



THE APPLICATION OF BUILD, OPERATE AND
TRANSFER (BOT) CONTRACT IN *MAJLIS AGAMA
ISLAM WILAYAH PERSEKUTUAN MALAYSIA*
(MAIWP)

BY

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requirement for the degree of Master of Islamic
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ABSTRACT

This Build, Operate and Transfer (BOT) is a new concept applied in developing and constructing private and public infrastructures. It is a means of project financing and operating practiced primarily in the area of private infrastructure in developing countries. Recently, some *waqf* institutions have applied the BOT approach. The BOT structure gives a new direction in the field of *waqf*, as it enhances *waqf* property for public benefits. The involvement of *waqf* institution in developing its property and public infrastructures through BOT is a challenging exercise. The study examines the current practice of this contract in *waqf* institutions in general and in Majlis Agama Islam Wilayah Persekutuan with reference to the contracts applied in compliance with the principles of Shari'ah. Besides that, the study aims at identifying the Shari'ah issues and problems the *waqf* institution may face during the implementation of BOT. The study will look into the general idea of BOT contracts, its concept, structures, contents as well as operation. The methodology used in this study is archival research with emphasis on contemporary works on Islamic jurisprudence. The data and related information are collected from classical and contemporary books, conference and seminar papers, interviews and discussion.

ملخص البحث

وقد يُعد عقد البناء والتشغيل والإعادة (BOT) عقداً جديداً يُستخدم في بناء وتعمير المرافق العامة والخاصة. وهو وسيلة لتمويل وتشغيل المشاريع التي تُطبق بشكل أساسي في المرافق الخاصة في البلدان النامية. وقد تم تطبيق عقود البناء والتشغيل والإعادة (BOT) من قبل بعض المؤسسات الوقفية. ولا جرم أن هيكل هذا العقد سيفتح اتجاهاً جديداً في حقل الأوقاف حيث له أهليته في تفعيل أموال الوقف للمنافع العامة. لكن مساهمة المؤسسات الوقفية في تطوير أموالها والمرافق العامة عن طريق عقد البناء والتشغيل والإعادة (BOT) قد أثبتت أنها عملية مجهدة. وتهدف هذه الدراسة إلى النظر في التطبيق المعاصر لهذا العقد في المؤسسات الوقفية بصفة عامة وفي المجلس الإسلامي للإقليم الاتحادي على وجه الخصوص مع الإشارة إلى مدى موافقتها للشريعة الإسلامية. كما تهدف إلى بيان المسائل الشرعية والمشاكل التي قد تواجهها مؤسسات الوقف أثناء تطبيقها لعقد (BOT). ستتطرق هذه الدراسة إلى الفكرة العامة لعقود (BOT)، مفهومها، وهيكلها و فحواها. والمنهج المنشود تطبيقه هو الدراسة المكتبية والنوعية من خلال الإطلاع على الكتب التراثية والمعاصرة في الفقه الإسلامي. ويتم جمع البيانات والمعلومات ذات الصلة من خلال الكتب القديمة والمعاصرة، بالإضافة إلى الأوراق المقدمة في المؤتمرات، والمقابلات وكذلك المناقشات مع المشرف.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion it confirms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Master of Islamic Revealed Knowledge and Heritage (Fiqh and U^Ul al-Fiqh)

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DECLARATION

I here declare that this dissertation is the results of own investigation, except where otherwise stated. I also declare that is has not been previously or concurrently submitted as a whole for my other degree at IIUM or other institutions.

Saidatolakma bt Mohd Yunus

Signature.....

Date.....

INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA

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My father
MOHD YUNUS B SAABAN
Who taught me the value of knowledge,

My mother
MARIAM BT MAHIDIN
Who loves and inspires me,
Whose blessings and prayers helped and
strengthened me to overcome many difficulties...

And

My Family
Who supports and motivates me...

