

# WAQF LANDS AND CHALLENGES FROM THE LEGAL PERSPECTIVES IN MALAYSIA

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## ABSTRACT

This paper seeks to look at waqf administration in Peninsular Malaysia from the perspective of enforcement of the law. 'Waqf' is listed under the State List of the Federal Constitution 1957 and thus comes under the jurisdiction of the state governments. Given the multifarious backgrounds of the states and religions in Malaysia, the question is how far does the administration of waqf lands achieve some semblance of uniformity and whether waqf lands are able to realize its role to be able to endow maximum benefits to the Muslim ummah as a whole and specifically those named as beneficiaries? The issue often raised in academic and non-academic discourses on waqf lands in Malaysia is that the legal provisions specifically the National Land Code 1965, is not able to strictly guarantee the protection accorded to waqf lands according to that which is required by the teachings of Islam. The lack of understanding of legal practitioners and the legal draftsmen of yore which began from the times of British influence resulted in the lack of specific legal provisions for the administration of waqf lands in Malaysia. Today, the same legal challenge permeates amongst waqf administrators as well as land administrators who also have minimal appreciation concerning the spirit and rationale of waqf in Islam. This paper puts forth two proposals – one in the short term and one in the long term. In the short term, all waqf administration is to be streamlined and a specific procedure is to be identified and put in place having regard to the existing legal framework that involves the state administration, the Attorney-General's Chambers, the Ministry related to Lands and Mines as well as the judiciary. In the long term, amendments of the laws are imminent so that the status and objectives of waqf could be realized in the way that it is prescribed by Islam.

*Keywords: Waqf; land; National Land Code 1965; State Islamic Religious Council; Islam*

## 1 Introduction

The discourse on waqf (Arabic word), specifically waqf lands in Malaysia, has been the subject of debate in academic and non-academic forums. (Nor Haliza and Muhammad M.O, n.d. p.2) It has become an important agenda for the Muslims because it is sanctioned by the religion and becomes a responsibility, either as *fardhu ain* (mandatory individual obligation) or *fardhu kifayah* (mandatory societal obligation). Waqf, (plural is awqaf) means hold, confinement or prohibition. The word waqf is used in Islam in the meaning of holding certain property and preserving it for the confined benefit of certain philanthropy and prohibiting any use or disposition of it outside that specific objective. Waqf widely relates to land and buildings. However, there are waqf of books, computers, and vehicles for mosque and community use, shares and stocks and cash money. It is an act of holding certain property and preserving it for the confined benefit of certain philanthropy, and prohibiting any use or disposition of it outside that specific purpose (Kahf, 2002) As a Muslim, the act of surrendering one's land in perpetuity for the benefit of others to be used for good purposes, is considered as a virtuous deed and is held in high regard by the religion. Nevertheless, several issues arise in regard to implementation, ranging from the responsibility of the manager as a trustee, who is a manager or the appropriate sole trustee as well as the need to ensure that the objectives of the waqf is undertaken consistently.

## 2 The General Laws Relating to Waqf

The waqf system in Malaysia is implemented through several laws, namely, the Federal Constitution 1957, the National Land Code 1965 (NLC), Administration of Islamic Law (Federal Territories) Act 1993 (Act 505), Selangor Wakaf Enactment (No. 7 of 1999), Trustee Act 1949 (Act 208), Malacca Wakaf Enactment 2005, Negeri Sembilan Wakaf Enactment 2005 and the respective Administration of Islamic Law Enactments of the various states as well as other laws having effect on the administration of waqf like the Trustee Act 1949, Specific Relief Act 1950, Contracts Act 1950 and others.

## 3 The Meaning of Waqf according to the Law

The definition of waqf can be found in several statutes. Section 2 of the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) provides that there are two terminologies for waqf, namely, general waqf and special waqf. General waqf means waqf that is sustainable in respect of capital and the profits from property for religious or charitable purposes recognized by Islamic law and properties that are given in waqf in such manner. Special waqf relates to sustainable waqf or for specified period upon assets capital for religious or charitable purposes recognized by Islamic law and properties that are given in waqf in such manner, the profits of which is

given to persons or bodies or purposes specified in the waqf instrument. The Pahang State Islamic Religious Council has begun to restrict the acceptance of special waqf in view of the difficulties faced in its administration. General waqf will allow the State Islamic Religious Council to use such waqf property for religious purposes or for other purposes deemed more beneficial but subject to the conditions of the waqf. In the event that the waqf lands is needed by the government for a public purpose that is more important, compensation will be used to replace the land with another piece of land that becomes waqf land through the process called 'istibdal waqf'.

