

Acquisition of *Waqf* Lands by The State Authority : A Case Study of Land Acquisition in Terengganu

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ABSTRACT

The Land Acquisition Act 1960 has listed out some categories of land that can be acquired for certain purposes by the Government or the State Authority (SA), namely registered alienated land. In this regard, the National Land Code 1965 has allocated the power to place any *waqf* land under a specific administrative body, the State Islamic Religious Affairs Council (SIRC). The objective of this article is to identify some issues connected with the acquisition of *waqf* land by the SA. It is also to recommend some improvements to the law in order to ensure that the acquisition of *waqf* land is in line with Sharia. As a case study, the State of Terengganu is chosen to highlight the issues connected with the acquisition of *waqf* land by the SA. The study adopts the qualitative approach, where data are collected through library research and the content analysis method. The research findings reveal that most of the remedies awarded in the *waqf* land were monetary compensation based on market value.

Keywords: Acquisition, case study, Terengganu, *waqf* land

INTRODUCTION

Buang (2010) defined acquisition as transfer of ownership of property that must indicate a person or body to whom the property is transferred. Land ownership in Peninsular Malaysia is governed by the Federal Constitution (FC), National Land Code 1965 (NLC) and the Land Acquisition Act 1960 (LAA). In Malaysia, land ownership is guaranteed under Article 13 of the Federal Constitution, which provides that private

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property cannot be compulsorily acquired or used, unless it is done in accordance with the law and the deprived owner is paid adequate compensation. In *Chiranjit Lal v Union of India* AIR (1951) SC 41, Mukherjee J defined acquisition as follows: "Acquisition means and implies the acquiring of the entire title of the expropriated owner, whatever the nature or extent of that title might be. The entire bundle of rights which were vested in the original holder would pass on acquisition to the acquirer leaving nothing in the former" (p. 54). In other words, although an individual has a right over his property, this right can be denied through legal procedures subject to adequate compensation being paid to the owner.

Section 3(1) of the LAA provides that any alienated land may be acquired by the State Authority (SA) if needed: (a) for any public purpose; (b) by any person or corporation for any purposes, which in the opinion of the SA is beneficial to the economic development of Malaysia or any part thereof or to the public generally or any class of the public; (c) or for the purpose of mining or for residential, agricultural, commercial, industrial or recreational purposes or any combination of such purposes. *Waqf* land may also be compulsorily acquired by the SA under the LAA. This is a result of not having precise laws dealing with acquisition of *waqf* land. According to Ibni al-Manzur (1994), *waqf* comes from the Arabic verb '*waqafa*', whose root means 'to prevent' or 'to stop' or 'to restrain' or 'to abstain'. Other jurists such as Muhammad (1971),

al-Syirbini (1994) and Ibn Qudamah (1999) deliberated the legal context of *waqf*, which referred to an irrevocable gift of a corporeal property ('*ayn*') for the benefit of the donor's family or someone else or something, in perpetuity, as charity promised and executed normally during the life-time of the donor, that is not capable of transfer, gift and transmission thereafter. As a whole, *waqf* is a perpetual dedication of movable or immovable property for religious, pious or charitable purposes. Therefore, the main characteristics of classical *waqf* are irrevocability, perpetuity and inalienability. In other words, *waqf* carries with it an element of eternity in benefits that become the goal of *waqf* (Salleh, Hamid, Harun, & Abd, 2015).

Section 2 of the LAA clearly stipulates that the government has the power to acquire land including that under the control of the SIRC because the status of land that has been endowed as *waqf* land is also classified as alienated land. Therefore, as with other alienated land, the SA can exercise their power to acquire *waqf* lands at any time without any legal restrictions (Mat, 2012a). Further, there is no legal provision indicating that any acquisition of *waqf* land must be replaced with another piece of land of similar nature and value (Mohamad, Syed, & Ali, 2012). Hence, *waqf* land could also be acquired by any party for the purpose of economic development such as housing projects or government projects. This provision is inconsistent with Islamic principles, which state that the acquisition of land must be in line with

public interest (*masalahah 'ammah*) such as for the construction or expansion of a mosque, cemetery or roads (Ismail, Harun, & Omar, n. d).

