THE DEVELOPMENT OF WAQF PROPERTIES BY USING CREDIT-BASED FINANCING METHODS: A CRITICAL REVIEW AND ITS IMPLICATIONS TO SOCIAL WELFARE OF THE UMMAH

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ABSTRACT

Waqf properties constitute a large percentage of societal wealth in several Muslim countries. Yet, numerous Muslim countries are facing enormous socio-economic problems such as poverty, illiteracy and lack of basic healthcare services. This encourages contemporary Muslim scholars to formulate new financing methods that can be used to develop Waqf properties and ensure that these modes conformed with the Shariah. These methods are grouped into three, namely: credit-based financing, institutional financing and corporate-based financing. Indeed, the applications of some of these financing methods have been proven successfully in the development of Waqf properties. This paper attempts to critically review credit-based financing methods to aid the development of Waqf assets and their implications on the social welfare of the ummah. We realized that some of the credit based methods such as Build-Operate-Transfer and many of its variance are not suitable in developing Waqf assets, which require that the method will generate sufficient income to meet urgent social needs of society. There is no income guarantee with most of these credit–based contracts. In fact, the financier or developer will own the building (usufruct) for a long leasing period and by the time they sell or transfer the building to Waqf institution, the building will be old, dilapidated and its value depreciated; thus it defeats the very basic notion of improving social welfare of the people.

Keywords: Waqf Properties, Socio-Economic, Financing Development, Waqf projects, Waqf management.

1. INTRODUCTION

In the Middle East and many other Muslim countries, Waqf forms huge reserve of high-potential lands for socio-economic development. However, most of these Waqf properties are being neglected, left idle, unproductive and misused. This has distorted the noble intention of the institution, which primary concern is to support the socio-economic development of Muslim ummah. Historically, Waqf institutions play a significant role in caring of the orphans, the poor and the needy, the widows, the handicapped and the old. These institutions provide food, shelter, healthcare and all the basics needs. Back in the 18th century, Istanbul recorded an estimated population of 700,000. From this number, up to 30,000 people were fed on daily basis by the charitable complexes established under the Waqf system (Saduman and Aysun, 2009). On this basis, contemporary Muslim scholars are encouraged to design a suitable and acceptable methods of financing that could be used for the development of Waqf properties. The methods are structured based on the three well known Islamic financing

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principles: the principle of sharing, the principle of sale and the principle of leasing. They are categorized into three broad based groups: credit-based financing, institutional financing and corporate-based financing (Kahf, 1998). Therefore the objective of this paper is to review credit-based financing methods that are suitable for the development of Waqf properties and its impacts on social welfare.

2. CONCEPTS OF WAQF

The origin of word ‘waqf’ comes from Arabic word ‘al-waqf’ which literary means to stop (al-sukun), to prevent (al-mana’a) and to suppress (al-habs) (Hasan Ayyub, 1998). The word al-habs itself could be defined as preventing (mana’ahu), holding (‘amsakuhu) and trapping (sajjanuhu). The wording al-‘hubays refers to maf‘ul, which means each and every properties held with the intention to be distributed and donated towards good deeds. Thus, wording such as al-‘ihbās and al-awqāf refer to the same thing, to hold and distribute benefits for the purpose of ibadah (Abu al-Fadl Muhammad, 1982).

Imam Abu Hanifah explained that the relationship between a donor and endowed properties never ceased as long as the properties exist. Hence, the benefits he/she derived from waqf properties will be infinite. The physical characteristics of the waqf property should not be changed and the benefits from it must be distributed to mawqūf ‘alayh. Mawqūf ‘alayh refers to people (individual, group or organisation) who are beneficiaries of waqf assets (Muhammad Amin, 1966). However, according to al-Dasuqī, Maliki’s jurists Waqf usufruct should be enjoyed by rightful beneficiaries as specified by the donor.

Al-Khassaf (1904) defined Waqf as immobilization of an owned property (habs al-‘ayn) for the purpose of worship (‘ibadah) or charity (tasadduq) with revenues from that property allocated to the poor and needy. According to Kahf (1998) Waqf signifies the usufructory donation, made in favour of a beneficiary, with a view to the fulfillment of some pious aim or some project of general utility, which entails the legal sequestration of the gift or donation, whether this donation includes, or does not include usufruct.

