

WAQF INSTRUMENTS FOR CONSTRUCTION CONTRACT: AN ANALYSIS OF STRUCTURE

Abdullaah Jalil

Asharaf Mohd Ramli

Universiti Sains Islam Malaysia (USIM)

ABSTRACT

The waqf instruments for construction and development of property are still underutilized in this country. Taking into consideration the increasing cost of construction and limited sources of funds, the potential of waqf instruments to attract more public funds should not be ignored. Waqf instruments could be developed for financing the development of several institutions such as universities, research centres and et cetera. The paper aims to study and analyze the structure of waqf instruments that could be further developed for construction of potential assets. This includes the risks, parties involved, advantages as well as disadvantages. It is a conceptual paper and the authors apply the inductive and deductive methods as well as analysis of the relevant literatures to reach at the findings. The findings suggest several methods and structures of waqf instruments for future development. It could be significant for those institutions that have planned to apply this concept in the nearest future.

Keywords: Waqf, endowments, waqf property, construction, Islamic financial instruments

Abdullaah Jalil and Asharaf Mohd. Ramli (2008). Waqf Instruments for Construction Contract: An Analysis of Structure. Presented at the 3rd Islamic Banking, Accounting and Finance (iBAF) 2008, Kuala Lumpur, Universiti Sains Islam Malaysia (USIM).

Introduction

The waqf instruments for construction and development of property (e.g. buildings) are still underutilized in Malaysia. Taking into consideration the increasing cost of construction and limited sources of funds, the potential of waqf instruments to attract more public funds should not be ignored. Waqf instruments could be developed for financing the development of several institutions that could such as universities, hostels for poor students, research centres, orphanage house and *et cetera*.

For the purpose of the discussion, the construction contract is defined as “*formal agreement for construction, alteration, or repair of buildings or structures (bridges, dams, facilities, roads, tanks, etc.).*”¹ The discussion of the paper is on the possible framework that could be adopted in the construction contract for *waqf* buildings. It could provide a preliminary or general framework that could be discussed in details later.

Problem Statement

Some institutions may have limited fund to develop their buildings that are necessary to the operation of their tasks/roles. At the same time, the institutions may have significant contribution and roles in the development of the Muslim community. Hence, considering the concept of *waqf* as a mechanism to raise fund from the public, corporate institutions, rich individuals and etc. for the construction of buildings is essential.

Objectives of the Paper

This paper aims:

- to study and analyze the structure of waqf instruments that could be developed for construction project
- to suggest the framework of waqf instruments that suitable for construction project
- to analyze and illustrate the advantages and disadvantages of this scheme based on a possible implementation at public universities

It is a conceptual and theoretical paper and the authors apply the inductive and deductive methods as well as analysis of the relevant literatures to reach at the findings. The findings shall suggest the structure of waqf instruments for future development. It could be significant for those institutions that have planned to apply this concept in the nearest future.

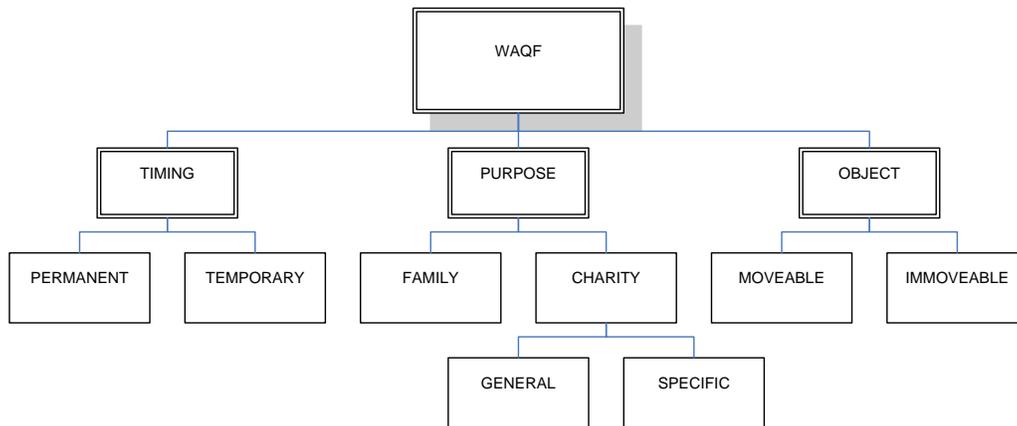
¹ Source: <http://www.businessdictionary.com/definition/construction-contract.html>