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TABLE OF TRANSLITERATION

Table of the system of transliteration of Arabic words and names
used by the International Islamic University Malaysia.

b = ب t = ت th = ث j = ج Ĩ = ح kh = خ d = د dh = ذ r = ر	z = ز s = س sh = ش Ĩ = ص dh = ض Ĩ = ط Đ = ظ Ñ = ع gh = غ	f = ف q = ق k = ك l = ل m = م n = ن h = ه w = و y = ي
--	--	---

Short vowels:	a	i	u
Long vowels:	ā = ا	ī = ي	ū = و
Diphthongs:	ay = ا ي	aw = و ا	

CHAPTER ONE

INTRODUCTION

1.0 INTRODUCTION

Recently, observers of contemporary economic activity noted that great efforts have been made to increase the efficiency of public sector projects and reduce its management cost¹. One of the efforts that have been made is through the application of the build, operate and transfer (BOT) model which allows private sectors to undertake public projects such as the production of roads, bridges, and also the distributing of electricity and water for the users. This model gives the opportunity to the private sector to carry out public projects, financing, operating and managing it according to the performance standards set by the government². The operation period is long enough to allow the private company to pay off the construction costs and realize a profit, typically 10 to 20 years. The government retains ownership of the infrastructure facilities and becomes both the customer and the regulator of the service.

Besides increasing the efficiency of public projects, it is said to give a new direction in the field of endowment (*waqf*) as it is able to enhance the development of *waqf* property. The application of BOT in this field prevents the poor management of endowment funds as well as its utilization³. Lately, *Majlis Agama Islam Wilayah Persekutuan* (MAIWP) takes an initiative to develop a *waqf* land using the BOT

¹ Mu'lyiddīn, Almad, "Ta'libiq niDām al-binā' wa al- tamlīk fī ta'Nmīr al- awqāf wa al-marāfiq al- 'āmmāh", (Paper presented at the 19th conference of Majma' al-Fiqh al-Islāmī al-Duwālī, United Arab Emirates, 2009), 3.

² Ibid.

³ Sulaymān, ŅAbdul Wahāb, "ŅAqd al- binā' wa al- tashghīl wa i'ādat al-milk", (Paper presented at the 19th conference of Majma' al-Fiqh al-Islāmī al-Duwālī, United Arab Emirates, 2009), 14.

contract as it provides a lot of benefits to nation. This step will help the government as well as *waqf* institutions to enhance the economy as it relieves the budget burden of preparing many infrastructures for the use of many people. This paper presents a study on how this new scheme is organized and managed, particularly when it involves parties such as *waqf* institutions and private companies.

The practice of *waqf* is considered as one of the best and ever lasting charity which brings endless benefits to people. Besides, Allah encourages mankind to help others in difficulty. Allah says:

{ وتعاونوا على البرِّ والتَّقْوَى }

“...and help you one another in righteousness and piety”. (al-Mā`idah: 2)

The practice of *waqf* is one of the ways or methods to accomplish the aim. Even though many people have been contributing capitals to the *waqf* endowment, still there are many problems in utilizing all the properties for example in terms of managing the *waqf* land. The utilization of *waqf* property is poor in almost institution of *waqf* which brings to the limited development⁴. The situation will not confirm the aim of *waqf* stressed out by the Prophet (ﷺ) since it does not provide the endless benefits to people. The *waqf* properties need to be developed for the benefit of many people and also for the betterment of *ummah*. Besides that, it helps a person who contributes to *waqf* to have continuous and endless charity in both worldly life and the hereafter. Some alternatives have been taken to widen the field of opportunity of *waqf* institution in developing its properties especially the land without facing problem in financing, managing and operating.

⁴ Idris bin Ramli, *Harta Waqaf: Pengurusan dan Permasalahannya (Pengkhususannya di Negeri Selangor)*, (Petaling Jaya: Universiti Islam Antarabangsa), 35.

As the *waqf* property is not fully developed by many institutions, an alternative has been digging out to ensure all *waqf* institutions capable of maximizing the utilization of the *waqf* property⁵. Therefore, this study aims at presenting the new way of developing *waqf* land through a build, operate and transfer (BOT) contract which aims at increasing the use of *waqf* land and developing it for the betterment of *ummah*.

The study will review the permissibility and impermissibility of the BOT scheme and discovers its related issues. Besides, it attempts to find out the possible solutions of the issues for Shari'ah compliant and seeks to explain the implementation of BOT practiced by *Majlis Agama Islam Wilayah Persekutuan* (MAIWP) which is the main focus of this study. In searching the pertinent information, the researcher will rely on interviews with relevant parties, discussion with relevant persons and more on written materials.

