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**LEGAL FRAMEWORK FOR MANAGEMENT OF WAQF
LAND IN MALAYSIA**

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PRIMER ON WAQF ADMINISTRATION IN MALAYSIA

D Malaysia is a Federation consisting of 13 states and three federal territories. In
E respect of the states, each State Islamic Religious Council ('SIRC') is declared
F by the law to be the 'sole trustee' of all *waqf*, whether general or specific *waqf*,
G in such state. Each SIRC has an administrative framework for *waqf*
H management consisting of their experts and officials to carry out the due
I administration of the *waqf* property for the benefit of the beneficiaries named
J in the *waqf*. If no beneficiaries are stated, this will be determined by the Islamic
K jurists based on the injunctions of the al-Quran and traditions of the Prophet
L Muhammad PBUH.³

F *Waqf* involving immoveable property⁴ is for the settlement of the
beneficiaries named by the donor in the *waqf's* explicit terms, or the property
may be rented out to the public, and the benefits accruing from the letting of
the property could then be used to help and assist the beneficiaries towards the
G specified purpose. It is typical for the beneficiaries of *waqf* to be the
underprivileged, poor or orphans or even the general Muslim public, but
sometimes they may involve special beneficiaries, who are the donor's heirs and
descendants. The common practice of the Muslim community on *waqf* in

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3 Sharifah Zubaidah Syed Abdul Kader, Nuarual Hilal Md Dahlan, *Current Legal Issues Concerning Awqaf in Malaysia*, Chapter 4 in Prof Dr Syed Khalid Rashid, Prof Dr Arif Hassan, (eds) *Waqf Laws and Management (With Special Reference to Malaysia)*, Institute of Objective Studies (New Delhi: 2013) pp 83–115.
4 'Immoveable property' includes land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth, see s 66 of the Interpretations Act 1948 and 1967 (Act 388).

Malaysia (especially prior to the 1950's)⁵ is to stipulate that his or her land shall be used to build mosques, *surau*, religious schools and cemeteries.⁶

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The legal framework since 1952⁷ is that all *waqf* created under Islamic law is to be vested in the SIRC.⁸ As far as the SIRC is concerned, as soon as all the requirements for the creation of *waqf* are fulfilled, the property becomes *waqf* property and is therefore vested in the SIRC and can already be registered in the *waqf* register maintained by the Registrar of Waqf.⁹ In respect of immoveable property however, there is an extra step to be done before such lands can be legally recognised as *waqf* land. The SIRC is to make an application at the respective land offices for the endorsement of the statutory vesting on the register document of title where the endorsement describes the SIRC as sole trustee.¹⁰ This process therefore involves two authorities, namely the SIRC and the land administration authority. Hence, although the management and administration of *waqf* lands fall on the SIRC, the land administration authority plays a significant role in facilitating the vesting of this right into the SIRC.

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Given that *waqf* is a state matter under Malaysia's Federal Constitution, it is within the exclusive powers of the state government to legislate laws on the administration of *waqf* and so the administration of *waqf* properties has been put under the powers of the SIRC under the respective states' administration of Islamic law enactments.

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Only Selangor, Negeri Sembilan, Melaka and Johor have specific laws on *waqf* administration and management.¹¹ These laws provide generally for the administrative structure of *waqf* management in those states placing the Majlis (Council) at the top as the policy making body that can give directions and decisions and a Wakaf Management Committee below the Majlis with powers of management of the *waqf* property. The states have not as yet enacted comprehensive rules relating to the management of *waqf* properties.

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5 The first state law on the administration of Islamic Law that contained some provisions on *waqf* was passed by Selangor in 1952 vide Administration of Muslim Law Enactment 1952 (Selangor).

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6 Syed Khalid Rashid, *Muslim Law*, Eastern Book Company, Lucknow, 1996, Chapter IX.

7 Above, n 3.

8 See for example s 4(1) of the Wakaf Enactments in Selangor (1999) and Malacca (2005) states that 'a *waqf* shall immediately come into effect once all the requirement and conditions of *waqf* had been fulfilled' and by referring to s 3 the creation of *waqf* is determined according to *Hukum Syarak* (Islamic Law).

