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THE IMPACT OF LAW ON THE DEVELOPMENT AND COMMERCIALISATION OF *WAQF* PROPERTY

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Abstract:

Waqf has a long history of improving a country's and civilisation's economic cycles. However, there is a lack of development and commercialisation of *waqf* property in Malaysia, with 11,091.82 hectares of land remaining undeveloped (92.8 per cent). The law must be improved, and *waqf* functionaries must be empowered to develop and market *waqf*. *Waqf* was established under Muslim rule. Hence the National Land Code of 1960 (NLC) does not recognise it as a trust. As a result, when the Land Administrator registers the *Waqf* Land in the Title, the registration will merely include the name of the State Islamic Religious Council without endorsement as sole trustee, and the record indicating the property is a *waqf* property will stay with the Registrar of *Waqf*. Many Muslims are concerned that the State Islamic Religious Council may abuse its power or mismanage the situation due to this situation. This will impact the expansion of Islamic finance and the well-being of society. This article aims to look at how the legislation affects the development and commercialisation of *waqf* land. This work employs qualitative research methods. Thematic analysis will be used to analyse the data. The legal implications and challenges surrounding the development and commercialisation of *waqf* land in Malaysia were discovered in this study. The conclusions of this article are critical in assisting diverse stakeholders in developing and commercialising *waqf* land.

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Introduction

Many scholars agree that *waqf* was practised during the time of Prophet Muhammad (PBUH) when he built Quba's Mosque to serve as an educational institution upon his arrival in Medina in the year 622 M. (Pitchay, 2014; Md Nuruddin *et al.*, 2019). Looking at successful public projects funded by *waqf* funds, such as Al-Azhar University in Egypt, the University of Cordova in Spain, and Al-Noori Hospital in Damascus, it is proven that *waqf* institutions have provided tremendous benefits not only to the Muslim community but also to the public at large (Ali, 2017).

The existence of *waqf* institutions in Malaysia is thought to have begun more than 800 years ago when Arab Muslim traders brought Islam to the country in the 10th century (Yaacob, 2013). *Waqf* is thought to have been actively practised among Muslims, particularly in Terengganu, as evidenced by one of the early 19th-century *waqf* deeds by Sultan Umar to promote education and disseminate knowledge to society (Yaacob & Nahar, 2017), while some researchers believe that the practice of *waqf* in Malaysia can be traced back to the 14th century after the Malacca Sultanate accepted Islam (Pitchay *et al.*, 2018).

Before the 1950s, the Muslim community's common practice of *waqf* was for *al-waqif* (the donor) to entrust *waqf* property verbally to a person with the qualities of becoming a trustee (such as an Imam, religious teacher, or *ketua kampung*) where no proper legal documentation was prepared to finalise the entrusted *waqf* arrangement (Abd Mutalib & Maamor, 2018) Historically, the majority of *waqf* lands were used to construct mosques, surau, religious schools, and cemeteries (Syed Abdul Kader & Mohamed, 2014).

However, since 1952, the management of *waqf* has become more systematic. The law grants the State Islamic Religious Council (SIRC) the authority to become the sole trustee of all *waqf* established under Islamic law (Syed Abdul Kader & Mohamed, 2014). Thus, SIRC has the legal duty to manage, maintain, protect, and develop *waqf* in their respective states, whether general or specific *waqf*, because *waqf* matters fall under the State List of the Federal Constitution (Abas & Raji, 2018; Abd Mutalib & Maamor, 2018).

However, the Web Portal i-Wakaf reported that the estimated total *waqf* lands held under SIRCs' records were around 8,861.13 ha, and according to former Datuk Dr Sohaimi Mohd Salleh, 99.28 per cent of the *waqf* lands remain undeveloped due to a lack of funds (Pitchay *et al*., 2018). Furthermore, previous research discovered that, as a result of the SIRC's poor and inefficient *waqf* governance, many *waqf* properties are still held under the administration of individual *waqf* trustees and remain undeveloped (Isamail *et al.*,2015; Abas & Raji, 2018).

