDATIONS FOR A NEW IDEAL FINANCIAL MECHANISM

In the light of the abovementioned findings, this study proposes the following:

5.3.1 Recognition of Value-based Concept of Waqf

It is proposed that monetary value be assigned to all *waqf* objects or subject matters and, then, to consider the assigned value to be the principal capital of *waqf*. This means, a switch from non-liquid capital to liquid one, hereafter called “value-capital”, is made.

This switch is necessary and in the interest of Muslims. Under this theory the duty of the nazir or trustee would be only to maintain the value of the object or the subject matter but not its physical form_ similar to the value of currency notes. Therefore, as long as the value of the subject matter of waqf is serviced and maintained, its physical form can be disposed. For instance if the value of land, building, or goods is determined to be, say, one million, such value must be registered and the amount being invested. The land or goods can be sold and charged.

Switching from the perpetuity of subject matter to the perpetuity of dedication which could be actualised by amortisation of the value of the subject matter, the following things would be the subject matter of *waqf*:

1. land, trees, and buildings (title together with usufruct);
2. the revenue of land and buildings for a specified time;
3. goods and chattels capable of revenue such as cars, tools, equipments etc;
4. equities and bonds in companies;
5. rights and warrants in companies;
6. saham waqf;
7. cash waqf;
8. intellectual property rights;
9. goods to be used for a particular purpose such as textbooks, health equipment;
and
10. services provided by individuals.

Looking at the above list, *waqf* objects or subject matters are of two categories: those which are capable of revenue and those which are not. Accordingly, each category must be treated differently.

5.3.2 Creation of Reserves Account

Irrespective of the object of waqf being revenue generating or otherwise, it is, always, open to losses, depreciation and normal wear and tear. To conform to the perpetuity of dedication and safeguard the principal capital account a reserve account should be created to service the principal capital account. This will be discussed further.

4.3.2.1 Revenue-generating Waqf

All income-generating *waqf* objects irrespective of perpetuities or otherwise, should be valued in cash and this cash value should be considered as the principal capital of *waqf*, referred to as value-capital. The value, and not the object, should be considered perpetual and, therefore, be maintained all the time. This can be done by having a reserve account which may function along a larger fund to be called hedge fund. The hedge fund would be in form of a cooperative comprising all reserve accounts of various waqfs. A portion of the income of the object can be diverted to the reserves account for the purpose of compensating losses. At a time, the object may need replacement, or repair. At this moment the accumulated funds in the reserve account may be equal to or greater than the value of the waqf object, depending on the life-span of the object and the amount it generates. At another time, the reserve fund may not be able to reach the actual value of the object, a case which needs the attention of mutawalli and fund managers. The issue of the deficit can be resolved by diverting funds from those accounts, in the hedge fund, which has surpassed the value of the object, or in case there is no surplus in such account, a portion, from those accounts which have the capability of reaching the value of the particular waqf object, be taken and entered the account in deficit, whereby the object can be repaired or replaced.

The reserve account should go in tandem with the life of the waqf object. This is proposed for the sake of the waqif as well as the mawquf and the larger interest of the

community. The funds in this account can be used to save the mawquf that was donated by the waqif, and other time it can assist other waqf properties. In case there is no such eventuality, the funds can be placed in the principal capital thus multiplying the value of the waqf (dedication). In other words, where the object of waqf does not need service, repair, replacement, and so on, and the reserve account exceeds the value of the principal value of the waqf property, the excess can be transferred to the principal capital account (i.e. valu-capital) thereby raising the principal capital of *waqf*, and hence added to the name of the *waqif*, the revenue of which can be subjected to the same measures as the original capital value.

4.3.2.2 Non-revenue Generating Waqf

While it is easy to think of value-capital and reserve account in case of land and other revenue-generating goods, it is however, difficult in the case of goods donated for recurrent use or direct consumption and services. Nevertheless, this does not mean that a value should not be assigned thereto. In the value-based concept of waqf, each item donated and each service provided by a volunteer should also be measured by their value.