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9 See for example, ss 6 and 34 of the Wakaf (State of Selangor) Enactment 1999.

10 It is interesting to note that the effective date of statutory vesting is not the date of endorsement of the vesting on the Register Document of title but the actual date of the *waqf* created.

11 See Table 6.1 below.

- A Conceptually there should not generally be any obvious difference on the procedures for *waqf* creation and its management given that Islamic law has prescribed clear guidelines on what constitutes *waqf* property, the manner of creating *waqf* and the general principles of waqf management. Nevertheless, it is noted that there is a need for the standardisation of methods to create *waqf* to facilitate the administration and management of *waqf* lands by the SIRC. A standardised method of creation and registration of *waqf* lands will assist the SIRC in preparing a comprehensive *waqf* enactment incorporating the use of the same procedures which would then encourage owners of land to create *waqf* over their lands on the basis of an easy and clear system. The efficacy of such a system would create confidence of the general public to create *waqf* over their property and dedicate the benefit to the community.

THE DIFFERENCE BETWEEN WAQF AND TRUST

- D The word '*waqf*' under Malaysian law refers to the dedication of any property from which its usufruct or benefit may be used for any charitable purpose ... according to Islamic law but does not include a trust which is defined under the Trustee Act 1949.¹² The word '*waqf*' in Malaysia is therefore strictly confined to *waqf* that is created according to Islamic law and such *waqf* must come within the jurisdiction of the SIRC as 'sole trustee'. The many discourses on waqf in Malaysia lately indicate that there is some confusion between the concept of *waqf* in Islam and the concept of trust under civil law. Many businessmen and profit-making bodies in Malaysia have a tendency to treat the two alike.

- G The fact that the law states that the SIRC is to be the sole trustee for all *waqf* created is considered by some as a 'legal hindrance' to the creation and management of *waqf* properties especially by profit oriented bodies or individuals who do not wish to come under the SIRC's *waqf* management structure for fear of lack of competent personnel, general distrust and the desire to have full control over the management of the *waqf* property. The trend for them is to place the *waqf* property under the governance structure of a registered society under the Societies Act 1966 or in the case of a public company, a trust company¹³ under the Trust Companies Act 1949. In respect of the former, a trust deed is drawn up to deem the property as a 'trust property' under provisions of the Trustee Act 1949 and then the trustees may elect to form a body corporate in the form of a foundation registered under the Trustees (Incorporation) Act 1952. In such cases, any legal dispute relating to the

12 See s 2 of the Wakaf (State of Selangor) Enactment 1999.

13 A public company incorporated for charitable purposes.

properties under the foundation will be decided by the civil courts as opposed to *waqf* property which comes under the purview of the Shariah Courts.¹⁴

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Legal issues and questions that may arise are as follows: Is not the act of placing existing *waqf* property under the Trustee Act 1949 against the law relating to *waqf*? Having regard to the perpetual character of a *waqf* property (*muabbad*) under Islamic law,¹⁵ can one legally 'convert' *waqf* property into trust property? Can land that was initially recognised as *waqf* land by the SIRC be subsequently placed by the existing private trustees under the governance structure of an incorporated foundation? If so, can the SIRC challenge the validity of the power of such foundation by arguing that the SIRC has a better right over such *waqf* property under the laws relating to *waqf*?¹⁶ And if so, which court shall have jurisdiction to determine such question?

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What is clear is that Malaysian law separates the concept of *waqf* and trust especially in relation to immovable property. Section 5 of the NLC for example, gives a general definition of 'trust' which emphasises that the word 'trust' does not include a *waqf* created in accordance with the principles of Muslim law. This definition can be found in all the states having *waqf* enactments namely, Selangor, Negeri Sembilan and Malacca. Other than emphasising that *waqf* is not a 'trust' in the conventional context, an accompanying implication is that the general public as well as *waqf* managers and the administrators must understand that *waqf* does not come into existence through branding and the statement that it is the act of 'making *waqf*' but that its existence must be based on the principles of Islam. Therefore, if a building is used for activities that are contrary to the principles of Islam and it is thereafter given in *waqf*, it cannot be taken as *waqf* property but could come under the definition of 'trust' within the meaning of the Trustee Act 1949 (Act 208).

