Development of Waqf Land: Issues, Prospect and Strategies

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Abstract

The issues of abandoned and underdeveloped waqf land are not new and the problem is faced particularly by the trustee. The factors that inhibit the development of waqf land are also publicly known. Although some waqf land has been developed in Malaysia, it is limited to the provision of mosque, religious school, and cemetery. This has hindered waqf properties from generating income that can benefit the Muslim society in this country. Therefore, there needs to be a new approach and strategy in creating an administrative system that is well-managed, efficient and responsive, especially in the use of latest information technology, and a new dimension of development that can make waqf land the country's main economic strength, which will change the perception of the society about the traditional waqf practices. This paper gives a number of recommendations to the authorities for developing waqf land in the hope that they provide a path towards the full exploitation of waqf land for the economic development of the ummah and the society at large.

Key words: problems of waqf land, strategies in developing waqf land, National Foundation of Waqf Properties.

1. Introduction

Fundamentally, there are several problems accountable to the slow development of waqf land in Malaysia. The problems have produced negative impacts on the social and economic well-being of the society and, therefore, need to be given serious attention for more effective and comprehensive solutions.

In providing the solutions, there need to be an overview of the main problems that often inhibit the smooth efforts in developing waqf land to the optimum level. In this paper we would like to confine the discussion to the general waqf whereby it allows for a higher and better use.
2. Problems in developing Waqf Land

Generally, there are a number of problems related to waqf/land that inhibit its development. Studies by Nik Mohd Zain (1999) and Azizian (1999) indicate that factors related to legal, location, physical conditions, ownership, registration, illegal occupation, database, and financing are mainly responsible for the said problem. In this paper, however, we do not focus on the financial aspect.

2.1 Legal Aspects

There are a multitude of legal issues that tend to hold back the development implementation of waqf/land. Certainly, the development of waqf/land will not take place smoothly without the necessary refinements on the legal aspects concerning waqf matters. Among the main issues that have come to surface in this context are:

i. Non-uniformity of waqf issues among states has created differences in the understanding, interpretation, procedure in issuing decrees and hukum. This is due to the position of waqf/land, like any other religious assets, being under the state's jurisdiction (Federal Constitution, Ninth Schedule, List 2(1)). Differences in interpretation and conservative understanding pertaining to certain aspects of waqf will certainly inhibit the development activities of waqf land.

ii. Until today, there is no special enactment relating to waqf management and administration in many states, except for Selangor. Selangor Waqf Enactment 7(1999) provides comprehensive and systematic legal powers to Majlis Agama Islam Selangor to manage waqf/properties. Void of such an enactment, there will be no available document that contains procedural details pertaining to the management and administration of waqf.

2.2 Location

The bulk of waqf land in the urban areas are sited on less strategic location and lack development potential while more interior waqf land is not being optimally developed due to the absence of need for the use specified by the waqf. There are also parcels of waqf/land in active development areas that could not be developed due to constraints in the ziyahah. For example, waqf/land located in a Local Authority area have to comply with the Local Plan (if any) to ensure that their development is in accordance with the planning requirements. Should the site fulfills the wish of the waqf/land and also satisfies the local Plan then it is only proper to develop it. Therefore, the location factor should be given a very serious consideration to ensure that waqf/land can be practically developed.

2.3 Physical characteristics

Besides the location factor, physical factors often become an obstacle to the development of waqf/land. However, this facet is easier to overcome if there are sufficient financial resources available. This is so because the physical problems resulting from the characteristics of the land such as undulating or rough terrain, etc. can be overcome by the use of technology. In other words, the scale of physical problems is very much influenced by the technological capability of the parties involved. Besides the physical problems, there are also problems of small-sized and scattered located parcels.

2.4 Illegal occupation

There are cases of trespassing or illegal occupation of waqf/land in Selangor, Johor, Melaka, Terengganu and Perak whereby the parcels are used as squatters' settlements and business premises. In some states, this becomes a grave problem primarily due to lack of monitoring and enforcement.

2.5 Title registration

This is also an important factor that contributes to the failure of the development of waqf/land. Without title registration, the trustee does not have the legitimate right to develop the land for any purpose. One reason is that, each development undertaking requires permission from the land 'owner' without which the development application will not be approved by the authorities.

Therefore, the trustee such as Majlis Agama Islam should register all properties that have been donated either as a special waqf or a general waqf. Some of
the unregistered waqf lands are not even included in the list at the Majlis. This is an issue that definitely needs collective action for solution as the part of those concerned.