It is important to note that the SRIC must find ways to develop *waqf* property to generate economic benefits for the Muslim community (Hashim & Rahman, 2012; Ibrahim *et al*., 2019) as long as the *waqf* conditions are followed and the donor's (*al-waqif*) interest to protect the beneficial life of the assets being preserved is saved (Hashim & Rahman, 2012).

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Undoubtedly, many previous studies have attempted to address the issue of idle *waqf* land. Many *waqf* models have been proposed by researchers, one of which is the Cash Waqf Model. According to Pitchay *et al.* (2014), Ali (2017), and Marzuki *et al.* (2012), the cash *waqf* model can serve as an important economic instrument in Islamic civilisation and has evolved into a powerful engine of economic growth and poverty eradication in a variety of jurisdictions.

Cash *waqf* is accepted as one of the *waqf* instruments in Islam in Malaysia, according to the Fatwa delivered by the 7th Jawatankuasa Fatwa Majlis Kebangsaan on the 10th to 22nd of April 2007, which states that, "... giving *waqf* in the form of cash *waqf* is permissible in Islam..." (Ramli & Jalil, 2014). Although *waqf* is a state matter, it has become a national plan due to its enormous potential to benefit the Muslim community and the general public.

This can be seen in the Federal Government's establishment of the Department of Awqaf, Zakat, and Hajj (JAWHAR) and the Yayasan Wakaf Malaysia (YWM) to assist State Religious Islamic Councils (SRICs) in effectively managing and developing *waqf* property in their respective states. Not only that, but the Federal Government agreed to allocate RM256.5 million in RMK 9 for the development of *waqf* assets (Ramli & Jalil, 2014; Pitchay *et al*., 2018). However, due to economic reasons, the government's allocation was reduced to RM72.76 million under RMK 10 in 2010 (Pitchay *et al.*, 2018).

Realising that the government's budget allocation for *waqf* development can be volatized depending on economic changes, the SIRCs must be ready to work for another alternative to develop *waqf* property. However, to maximise the potential development of *waqf* lands, the Religious Authorities need to work hand in hand with professional bodies to formulate suitable methods and programs to fulfil society's needs (Mahmood & Mohd Shafiai, 2013).

According to JAWHAR statistics from 2014, Malaysia has approximately 11,091.82 hectares of *waqf* lands, of which 7,791.04 hectares (70.25 per cent) are undeveloped *waqf* lands (Mohamed Azmi *et al.*, 2016). To ensure the success of the *waqf* philosophy, *waqf* affairs should be handled by a qualified, knowledgeable, and professional *waqf* manager in terms of Islamic principles and property management (Abas and Raji, 2018).

With attention to that, several *waqf* models exist upon the initiative of SIRCs, working hand in hand with other financial institutions, corporate bodies, and GLC such as Waqf Seetee Aishah Model, MyWakaf Model, Menara Imarah, Wakaf Model, Waqf An-Nur Model and also AWQAF Holdings Berhad Waqf Model. Those models, such as Menara Imarah Wakaf Model, have proved their success in developing and managing *waqf* efficiently and can be used as a reference in the future (Md Nuruddin *et al*., 2019).

The Impact of Law on the Development and Commercialisation of *Waqf* Property

Unregistered Waqf Land

In Malaysia, it has long been a *waqf* practice for some *al-waqif* to choose to surrender their property as *waqf* and appoint an individual trustee to manage it. However, literature revealed that many *waqf* lands are still registered in the names of individuals, mosque committees, or even the donor themselves, in contrast to the law that states that SIRC is the sole trustee of all *waqf* in Malaysia, leading to cases where the donor's or trustee's heir did not declare *waqf* to

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the authorities and treated *waqf* property as their estates. (Abd Mutalib *et al.*, 2015; Yaacob & Nahar, 2017).

Another important point regarding the registration of *waqf* property is that when *al-waqif* has the intention to create *waqf*, but then he transferred and registered his property to a public company, registered society, or trust company by using a trust deed governed under the Trustee Act 1949, the said property is not a '*waqf* property' under the governance of the Shariah law, but become 'trust property' under Trustee Act 1949 (Syed Abdul Kader & Mohamed, 2014).