As time has changed, and the original one-man-management has been replaced by institutional-management, nothing should go without record and value requisition. Each time an equipment is donated, a principal capital account be assigned to it, and its value should be recorded. In order to realise the value, a minimal fee should, based on a sound calculation, be charged on its use by the public or who needs to use it. These fees should be credited to the principal value-capital account, invested by the institution, and the revenue of which should be divided into expenses and reserves. The reserved amount be invested and then treated as mentioned above.

Similar formula can be applied to the time and experience of the volunteers. Their

services should not be taken for granted. The services they provide have market value, and that can be either paid by the public at a minimum fee, or bought by corporations and the rich.

5.3.3 Recognition of Financial Modes

It is recommended that all proposed financial modes as practised in other countries should be recognised and adopted. Nevertheless, it is suggested that an order of priority for these mechanism be recognised too, as some of these methods are not as beneficial to waqf as some others.

5.3.4 Recognition of Cash Waqf

Beside saham wakaf, it is incumbent to recognise cash waqf too as public interest requires this. To make this proposal a reality, the following recommendations are made:

- ◆ To recognise cash waqf, there is need for state muftis to issue new and clear fatwa to that effect. Even though the recognition of cash waqf is not a reliable opinion in the Shafi'e school, it is however so in other schools.
- ◆ Following the fatwa, the states need to draft clear legal regime for registration of cash waqfs, the management and investment of its funds.
- ◆ As time passes, there would be a tremendous amount in the fund, and for this, a **waqf real estate trust** fund is proposed.
- ◆ To attract more funds, and make the waqf institution stronger, the establishment of **waqf bank** is highly recommended.

- ◆ To have the confidence of the donors, and encourage more donors, education of public through the media, mosques, banks, and other agencies, transparency and the adoption of other measures should be given priority.

5.3.5 Recognition of Transferable Lease of Waqf Land

This study proposes that the waqf land can be leased under hokr or hukr according to Hanafi and some other jurists. The Shafies have recognised a long lease for a term of 100 years. This opinion therefore enables to waqf institutions to incorporate a development arm under the Companies Act 1965 and thereafter lease waqf land to it for the term not exceeding 99 years. This will be similar to state leasehold alienation. Within this term the corporation can sublease the subject land or charge it to banks and financial institutions. In the eventuality of foreclosure the purchaser of the land will be subject to the conditions of the master lease.

5.4 LIMITATION OF THE STUDY

This study was focused on the fiqhi perspective of financial methods. It is not a legal study, neither it is a true financial practice whereby the practicality of each method can be empirically assessed. The empirical study was limited to the three states and, therefore, the findings relating thereto may or may not be representative of other states.

Since the study limited to the recognised modes of financing waqf property in terms of Shariah compliance, the practicality of these methods can only be assess by the wiliness of the financial institutions. Further, the empirical study was concerned with the generic

issues. The specifics of the various modes at this time were not seen to be necessary.

5.5 SUGGESTIONS

Based on this study, it is suggested that future studies should focus on the following issues:

- ◆ the feasibility of waqf bank and waqf real estate fund;
- ◆ the framework for the investment of waqf funds;
- ◆ the proposal for a conducive legal regime for the development of waqf properties;
- ◆ the powers and duties of waqf trustees at par with those of trustees under the common law
- ◆ testing the proposed modes from perspective of financial institutions.

5.6 CONCLUSION

The classic definitions of waqf show that *waqf* is irrevocable gift of a corporeal property (ayn) for the benefit of donor's family or someone else or something in perpetuity as a charity promised and executed normally during the life time of the donor which is not capable of transfer, gift, and transmission thereafter. It is a thought of the past and present scholars that the implication of these definitions is that waqf property is irrevocable, perpetual and inalienable.

Perpetuity of waqf was thought to be unanimously agreed upon by all Muslim jurists and its inalienability was expressed in the Hadith of the Prophet. Irrevocability is neither a

matter of legal texts to show so, nor it is unanimously held by all Muslim jurists. Ironically, the latter is less harmful to the preservation of *waqf* than the perpetuity and inalienability of the subject matter of waqf.