Imam Syafi‘i described waqf as “to hold a certain asset/property so that it can only be used to derive usufruct while maintaining its physical attributes, and its owners surrender the right to manage the property to Waqf institution” (Muhammad Idris, 1968). Moreover, al-Syarbinī Syafi‘i’s jurist explained Waqf as the act to retain a properties/asset by preserving its physical attributes so that it can be used by mawqūf ‘alayh (beneficiaries). Furthermore, al-Nawawi and al-Sha‘banī stated that the practice of waqf is a way to continuously distribute the benefits from a waqf property for the sake of Allah.

In a Malaysian context, waqf is defined as a property that is retained and void in any transaction, hibah and wills (Jabatan Wakaf Zakat Dan Haji, 2006). The physical attributes of the property must be preserved but the revenues generated from waqf properties should be used for social welfare such as charity, orphanage or as specified by the donor. It is obvious from the definition that the waqf properties must be something that has value, such as mosques, schools, hospitals and lands (Muhammad Akram, 1994). Thus, any valuable property can become a waqf property, no matter if it is a liquid asset like money and shares or if it is a fixed asset such as buildings, shops and land. Waqf is a continuously usufruct-giving asset as long as its principal is preserved. Preservation of principal may result from its own nature as in land or from arrangements and conditions prescribed by the waqf founder (Kahf, 1998).
2.1 Types Of Waqf

Waqf is a pious endowment or foundation which pledges specific incomes or usufruct of the property for the maintenance and upkeep of a named beneficiary. If the beneficiary is of a charitable nature, such as a mosque, school, hospital or orphanage it is a public Waqf (Waqf Khayri). If the beneficiary is an individual and (or) descendants it is a family Waqf (Waqf dhurri or ahli). If the beneficiaries are a combination of charitable and individual beneficiaries, it is a mixed Waqf (Waqf Mushtarak). Thus, there are three types of Waqf that is Waqf Khayri, Waqf dhurri or ahli and Waqf Mushtarak (Dequilihem-Schoem, 1986).

Public Waqf is an endowment made by the founder to support the general good and welfare of the society, the poor and the needy. Usually the founders created such Waqf in the form of building such as mosques, schools, hospitals, orphanage houses, guest houses, or dedicated books, land for cemeteries and dedicated weapons etc. and indeed, its beneficiaries are public or charitable institutions. The founder of public Waqf retained little, if any, financial stake in the endowed property.

In the family Waqf, the founder endows his property to his children and grandchildren, relatives or to other person he specifies. The founder could stipulate that its manager or Mutawalli would earn handsome salary, appoint himself as the first Mutawalli, and, in that capacity, hire his relative as salaried employees of the Waqf. In this manner, he could devote a substantial portion of the Waqf resources to enhance his family financial security (Crecelius, 1986). The Mutawalli of a family Waqf, man or women, normally received 10% to 15% of the Waqf income and could be higher than that depending on the social norms of the region. Under, some arrangement Mutawalli income consists of the surplus after all other expenses of the Waqf had been met. Like those of charitable Waqf, family Waqf usually qualified for tax reductions, if not for outright exemption (Crecelius, 1986). However, it is mandatory that upon the death of all individuals’ beneficiaries, the final recipients have to be of a charitable or public in nature. In Waqf Mushtarak, the Waqf revenues are divided between charitable or public institutions and specific individuals (sometimes their descendants) i.e. the founder dedicates a part of his property to his family and another part to the public in other words it is a combination of Waqf Khayri and Waqf dhurr (Dequilihem-Schoem,1986).