Furthermore, all State Enactments have excluded the concept of 'trust' under the Trustee Act 1949 from the definition of *waqf*, implying that the SIRCs and Shariah courts have no control or jurisdiction over the said property. Indeed, section 5 of the National Land Code emphasises that 'trust' does not include a *waqf* established under Shariah law.

Courts' Jurisdiction to Hear Waqf Cases Involving Islamic Finance Litigation

Suppose Islamic financing facilities are involved in Waqf Development and Commercial projects, such as the *ijarah* agreement and the *istisna* agreement. In that case, the government must be prepared to provide the Malaysian legal system with an appropriate court's jurisdiction to deal with such matters. This is due to the complexity of the law involved, namely *waqf* under Shariah law and Islamic Banking and Finance law.

Shariah Court has constitutional jurisdiction over *waqf* matters because *waqf* is listed under paragraph 1, List II (State's List) in the 9th Schedule of the Federal Constitution. In contrast, Islamic banking and finance are subject to Shariah law but are governed by Federal laws passed by Parliament. This situation raised whether Islamic banking and finance should be subject to Shariah Court or Civil Court jurisdiction (Hasshan, 2016).

Even though the High Court Judge in the case of Bank Islam Malaysia Bhd v. Adnan bin Omar (Civil Suit No: S3-22-101-91) and also in the case Mohd Alias Ibrahim v. RHB Bank Berhad & Anor [2011] 4 CLJ 654 affirmed that the position of Islamic banking and finance falls under the jurisdiction of Civil Court by stating that the law relating to finance, trade, commerce, and industry falls within the ambit of the Federal List in List I, Ninth Schedule to the Federal Constitution.

According to Hasshan (2016), the current Civil Court structure may not be adequate for effective dispute resolution involving Islamic finance cases because Islamic banking and finance is a special area of law that requires judges specialised in Islamic Banking and Shariah to decide the matter.

Indeed, Practice Direction No. 1 of 2003 was issued by the Chief Justice of Malaya, forming a Muamalat Court under the Commercial Division of the High Court of Malaya in Kuala Lumpur to hear Islamic finance cases filed within the local jurisdiction of the Kuala Lumpur High Court. However, based on research conducted by Hasshan (2016), the study found that there is no special division (i.e., Mualamat Court) established at the High Court of Malaya outside the territory of Kuala Lumpur (e.g., in Shah Alam High Court, Seremban High Court, etc.) nor in subordinate Courts to cater for Islamic Finance proceeding.

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Another point of contention is that *waqf* development involves Islamic law, which is governed by fatwas, but civil courts are not. The Federal Court decided in the case of Commissioner for Religious Affairs; Terengganu v Tengku Mariam Tengku Sri Wa Raja & Anor [1970] 3 LNS 1 that the civil courts were not bound by the Mufti Terengganu's gazetted ' Fatwa,' and that the *waqf* in question was void (Yaacob, 2013).

Inefficiency In Waqf Investment, Financial Management, Accounting and Reporting

A good *waqf* investment, financial management, accounting, and reporting of the *waqf* system are required to increase public trust in SIRC accountability (Abd Mutalib *et al.*, 2015; Yaacob & Nahar, 2017). However, previous research indicates that SIRCs face several challenges when managing *waqf* property, such as difficulty collecting rental income.

Among the difficulties are the SIRCs' failure to lease out the *waqf* property at a competitive rate, weaknesses in the SIRC credit control, and the inability to collect 100% of the total rental income every month due to late rental payments by some tenants. Abas and Raji (2018) To maximise rental collection, SIRCs must also ensure that the buildings on *waqf* property are well-maintained and functional so that tenants are satisfied with the quality of the property that they rented (Abas & Raji, 2018).