To stay loyal to the idea of perpetuity and inalienability, a way has been discovered to transfer the object of waqf, if needed. This is achieved through shifting from the physical being of the subject matter to the ‘dedication’ per se, as actualised by the value of the subject matter; meaning that the value of the dedication would remain perpetual and, thus, non-transferable.

It is hoped that by opening the door to value-based capital of *waqf* would eliminate the problem of non-liquidity of the waqf assets. This will encourage the public to contribute to the enrichment of *waqf* institutions easy and less costing.

While cash may be considered as an ideal financial solution to the problems of waqf institutions, the recognition of other modes such as credit-based financial methods of *istisna*, *ijarah*, and *murabahah*, securitisation and joint-venture is still needed. The more the financial methods there are the better the chances of developing of waqf properties will be.

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Universiti Teknologi Malaysia
Faculty of Geoinformation and Sciences
Department of Land Administration and Development

Questionnaire on

**AN IDEAL FINANCIAL MECHANISM FOR THE DEVELOPMENT OF WAQF
PROPERTIES IN MALAYSIA: PRACTICE**

Researchers: Dr. Mohammad Tahir Sabit
PM Dr. Ismail Omar
PM Dr. Abdul Hamid Hj Mariman

Respondant:

Name of the Officer:
Contact No.
Position:
Department:
Organization:
Type of the Organization: Public/Statutory/ Private
State:

Notes:

1. The contents of this questionnaire will be used purely for academic purposes
2. The accuracy of the information is highly needed
3. The names and positions of the respondents are required only to confirm and seek clarifications
4. Specific information will be kept confidential if demanded so.

Since the development of waqf properties requires finance in accordance to Islamic law, the researchers are looking at the prevailing practices of the nazirs and mutawalies in Malaysia. To achieve the above goal it is requested if you could kindly answer the following questions according to your practise, otherwise you may write *inapplicable* or *add* a new form of finance practiced by your office.

Section One: general

1. In the state of (.....) we **recognize** the following methods of finance for waqf property development

- | | |
|--|---|
| <input type="checkbox"/> Istisna' | <input type="checkbox"/> murabahah |
| <input type="checkbox"/> Musharaka | <input type="checkbox"/> Cash proceeds from waqf certificates |
| <input type="checkbox"/> Mudarabah | <input type="checkbox"/> Bonds / Sukuk |
| <input type="checkbox"/> Ijarah | <input type="checkbox"/> Others |
| <input type="checkbox"/> Bai-bithaman Ajil | <input type="checkbox"/> None, why |

Please specify if any _____

2. In the state of Johor we **practice** the following methods

- | | |
|--|---|
| <input type="checkbox"/> Istisna' | <input type="checkbox"/> Murabahah |
| <input type="checkbox"/> Musharaka | <input type="checkbox"/> Cash proceeds from waqf certificates |
| <input type="checkbox"/> Mudarabah | <input type="checkbox"/> Bonds / Sukuk |
| <input type="checkbox"/> Ijarah | <input type="checkbox"/> Others |
| <input type="checkbox"/> Bai-bithaman Ajil | <input type="checkbox"/> None, why |

Please give a reason _____

3. We do not necessarily follow a specific method of finance, we tend to joint two or more of the above methods:

☐ Yes (specify which one)

☐ No

Pleas specify _____

Section Two: Institutional Finance

4. Our source of finance for development, renovation and similar activities is

- ☐ a. Local Islamic Bank (specify)
- ☐ b. Local traditional Banks (specify)
- ☐ c. International Banks or Institutions

d. Government:

☐ State ☐ Federal ☐ Statutory bodies (e.g. UDA / Baytulmal)

☐ e. Non

Please specify the terms _____

5. The projects that are financed by either of the sources number at

- ☐ 1. Local Islamic Bank (projects)
- ☐ 2. Local traditional Banks (projects)
- ☐ 3. International Banks or Institutions: (projects)
- ☐ 4. Government:

☐ State ☐ Federal ☐ Statutory bodies (e.g. UDA)

6. The title to the land/ property is held by

- ☐ The bank/financer
- ☐ Waqf

7. The land belongs to waqf and the building belongs to the bank/state with the option to repurchase the property from the builder/ financier

8. The land is leased to the bank/..... and the building belongs to the bank/ But the waqf will purchase the building after a specified period of time.