The Selangor Waqf Enactment (No 7 of 1999) defines waqf as the surrender of any property where the profits or interests from it can be used for any charitable purpose either as a general waqf or a special waqf according to Islamic law. Notwithstanding this, this definition excludes a trust defined under the Trustee Act 1949 (Act 208). The Negeri Sembilan Wakaf Enactment No. 5 of 2005 defines waqf as the surrender of ownership of any property, the benefits, interests or profits of which can be used; the surrender of the benefits, interests and profits from any property; or the giving of expertise or services, the benefits, interests of profits of which can be used either as general waqf or special waqf, according to Shariah principles, but excludes a trust defined under the Trustee Act 1949 (Act 208). According to section 2 of the Malacca Waqf Enactment 2005, waqf is the surrender of any property, the benefits or interests of which can be used for any charitable purposes either as a general waqf or special waqf according to Islamic law but excludes a trust as defined under the Trustee Act 1949 (Act 208).

Research on waqf has shown that the earlier legal approach taken often mixes the approach of English law with local law. Zubaidah, S and Nuarrual Hilal, 2011; Sabit, n.d The consequence of this is that presently, waqf lands are administered in accordance with any suitable law. Although several states have enacted specific laws relating to the administration of waqf, restrictions posed by other laws, especially, the National Land Code 1965 as well as misunderstanding of the provisions of the Federal Constitution on the jurisdiction of states and the courts have resulted in inefficient implementation of waqf administration in Malaysia. Although waqf administration has been working and many types of improvements can be effected within the existing system of administration, it is strongly believed that there is a need for legal reform of existing laws to provide an enabling legal environment, particularly in regard to having specific provisions for the creation of waqf and to clarify the issue of jurisdiction so that the administration of waqf can be effectuated smoothly. The need for special laws relating to waqf is also needed to guarantee the sustainability of the development of waqf lands as this is a religious duty for Muslims. Furthermore, given that Malaysia is a multi religious and multi racial country, the putting in place of specific laws relating to waqf would allay concerns as regards confusion that could hinder the development of waqf lands in Malaysia in the future.

#### **4 Source of Powers for Waqf Administration in Malaysia**

Although waqf has long been undertaken by the Muslims in Malaysia, the institutionalized management of waqf only came about in 1952 when express powers to manage matters relating to waqf was granted to the State Islamic Religious Councils ('SIRC'). This has been enshrined in the laws relating to the administration of Islamic law and Malay adat, termed as "Laws for Administration of the Religion of Islam 1952". An amendment to this law was made in 1989 which was known as the Administration of Islamic Law Enactment 1989 which sought to consolidate all laws relating to the administration of the Religion of Islam in Selangor. In 1999, a special enactment relating to waqf was passed, namely, the Selangor Waqf Enactment 1999. This enactment is important as a source of referral to streamline waqf administration in the state of Selangor. Among others, it provides for the implementing procedures for registration and supervision of waqf property, emphasizing the necessity of registration of waqf properties in Selangor in the name of the Selangor Islamic Religious Council(SIRC) as the sole trustee of waqf properties in Selangor.(Section 32 of the Selangor Wakaf Enactment 1999)

Other than legal provisions, in regard to waqf administration, reference must also be made to the Circular of the Director of Lands and Mines issued on 24th November 1999, advising the Registrar of Titles and Land Administrators concerning the registration of waqf through statutory vesting to the SIRC based on section 416C of the NLC. Although some states have tried to adhere to this circular, many others have not due to various reasons among others due to the fact that matters on Islam lies in the state thus some states ignore the need to follow the directive. The administration of waqf is undertaken also with reference to the decisions of the State Fatwa Council meetings. For example, the Selangor State Fatwa Council, has among others, decided that : "The state government may create waqf over its property for the specific use of Muslims including the site of a mosque, prayer room and Islamic school".