Market Value

The principles of awarding compensation for land acquisition are found in the First Schedule to the LAA, wherein it is stated that the compensation must be in accordance with the market value of the land in question at the time the land is gazetted for acquisition. Section 2 of the First Schedule to the Act states that in determining the amount of compensation to be awarded for any scheduled land acquired under the Act, consideration must be made in respect of the following matters and no other: (a) the market value as determined in accordance with section 1 of the First Schedule; (b) any increase in the value of the property belonging to the interested person that is likely to accrue from the use to which the land acquired will be put; (c) the damage, if any, sustained or likely to be sustained by the person by reason of the acquisition injuriously affecting his other property or his actual earnings; (d) the damage, if any, sustained or likely to be sustained by the person by reason of the acquisition injuriously affecting his other property or his actual earnings; if, in consequence of the acquisition, he is compelled to change his residence or place of business, the reasonable expenses incidental to such charge; and (f) where only part of the land is being acquired, any under-taking by a competent authority to construct roads, drains, walls,

fences or other facilities benefitting any part of the land left unacquired, provided that the undertaking is clear and enforceable.

In determining what is the 'market value' of the acquired land, the Collector is required to take into consideration the principles contained above and, in addition, any express or implied conditions restricting the use of the said land (Buang, 2010, p. 317). The term 'market value' has not been defined in the LAA (Chin, 1999, p. 45). In the case of *Foh Chong & Sons Sdn Bhd v the District Land Administrator, Johor Bharu and Another* [2005] 3 MLJ 748, the High Court decided that:

The principles of awarding compensation for land acquisitions are found in the First Schedule to the Land Acquisition Act 1960 (Act 486) wherein it is stated that the compensation must be in accordance with the market value of the land in question at the time the land is gazetted for acquisition. (p. 751)

In *Nanyang Manufacturing Co v The Collector of Land Revenue Johore* [1954] MLJ 69, Buhagiar J stated the definition of market value as the price that an owner, willing to sell but not obliged to sell, might reasonably expect to obtain from a willing purchaser with whom he is bargaining the sale and purchase of the land. The judge further summarised the three recognised methods of valuation as follows: (i) the opinion of experts, (ii) the price paid, within a reasonable time, in *bona fide* transactions

of purchases of land acquired, or of the land adjacent to the acquired and possessing similar advantages; and (iii) a number of years' profit from the land. In *Superintendent of Lands and Surveys, Sarawak v Aik Hoe & Co* [1996] 1 MLJ 243, Suffian J stated that market value meant the price expected to be obtained by a seller from a willing purchaser.

Market value was clearly defined in *Ng Tiou Hong v Collector of Land Revenue Gombak* [1984] 2 MLJ 35, when Syed Agil Barakbah HMP stated the main principles in determining market value: Firstly, market value refers to compensation that must be determined by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. Secondly, market price can be measured by a consideration of the price of sale of similar land in the neighbourhood or locality that is of similar quality and position. Thirdly, its potentialities must be taken into account. Fourthly, in considering the nature of the land regard must be given as to: whether its locality is within or near a developed area; its distance to or from a town; availability of access road to and within it or presence of a road reserve indicating a likelihood of access to be construed in the near future; and expenses that would likely be incurred in levelling the surface and the like. Fifthly, estimates of value by experts are undoubtedly some evidence but too much weight should not be given to an estimate unless it is supported by, or coincides with, other evidence.