3. CREDIT-BASED MODES OF FINANCING DEVELOPMENT OF WAQF PROPERTIES

According to Sadique (2008), investment of waqf properties are necessary as it will generate income that will support waqf institution in providing services to its beneficiaries. Awqaf have been in existence for long period, and evidence shows that a substantial portion of awqaf in terms of real estate, agricultural lands, in most instances have been neglected or did not receive the care and attention necessary to make them flourish. As a result, these properties only generate meager incomes that are hardly enough to fulfill objectives of Waqf institution. This has made it necessary for the institution to examine the possible avenues and means, through which Waqf properties could be developed, in order to make them generate sufficient revenues to support, maintain and contribute to their respective beneficiaries (Sadique, 2008). Contemporary Muslim scholars categorized financing methods for developing Waqf properties into three broad based groups: credit-based financing, institutional financing and corporate-based financing. However, the focus of this paper is on credit-based financing methods. These methods include the following:
3.1 Build, Operate, and Transfer (Ijarah Thumma Tamlik)

The build-operate-transfer (BOT) scheme has gained worldwide popularity as a mechanism to limit public spending on governments’ budgets and facilitate private financing of desirable public facility projects (Algarni et al., 2007). In particular, pay toll-road projects have been accounted for an important share of the investment among all types of BOT arrangements in the past two decades in both, developed and developing, countries (Medda and Carbonaro, 2007).

In a BOT scheme, private investors - the "sponsors" - receive a concession to finance, build, and operate a facility over a set period of time, in exchange for the right to charge the users of the facility at a rate which makes the investment commercially viable and earned acceptable profit. At the end of this period, the ownership of the project is transferred back to the awarding authority (Jefferies and McGeorge, 2009). In a BOT scheme, the goals of the state is to obtain infrastructural facilities with greater efficiency and speed, without the state taking on the adherent financial responsibility. The BOT system requires a facility to pay for itself on a commercial basis, through implementation of the "user-pays" principle. Private investors absorb the long-term risks of financing, developing, and managing an infrastructural facility based on potential commercial rewards. Concessions can be granted for any period, with power-generating facilities often in ten-to-twenty year range, toll roads in twenty-to-thirty-year range and the Eurotunnel, fifty-five years (Paul, 1997).

Since the early 1980s the concept has been applied to power generation, telecommunications, sewage and water, bridges and toll roads, and other facilities in both developed and developing countries. The Anglo-French channel tunnel, the Eurotunnel, built in the early 1990s, probably is the largest ever BOT project. This demonstrates the feasibility of the concept. More importantly, private concessionised infrastructure has long been in place in Hong Kong: the private China Light and Power has been providing electricity since early of this century, and more recent successful projects which include the cross-harbour tunnels (Paul, 1997).

This financing method can be used to develop Waqf property. The value of a waqf land can be improved if the location is strategic and the viable commercial project is expected to be profitable. In developing the potential waqf land, the financier will provide capital and expertise while the trustee provides Waqf land (Hydzulkifli and Asmak, 2013). In this arrangement, Waqf institution issue permits to a financier to construct a building on Waqf land. The financier authorizes the developer to erect such building. When the building is completed, the Waqf institution leases the building for certain period and during this period the building is owned by the financier. After the maturity of the lease, the financier would have already obtained its principal amount and desired profit and the building would be transferred to the Waqf institution through sale or inform of gift (Mustafa and Ashraf, 2009).

The earliest application of B.O.T financing method can be traced back to 1859 with the construction of Suez Channel. The purpose of the channel is to shorten the time and cost involved for merchant to trade in the Middle East. This project was the first large-scale B.O.T project with a 99 years concession period. Upon maturity, the financing companies will surrender all management right and fee collection to Egyptian government (Mohamed and Ahmed, 2002). This model is practiced by IDB which financed constructions of industrial goods for a certain period of time where the borrower pays biannual rentals, and at the end, the ownership of the assets is transferred to the beneficiary (Muhammad, 2006).
Furthermore, the Islamic Religious Council of Federal Territory adopted this model for the construction of a 34-storeys building at a 0.484-ha site on Lot 168/169, Jalan Perak, Kuala Lumpur. The council entered into an agreement with Lembaga Tabung Haji (LTH), whereby the council offered its land and LTH will develop the land using their own funds. LTH then assigns the project to its subsidiary; namely TH Technologies Sdn Bhd to construct the building within 48 months, based on the contracts of Istisna and al-Wakalah. As a consideration of the said arrangement, LTH will enjoy the right to use the building and the land for the period of 25 years, at the same time the council will receive RM 56.6 million from LTH as a rental payment for the lease of the land based on the contract of Ijarah. At the end of the lease period, LTH will hand over the building and the land to the Council (Mustafa and Ashraf, 2009).