The decision of the 77th Conference of the National Fatwa Committee has stipulated that the federal government can be taken as a person who creates a waqf with the condition that the available provision for the development of waqf lands is intended for waqf as as a person who creates waqf, the government has the right to determine the conditions of the property to be the waqf property. Nevertheless, the appointment of a *nazir* is not

allowed as it contradicts the existing enactments that provide the sole trustee for wakaf is the SIRC. Other than the above agencies, reference can also be made to the decisions made by the meetings of the states Islamic religious councils, the National Council for Local Government and the National Land Council as the majority of waqf involves immovable property.

## 5 The Status of Waqf Lands under the Malaysian Legal System

The 2nd list, namely the State List, in the Ninth Schedule of the Federal Constitution places matters relating to religion, customs and practices as well as land as matters under the jurisdiction of the states. This means that matters relating to religion including waqf, is put exclusively under the powers of the Ruler or governor of the state and the Ruler or governor may delegate this power to the state Islamic Religious Council (SIRC) who will then be responsible in administering matters relating to waqf lands. There should not generally be any glaring difference on the procedures to create waqf given that Islam has prescribed clear guidelines on what constitutes waqf property and the manner of creating waqf. Nevertheless, it is posited that the standardization of methods to create waqf will facilitate the administration and governance of waqf lands by the SIRC, Registrar of Titles and Land Administrators. For example, appropriate standardized registration and methods will assist SIRC to use the same procedures and this will then facilitate owners of land to create waqf over their lands on the basis of a system that is easy to understand and implement. Such system would also be efficient and evokes the confidence of the general public to create waqf over their property and give benefit to the community.

The existence of numerous legal provisions including the Waqf Enactments is based on article 74(1)(2) of the Federal Constitution which provides that parliament and the state legislative assembly has the power to make laws relating to matters laid down in the Ninth Schedule of the Federal Constitution empowering the state to enact legal provisions relating to the administration of matters relating to administration of matters relating to Islam and customs for the respective state. Article 80 provides for the division of legislative powers in the Ninth Schedule as an executive power and waqf is listed in Item 1 of the 2nd List (state list) and thus comes within the jurisdiction of the state. As power is granted to the states encompassing the 14 states in Malaysia, it is often said that there are differences in terms of the implementation of Islamic law including the laws and administration of waqf.

The question is: given that the power to administer waqf is granted to the states, does this mean that this same power is given to the State Executive Committee Meeting or State Islamic Religious Council? It is important to understand that Item 1 when read with Article 3(2) of the Federal Constitution, reflects that matters relating to religion of Islam falls under the jurisdiction of the Ruler or the Yang Di Pertuan Agong (YDPA). Hence, the SIRC takes the role of Advisor or Assistant to the Ruler in matters relating to the religion of Islam and Malay customs. This principle has been codified in the respective states through the administration of Islamic Law Enactments. In the administration and management of waqf, the SIRC is the authoritative body in regard to drafting and determining the policies in regard to waqf. For the purpose of implementing and enforcing the policies, the State Islamic Religious Department or any party including a corporation established by the SIRC upon advise of the Head of Religion has the responsibility to administer waqf. Nevertheless, the Federal Constitution also provides for cooperation between the federal government and the state government, specifically in regard to the administration and management of matters relating to religion. Article 80(5) enables negotiation and consultation between the federal and the state in the implementation of specific functions subject to federal and state laws.

There are two types of laws that are referred to by the states in regard to waqf. Firstly, for states that have yet to enact specific laws on waqf, the administration is provided in an Act or an Enactment relating to administration as well as provisions relating to the Shariah Court. An example is section 61 of the Administration of Islamic Law (Federal Territories) Act 1993 that states that the Council is the sole trustee for all waqf, whether general waqf or special waqf and section 65 of the same Act provides for ways in which the property of capital assets related to waqf is to held separately and is excluded from becoming part of the savings fund and is used according to the intended waqf (Administration of Islamic Law Act (Federal Territory)). Although many discussions have been held on waqf and many resolutions have borne out of seminars on waqf, lack of understanding concerning the powers of the SIRC as well as the culture of being in the 'comfort zone' has resulted in the slow development of the waqf institution.