Literature Review

Waqf or Islamic endowment is a well-known topic in the area of Islamic economics, Islamic finance and Islamic jurisprudence. The topic has been discussed in great details in the literatures of Islamic jurisprudence especially and Islamic studies generally by the Islamic jurists and scholars for hundreds years. In general, *waqf* could be categorized into several categories from three different aspects i.e. timing of *waqf*, purpose of *waqf* (the beneficiaries) and the *waqf* object.

In principle, the timing of *waqf* must be permanent. However, it could be temporary in accordance to the *Malikiyyah* (al-Zuhayli, 2000). In term of the purpose of the *waqf*, the *waqf* could be made to the family of *al-waqif* (donour) or to the public for the charitable purposes. The charitable purposes could be general or specific (e.g. for the purpose of education only). However, from the managerial perspective, general *waqf* is better than the specific *waqf* as it gives more flexibility to the manager to develop the *waqf* property in order to optimize the benefit of the *waqf*. In term of the object of *waqf*, generally it could be moveable or immoveable. (See Figure 1 for illustration).

Figure 1: The Categories of Waqf in Islamic Jurisprudence



Nowadays, the main issues related to *waqf* properties or assets are the management and development aspects. Most of the current literatures focus on the development of *waqf* property rather than the establishment of new *waqf* property. Sources for the financing and development of *waqf* property could be obtained from (al-Misri, 2005):

- i. The property of *al-waqif* (donour)
- ii. The property of *al-mawquf^calayh* (beneficiaries)
- iii. The revenue of the *waqf* property
- iv. The revenue of other *waqf* property
- v. Baitumal for *maslahah* (public interest)
- vi. Reserves from the revenue of the *waqf* property
- vii. The sale of a portion of *waqf* property to develop the remaining portion of *waqf* property

- viii. The lease of the *waqf* property with advanced rentals
- ix. Charities
- x. Loan or debts (without interest)

Developing waqf properties according to Abu Zahrah (2007) is essential to make sure that these assets are continuously provided benefits or usufruct to the beneficiaries as stipulated by the founder. Cizaksa (1998) states that waqf institutions during Ottoman Empire are responsible in providing public facilities such as mosques, public halls and schools which enable the Government to reduce the expenditure on establishing such services. The income generated by waqf properties according to Kahf (www.kahf.net) are used by the waqf managements to build public hall, religious schools or madrasah, universities and to make payment for Imams, and preachers. In Malaysia as stated by Ahmad Zaki et.al (2006), most of the traditional religious schools are built on waqf lands.

Waqf properties can be developed through various ways. Kahf (www.kahf.net) has categorized three modes of financing that can be applied in developing waqf assets, namely; traditional modes, modern schemes modes and self finance modes. The traditional concepts of *hukr*, *istibdal* and *ijaratain* have been widely used by waqf institutions in the Muslim countries. *Hukr* or indefinite lease right according to Anas Zarqa (1994) requires the lessee of waqf assets to pay large lump sum of rent and it is used by the nazir to develop waqf assets. The concept of *istibdal* and *ibdal* require the exchanging of waqf assets to other properties. Modern schemes of developing waqf assets as suggested by Md. Nurdin Ngadimon (2006), Muhamad Kholid et. al (2007), Kahf (www.kahf.net) and Tahir Sabit (2003) is the securitization of waqf through *sukuk*. The difficulty of getting enough funds to develop waqf assets required waqf institutions to finance the development projects by themselves through cash waqf and share waqf. Cizaksa (1998) elaborated on the experience of cash waqf during Ottoman Empire and its possible implementation in the contemporary Muslim countries.