In *Ong Yan & Anor v Collector of Revenue Lands, Alor Gajah, Malacca* [1986] 1 MLJ 405, Wan Yahya J highlighted the trend of recent cases reflecting that in assessing market value, the court does not only consider the present utility of the land but also the potential use of such land in the future. The judge further summarised the five known methods of valuation as follows: (i) the opinion of experts; (ii) the costing method, which is adding by the primordial value of the land and any costs of improvement and all elements of profits; (iii) comparing the sale price of land in the neighbourhood of the acquired land; (iv) a number of years' purchase of the profit from the land acquired; (v) the residual method, namely by retrocessive deduction of the cost of development and building from a built-up property so as to arrive at the residual value of the land. Out of the five methods, the judge in this case chose the comparative sale method as the best guide to a fair assessment and did not really depend on the valuation of the real estate expert (Buang, 2010, p.320). In other words, what is emphasised is not only the remedy for the loss of ownership but also compensation for any expenses incurred on the land, such as buildings, as well as loss of earnings consequential to any land cultivation and future development that is likely to be incurred.

Legal Position of Waqf

Islamic law matters in Malaysia are governed at state level through the Sharia Courts by virtue of the State List of the Ninth

Schedule to the Federal Constitution. A state's jurisdiction, including Terengganu's, over Islamic matters is definite. *Waqf* is one of the matters related to the religion of Islam as listed under Item 1, List II (State List) of the Ninth Schedule of the Federal Constitution. Item 1 reads as follows:

...Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue....

Based on the above provision, it is clear that matters related to *waqf* are under the jurisdiction of the state. Article 74 of the Federal Constitution further provides that the Legislature of a state may make laws on any matters specified in the State List (*Waqf* Land Vesting Management Manual, 2010). The state can create the laws on the above matters. In other words, the *waqf* institution has been provided by the Islamic

Religious Administrative Enactments of each state or other enactments relating to the state's *waqf* property (Ishak, 2013). Therefore, each state has the power to enact its own *waqf* laws without being subject to the federal law. This could be seen when the states of Selangor, Malacca and Negeri Sembilan Enactment specifically legislated *Waqf* Enactments for their respective states. For states with specific *waqf* legislation, the administration and management of *waqf* property was subject to such law (*Waqf* Land Vesting Management Manual, 2010). In states other than Selangor, Malacca and Negeri Sembilan that have yet to introduce specific *waqf* legislation, matters related to *waqf* form part of the state's jurisdiction and only the Sharia Court can hear and decide any matters related to the *waqf* (Dahlan, Yaa'kub, Abdul, & Palil, 2014).

Under the NLC, the position of the *waqf* was provided for in section 4(2)(e), which explicitly stipulates that no provision in the NLC is applicable to *waqf* land, except as otherwise provided. The provisions of the NLC expressly provide that *waqf* lands are not recognisable as being administrable under the NLC. This provision seems to generally recognise that only *waqf* laws are needed to govern and administer *waqf* land. Therefore, the general principles of the NLC that are not in line with Islamic law are not applicable to the extent that they are inconsistent in terms of the management and administration of *waqf* land (Md Omar, 2013).

The Department of Wakaf, Zakat and Haji (JAWHAR) published a manual for

waqf land i.e. 'Waqf Lands Administration Manual 2010' and proposed three methods to register *waqf* land according to the NLC. Firstly, the *waqf* land can be transferred using Form 14A, where the land will be transferred from the original registered proprietor (the donor) to the *mutawalli* (the State Religious Council). The *mutawalli* is the person or institution who is assigned as legal custodian over *waqf* assets or funds. Secondly, *waqf* land can also be transferred to the *mutawalli* using the surrender and re-alienation provision under section 197 of the NLC. The land can be dedicated for *waqf* by Muslims through the mechanisms of Part 12 of the NLC, which deals with the surrender of the ownership of alienated land to the SA (sections 195 to 204). The act of registering *waqf* land can be done under the provisions in Part 30 of the NLC that regulate registration by way of statutory vesting as stipulated in sections 414 to 416. Lastly, *waqf* land can be registered under the provisions of section 416C of the NLC in the name of the SIRC as transferee (Syed, & Mohamad, 2014). Section 416C of the NLC includes statutory vesting in favour of the transferee of alienated land derived by way of donation, gifts, bequest, permission, consent or any other means. Applications may be made by the transferee by presenting evidence of such donation, gift, bequest, permission, consent or in any other way to the Registrar of Titles or the Land Administrator for endorsement in order to affect the rights and entitlement of the transferee as well as to bind the land proprietor. The rights granted are to occupy,