Selangor has pioneered the enactment of the Waqf Enactment 1999 that has special provisions to clarify the process of creating waqf, matters relating to waqf property (*mauquf*), waqif (the person who creates the waqf), *mauquf alaih*, invalid waqf, the replacement of waqf property (*istibdāl*) and the development of mauquf as well as powers concerning the management of waqf and the Council as the sole trustee (Section 32 of Selangor Wakaf Enactment 1999). Section 46(2)(b)(vii) of Act 505 provides that the Shariah High Court is empowered to hear and decide actions and proceedings in matters connected to waqf or *nazar* involving Muslim conflicting parties.

Malaysia is a country that practices the Torrens system of registration of lands thus even though the concept of indefeasibility of title accords a high level of assurance to the land owner, to a certain extent it presents a challenge to the smooth running of waqf administration as confusion in management arises that necessitates cooperation of all affected agencies. (Section 340; 78(3) NLC) These challenges and hindrances will be examined further in this writing.

## **6 Exemption of application of the National Land Code 1965 in respect of Waqf Lands**

The National Land Code 1965 generally makes no mention of the word 'waqf'. This means that there are no specific procedures inserted in the National Land Code that statutorily acknowledges the process of managing and administering waqf lands in Malaysia. Nevertheless, the main objective of the National Land Code 1965 is to bring about uniformity in the management of lands in Malaysia. Given that Malaysia is a country that appreciates diversity in cultural practices and religion, several exceptions have been provided to protect and respect cultural practices and customs of the local community including waqf which is a practice based on religion. Section 4(2)(e) of the NLC provides that provisions of the NLC are not applicable in respect of waqf lands except if otherwise provided. This provision is seen as a guarantee that although the NLC is the main law controlling the administration of lands in Malaysia, it accords express recognition and respect to the uses and practices on land based on Islamic principles in Malaysia. Therefore, the main principles in the NLC are not generally applicable in regard to the administration of waqf lands in Malaysia. It can also be said that the principle of land registration as provided under the NLC may be taken as not applicable in respect of waqf lands. The absence of procedures relating to this has resulted in many waqf properties being unregistered and even if registered, the beneficiary and the waqf trustee consists of many different parties. The lack of clear procedures relating to the registration of waqf lands does not mean that waqf lands do not need to be registered. It is strongly believed that the registration of waqf lands should be a necessary requirement in order to guarantee its sustainable management in times to come. Hence, clear provisions relating to the requirement of registration and the updating of records in line with the wide utilization of the computerized system presently should be included in laws relating to waqf lands. Other provisions that should be included are identification of the registered owner as well as the role and powers of the waqf trustee/ administrator.

Section 5 of the NLC emphasizes that the word 'trust' does not include a waqf created in accordance with the principles of Muslim law. This definition can be found in all the states having Waqf enactments namely, Selangor, Negeri Sembilan and Malacca. Other than emphasizing that waqf is not a 'trust' in the conventional context, an accompanying implication is that the managers and the administrators must understand that waqf does not come into existence through branding and the statement that it is the act of 'making waqf' but that its existence must be based on the principles of the Shariah. Therefore, if a building is used for activities that are contrary to the principles of Islamic law and it is thereafter given in waqf, it cannot be taken as waqf property according to Islam but could come under the definition of 'trust' within the meaning of the Trustee Act 1949 (Act 208).

## **7 Procedure for the Registration of Waqf Lands**

Presently, there are several ways for waqf land to exist as follows:

Through the transfer of land to the name of the State Islamic Religious Council (SIRC) or to the receiver of the waqf, for example, the owner of a school or the principal or the head of religion. In many cases, if the land title is a Registry Title, Form 14A is used to effect the transfer of waqf land, or a part only of it or a lease of such land. (sections 215; 217; 218 of the NLC) The *mauqif* (person who creates the waqf) will put his signature on the instrument of transfer using black ink before the Land Administrator and the State Islamic Religious Council (usually represented by 3 persons) will sign the instrument as the receiver of waqf and affix its official seal.