It could be observed that the focus of the contemporary writings is on the development of existing waqf property (land). However, the focus of this study is the construction of waqf building on public (government) land.

Research Methodology

This section discusses the sources of data, the methods of analysis and the analytical framework of the paper. This study uses qualitative method as it is a conceptual and theoretical in nature.

Sources of Data

Since this study is conceptual and theoretical in nature. The sources are secondary data available in the literature related to the management and development of waqf property. The literature comprises books, seminar proceedings, periodicals and internet resources, in either English or Arabic.

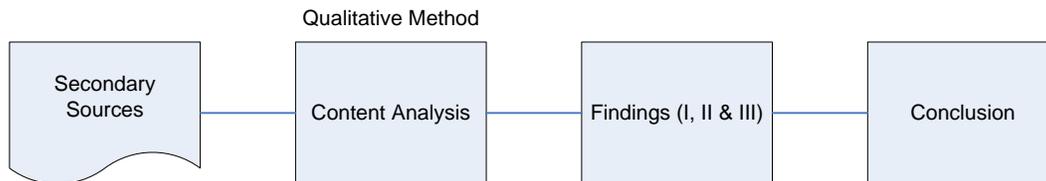
Methods of Analysis

The authors apply the content analysis method through deep and intense readings of the previous texts and literatures related to the topics. The researchers apply the content analysis method for making inferences by objectively and systematically identifying specified characteristics of the most significant point available in the relevant literatures. This is the method used in this study in order to achieve the previously stated objectives. For the purpose of illustration of the *waqf* framework, the authors discuss the potential implementation of the concept at Islamic Science University of Malaysia (USIM).

Analytical Framework

Figure 2 illustrates the analytical framework of this study.

Figure 2: The Analytical Framework of the Study



Findings: The General Framework of Waqf Concept for Construction Project: An Analysis