utilise, control or manage the land, and not to act as the land proprietor. Therefore, the statutory vesting under this provision is restrictive, wherein the SIRC can only occupy, use, control or manage the *waqf* land but not own it.

Therefore, the SIRC is the body given the responsibility of administering and managing *waqf* lands as sole trustee in respect of all *waqf* lands and the trustee for all types of trust in the form of Charitable Trusts (*Amanah Khairat*), which look after the welfare of Muslims. The SIRC has been established in every state for the same purpose, namely, to be responsible for maintaining, developing and managing *waqf* property, but they differ in the implementation of control of management (Ab, Mohamad, Mohamed, & Abdul, 2011).

In Terengganu, *waqf* lands fall under the jurisdiction of the Islamic Religious Council and the Malay Customs of Terengganu (MAIDAM), a body that is responsible for looking into the affairs of *waqf* land administration. Section 63 of the Administration of Religious Affairs (Terengganu) Enactment (No. 2 of 2001) states:

Notwithstanding any provision to the contrary contained any instrument or declaration creating, governing or affecting it, the Majlis shall be the sole trustee of- (a) all wakaf, whether wakaf am or wakaf khas; (b) all nazar am; and (c) all trusts of every description creating any charitable trust for

the support and promotion of the religion of Islam or for the benefit of Muslims in accordance with Hukum Syarak, to the extent of any property affected by the wakaf, nazar am or trust and situated in the State of Terengganu.

Section 64 provides that, “All property subject to section 63 shall without any conveyance, assignment or transfer, and, in the case of immovable property, upon registration under the written law relating to land, vest in the Majlis, for the purpose of the wakaf, nazar am or trust affecting the property.”

Mahamood (2005) stated that the purpose of the appointment of the SIRC as sole trustee of *waqf* was to ensure that *waqf* is efficiently managed and administered, so that it can generate substantial revenue

that will benefit the beneficiary or be used for welfare purposes that are either or not determined by the *waqif*.

A Case Study of Acquisition of *Waqf* Land by the Terengganu State Authority from Year 2009 to 2014

In Malaysia, nearly all mosques, Muslim prayer houses (*surau*) and cemetery sites that are built on government land are yet to be transferred to the SIRC (Mat, 2012b). In Terengganu most of the *waqf* lands affected by the acquisition are those donated for use as mosques, Muslim prayer houses and cemeteries. Fortunately in Terengganu, these land titles are already registered under the SIRC and compensations has been paid by the government to the SIRC as *mutawalli*. The list of *waqf* land in Terengganu that was involved in the acquisition of land from the years 2009 to 2014 is shown in Table 1.

Table 1
List of types of *waqf* land involved the land acquisition with compensation

Year	Types of <i>Waqf</i>	Location	Compensation Sum (RM)	Purpose of Acquisition
2009	Welfare of Roh Hj Omar	Kg. Bukit Dungun/ Bukit Payung	21,560.00	MC
	Hiliran Mosque	Kg. Pak Bang/Chabang Tiga	55,090.00	MC
	Tok Ku Mosque	Kg Melintang/Kubang Parit	32,661.00	MC
	Tok Ku Mosque	Kg Melintang/Kubang Parit	33,687.00	MS
	Tok Ku Mosque	Kg Melintang/Kubang Parit	13, 908.00	MC
	Mosque site	Kg Amir/Mukim Kampung Raja	23,590.00	MC
	Religious Education	Kg Pak Pe/Gelugur Raja	294,645.00	MC
2010	Beneficiaries of Haji Abdullah bin A. Aziz (Tok Pelam)	Kg. Ladang Tok Pelam/Bandar Kuala Trg.	9,133,430.27	RP
	Pasir Akar mosque site	Kg Pasir Akar/Pasir Akar	25,920.00	MC
	Bukit Bayas Mosque site	Kg. Laut/Pengadang Buluh	13,205.00	RE
	Beneficiries of Sheikh Kadir	Kg. Laut/Pengadang Buluh	113,905.00	RE