This study is first trying to look into the general idea of BOT contracts, its concept and operation as been practiced before and then followed by the application of BOT contract in the *waqf* institution in enhancing the use of *waqf* property especially the land. This new scheme will hopefully become an effective way for the growth of *waqf* and able to attract more *waqf* institutions to be more systematic and responsible for the future of the people not merely performing the role of collecting *waqf*.

1.1 PROBLEM STATEMENT

Waqf is a capital gift to Allah (à) and could also be considered as a kind of *Īadāqah jāriyah* (recurring, continuous or ongoing charity) which means permanent dedication to Allah (à) as recognized by Islamic law. *Waqf* has been inherited from the past and it

⁵ Idris bin Ramli, *Harta Waqaf: Pengurusan dan Permasalahannya (Pengkhususannya di Negeri Selangor)*, 35.

has potential for the reconstruction of social and economic life communities. Making a *waqf* is considered as a virtuous act, an act of spending in a way of Allah which carries great rewards from Allah (à).

However, today the institution of *waqf* has declined in significance and performance both in Muslim countries and communities. The *waqf* property is not fully in used for the benefits of people and it remains undeveloped. In fact, the institution of *waqf* has the capability to enhance the economic growth through the property owned by which future income can be generated. It is an obligation to increase the benefits of *waqf* property since its main purpose is to provide continuous services for the public.

Furthermore *waqf* is the way to gain ongoing charity even though one has passed away. It is prohibited to keep the property particularly the land remains stagnant with no attempt to develop it. Allah says in Quran: (HĒd:61)

{ هو أَنشَأَكُم مِّنَ الْأَرْضِ وَاسْتَعْمَرَكُمْ فِيهَا }

From this *ayah*, it shows that, Allah has enjoined the development of land for the benefits of people.

The chance of developing *waqf* property is not widely open to all *waqf* institutions since there are problems in managing it for example lack of expertise as well as insufficient resources necessary for the development. Most of the time, it involves financial problem. Sometimes, the development of *waqf* especially the land is not successful due to the poor management of *waqf* funds and the shrinking role of service resulted from the bureaucratic management. This situation perhaps might burden all the people and they are far away from the *waqf* great benefits. Therefore, to ensure all levels of people have the same opportunity in receiving the *waqf* benefits,

an alternative should be outlined. Reaching for the aim, today, the development of *waqf* land has done through BOT projects to expand its use for the people and at the same time encouraging them to involve in *waqf*. This method has been practiced before where it gives the private sector to run the public projects, finance and manage it on *waqf* land. Through this project, perhaps the benefits from the *waqf* property are endless and unlimited to all people.

1.2 RESEARCH QUESTIONS

This study attempts to answer these questions:

1. What is Build, operate and transfer (BOT) contract?
2. What are the Sharī'ah evidence on the permissibility and impermissibility of Build, operate and transfer (BOT) contract?
3. What are the contracts applied in Build, operate and transfer (BOT)? Are they in the line of Sharī'ah?
4. What are the doubts in BOT and what are its possible solutions?
5. To what extent and what are the modes of BOT approved and disapproved by Jurist in the past, allowing the implementation of BOT?
6. What are the recently raised issues in developing *waqf* land?
7. How is the implementation of BOT practiced by *Majlis Agama Islam Wilayah Persekutuan*? Is there any pertinent matter need to be resolved?

1.3 OBJECTIVES OF RESEARCH

This study is in effort to achieve these main objectives:

1. To know the concept of BOT, its operation and application as well as its benefits and drawbacks.

2. To study the applied contracts in BOT projects in order to know its suitability to the Shari'ah.
3. To discuss the Shari'ah evidence to confirm its position whether it is Shari'ah compliant or not.
4. To identify issues related to the development of *waqf* property.
5. To clarify the doubts in the application of BOT if any.
6. To analyze the modes of BOT approved or disapproved by Jurist in the past regarding the implementation of BOT in enhancing *waqf* property.
7. To identify the application of BOT contracts practiced by MAIWP in its attempts to increase the utilization of *waqf* property particularly the land.

1.4 THE IMPORTANCE OF RESEARCH

Since *waqf* has a great potential to transform the social and economic life, the issues involved in the revival of *waqf* and its role in the social and economic development need an attention. *Waqf* should be practiced in anyway and its property especially the land should be developed for the public benefits and the development of Muslim countries. Because of this purpose, it is a responsibility to find out the best way of maximizing the utilization of *waqf* property and encourage the *waqf* institutions to participate in a project known build, transfer and operate (BOT) in order to ensure the *waqf* property keeps developing for the public profits.