9. We have our own formula which is

.....

.....
.....

Section Three: Joint Ventures:

10. We normally develop our properties on the basis of joint venture with private companies in the form of

- ☐ Build and Transfer
- ☐ Build – Lease – Transfer
- ☐ Build – Operate – Transfer
- ☐ Others

Please explain _____

11. The period of encumbrance ranges fromyears to
.....years.

12. Joint ventures are taken on the basis of

- ☐ Hukr,
- ☐ Ijaratain
- ☐ Murabahah cash sale

- ☐ Bay' bithaman al-ajil
- ☐ Mudarabah
- ☐ Musharaka
- ☐ Others (please specify
.....)

Section Four: Inter-organisational Finance: local

15. We finance our development activities through

- ☐ Baytulmal
- ☐ Saham Wakaf
- ☐ Waqf bonds (sukuk)
- ☐ Other waqf funds

16. We finance our

- ☐ Operational needs
- ☐ Building or rebuilding the waqf properties

17. Baytulmal acts as

- ☐ investor
- ☐ benevolent creditor
- ☐ donor

18. Baytulmal as investor

- ☐ owns the property
- ☐ does not own the property

19. In the case of baytulmal being an investor the accounts of baytul mal and waqf for returns and profits of the investment are kept

- ☐ Separately
- ☐ Jointly

20. The investment of baytul mal are based on

- ☐ Istisna'
- ☐ Murabahah
- ☐ Musharaka
- ☐ Mudarabah
- ☐ Bay'-bithaman Ajil
- ☐ Others please specify.....
.....

21. The proceeds and returns of Saham waqf are

- ☐ a. **Invested** (saham exist in terms of the specified cash, but the cash is invested on business i.e. construction, according to one of the established modes of the Islamic finance such as Istisna' and others)
- ☐ b. **Converted** (the cash proceeds of the saham are converted to land and building and therefore each of the saham is identified in terms of a piece of land)
- ☐ c. **Donated** (considering the waqf of saham as temporary waqf)

22. The department has issue to sukuk bonds to the public and or financial institutions for purposes of raising capital to finance waqf land development. These bond are

- ☐ a. secured (guaranteed by government or financial institution (please name the institution
- ☐ b. Unsecured

23. The issued bonds are

- ☐ a. Ijarah bonds
- ☐ b. Mudarabah bonds
- ☐ c. Others (please specify)

24. Other waqf funds belong to

- ☐ a. Waqf am
- ☐ b. Waqf khas

25. The investment-methods applied are

- ☐ a. **Istibdal and finance** in case the existing waqf land is sold and the proceeds are used to purchase new land of similar size and invest the balance on the development of the amalgamated waqf lands according to one of the Shariah recognised modes of finance.

Please specify the mode of investment according to Shariah

.....

- ☐ b. **land of similar waqf is sold** and the proceeds are invested on the development of other waqf land

- ☐ c. Others, Please specify

.....

.....

.....

Section Five: Inter-Organisational Finance: Inter-State

23. We finance our development through cooperation with other States by

- ☐ i. investment
- ☐ ii. borrowing
- ☐ iii. joint-ventures

24. Our partners/ investors and lenders are

- ☐ i. Waqf Funds
- ☐ ii. Baytul-mal
- ☐ iii. Others, Please name them

Section Six: Miscellaneous

25. Do banks finance waqf properties

☐ Yes

☐ No

If no, why? Please mark below

☐ Legal Problem concerning transfer of title

☐ Too expensive, we are not interested

☐ No contact is made

26. Does waqf in your state have vacant land to develop:

☐ Yes

☐ No

27. Have you considered re-development of the waqf properties?

☐ Yes

☐ No

28. Have you considered the re-development of lands belong to

☐ Masjid

☐ School and Madrasah

☐ Others,

5. We have no vacant land attached to:

☐ Masjid

☐ Grave Yard

☐ School

☐ Others, _____

6. Our vacant land is :

☐ Idle

☐ Rented

☐ Cultivated

☐ Under development