2.6 Database

Most Islamic religious councils do not have a complete database of waqf land and it creates a serious problem in the development process of the land involved. Naturally, basic information about the property such as location, actual site, land area, physical conditions, and the surrounding development is required before any development proposal is submitted to the authorities. The absence of such information will pose difficulties to the council in the development process.

3. DEVELOPMENT OF WAQF LAND

The State of Johor Darul Ta’zim is one of the fastest growing states with a 9.6% economic growth rate in 2005. Johor Bahru which is the state capital and centre for state administration has also enjoyed such a rapid growth and has become a potential region for project and infrastructural development. This has attracted many local and foreign investors in land development. This situation has largely encouraged an increase in the land value in the state, in general, and in Johor Bahru, in particular. The increasing demand for urban land could cause the land value in this region to rise. The limited supply of land suitable for development has encouraged optimum utilization of land to ensure profitable returns. Therefore, it is rather an awkward situation to let land stock in the urban area to remain idle.

For this reason, it is only appropriate for Majlis Agama Islam Johor to put effort in developing potential waqf land. Productive waqf development needs a strategic investment to ensure continuous returns. Temporary type of development such as renting out of vacant land for certain use is not a profitable venture. On the other hand, waqf land, particularly general waqf, should be developed into its highest-and-best use. Among the development activities that have taken place on waqf land in Johor are construction of petrol station, shop-house, office, and plantation.

In general, there are 2,477 parcels of waqf land in Johor until May 2004. The district of Johor Bahru records the highest number of waqf properties (556), followed by the districts of Muar (509) and Batu Pahat (400) while Mersing has the least number of registered waqf properties. Table 1 clearly shows that waqf land surau outnumber other types of waqf dedication.

<table>
<thead>
<tr>
<th>DISTRICT</th>
<th>MOSQUE</th>
<th>SURAU</th>
<th>RELIGIOUS SCHOOL</th>
<th>CEMETARY</th>
<th>GENERAL</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>JOHOR BAHRU</td>
<td>109</td>
<td>240</td>
<td>170</td>
<td>40</td>
<td>38</td>
<td>556</td>
</tr>
<tr>
<td>MUAR</td>
<td>75</td>
<td>244</td>
<td>76</td>
<td>77</td>
<td>37</td>
<td>509</td>
</tr>
<tr>
<td>BATU PAHAT</td>
<td>82</td>
<td>183</td>
<td>91</td>
<td>88</td>
<td>90</td>
<td>499</td>
</tr>
<tr>
<td>KLUANG</td>
<td>34</td>
<td>61</td>
<td>43</td>
<td>31</td>
<td>14</td>
<td>183</td>
</tr>
<tr>
<td>SEGAMAT</td>
<td>56</td>
<td>51</td>
<td>38</td>
<td>63</td>
<td>14</td>
<td>222</td>
</tr>
<tr>
<td>KOTA TINGGI</td>
<td>36</td>
<td>33</td>
<td>40</td>
<td>39</td>
<td>12</td>
<td>160</td>
</tr>
<tr>
<td>PONTIANG</td>
<td>52</td>
<td>95</td>
<td>58</td>
<td>51</td>
<td>12</td>
<td>268</td>
</tr>
<tr>
<td>MERSING</td>
<td>15</td>
<td>10</td>
<td>21</td>
<td>16</td>
<td>-</td>
<td>80</td>
</tr>
<tr>
<td>JUMLAH</td>
<td>462</td>
<td>919</td>
<td>498</td>
<td>405</td>
<td>193</td>
<td>2,477</td>
</tr>
</tbody>
</table>

Source: Enny Sulisllis Sulisman (2006)
Table 1 also shows that the number of parcels of special waqf (mosque, surau, religious school and cemetery) is much higher than that of general waqf. This historically signifies the people’s understanding, perception, and attitude that these four types of waqf give most rewarding in the hereafter. This is, in fact, a faint understanding of the waqf concept and the society has to be cleared of such a misunderstanding. Rewards comes from Allah s.w.t. and so long as the property is utilized and devoted according to the Shari’ah for the welfare of the people, it does not matter whether the waqf land is for a special or a general purpose.

As far as Malaysia is concerned, the site for religious use is allocated for by the developer as a condition in the planning standards required by the Local Planning Authority before obtaining a planning permission for residential development. The site allocated if comply the requirements and needs of the people the mosque has to be constructed. These factors help expedite the development of mosque in a newly developed area. Once the construction completed, the administration of the mosque is then under the supervision of Majlis Agama Islam.