Other than using the transfer Form 14A, a waqf land may also be effected by using Forms 12A and 12B. This is normally used in respect of Land office titles (HS (Mukim), Mukim Grant, Mukim Lease). It is a process of the waqif surrendering the land to the State Authority and the State Authority re-alienating it to the State Islamic Religious Council. The application and simultaneous process under section 204 of the NLC is necessary to prevent delay and technical problems related to the re-alienation that could hinder the effectuation of the waqf land. There is also the practice under section 197 of the NLC to surrender the whole land and Form 12B to surrender a part only in accordance with section 200 of the NLC. This is taken as the initial step for the purpose of reservation of land and the process is provided for under section 62 of the NLC to be approved by the State Authority, but is most often delegated to the Chief Minister. The process that is taken to reserve the land normally takes a long time although such land has changed its status from alienated land to state land. Another

worry if the land is not immediately reserved or gazette as waqf land is in the case where the waqf document goes missing from the land office or the office of the State Islamic Religious Council. There would no longer be any evidence to establish the waqf and thus the waqf status would be eliminated altogether. In the long process of reserving waqf land, all the interests in the land is given to the State Authority and the State Islamic Religious Council or the Baitul Mal will lose their interest in the land within this period. It is not impossible that within this period when the land becomes 'State land', it can be subject to application for alienation by other parties.

Other than that, the existence of waqf land also involves an application for alienation of state land using the Schedule 1 Form (rule 3) according to the NLC. Nevertheless, this process is only taken to be perfected once the land is gazette as waqf land. In the case of *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors.* [2008] 6 MLJ 488, the Court of Appeal rejected the application of the Selangor State Islamic Religious Council to declare a piece of land that was approved by the Shah Alam City Council as a cemetery as waqf land on the ground that the said land had not been gazette as waqf land. It is clear that based on the present laws, for example in the state of Selangor, the declaration of waqf land is still subjected to Shariah principles and the provisions of other written law.(section 13 of Selangor Wakaf Enactment 1999) This type of challenge may happen from time to time and would definitely interfere with the sustainability of the administration and development of waqf lands in Malaysia.

Although a notation concerning the transfer exists in the document of title, statutory vesting under section 416c does not require permission to transfer ownership. The process of vesting can be done at the Land Office after an application from the SIRC with sufficient evidence on the existence of waqf to the Council whether through a completed form or written declaration. The note of 'waqf' is needed in order to endorse such registration. Registration under this section is in compliance with Syariah law and NLC and above all it is simple and fast. Moreover the note 'waqf' will further perpetuate its waqf status. Although the practice of registration differs from one state to another, there is not much change in terms of procedure and law as ultimately reference will be to the National Land Code. For example the procedure to use Form 30A is a common procedure used by the Penang Islamic Religious Council for the purpose of registering waqf lands in Penang.

## **8 Problems in the Administration of Waqf Lands**

### **a. Lack of statutory provisions in the present legislation**

Some states in Malaysia have made a commitment to introduce law to specifically deal with waqf. Nevertheless the provisions are inadequate. Provisions dealing with the registration of waqf land by the SIRC are always subject to the NLC where the powers lie with the Land Administrator while NLC has provisions which exempt waqf from the NLC (section 4(2)). One suggestion for improvement is the SIRC should exercise their powers to regulate and introduce rules on waqf without having to enact new law as that will take a longer process. On the other hand, the Land Administrator should take heed of any direction received from SIRC on waqf land and a Standard Operating Procedures (SOP) is needed to expedite the whole process. Until now, the running of the waqf differs to a certain extent among all the states and the grey areas on waqf are most of the time, referred to the court for decision. For example, in *G Rethinasamy v Majlis Ugama Islam, Pulau Pinang* [1993] 2 MLJ 166, the Land Administrator was held as having no power to transfer waqf land to the Plaintiff who is a non-muslim. Any amendment of the law is welcome and the amendment to article 121 the Federal Constitution helped to resolve the issue of redundancy of jurisdictions on waqf. Nevertheless, the understanding of the judges on this matter will ensure that matters relating to waqf must be upheld as it is a part of Islamic principles.