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Although *waqf* is in the nature of a charitable trust, and given that the NLC recognises trusts created over land, the NLC expressly declares that such trusts under the NLC do not include *waqf* created in accordance with the principles of Muslim law.¹⁷ This therefore allows *waqf* lands to be specifically governed by

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14 See s 2 of all the state *waqf* enactments that define 'court' as 'Syariah court'.

15 A *waqf* is perpetual whilst a trust may be restricted by time.

16 Note that s 2(1) of the Trustees Incorporation Act 1952 includes 'trustees appointed by anybody or association of persons for, amongst others, 'religious' purposes ...'. This awkward legal position may have arisen due to the 1952 Federal law being passed in the same year as the first administration of Muslim law enactment in Malaysia containing the provision relating to the SIRC being the sole trustee for *waqf* in the state.

17 See definition of 'trust' under s 5 of the NLC.

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- A Islamic law. The *waqf* deed need not be deposited at the land office in accordance with s 344, nor would there be a right to lodge a trust caveat over such *waqf* lands under s 332.

WAQF LANDS AND THE NATIONAL LAND CODE

- B The special position of *waqf* lands are acknowledged under Malaysia's National Land Code ('NLC') by s 4(2) which states to the effect that nothing in the NLC shall affect the provisions of '(e) any law for the time being relating to *wakaf* or *baitul mal*'. This means that when it comes to *waqf* lands, the governing law shall be the provisions enacted by the state authority relating to *waqf*, be it provisions in the Administration of Muslim Law Enactments or Rules made thereunder or the state *waqf* enactments. This provision is seen as a guarantee that although the NLC is the main law controlling the administration of lands in Malaysia, it accords express recognition and respect to the uses and practices on land based on Islamic principles in Malaysia. Therefore, the main principles in the NLC are not generally applicable in regard to the administration of *waqf* lands in Malaysia.

- E It is also right to contend that the principle of land registration as provided under the NLC may be taken as not applicable in respect of *waqf* lands. The absence of procedures relating to this has resulted in many *waqf* properties being unregistered and even if registered, the beneficiary and the *waqf* trustee may consist of different parties.

- F The lack of clear procedures relating to the registration of *waqf* lands does not mean that *waqf* lands do not need to be registered. It is strongly believed that the registration of *waqf* lands should be a necessary requirement in order to guarantee its sustainable management in future. Hence, clear provisions relating to the requirement of registration and the updating of records in line with the wide utilisation of the computerised system presently should be included in laws relating to *waqf* lands. Other provisions that should be included are identification of the registered owner as well as the role and powers of the *waqf* trustee/administrator.

- H It is possible for the state Islamic Religious Council itself to create *waqf* over its own lands (through the concept of *irsod*).¹⁸ This could be done by applying for state lands and the state authority could facilitate this by using its powers to alienate land in perpetuity under s 76(1)(aa) of the NLC. Such alienation must

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18 For example, the Selangor State Fatwa Council, has among others, decided that: 'The state government may create *waqf* over its property for the specific use of Muslims including the site of a mosque, prayer room and Islamic school'.

however be expressly for public purposes or 'where the state authority is satisfied that there are special circumstances which render it appropriate to do so.'

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One method that has been done to create *waqf* land under the NLC is for the donor to surrender his land to the state authority under the provisions of s 197 and then for the State Islamic Religious Council to apply to the state authority to re-alienate the land to the Council to hold as *waqf* land according to the proposed layout. This type of process is however time consuming and the memorial of registration after the alienation still does not indicate the status of such *waqf* land.

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The earlier (and to a certain extent, existing) practice of the SIRC's was to require the donor of *waqf* land to transfer such lands to the Council by way of executing Form 14A (instrument of dealing for a transfer under the NLC) prescribed by s 215 of the NLC. Such transfer is exempted from stamp duty and upon registration of the transfer, the land would be absolutely transferred to the Council. A person who conducts a search on the land title would not however be able to discover the status of the land as *waqf* land and that the council is holding the land as sole trustee of the donor for nothing to this effect is recorded in the memorial of registration or the register document of title. If it were a trust, then the trustee could register the trust under the provisions of s 344 of the NLC by depositing the trust document and the registrar would accordingly make a memorial on the register document of title describing the transferee as 'trustee/trustees'.