Waqf land located in the urban area has a similar potential with other types of land parcels. However, it depends on the wisdom and capability of Majlis Agama Islam to develop the land to the optimum level. Thus, a number of aspects need to be given attention and they form part of the implementation strategies that should be devised by the authorities.

4. WAQF LAND DEVELOPMENT STRATEGIES

Taking into account the various problems faced by the waqf institutions, we propose a number of strategies to enable consolidation of strategies in the administration, development, and management of waqf properties. Among the strategies are the establishment of National Foundation of Waqf Properties (YHWW), co-ordination in the legal aspects pertaining to waqf, corporatization of the nazar’s institution, improvement in the methods and process of waqf, development of waqf information system, direct involvement in waqf planning and development, and innovative method of waqf development (including islah al-wad), and public awareness.

4.1 National Foundation of Waqf Properties

Realising the constraints that have been briefly mentioned above, it is timely to establish a parent organization that is responsible for the administration, management, and development of waqf properties in Malaysia, let alone the Jabatan Wakaf Zakat dan Haji (JAWZaH) that has been formed five or six years ago, under the purview of the Prime Minister Department. Based on the experiences of other countries such as Singapore, Africa, and others, the establishment of National Foundation of Waqf Properties (YHWW) is considered necessary. This is an independent foundation with the executive powers to mobilise resources for the development of waqf properties all over the country. In this context, participation from corporate people, well-to-do individuals, and others in the socio-economic development of waqf properties will help the government materialise its vision to make waqf a vehicle for the society’s socio-economic well-being. However, the foundation needs to carry out its responsibility as a trustee with the knowledge and skills in all matters of waqf. This is important to ensure that waqf properties are able to generate income that finally can benefit the ummah.

4.2 Coordination of laws in matters relating to waqf

As a matter of fact, the efforts to coordinate the Islamic law (not only related to waqf) have long been initiated but till now they have met with a deadlock. The idea to enact a uniform law on matters pertaining to the development of waqf land that is applicable to all states in Malaysia should not simply be abandoned as in the case of the draft for Zakat Act that has been put into a framework in 1980s. Open-mindedness of all parties related to religious affairs is needed to realise this effort.

The law relating to waqf is provided in the state’s enactment of Islamic religious administration. So far, Selangor is the only state that has a law specially for waqf. The Enakmen Waqf (Negeri Selangor) 7/1999 provides a more systematic and comprehensive legal power to Majlis Agama Islam Selangor in the management of waqf properties. This enactment has 50 sections and 9 sub-sections. Among important provisions in the Selangor Waqf Enactment are:

i. Provisions pertaining to the creation of waqf - Section 3 – 10
ii. Provisions pertaining to creating Saham Waqf - Section 17(1) and (2).

iii. Powers of Majlis Agama Islam Selangor to execute tituladal and development of manpower - Section 19.

iv. Powers of establishing Waqf Management Committee - Section 21.

v. Powers of Majlis Agama Islam Selangor to act as the sole trustee of all waqf properties - Section 32.

vi. Powers of Majlis Agama Islam Selangor to appoint Waqf Registrar - Section 34.


viii. Provisions for taking actions against illegal occupation of any waqf land - Section 45.

We suggest that all other states consider enacting and enforcing a similar law. Such efforts, apart from enabling the detailed implementation of the existing waqf law, will provide a more serious commitment of the states towards creating a legal framework that will improve the development process of waqf land.

Another problem inhibiting the development of waqf land is illegal occupation. Provisions relating to illegal occupation of waqf land need to be included either in the specific waqf act or State's Enactment of Crime Offences to expedite enforcement and prosecution procedures. Such provisions have already been included in states' laws, for instance, Selangor Waqf Enactment (1999), Islamic Religious Administration Enactment (Johor) 1978 (Section 50), Enactment Crime Offences (Melayu) 1991 (Section 78), Shari'ah Crime Offences Enactment (Selangor) 1995 (Section 93), etc. However, other states do not have such enactments, while others provide no specific reference to 'illegal occupation or trespassing of waqf land', but instead have provisions for 'illega occupation or trespassing of land that belongs to Majlis'.

4.3 Corporatisation of Nazir's Institution

A nazir or a matawalli is an individual, committee, group of people, agency, or the Majlis that are appointed and entrusted with safeguarding and managing waqf, in line with the aspiration, terms and conditions of the waqf. A waqf can appoint any individual as a nazir, either himself, family members, or other individuals. The judge or qadi can also appoint a nazir on behalf of the waqf. Among the conditions is that, a nazir should uphold fairness and has able physical capacity and mental strength.