BOT scheme gives several advantages for the Waqf institution as the owner of the asset i.e. land on which the building/other assets will be developed without need to finance it. Secondly, BOT scheme provides assurance of preservation of ownership of the Waqf asset as it remains on the Waqf institution. This assurance is important since, according to Imam Shafi’i, once an asset is endowed then it is owned by Allah, the Almighty (Kholid et.al., 2007). However, there are some disadvantages of using BOT scheme as a way to develop Waqf assets. BOT requires developer to build the Waqf asset followed by operating the developed asset and then transferring the asset back to the Waqf institution upon the completion of the tenure duration. Under this scheme, Waqf institution will get back the developed Waqf asset i.e. office building, after developer operating it for a long duration of BOT contract (e.g. 25 years). in this situation, Waqf institution is exposed to some risks such as the developed assets may have been obsolete by the time it is transferred to Waqf authority, the area may lost its business attraction, and etc. (Kholid et.al., 2007). Thus, it may not serves its main purpose of improving the welfare of the Muslim Ummah.

3.2 Build, Lease and Sale (B.LS)

This is a contract based on the long lease of the Waqf property. The developer or leaseholder will construct a building on the Waqf land with an understanding that the Waqf authority will buy the building from the developer at the end of leasing period (Kahf, 1998). The Waqf institution may lease the building for long and specified period and pay annual rental payment directly to the developer account. At the end of the lease, Waqf institution will owns the building through sale transaction. The contract includes 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 (Hassan and Abdullah, 2008).

The Islamic Religious Council of Pulau Pinang in Malaysia followed this model in constructing its 21-storey of UMNO Tower’s building in Georgetown. This building was erected on Waqf land and the council leased the building to the developer for a period of 99 years. At the end of the lease period, the council will own the building through sale transaction. However, this long leasing period defeats the purpose of developing Waqf land to urgently generate sufficient incomes that will be used to improve on social welfare of the people (Hydzulkifli & Asmak, 2012). Moreover, if the selling price is too high after the leasing period, Waqf institution may not be able to afford to purchase the building and in the end they may lose right of ownership over the property. In any case, projects never proceed to the physical development stage. The result is a considerable loss of both time and money, and perhaps even ownership of Waqf assets.
3.4 Build – Transfer – Operate (B.T.O)

BTO (build-transfer-operate) refers to a concession where ownership of the facility is transferred to the government upon completion of construction and/or installation. For the remaining period of the concession, the financier retains the right to operate the facility and reap the financial rewards. In a BTO project, risk increases because the facility is not available as collateral. Therefore, the project depends heavily on the strength of the concession contract in providing and guaranteeing access to project revenues as well as the general stability of the operating environment (Paul, 1997). However, this contract may be suitable for developing Waqf properties as ownership will be totally transferred to Waqf institution upon completion of construction.

This method is used to develop waqf land where the Waqf institution will lease the land to financier and financier can use the land to build viable commercial property that is expected to generate sufficient rental income. A contract will be agreed between the financier and Waqf institution where financial institution will finance and manage the project and Waqf institution will provide land for the development of the project. Upon building completion, the waqf institution will be the owner but the financier will be granted the proprietary rights until the lease expired. According to the proprietary rights, the developer is allowed to reside in the building or to rent it out to third parties (Nazih, 1993).

The State Islamic Religious of Pulau Pinang contracted Majlis Amanah Rakyat (MARA) to develop waqf lands along the Campbell and Chulia motorway at Pulau Pinang. MARA financed the construction of commercial Muslim centre at the cost of RM3.8 million and leases the complex for 30 years period. At the end of the 30-year, the building proprietary rights will be transferred to State Islamic Religious of Pulau Pinang which then will be the owner of both the building and its usufruct (Hydzulkifli & Asmak, 2013).

3.5 Istisna’ Financing

The contract of Istisna is suitable to facilitate the manufacturing or construction of an asset at the request of the buyer. Once the manufacturer undertakes to manufacture the asset or property for the buyer, the transaction of Istisna comes into existence. Both parties, namely the buyer and the manufacturer, agree on a fixed price and also agree on the specification of the asset intended to be manufactured. At the time of the delivery, if the asset does not conform to the specifications, the party placing the order has the right to revoke the contract (Iqbal and Mirakhor, 2007).