The present weaknesses of the NLC in dealing with waqf can be improved with amendments of some of the provisions. Presently, waqf administrator has not been included in section 43 to be among the persons who can deal with waqf land. Therefore, the SIRC being the sole trustee for waqf shall be clearly mentioned as a person entitled to deal with land. The SIRC as the sole trustee and registered owner of the waqf land has a role to maximize the benefit of waqf land according to the intention of the waqf creator. Thus, the sustainability of waqf land depends on the proper registration of the waqf so it stands as a caveat to inform others on the status of the land. Section 64 (1) (2) of the NLC gives power to the State Authority to revoke any land reserved for public purpose or to revoke any lease for the same purpose. Hence, leased waqf land is also subjected to the same procedures and actions thus it runs against the spirit of waqf land which is meant to be permanent. The needs seem to be more imminent in Malaysia where the backgrounds of the people are different and the religious beliefs vary. Without having a specific law, waqf land is always prone to be changed or ignored by those in authority who refuse or are reluctant to understand and thus protect the belief of others. Provision and policy on waqf must hold the principle that the principles relating to waqf must take priority against any other law or policy that seem to be in contradiction to the principle of waqf. For example, the principles relating to *waqf istibdal* (replacement of intention of waqf) seems to be vital in ensuring the sustainability of waqf land. There are also efforts to provide pre-counsel before a land owner opts to create a waqf over his land.

The usage of Form 30A and 30B is not practical as there is a total transfer of ownership to the transferee which is certainly against the basic rule of waqf. Apart from taking a long process for the registration, some states which are currently without specific legislation on waqf are left with many weaknesses such as no standardization of practices, lack detailed laws and procedures as well as no clear rule to register the land under the SIRC. The proposal to use the vesting order under the NLC has been promoted by the Department of Land and Minerals and sent to all states in Malaysia. (Government Circular. 8/1999). There is no specific Form in the NLC to expedite the registration process but the Land Administrator has the power to register using Form 14A or reject it if he finds that the registration would be in contradiction to any law. In general, the vesting order for waqf land using section 416C may not be the best option to maintain and protect waqf land. The vast discretionary power of the Land Administrator will certainly require an officer with the understanding of the dynamic “spirit” of waqf and its roles for the Muslim as a whole. Such lack of understanding is evident when there are large tracts of land left idle for various reasons.

The NLC provides for 99 years as the ceiling for disposal of state land and this policy may give adverse effect to the creation of waqf land which is permanent in nature. An amendment can be done to section 76 (aa) to include waqf land as land that should be disposed as freehold land. Moreover, the computerized land system cannot register waqf land for a part only of land as there is no special provision to cater for such application. Hence, currently all endorsements or registrations are done manually which may be prone to mistakes.

Waqf land is also subject to be compulsorily acquired by the State Authority under the Land Acquisition Act 1960. This is again a result of not having a specific law dealing with waqf. As such there is no legal provision that clearly states that any acquisition of waqf land must be replaced with another land of similar nature and value. While there is an enactment to protect the Malay Reservation Enactment, it is believed that such provision for replacement of land is more crucial in regard to waqf lands because the creation of waqf land indicates an act of submission to God (*ibadah*) and the benefit is not only confined to the creator but the whole community and the government can also enjoy the fruits of waqf land if it is efficiently administered. The issue involving “the spirit of waqf” arose in *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2008] 6 MLJ 488. The waqf relates to land reserved for a Muslim cemetery but the residents of the apartment which was later developed near the area raised an objection and the court made a decision that the cemetery was not formalized as the land has yet to be gazetted by the state government. The priority of the formality seems to take priority against the religiously created waqf which is already completed. Thus, the decision of the Appeal Court failed to uphold the principle as well as the spirit of waqf. Unless and until there is a provision for compulsory replacement of waqf land if there is a need to degazette or cancel the intention of the waqf creator, waqf land remains prone to such adverse decisions.