The duties of a nazir are not confined to protecting waqf properties from damage, destruction, or illegal occupation but as an administrator, a nazir has to do his best in the interest of the beneficiaries and the land itself, other than tenancy or land development. In some circumstances pertaining to waqf, the majority of jurisprudents taking into consideration those in the Syaf'i and Hanafi schools, allow the nazir to apply for loan or take upon financial liability to ensure that the benefits from a particular waqf land can be channelled to the beneficiaries. Therefore, the appointed nazir must have the necessary skill, expertise, and knowledge to
develop waqf land. A nazir can also be considered as a scholar, just like the trustee of the orphans, who is responsible for protecting waqf land and enhancing its value.

Verbal and private appointment of nazir to manage waqf properties having development potential is considered inefficient. The implication is that, individually and privately managed waqf properties could not be utilized to the maximum. These properties should be managed collectively by a professional organization or committee in order to increase the management efficiency and, thus, maximize the benefits. Therefore, an organization that is entrusted as a professional nazir should be formed to manage all waqf properties.

The formation of this organization will not necessarily ignore the duties and roles of the nazir appointed by the waqf. This organization will act as a centre and consultant to monitor, coordinate, and plan the best strategies to develop waqf properties. Apart from that, individual nazirs have to be identified and registered through this organization to facilitate the management of waqf properties. This organization can use the legal mechanism to take over powers and duties of unqualified nazirs such as those who are old, having memory lapse, or committing breach of trust.

4.4 Strengthening the method and procedure in creating waqf

The sigkah method now practised need to be refined to overcome problems associated with ownership and development of waqf land. The present practice is that, each waqf is required only to furnish the trustee with a sigkah form but sometimes without complete evidence. For example, land title is not attached together with the form and the problem exacerbates if the waqf is not registered at the Land Office.

Such practice should be revised and rectified. The proper method and procedure should be made known to the public, especially with regard to creating general waqf. Proper understanding among the people about the correct method and procedure in creating waqf can attract more participation from the public.

Apart from being able to give a better understanding to the public, the procedure and guidelines have to stipulate that each time waqf is created, Majlis has to conduct title search at the Land Office to ascertain the particulars of the land such as the actual location, size, express conditions, limitations of interest, or encumbrances of the property. Consideration of each factor that inhibits development should be made. This means the land to be donated should not be entangled by problems with regard to title, ownership, location, or other physical conditions. This preliminary exercise will prevent the registration of lands with legal complications that will jeopardize their future development.

The waqf should also be advised to donate land that has development potential. It is quite often that a waqf donates land that cannot be utilized for something whereas a Muslim should give away something good and utilizable by others. Besides giving a proper understanding on the correct method and procedure of creating waqf, the trustee or its representatives should go to the ground to identify the location of the land to be donated and give appropriate advice to the donor. Only after both parties are satisfied with all relevant matters, then the sigkah process is consummated.

4.5 Development GIS-based land information system for waqf land

A complete information system that displays the most up-to-date data of waqf properties is needed. Among other things, this system is capable of displaying the location of the parcel, its size, physical conditions, accessibility, and the surrounding conditions. This system is developed not only to be used to store the latest data on waqf land but also to enable the administrator to carry out the management and planning more efficiently and systematically. This system is also capable of objectively and methodologically assist the authorities to identify waqf land with good potential for development (Hamid, 2005).

Among the steps in developing this system are: carrying out user requirement analysis, designing the database, constructing the database, developing application and user-interface, testing the system, and staff training.

We suggest that the state Islamic religious councils forge a co-operation with any institution capable of assisting them in developing the system, through a memorandum of understanding or consultancy.
4.6 Direct involvement in the planning and development process

So far, there are a lot of problems and challenges in developing waqf properties that ultimately affect the management of waqf properties throughout the country. These shortcomings are the results of organizational weaknesses, lack of expertise, and financial problems.

As already addressed, one of the reasons for the failure in developing waqf land is its unsuitable location or non-compliance with the local plan or non-fulfilment to the local residents’ need. To avoid such problems, it is only appropriate for those who have the expertise and knowledge on the planning and procedures for developing waqf land to be involved directly in the development process.

The state structure plan and the local plan have to be understood since they are the essential documents in determining land use and development. Public participation in the process of preparing both documents has to be fully exploited to disseminate views and suggestions, especially with regard to maximizing the utilization of waqf properties. Similarly, neighbouring owners to land that is to be developed must express their views before a final decision on planning permission is given to the applicant.

With such exposure, the parties involved will be able to play their role in giving comments and recommendations in the process of considering planning permission applications. The involvement of the parties concerned can help determine the suitability of the proposed site in terms of location etc. In some circumstances, the existing waqf land can, for example, be proposed to be developed for mosque while the land allocated by the developer used for other public purposes. This will guarantee a more efficient and effective land use.