Like Ijara, Istisna also has great potentials to be applied in project financing for different sectors and industries. Successful applications of istisna include aircraft manufacturing, locomotive and ship building industries, manufacturing of heavy –duty machinery, housing, hospital, roads, etc. (Toutouchchian, 2009). Istisna’ mode could be employed more effectively in the development of Waqf properties in forms of housing units, business structures, factories, workshops, etc. that could be leased to potential businessmen or operated by Waqf itself (Sadique, 2008).

In adopting this mode for financing Waqf projects, the Waqf management engages a financial institution to construct a structure on the Waqf land according to specifications provided by the Waqf. They will make an agreement that the completed structure would be transferred to the Waqf against a fixed lump sum to be paid by the Waqf institution on agreed date, or over
a period as arranged between the parties in instalments (Sadique, 2008). The Waqf could undertake to pay throughout the duration of construction and beyond, until the agreed amount is fully settled. The method in practicality means that a large part of the agreed price is paid in instalments, through income received by the Waqf by way of leasing the property to prospective lessees that takes place after completion of the construction (Sadique, 2008).

In this arrangement, the Istisna’ contract is primarily affected between the Waqf and the financial institution. Although financial institution plays the role of the constructor in this case, it may not undertake the construction process by itself (Kahf, 1998, 2000). However, financial institution can enter into another contract of Istisna’ with the developer and this is called back-to-back or parallel Istina’ (Iqbal and Mirakhor, 2007). Hassan and Abdallah (2008) opines that it is not necessary that the financier itself construct the building, but it can enter into a parallel contract of Istisna’ with the developer. This contract is based on similar terms, with the price to be paid to the developer being lower than that in the first contract between the financier and the Waqf institution (Sadique, 2008). The differences between these prices formed the profit of the financial institution. Indeed, the selection of the developer and all negotiation pertaining to the price, specification etc. are finalized between the developer and the Waqf. The bank is brought into the process at a later stage, before any contract is concluded between the Waqf and the developer and the bank can enter the Istisna’ contract with Waqf and another contract with the developer and these two contracts must remain independent of each other (Sadique, 2008).

The Islamic Fiqh Academy Jeddah, in its resolution on investment certificates, has upheld that in the case of Istisna’ involving Waqf projects, the government may provide an undertaking to settle the dues of the developers which shall take the form of a gift or interest-free loan to the Waqf (Sadique, 2008). One of the main advantages of Istisna financing is that there is no violation of the restriction on Waqf ownership, as the financial institution engage with Waqf in the capacity of service provider who also supplies the materials necessary for the construction of Waqf property and sell the manufactured product to the client (Sadique, 2008). However, this mode will only be effective when Waqf management adopts best corporate governance practices such as transparency, accountability and having independent board of directors, etc. This makes financiers to have confidence in the institutions and provide capital for the projects (Kahf, 2007).

4. CONCLUSION

Waqf institutions have certain unique features and these features dictate that some important adjustments are needed in these methods of financing before they can be applied to finance the development of Waqf properties. These features include nature of ownership of Waqf assets, transfer of ownership, leased period and rental payment, permanency of Waqf and responsibilities of caretaker. For instance, the fact that the Waqf is owned by Allah and that no party can gain its ownership through any contract. It is essentially impossible to transfer the ownership of a Waqf asset to another party by any means in normal circumstance be it through sales or lease or given as a gift. This makes the application of build-operate -transfer and many of its variance for the development of Waqf properties questionable given the facts that these modes require the transfer of ownership of the leased asset or selling of the asset.

Moreover, BOT and its variance involve long term leasing before transferring the ownership of usufruct to Waqf institution and in that respect financiers gains more than Waqf
institutions. This defeats the purpose of developing Waqf assets that can be used to generate incomes to finance socio-economic programmes that are vital for improving social welfare of the ummah. In a nut shell, equity-based modes of financing such as Musharakah; self-financing modes using cash Waqf shares; and corporate financing such as issuing Ijara Sukuk could be more appropriate modes of financing development of Waqf properties. This because, Waqf institutions will share the income generates from the projects and can be in position to finance social welfare programmes without waiting for long period of time to ripe the benefits of the developed Waqf assets as the case with BOT and its variances.

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