Furthermore, the previous study discovered no specific Guidelines for Waqf Accounting and Reporting standards to which SIRCs officers can refer. As a result, SIRCs use four different types of reporting standards in preparing *waqf* financial and accounting reports, namely: I Private Entity Reporting Standard (PERS); (ii) Malaysian Private Entity Reporting Standard (MPERS); (iii) Malaysia Public Sector Accounting Standard (MPSAS); and (iv) International A (Md Nuruddin *et al.*, 2019). It isn't easy to assess and evaluate the SIRCs' achievement in managing *waqf* without a proper and standard *waqf* reporting system used by all SIRCs (Md Nuruddin *et al.*, 2019).

Location of Waqf Land

Previous research has revealed that most undeveloped *waqf* lands are located in rural areas and have little potential for commercial development (Ismail *et al.*, 2015). Although *waqf* land cannot be sold, transferred, or inherited by anyone because it belongs to Allah SWT until the Day of Judgment (Yaacob, 2013), one solution to the problem of undeveloped *waqf* land is due to its location in a less strategic area is the practice of *istibdal* (Md Nuruddin *et al.*, 2019; Isamail *et al.*, 2015).

Istibdal is the process of exchanging, selling, or purchasing unproductive *waqf* lands (due to their less strategic location) for another land of the same kind (with a higher market value) while maintaining the original purpose of *waqf* as intended by the donor (*al-waqif*) (Md Nuruddin *et al.*, 2019).

Since 1982, the Muzakarah Jawatankuasa Fatwa Kebangsaan has debated and approved the practice of *istibdal* (Isamail *et al.*, 2015). However, the development of idle *waqf* land using the *istibdal* concept appears to be less efficient, and Malaysian *waqf* development seems to be less progressive when compared to other Islamic countries such as Egypt, Kuwait, the United Arab Emirates, and Turkey (Isamail *et al.*, 2015)

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It is important to note that the practice of *istibdal* must be done carefully and by the Shariah and Majlis Fatwa decision (Kader & Wan Ismail, 2017). Many factors must be considered by the SIRCs before using *istibdal*, and not just generating *waqf* income as the primary consideration.

Previous research by Kader and Wan Ismail (2017) reveals that several *istibdal* issues involve Madrasah Salihiah *waqf* lands and three lots of *waqf* land for the Sultan Abdul Halim Airport extension. These *waqf* lands are all located in Alor Setar, Kedah. As mentioned above, the *istibdal* process for the *waqf* has become contentious, especially in terms of social welfare.

The first case involves *istibdal waqf* land on which Madrasah Salihiah was built. The problem began when the Majlis Fatwa Negeri Kedah agreed to do *istibdal waqf* by exchanging *waqf* land of Madrasah Salihiah to allow Bellview Group of Company (a company owned by non-Muslim Chinese) to build a the 'Aman Sentral Shopping Complex.' In exchange, the Kedah SIRC (MAIK) will receive monetary compensation from the developer and Surau Al-Aman (in Aman Sentral Shopping Complex) as *istibdal waqf*. As a result, the State Authority demolished Madrasah Salihiah using the Land Acquisition Act 1960 [Act 486] to legalise the process under Civil Law.

While the second case is regarding the *istibdal waqf* of 3 lots of *waqf* lands (a paddy field area) situated in Mukim Titi Gajah, Alor Setar, to extend the Sultan Abdul Halim Airport, according to Kader and Wan Ismail (2017), as the result of the *istibdal waqf*, many farmers who worked for the paddy field have suffered the loss of income and need to find another job.

Conclusion

In conclusion, *waqf* can be considered '*a sleeping giant'* since Malaysia has many potential undeveloped *waqf* properties. The success of the *waqf* system has been proven by the history of Prophet Muhammad (PBUH), the era of the Ottoman Empire and in other parts of the Islamic world. Various legal issues may impact the development and commercialisation of *waqf* property, unregistered *waqf* land, courts' jurisdiction to hear *waqf* cases involving Islamic finance litigation and inefficiency in *waqf* investment, financial management, accounting and reporting. Further study needs to be made to strengthen the legal framework and governing law on *waqf* for *waqf* property development and commercialisation.

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