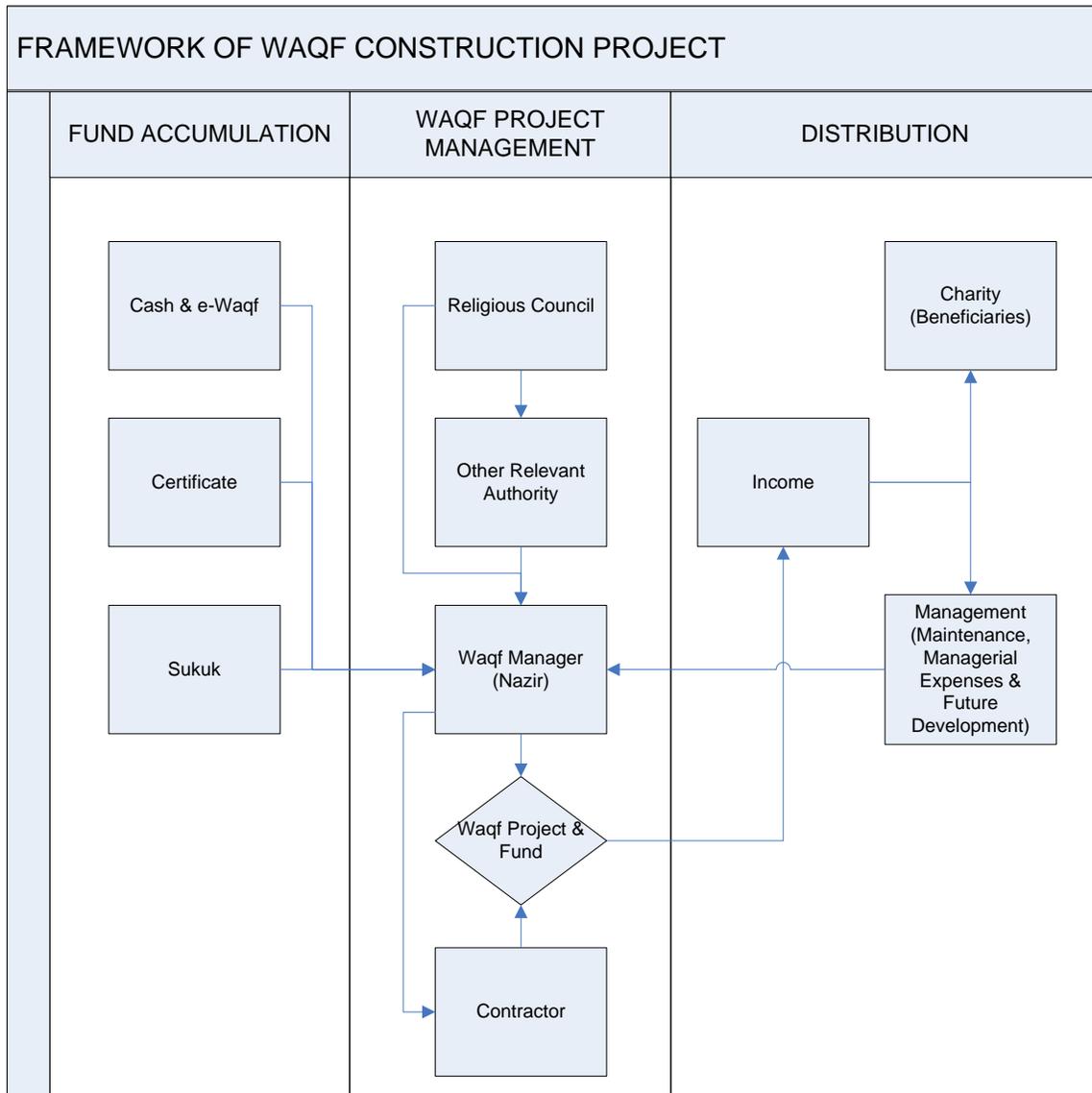
In this section, the authors propose the general framework of waqf concept for construction project and highlight the main issues that should be reviewed and discussed further. Based on the analysis, it is observed that there are three main stages that take place in the general framework of waqf concept for construction project namely (See Figure 3 for illustration);

- Fund Accumulation;
- *Waqf* Project Management; and
- Distribution of Income or Yields.

This framework could be a useful reference for *waqf* administrators for developing a *waqf* construction project. These stages should only commence after having the complete and finalized design of the building. This is important to ensure that potential contributors have enough information on the project to avoid the element of *al-jahalalah* (lack of information). It is due to the fact that the building does not exist yet at the time of contribution.

Each stage involves specific Shariah contracts and carries several issues. It begins from the process of raising fund from the public through several instruments. After the amount of fund has achieved its target (i.e. the total cost of the construction project), the management of the waqf construction project takes place. This stage involves a lot of legal issues and perhaps, it is the most critical stage out of the three stages. The issues of authority and ownership, the status of the parties involved and the selection of contractor should be vigilantly addressed. Then, the distribution of the income or yields generated from the waqf property takes place.

Figure 3: The Three Main Stages of the Waqf Construction Project



Instrument for Fund Accumulation of the Waqf Construction Project

The accumulation fund for the construction of waqf project could be realized through the setting up of the three instruments, namely; cash and e-waqf fund, per-square feet value certificate and the issuance of sukuk. These instruments provide an opportunity for the donors to dedicate their wealth for waqf purposes according to their preference as stated below:

Cash and e-Waqf Fund

Cash and e-waqf fund is considered as the easiest means for the public to join waqf scheme because they are only obliged to donate their money in cash or deducting from their bank account via e-waqf facility. As shown in figure 2.1 the accumulated fund will be managed by Nazir who is acted as an agent on behalf of the waqif based on wakalah contract. Under wakalah contract, nazir is responsible to channel the fund for construction project and the balance will be returned back to the fund for future project. Wakalah contract is deemed more practical due to the difficulty of getting the permission of the waqif to exchange (istibdal) cash money into immovable property. Upon getting the approval by waqf project management, Nazir is allowed to use the fund and appoints contractor for the construction of waqf project.