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One of the major problems in *waqf* land is that the land remains registered in the name of the *wakif* although *waqf* has been created. It is acknowledged that the Shariah requirements override a mere procedural requirement and that in respect of *waqf*, the creation and validity of *waqf* should go beyond the land law requirement. Nonetheless, many issues arise due to incomplete information or evidence to prove that '*waqf*' has been created over a piece of land. In this regard, the general land laws prevail in the absence of specific provision or evidence proving otherwise. Thus, confusion in management may arise which necessitates cooperation of all affected agencies. These challenges and hindrances will be examined further in this paper.

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The better way in which to secure the position of *waqf* lands in the land offices is by way of statutory vesting under s 416C of the NLC. Section 416C allows persons or bodies who have been statutorily vested with powers to hold land to apply for endorsement of such status on the register document of title. By virtue of a circular of the Director General of Lands and Mines No 8/1999, the State Islamic Religious Council may apply to the land office for the

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- A statutory vesting of *waqf* lands under its jurisdiction.¹⁹ Application is made in writing to the Registrar of Titles accompanied with the stamped trust instrument and a copy of the statutory provision vesting the power to hold land. The registrar will then make a memorial of the statutory vesting in the register document of title. In such a case, any search on the land title would
- B reflect the fact that the Council is vested with power to hold the land as sole trustee.

IDENTIFICATION OF WAQF LANDS

- C Given that the National Land Code is not generally applicable in respect of *waqf* lands, the current practice is to check with the Islamic Religious Councils concerning information and data relating to *waqf* lands in the state.²⁰ However, since Malaysia applies the Torrens system of land registration that emphasises on the ‘mirror’²¹ and ‘curtain’²² principles that the register is everything and the
- D need to be satisfied with all information appearing on the register respectively, the register document of title at the land office should accordingly be able to reflect the status of such lands as *waqf* lands. Accordingly, the only way that this can be done is by way of statutory vesting under s 416C of the NLC. In view of
- E this, it is therefore proposed that the practice of transferring *waqf* lands through Form 14A be discontinued and that all future vesting of *waqf* lands in the name of the Councils should be by way of statutory vesting.

- F Taking up the point by a noted scholar that survey and registration of *waqf* lands by the government is a necessity for the revival and better management of

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- G 19 Although some states have tried to adhere to this circular, many others have not due to various reasons among others due to the fact that matters on Islam lies in the state thus some states ignore the need to follow the directive, see Nor Asiah, Sharifah Zubaidah Syed Abdul Kader, Zuraidah Hj Ali, ‘Waqf Lands and Challenges from the Legal Perspectives’, Conference Proceedings, IIUM-Toyo University Joint Symposium on ‘Sustainable Built Environment: Lessons Learned from Malaysia and Japan’, 15 November 2012, Tokyo University, Tokyo Japan.
- H 20 The Council is under a statutory duty to annually publish a list of *waqf* properties, investments and assets under its jurisdiction in the State Gazette. See for example, s 58 of the Administration of Islamic Law (Kedah Darul Aman) Enactment 2008 and s 95 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003.
- I 21 The ‘mirror principle’ is a metaphor used to explain the strength of registration of titles and interests in land under the *Torrens* system of land registration. The register at the land office is like a mirror that reflects all information that a person would want to know about the land at such point in time (see Theodore BF Ruoff, *An Englishman Looks at the Torrens System: Being Some Provocative Essays on the Torrens System after One Hundred Years* (Sydney Law Book Co, 1957) 7–8).
- 22 Under the curtain principle, the register is conclusive evidence of title and interests in the land. Thus, a prospective purchaser needs to be satisfied with all the information on the register document of title that there is no need to go beyond the register. *Ibid.*

awqaf,²³ unlike the position in India, Malaysia is at a better position to effect survey and registration of its *waqf* lands. This is because Malaysia's land administration system is premised on the Torrens system of registration of titles and interests where official surveys of lands are already being effectively carried out by all land offices with the assistance of the Department of Survey and Mapping. There is only the need for the State Islamic Religious Councils to work together with the Department of Lands and Mines and the Department of Survey and Mapping to further refine its existing data and information on *waqf* lands in the state and eventually in the country.