This study is very important as it highlights the new solution for the stagnant and undeveloped *waqf* property which gives advantage to all parties involved. Besides, it is important to let people know the necessity of *waqf* in developing Islamic country through the BOT projects. This new project helps the country or state to finance infrastructure projects which is considered as a prerequisite for economic

growth. Through the application of BOT, adequate funding for projects is available and the guarantees of the companies to complete the projects are acquired. If there are shortcomings or disadvantages during the running projects, the state will not bear the risks. The study is very important in order to give an exposure and new alternatives to the *waqf* institutions in developing *waqf* property. Therefore, the continuation of the *waqf* benefits can be maintained for the sake of many people. This research also is trying to find out the opinion of Islamic scholars and the actual practices of BOT in order to have a better understanding.

1.5 METHODOLOGY

The methodology of the study will be qualitative reading the Arabic, English as well as Malay books in the related field. The application of BOT contracts in the development of *waqf* property will be understood using qualitative reading the Arabic and English materials to know its operation and the management. This study will be descriptive which describes the definition and the nature of the applied contracts by reading the classical Arabic text in Fiqh and Usūl al-Fiqh. Besides, this study will rely on interviews with the relevant parties.

The structure of this study is as follows. After the first chapter which is an introductory, an overview of BOT contracts applied is discussed. It includes a brief definition and conceptual frameworks of the BOT as well as its background. The following chapter will brief about the *waqf* itself and it attempts to discover the real situation of *waqf* institutions and its property whether it is developed or undeveloped. Then, it tries to come out all the alternatives that have been practiced to develop the property. The next chapter will discuss the contracts applied in BOT and the contractual relationship among the parties involved. This chapter then followed by the

discussion on the parties involved in terms of the rights, benefits and ownership as well. Then the application of BOT in MAIWP, its operation, and the practical implementation as well as the challenges faced is highlighted. In the last chapter related issues on the development of *waqf* property particularly the land will be outlined and the possible suggestion will be proposed to deal with it and of course, it is accordance to SharīḤah views. This study is concluded with suggestions and possible recommendations for the operation of BOT.

1.6 LITERATURE REVIEW

1) “*TalḤbīq niḤām al-binā’ wa al-tamlīk (BOT) fī taḤmīr al-awqāf wa al-marāfiq al-āmmah*” is a paper presentation prepared by Dr AḤmad MuḤyiddin and it is one of the main references that the researcher refers to in order to have general idea about the topic. In the introduction of the paper, the author stressed out the importance of BOT in rising up the efficiency of public sector projects and reducing the management cost for the development of economy. According to him, BOT is also a new direction for *waqf* institutions to expand the utilization of its endowment for the benefits of many people. The poor management of endowment funds and its poor utilization lead to the economic activity backwardness. Therefore, it is necessary to have alternatives aim at enhancing the activity of *waqf* endowment funds and one of the ways is through the BOT projects. According to him again, the application of BOT in managing *waqf* endowments is one of the successful contemporary process for the *waqf* institutions to be one of the important parties who contributes to the economic development⁶. This paper presents some ideas of Jurist in the past regarding the topic and draws an attention to the previous actual Islamic practices on BOT.

⁶ MuḤyiddīn, AḤmad, “*TalḤbīq niḤām al-binā’ wa al-tamlīk (BOT) fī taḤmīr al-awqāf wa al-marāfiq al-āmmah*”, 2.

Then the author gives a brief explanation on the concept of BOT, the advantages as well as the stages and the parties involved in the establishment of BOT projects. According to him, the application of BOT brings a lot of benefits to all parties namely the public and private institutions concerned and the state as well. This is because, a state for example is capable to build so many infrastructure projects and does not have to bear the financial risk burdens since there is an adequate funding and guarantees to complete the projects from the companies who run them. Besides, the project helps the state to direct the public resources to the social and service sectors such as education and health for the betterment of life⁷.

As for the operation of BOT, the author said that the state will identify the infrastructure projects that wish to build or update. The state will invite different companies to operate the projects using the BOT method at the same time encourage competition among those different companies after assessing the economic feasibility of the projects. The author further argues that, the state is responsible to protect the companies from the political risks and safeguard them mainly when transferring the project revenues abroad. The company who accomplishes the project then gains the revenues from the users. Some of the revenues are distributed to the investors and the shareholders in the company who also contributes to the completion of the projects⁸.