Per-square Feet Value Certificate

The certificate of per square feet value for waqf project will be offered to the public once the details of the intended project are finalized. The essential elements of the project such as the type of construction project, the cost of the project, the price of each certificate and the duration of the project must be disclosed in details. While cash and e-waqf fund do not required any minimum amount, any individual or institutions must pay certain amount in order to get the certificate e.g RM 30.00 per square feet. The pool of money accumulated will be directed to construct buildings such as research centers and labs.

The Issuance of Sukuk

Developing wakaf assets through the issuance of sukuk is another potential instrument to be applied by waqf administrations. This instrument is still underdeveloped in Malaysia although the country is well known for pioneering the issuance of various sukuk at the domestic and global stages. Two countries Saudi Arabia and Singapore have so far developed their waqf lands through the issuance of sukuk al-muntafa'a and sukuk musyarakah respectively.

Considering the active role of nazir in managing and monitoring waqf projects on behalf of waqif and other relevant authorities, sukuk based on *wakalah* and *waqf*

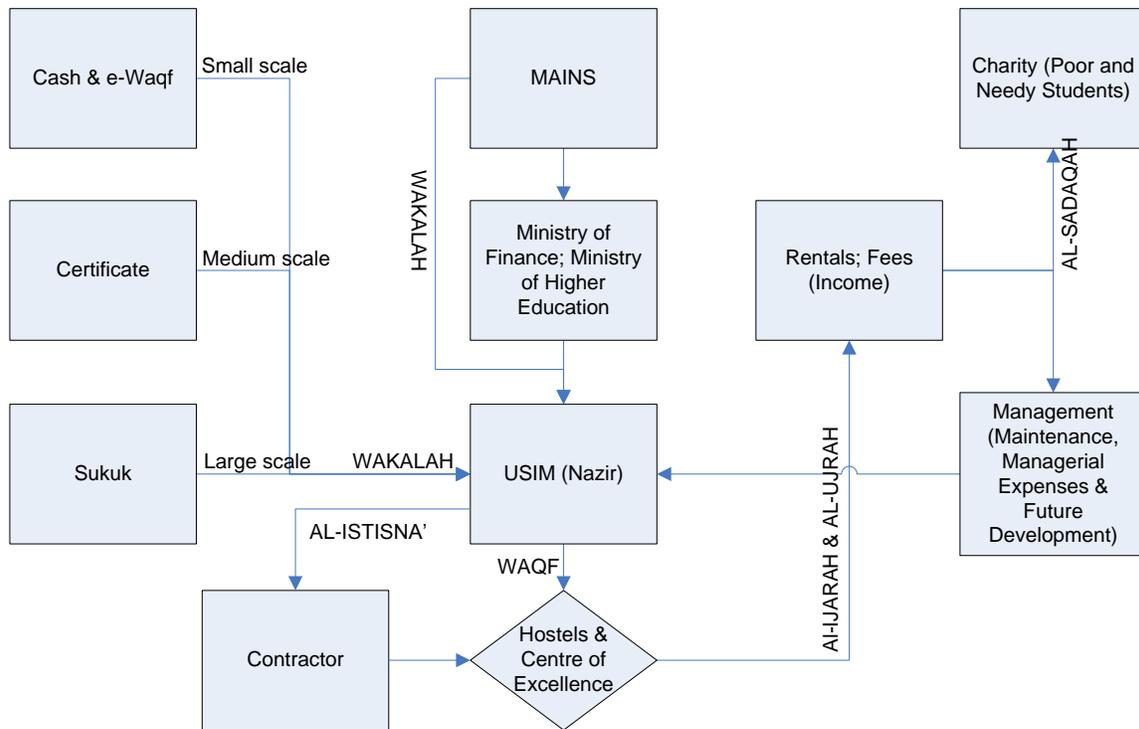
concept is seems favorable. In sukuk *wakalah* and *waqf* structure's, *nazir* is responsible to issue the sukuk and channel the fund accumulated for construction project. It is worth to note that this instrument is developed mainly for large scale project that require a large amount of money, for example to build a university and hospital. In addition, the price of each sukuk certificate is slightly higher than the previous two instruments. For that reason, *nazir* should use appropriate marketing strategies to attract the wealthy, organizations as well institution to participate in this charitable activity.