It is also proposed that for ease of reference, lands that have been surveyed and identified as *waqf* lands should be made easily identifiable akin to the documents of title for Malay Reservation Lands. Thus, if documents of title for Malay Reservation Lands can be printed in red ink, it is proposed that the documents of title for *waqf* lands be printed in green ink. Thus, any green ink grants would be easily identifiable as *waqf* lands when conducting a search at the land office.

LEGAL FRAMEWORK FOR WAQF MANAGEMENT AT STATE LEVEL

Not all states in Malaysia have enacted specific rules or enactments relating to *waqf*. The laws relating to *waqf* at state level can therefore be divided into two categories, firstly, provisions in the state Administration of Muslim Law enactments and secondly, specific rules or enactments relating to *waqf*.

The following table illustrates the present laws relating to the administration of *waqf* in the respective states administration of Islamic law enactments in Peninsular Malaysia.

Table 6.0 — Provisions relating to Waqf in the Respective States' Administration of Islamic Law Enactments

State	Enactment	Sections
Perlis	Administration of the Religion of Islam Enactment 2006	ss 89–95
Kedah	Administration of Islamic Law (Kedah Darul Aman) Enactment 2008	ss 51–58

23 Prof Syed Khalid Rashid, 'Certain Legal and Administrative Measures for the Revival and Better Management of Awqaf', IRTI Working Paper Series, WP#1432–02, Islamic Economic Studies, Vol 19 No 1.

A	State	Enactment	Sections
	Penang	Administration of the Religion of Islam (State of Penang) Enactment 2004	ss 89–95
B	Perak	Administration of the Religion of Islam (Perak) Enactment 2004	ss 78–84
	Federal Territories	Administration of Islamic Law (Federal Territories) Act 1993 (Act 505)	ss 61–68
C	Selangor	Administration of the Religion of Islam (State of Selangor) Enactment 2003	ss 89–95
	Kelantan	Council of the Religion of Islam and Malay Custom Kelantan Enactment 1994	ss 61–66
D	Terengganu	Administration of Islamic Religious Affairs (Terengganu) Enactment 1422 H	ss 63–69
E	Pahang	Administration of Islamic Law Enactment 1991	ss 70–78
	Melaka	Administration of the Religion of Islam (State of Malacca) Enactment 2002	ss 77–83
F	Negeri Sembilan	Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003	ss 89–95
	Johor	Administration of the Religion of Islam (State of Johor) Enactment 2003	ss 89–95
G	Sabah	Majlis Ugama Islam Negeri Sabah Enactment 2004	ss 51–57
	Sarawak	Majlis Islam Sarawak Ordinance 2001 (Chap 41)	ss 43, 51–54
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All the State Enactments above have excluded the concept of ‘trust’ under the Trustee Act 1949 from the definition of *waqf*. This should in itself, oust the jurisdiction of civil courts from deciding upon the matter of *waqf*.

I All the Enactments contain a provision declaring that ‘notwithstanding any provision to the contrary contained in any instrument or declaration, governing or affecting it’ the State Islamic Religious Council is to be the ‘sole trustee’ of all *waqf*. This is supported further by the next provision that vests the *waqf* property on the Council as follows:

All property subject to section ... 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*... affecting the property.

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These provisions would effectively put *waqf* property detailed in any instrument of *waqf* in Malaysia into the hands of the State Islamic Religious Council as 'sole trustee'. It is then up to the Council to make further rules and regulations for the administration of *waqf*. Such has been done in the states of Johor, Selangor, Negeri Sembilan and Melaka.

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The following table shows the specific laws on *waqf* administration in Johor, Selangor, Negeri Sembilan and Melaka.