4.7 Development of waqf properties by way of Istibdal

Waqf Istibdal means substituting a waqf land with another waqf land with a view to replace the former with something better, either through exchange, sale, or purchase according to Thurajib by maintaining the original intention of location of the waqf. Basically, waqf land cannot be transacted, given as present (istikhab), or inherited. However, to ensure continuity of the manum from the waqf property, the qadhi (judge) or the authority in charge of waqf can opt for istibdal as a means to optimize the benefits from the waqf. Although there are differences in opinions among the imams on istibdal, there is permissibility on this for the public interest.

In discussing the Shari‘ah law on istibdal, we need to differentiate between waqf for mosque and other types of waqf. For waqf other than the use for mosque, istibdal is permissible against a special waqf for the public interest. However, generally, waqf for mosques that is still useable and is in good conditions cannot be substituted, without an absolutely compelling need. According to the Hanafi school, all mosques under absolute waqf cannot be replaced even if they cease to be usable for prayers, damaged, or derelict.

The Shafi‘i school on the other hand forbids istibdal irrespective of its category. The Maliki school allows istibdal for mosques for building extension or road widening. They outrightly disallow istibdal of waqf for mosque even if the building is damaged.

However, the Hanafi school sanctions the istibdal of mosques that can no longer be utilized or cease to be usable based on the case of Sayyida ‘Umar b. Sa‘id. In the case of Sayyida ‘Umar b. Sa‘id, he ordered Sa‘id to shift a mosque and to build a ba‘itul-ma‘ad at the Istitibal of the mosque. This action by ‘Umar is considered ‘ijra’ as it was not disposed by the companions.

The proceeds from selling a waqf property can be used to purchase another similar or different property as long as the benefits from the waqf can be enjoyed by the society.

Also a suitable method to solve present problems and issues of waqf. Based on the opinions of Imam Ahmad ibn Hanbal, istibdal can create a more dynamic waqf institution for the sake of public interest and is capable of achieving the original intention of waqf, that is, the creation of welfare and the continuance of rewards by Allah. The problems associated with location, economy, or productivity of waqf properties often become the stumbling blocks in the development of waqf properties.

Among the issues that arise on istibdal is the hesitation of the nazar or the manager of the properties that the original intention or purpose of waqf is being denied or changed through the process. The fact is that, istibdal gives an opportunity to the nazar to continue with the intention of the waqf even though the
property is physically changed, the original intention remains intact.

Certainly, the ististidal process has to be implemented with due care by the committee that comprises experts in fushu and shar'ah, property consultants, and other professionals, who can deliver the best decision after carefully considering various factors and implications. Certainly, ististidal is a process that involves many considerations and steps. What is important here is that ististidal is able to ensure the preservation of the welfare of the society from the practice of waqf.

4.8 Public Awareness Program

The difficulty in developing waqf land can also be looked upon from one perspective, namely the lack of public understanding and awareness about waqf itself. One reason is because they are not exposed to sufficient information on matters pertaining to waqf. It is therefore proposed that the syllabus of Islamic studies at secondary schools includes a topic on waqf. Besides, more information on waqf should be disseminated to the public through the media. This is related to the suggestion that waqf properties should be developed professionally by combining specialists in various fields. Thus, the promotional activities and information dissemination on waqf can be implemented more effectively. Directly or indirectly, the public will start to gain information and knowledge on waqf and matters related to it such as ististidal, cash waqf, waqf laws, etc.

5. CONCLUSION

The problems in developing waqf land are not new. It is high time that these long-standing problems require quick and proactive actions by all parties, including the governments, legal institutions, institutions in charge of waqf management, the society, and others. The suggested strategies for developing waqf land should be given appropriate attention to revitalise waqf institution as an institution that can promote the socio-economic well-being of the ummah. This is in line with the government’s intention that wants to see waqf institution run smoothly and act as a vehicle for the society’s socio-economic well-being.

REFERENCES

Azizan Hamid (1999), Pentadbiran dan Pengurusan Harta Waqf Di Malaysia. Seminar Institusi Waqf Menuju Era Baru, Universiti Teknologi Malaysia.


Federal Constitution, Malaysia

Enakmen Pentadbiran Agama Islam (Johor) 1978

Enakmen Waqf (Negeri Selangor) 1999

Enakmen Kesalahan Jenayah (Melaka) 1991

Enakmen Kesalahan Jenayah Syariah (Sabah) 1995