From the authors' point of view these three instruments will be further divided into three categories according to the types of construction projects whether small, medium or large scales. While cash and e-waf fund is designed for small scale projects, per square feet certificate value and sukuk will be channeled for the construction of medium and large scale projects respectively.

Management of Waqf Construction Project

In Malaysia, the State Religious Council is the solely authorized party to manage the *waqf* property in accordance to the Article 74(1) (2) Federal Constitution of Malaysia within its area. Hence, the involvement of the State Religious Council in the *waqf* construction project is inevitable. However, the State Religious Council could engage into *al-Wakalah* contract to appoint the relevant institutions (e.g. USIM) to be the manager of the project as the project directly involves with their interest.

Figure 4: An Illustration of Waqf Construction Project Framework



The Contributions: Cash Waqf or Wakalah?

In the proposed framework of waqf construction project, the donors or contributors contribute in the form of cash. Hence, it might be seen as “cash waqf” at the first glance. However, in details, “cash waqf” is not suitable for the waqf construction project as it may have several issues. The issues are:

- “Cash Waqf” is a type of *waqf al-manqul* (endowment of movable properties) which is considered as invalid according to *al-Hanafiyyah* (Al-Zuhayli, 2000). Additionally, a movable property is easily subject to total physical loss.
- “Cash Waqf” has no benefit unless it is consumed (exchanged) with another. Hence, the cash has no eternal attribute which should be available in the waqf property.
- The value of “Cash Waqf” is subject to volatility. One of the disadvantage of cash waqf is that the value of cash is very much subject to depreciation and inflation which may affect the purchasing power of the cash waqf (al-Misri, 2005)
- The application of *istibdal* is inevitable in the “Cash Waqf” and the practice of *istibdal* has several strict conditions.

Hence, the proposed Shariah contract should be based on the *wakalah* (agency) contract. The potential “*nazir*” acts as the contributors’ agent to manage the *waqf* fund and develop the prescribed building at the prescribed area. Hence, the potential project should be prescribed in details to avoid the factor of *al-jahalah* (lack of information) that may invalidate the *wakalah* contract.

Project Construction

The construction of the building (e.g. hostels or excellence centre) should be based on the contract of *al-istisna'* (manufacturing sale)². In this particular framework, the *nazir* (acting as agent) deals with the contractor to build the building as prescribed in the *wakalah* and *waqf* contract. No third party financing is needed if the waqf fund is sufficient. In the case of non-sufficiency of the fund, a more complex structure is needed and the discussion is not within the scope of the study³.

Income and Distribution

The building e.g. hostels, could be leased to the university or students or any users at a reasonable rate. Exemption or rebate on the rentals could be given to any qualified and deserving parties (e.g. poor and needy students). The rentals acquired could be used for two main purposes. The two main purposes are:

- The maintenance of the (waqf) building. This involves the cost of managing (manager's salaries, security, *etc.*), upgrading, renovating, fixing, repairing, cleaning of the assets or *et cetera*.
- The charity purposes. This is based on the contributors' intention whether to make a general or specific endowment. It is better to make a general endowment so that the nazir could channel the fund to any types of charity purposes. The description of the beneficiaries could be done on the basis of their attributes e.g. poor and needy students.