Table 1 (continue)

	Mosque site	Binjai Rendah/Bukit Payung	No compensation	MS
	Mosque site	Binjai Rendah/Bukit Payung	No compensation	MS
2011	Religious education	Reli Kg Pak Pa/Gelugor Raja	170,289.00	MS
	General <i>waqf</i> (Mosque)	Baroh Kg. Panji /Gelugor	9,384.00	MS
2012	Late Royal Sultan	Kg. Padang Air/Kuala Nerus	457,120.00	MS
2014	General <i>waqf</i>	Kg Pantai Telok Tanjung/Bandar Kuala Terengganu	1,495,330.92	DP

Source: MAIDAM (2015)

Note: MC = Ministry Complex; MS = Mosque Site; RE = Road Expansion; RP = Residential Project; DP = Development Project

RESULTS AND RECOMMENDATIONS

Based on the above information, almost all of the *waqf* land acquired by the government in Terengganu was paid for with monetary compensation upon acquisition. Two methods of compensating the acquisition of lands were used, *ibdal* and *istibdal*. According to Badran (1986), *ibdal* is the selling of corporeal property to buy property/ other assets or in the form of money, while Ibn Qudamah (1999) highlighted *istibdal* as the buying of corporeal property ('*ayn*) that constitutes *waqf* replacement. Islam has set compensation value as being equal to or higher than the price of the land acquired. Land acquisition over *waqf* property, which is happening nowadays, refers mainly to the concept of the sale of '*ayn Waqf* or *Ibdal* to the Government that is subsequently replaced either in the form of land or with compensation money (Mat, 2008). *Waqf* land in Terengganu was acquired for the following purposes, namely, to erect a ministry complex, to expand roads and

build mosque sites, residential areas and development projects. The total amount of compensation paid was RM11,89,722.19; none was replaced by *istibdal*; this, in the opinion of the writers, is the best way to remedy the loss of *waqf* land upon acquisition by the SA.

At the same time, the acquisition of *waqf* land has adversely contributed towards the declining number of *waqf* land. This is in view of the difficulty of procuring strategic land that is almost not available to replace acquired *waqf* land as well as rising land price (Nazli Amirri Ngah, interview on 2015, March 25). Due to failure to replace, *waqf* land will inevitably disappear and will no longer exist. This definitely defeats the principles and concepts of *waqf*, which emphasise on the permanency of the donated property. For example, taking *waqf* land in Kg Pantai Telok Tanjung/Bandar Kuala Terengganu for a development project actually cannot be compensated with money because the compensation was too little compared to the profits generated by the

development that has since taken place in the area. Buang (2010) stated that the land owner is entitled not only to the land but also to any benefits derived from the land, and these become the determining factors that must be taken into account in deciding the amount of compensation.

With regard to *waqf* of mosques, Muhammad (1971) asserted that the Maliki and Shafi'i schools of law agreed that such *waqf* could not be sold or exchanged, except when the transaction could not be avoided due to public interest. As a result, all *waqf* property dedicated for use as mosques cannot be acquired by the government for any reason of development. This is due to the principle that *waqf* property cannot be sold, given or bequeathed. Thus, it becomes necessary for the LAA to be amended to forbid the acquisition of *waqf* land, mainly, that connected to *waqf* of mosques or Muslim prayer houses (*surau*) by the government for any reasons whatsoever. This amendment is consistent with the interpretation given by the Maliki and Shafi'i schools of law, which totally prohibit the exchange or sale of the *waqf* of mosques. Alternatively, we may refer to the less restricted and more liberal opinion of the Hanafi and Hanbali schools of law, which allow the implementation of *istibdal* under some circumstances. In Terengganu, *waqf* land comprising the Hiliran Mosque, Bukit Bayas Mosque and Tok Ku Mosque was acquired by the SA; this, in fact, was in violation of the above principles as it was used to build ministry and state unity complexes.