#### **b. No Standardisation in the Procedures for Vesting Order of Waqf lands**

Waqf land falls under the jurisdiction of each state (List II, Ninth Schedule of the Federal Constitution) and as a result, this has caused lack of standardized practices and inconsistency of laws and policies adopted in every state. The proposal to use the vesting order as one sole processes of registration of waqf is timely although it merely provides a short term solution to waqf land. Nevertheless it may assist to expedite the process and provides a friendlier and clearer mode of administration for the SIRC. There is a need to gain the people’s trust on the administration of waqf land in order to gear economic activities based on principles of Islamic law.

#### **c. Issues involving Ownership and Registration of Waqf land**

Studies (Muhammad, M.T.S, n.d; Sharifah Zubaidah and Nuarrul Hilal, 2011) show that one of the problems in dealing with waqf land involves the registration of the waqf land in line with the requirement of land administration in Malaysia. The problems relate to failure to register in cases of death of the land owner, and in cases where the waqf land was entrusted and registered in the name of village head or the Qadhi and the matter becomes worse if the trustee also dies. There are also cases where the next of kin refuses to acknowledge the waqf and decides to distribute the property according to estate distribution. Some waqf land are categorized as agricultural land and are subject to the rule that such category of land cannot be further transferred if the effect is the subdivided lot will become less than 2/5ths of a hectare. Thus, if the owner chooses to create waqf involving part only of his land and the size is 2/5 or less, it shall involve the subdivision and conversion of land which is costly and involves a few more land processes. Moreover, the NLC provides for indefeasible title for any registered owner and thus it is difficult to refer the matter to court if somebody denies the creation of waqf over any piece of land unless supported by a clear law dealing with waqf. At present, the administration of waqf in some states depends on the willingness of the waqf creator and their relatives with the cooperation from the religious authorities and the land office without any clear standard procedure specifically for waqf. For example, in cases involving a missing land title or document supporting the creation of waqf, the land owner or his family needs to lodge a police report or make a statutory declaration and a few other processes which sometimes vary

from one office to another. Thus, a special task force to look into all the problems and the urgency to transform the old waqf lands is crucial as the longer the delay the more problems will arise. A standard procedure would minimize any future problem in the creation of waqf land. The task force seems to be necessary to focus on all the issues and all waqf lands must be gazetted in order to ensure protection and sustainability of the special rights relating to such lands.

#### **d. Lease of Waqf land**

The Federal Government has a policy that they will only provide finance for projects carrying its name. As such, the SIRC is to lease the waqf lands to the Federal Government to comply with this policy and the SIRC must be the registered owner of the land to qualify to create a registered lease over the land. Thus, problems arise when some of the lands are still registered under the owner's name and are yet to be transferred to the SIRC. Therefore the need to transfer the ownership through proper registration of waqf land is deemed to be essential.

#### **e. Occupiers in Waqf land**

The presence of waqf land has existed in Malaysia since the early occupation of the Muslim in the states. As a result, in Penang for example, there are many areas that are known to be waqf land. The land has been occupied by peoples from various background with various activities have been conducted on the land. They have peacefully occupied the land and some of the lands are mistakenly believed to be vacant state land. Lately, there are calls for reviving the waqf land to bring better benefit for the Muslims and among the main obstacles is to ask the occupiers to vacate the land. The accompanying issues are compensation, reluctance as well as issues relating to equitable interests of the people as well as welfare. To make matters worse, there are many waqf lands that have now changed hands and ownership especially in Penang. Studies show that a large tract of waqf land in Penang has changed hands, some being transferred to non Muslims. It is a matter of concern for the Muslims that activities on waqf land should not be contrary to Islamic teachings. There are also cases where the the occupants refuse to allow the land for development as it means that they are required to move out of the land and opt for whatever settlement to be offered by the government or the developers.

#### **f. Limited Funds**

Limited funding is also among the main causes that hinders the development of waqf land. In most cases, the fund for development depends on the contribution of the public as well as the government especially the Federal Government base on the 5 Year Plan. Acknowledging the importance of public contribution and participation in waqf development, there is a need for new approaches in raising waqf funds. Sometimes, the effort must be done at appropriate times and circumstances. Malaysians are always known for their kind hearts and willingness to help financially. It is hoped that with proper explanation on waqf and its roles in societal and welfare development, Malaysians will extend their hands to religiously submit themselves to this effort.