The portion of each category could be stated in the contract. However, it is more flexible to leave it to the due diligence of the *nazir*.

The Advantages and Disadvantages of the Waqf Concept for Construction Project

The advantages of the waqf concept for construction project are:

- The access to the public fund at the lowest cost
- No third party financing is needed
- The *wakalah* concept provides flexibility to the managing party
- The willing donors and contributors could be local or global
- The building that could generate income is suitable for this project

² *Al-istisna'* is a type of sale contracts for non existing object. It refers to the sale with order to the manufacturer (in this case – the contractor) to manufacture (build) a specified object/asset.

³ For example, the *nazir* (e.g the university) could put his own money upfront and engage in a diminishing partnership (*musharakah mutaqisah*) contract with the State Religious Council. In a specified period, a portion of the income generated from the Waqf property could be used to acquire/buy the *nazir*'s shares of the waqf property. At the end, MAINS will finally own the building. This practice could be done from the Shariah point of view. However, the legal issues in such practice are massive.

However, the waqf concept for construction project may have several disadvantages. They are:

- There are legal issues that should be discussed and addressed
- The risk of under-subscription of waqf instruments. Hence, the waqf fund is not enough to meet the cost of the construction
- Default of contractor may lead to loss of public fund and confidence

Conclusions

The *waqf* concept offers the access to raise fund from the public for relevant institutions in the development of their institutions. The concept should not be underestimated as it has played undebatable vital roles in the development of several critical institutions, particularly in the area of education, worship and medication, throughout the Islamic history. The management of the *waqf* construction project is the most critical part of the whole process. Hence, the religious authorities in Malaysia should not involve in this project except with highly capable and reputable institutions in order to ensure and maintain the public confidence. The authors believe that there is an enormous amount of ready money and willing donours from inside and outside of this country to participate in this scheme if it can be well managed in transparency and integrity. The authors also suggest that more researches, particularly from the legal and marketing perspectives, should be conducted on the topic. The potential of this concept is vast and it should be developed in the nearest future.

References

Al-Misri, Rafiq Yunus. 2005. *Fiqh al-mu' amalat al-maliyyah*. Damascus: Dar al-qalam.

Al-Zuhayli, Wahbah. 2000. *al-Fiqh al-Islami wa adillatuh*. Damascus: Dar al-Fikr.

Kahf, Monzer. *Financing the Development of Awqaf Property, Waqf and Its Sociopolitical Aspects and Waqf: A Quick Review* at (www.kahf.net)

Md Nurdin Ngadimon. (2006). *Pengembangan Harta Wakaf Menggunakan Instrumen Sukuk*. Konvensyen Wakaf Kebangsaan. Kuala Lumpur.

Mohamad Tahir Sabit et. al. (2005). *An Ideal Financial Mechanism For The Development of The Waqf Properties In Malaysia*. Shah Alam Selangor.

_____ (2006). *Innovative Modes Of Financing the Development Of Waqf Properties*. Konvensyen Wakaf Kebangsaan. Kuala Lumpur.

Muhammad Abu Zahrah. (2007). *Wakaf Menurut Agama dan Undang-undang*. Terj. Haji Muhammad Yusuf Sinaga. Berlian Publications: Selangor.

Murat Cizaksa. *Awqaf in History And Its Implications for Modern Islamic Economies* at (www.mcizakca.com.)

Shamsiah Abdul Karim. (2006). *Pengalaman Majlis Ugama Islam Singapura Dalam Pengurusan Harta Wakaf*. Konvensyen Wakaf Kebangsaan. Kuala Lumpur.

Siti Mashitoh Mahamood. (2001). *The Legal Principles of Waqf: An Analysis*, Syariah Journal, 9:2 (2001) 1-12.

_____. (2006). *Waqf in Malaysia: Legal and Administrative Perspectives*. Kuala Lumpur: Penerbit Universiti Malaya

Websites

www.businessdictionary.com