Indeed, this paper gives a lot of information about BOT contracts, its concept and operation but it does not elaborate in details the application of BOT in *waqf*, its implementation and operation, which is the main focus in this research. Also there is no even a single reference from a jurist regarding the BOT practices.

⁷ Muġyiddīn, Aġmad, ,“Talbiq niġām al-binā’ wa al-tamlīk (BOT) fī taġmīr al-awqāf wa al-marāfiq al ‘āmmah”, 5.

⁸ Ibid., 6.

2) Dr. Aġmad Bukhait's⁹ paper presentation on the title of "*Taġbġq 'aqd al-binā' wa al-tashyġd wa al-iġġadah (BOT) fġ taġmġr al-awqāf wa al-marfiq al-'āmmah*" is the second reference that the researcher referred to in order to improve the understanding and information related to the topic.

The author presents a brief explanation on the application of BOT in construction of *waqf* and public utilities. The paper highlights the position or Islamic ruling (*hukm*) on BOT as its implementation widely spread among people. The author said the Islamic jurisprudence analysis is required to assess the implementation of BOT thus, it complies the Islamic principle which emphasizes the *maqāġid Shariġah* (purposes of Shariġah) in the management of funds and property. In attempt to reach a ruling (*ġukm*) on the implementation, the author presents a detail discussion on the instruments employed in the operation and review the investment contracts applied in the transaction¹⁰. This section helps the researcher much in dealing with the issues raised in the implementation of BOT.

In the first chapter, the author comes with the view saying that it is necessary to develop *waqf* endowment funds as well as the public utilities. He said, the effort is an obligation since the main characteristic of both *waqf* and public utilities is intended for the public benefits and not for the individual purpose. In order to reach the ongoing public interest, the *waqf* endowment funds and public utilities have to be developed.

The development of *waqf* and public utilities using the emerging transaction is discussed by the author in the next chapter. The application of investment in *waqf* has been practiced in Lubnan, Urdun and other Islamic countries through the BOT

⁹ Aġmad Bukhait is a lecturer in Fiqh al-Muqārā, University of Bani Suwaif, Bahrain.

¹⁰ Bukhait, Aġmad, "*Taġbġq 'aqd al-binā' wa al-tashyġd wa al-iġġadah (BOT) fġ taġmġr al-awqaf wa al-marāfiq al-'āmmah*", (Paper presented at the 19th conference of Majmaġ al-Fiqh al-Islāmi al-Duwāli, United Arab Emirates, 2009), 12.

contracts. According to him the application of the emerging transaction is a valid effort in developing *waqf* even though it is not practiced during the past. This is because the main focus in every development is the public interest. Since the focus aims at the benefits of public (*maʿlālah ʿāmmah*), the application is not prohibited. The author said all efforts that cause damage or harm to the public is absolutely forbidden¹¹. Unlike the investment, it is considered as one of the means that can bring advantage to the country economically. His view is acceptable but the application requires a concise analysis on the reality or the nature of the investment, the modes of contracts and, the means of the investment applied to be more SharīḤah compliant.

The author concluded the discussion on BOT by presenting the positive and negative impact resulted from the implementation of BOT projects. One of the positive effects mentioned is reducing the state resources and budgets. Besides, it avoids the imposition of new taxes which allows the state to pay attention on the most important facilities such as security, defense and other sectors that have no direct economic return. Although BOT reveals some drawbacks, it does not avoid the implementation as it seems to be closer to the *maʿlālah ʿāmmah* (public interest) and this would be doubtless in its legitimacy if it is not unambiguously ban for other reasons¹². Indeed the discussion to some extent helps the researcher to get better understanding regarding BOT's permissibility in developing *waqf* property.

3) Another paper that provides the researcher with information relating to the study is the paper written by Khālid bin SaḤḤed bin Abdullāh RashḤed, entitled

¹¹ Bukhait, Ahmad, "Taʿlībīq ʿaqd al-bināʿ wa al-tashyīd wa al-iḤḤadah (BOT) fī taḤḤmīr al-awqaf wa al-marāfiq al ʿāmmah", 11.

¹² Ibid., 32.