#### **g. Ignorance about the role of waqf and its institutions**

Generally, it has been shown that public awareness about waqf and waqf land exists. (Aidid, 2012) Nevertheless, the level of awareness is very low as compared to the general expectation on the development of waqf properties and investment. The general public generally believes that waqf is normally created for certain types of properties to serve those in need or for religious and educational purposes. They lack knowledge on the dynamic nature of waqf. For example some choose to adopt a strict interpretation and categorization of waqf and believe that waqf should only be used to materialize the original intention of the creator. As a result, this strict view has to a certain extent curtailed or slowed down the process of development of waqf land. This has also contributed to slow participation in the development of waqf and this can be worsened with data on the large tracts of idle waqf land which is due to lack of management and administration. The people's ignorance is obvious in cases involving protests about the use of *istibdal* for development of waqf land that diverts the original intention of the mauqif (creator). For example, some have also protested the development of waqf land into a hotel worrying that some activities in the hotel are unIslamic. In this respect, a proper monitoring system with clear guidelines is seen to be mandatory.

## 9 Recommendations and Conclusion

It is shown that waqf is part of the community assets that form part of the economic system. Its existence may be duplicated in any land systems as it provides security for community owned property aimed for the benefit of the public and managed by the trustee individually or through appointed agency. In Malaysia, there is urgency to make compulsory the registration of all waqf land or other landed properties in order to protect and manage the waqf properties efficiently. The recording system of waqf land as practiced in the land office must be improved to materialize the expectation of the *ummah* and Islamic principles on waqf. There is also a need to introduce a comprehensive waqf law to govern the administration of waqf lands. At present, any conflict is resolved with the help of the *fatwa* institution which certainly takes longer time and the decision of the Fatwa Council is not binding on other parties except to the party seeking to find an authoritative opinion on any issue. Hence, all the parties involved in the administration of waqf lands such as the State Islamic Religious Council, the Ministry of Land and Natural Resources, the Attorney-General's office, and the Department of Wakaf, Zakat and Hajj of the Prime Minister's Office should cohesively work towards having a standardized law on waqf. Such law would be an authoritative vehicle in resolving any conflict between waqf law and other related laws. There is also a need to have a Waqf Master Plan as guidelines for any project involving waqf land. Such Master Plan can be an important supporting document for any grant from the government especially the Federal Government. There is presently a policy decision for the establishment of the Waqf Foundation, discussed and agreed to during a Conference for a standardized Baitul Mal among all states in Malaysia. Among others it was decided that each state in Malaysia having a religious council must establish a Waqf Foundation with the main objective to reach out to the public. This approach is important for the sustainable development of waqf properties since the public is the main contributor that will determine the sustainability of waqf properties. The establishment of the Waqf Foundation has seen success in Johor and Selangor, with good track records in their management and activities.

The management of waqf land requires a concerted effort from various agencies, the public as well as there is a need for a clear, standardised and effective law in order to create a sustainable administration and management of waqf lands. Nevertheless, having recognized the weaknesses in the current administration of waqf land, the effort to increase the public contribution for the creation of waqf land as well as the development of waqf land should become the main agenda of all the Islamic religious councils in Malaysia or in any part of the Muslim countries. Obviously, there is urgency to enhance as well as to create innovative products for waqf as well as waqf land in order to attract the interest of the public about the importance of waqf land and its roles to the Muslim as a whole. The improvement varies in terms of image, the perception of the people, the trust of the public as well as giving priority to projects or programmes that give more value to the land. The best practices of other countries such as Singapore, offers guidelines and it is high time for the religious authorities in Malaysia to transform their organization and planning for a better administration of waqf lands. In this respect, any dispute and uncertainty on waqf management and development must be resolved with the commitment to uphold waqf institutions and products. Having mentioned the underlined principles and objectives of waqf in Islam, certainly a lesson can be learned by other charitable organizations is the need to have proper regulation to protect the property so that the very noble objectives of the charity last in perpetuity.

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