The rise in land price and inadequate compensation have made it difficult to sustain and replace *waqf* lands that were acquired by the SA. Should the acquired land be replaced with the purchase of any new land and endowed as *waqf*, it would go against the concept of *istibdal*, which requires the *waqf* land to be replaced with a land of equal or higher value. With regards to proper practice, Mat (2012) laid down certain guidelines. If the acquisition of *waqf* land is specifically for mosque and cemetery sites, there are two types of usage: firstly, when the donor/*waqif* endows his land specifically for mosque or cemetery sites, the land must be utilised in accordance with the wish of the donor/*waqif*. Secondly, if the land is endowed for the benefit or usufruct favouring mosques or Muslim prayer houses, any proceeds derived from this land must be channelled into the maintenance fund of the mosque or Muslim prayer house concerned. With respect to the implementation of *istibdal* for this type of land, where the building of mosques/Muslim prayer houses concerns partial acquisition, the respective agency or developer must bear all costs incurred in relation to maintenance and enhancement of the mosque/Muslim prayer house so as to preserve its original condition, subject to the committee's approval in respect of the mosque/Muslim prayer house concerned. However, where acquisition involves a whole piece of land with a mosque that can no longer be used, it may be replaced with another building for use as a mosque or Muslim prayer house; alternatively, the

existing mosque or Muslim prayer house can be disposed of by way of sale so that a new mosque can be constructed on a new site, and the existing land must be replaced with another land of the same size (Sulung, 2013).

On the other hand, if the acquisition of *waqf* land is specifically for Islamic burial, it needs to be replaced with other land so that the respective tombs can be moved to the new burial ground. Replacing the existing acquired land with monetary compensation might cause problems, especially in procuring new land for the purpose of building a new mosque or Muslim prayer house, which would incur high expenditure. Therefore it is recommended that *waqf* land that is affected by land acquisition by the government be purchased or replaced with other land as soon as possible and money compensation if paid, should not be owned or kept for a long period. Nevertheless, taking into account other factors such as lack of suitable land and the rise in land price, which makes it difficult for MAIDAM to procure new land, the attempt to replace acquired land with land is still preferred, though it may become optional.

Lack of uniformity of *waqf* laws between the states has resulted in differences in terms of process, procedure for issuance of *fatwa*, interpretation of laws and understanding in matters relating to *waqf*. In fact, the absence of specific provisions or comprehensive

enactments with regards to the management and administration of *waqf* in most states in Malaysia except for Selangor, Negeri Sembilan and Malacca would allow the civil courts to intervene even though these matters are under the jurisdiction of the Sharia Court. Therefore, a specific act or enactment on *waqf* should be done in order to coordinate all matters relating to *waqf*.

CONCLUSION

Most *waqf* land affected by land acquisition by the SA has not been replaced with land. The practice adopted by the land administrator in Malaysia is solely to pay monetary compensation. Payment of monetary compensation accommodates the relevant acquiring parties as they are not required to deal with the affected parties other than the land owners concerned, namely, by way of dealing only with the SIRC. *Istibdal* or the practice of acquisition of *waqf* land by substituting money as compensation should be revisited and reviewed from both perspectives of Islamic ruling and the LAA. Although the theory of *istibdal* in the form of monetary compensation is tolerable and meets the basic concept of *istibdal* in Islam, the implementation does not seem to achieve the purpose of *waqf* as laid down in Islam, if SIRC fails to ensure the existence of land assets that SIRC has been entrusted with in fulfilling the rights of the donor (*waqif*).

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