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Table 6.1 — States that have Specific Waqf Administration Laws

	State	Law
1.	Johor	Johor Wakaf Rules 1983
2.	Selangor	Wakaf (State of Selangor) Enactment 1999
3.	Negeri Sembilan	Negeri Sembilan Wakaf Enactment 2005
4.	Melaka	Melaka Wakaf Enactment 2005

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These laws contain more comprehensive definitions for *wakaf*, as well as the main constituents for the creation of wakaf such as the *wakif* (donor), *mawquf* (the *waqf* property), *mawquf ilaih* (the beneficiaries).

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The Wakaf (State of Selangor) Enactment 1999, when it was first passed, made waves as one of the most important and groundbreaking law relating to waqf administration in Malaysia.²⁴ It made provisions for the formation of a wakaf (Part II), *mawquf-ilaih*, *mauquf*, the position of an invalid *wakaf*, the establishment of a *Wakaf* Management Committee (Part VII), *Istibdal* and the Development of *Mawquf* (Part VI), and lays down the powers of the Council over *waqf* properties. The Selangor Enactment has since been overtaken by the *waqf* Enactments in Melaka and Negeri Sembilan.

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The Negeri Sembilan Wakaf Enactment 2005 is the latest law relating to *waqf* administration in Malaysia and offers the latest administrative structure relating to the management of *waqf*. The enactment lays down provisions relating to the role of the Council as sole trustee and responsibilities of the Council. It also contains provisions relating to the appointment of a Registrar of Wakaf, a Deputy Registrar and officers thereunder, the establishment of an Advisory Panel on Management of Wakaf, the establishment of a Wakaf Fund,

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24 It was one of the model statutes drafted by JAKIM for adoption by the states in Malaysia and Selangor was the first state to adopt it, Pawancheek Marican, 'Wakaf Law and Administration in Terengganu: An Analysis' [2005] 2 ShLR lxix.

- A the management of *waqf*, describes offences and penalties and provides for enforcement and investigation. A person who wishes to create a *waqf* over his property must apply to the Council for registration of such *waqf* property (s 6). The Council may also apply to the court under s 50 for any property to be declared as *waqf* property and the court may, under s 7, order that the property
- B be registered as a *mawquf*. Upon registration of *waqf* properties, the Council is empowered to issue a certificate of *mawquf* that would be conclusive evidence in any court, syariah or civil, that such property is *waqf* property (s 8). It is submitted that the provisions relating to *waqf* management in the Negeri Sembilan Wakaf Enactment be used as a feasible template for the revision of
- C *waqf* laws in other states in Malaysia.

WAQF LANDS ADMINISTRATION MANUAL 2010

- D The Department of Wakaf, Zakat and Haji ('JAWHAR') was established in 2004 under the Prime Minister's Department to oversee the management of *waqf* resources in the country.²⁵ JAWHAR has published a manual for *waqf* lands that aims to become the official guidelines to streamline the administration of *waqf* lands in Malaysia. It also represents the best practice for
- E *waqf* land management in Malaysia.

- F The Manual has three chapters, the first deals with the general concepts concerning *waqf* whilst the second chapter discusses the various ways of registering *waqf* lands at the land office under the NLC. The third chapter — most comprehensive chapter — deals with the management and administration of *waqf* lands covering processes on *waqf* lands such as the payment of quit rent, assessment rates, the creation of leases and tenancies of the land/ buildings, termination of such leases and tenancies, collection of rent of the *waqf* premise through counter payment, maintenance of the lands/
- G buildings, application of state land for the creation of *waqf* for public interest (*irsod*), replacement of *waqf* land (*istبدال*), insurance of *waqf* property and claiming insurance as well as applications to the land office for conversion from leasehold to freehold title.²⁶ Guidelines are also laid down relating to court
- H actions on *waqf* lands.

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25 Source: Jabatan Wakaf, Zakat dan Haji ('JAWHAR')

26 Sections 197 and 204 give options to the land owner to surrender land to the State Authority and the State Authority will then alienate the land to the SIRC (in the context of *waqf*) being the authority authorised to deal with *waqf* land.

PROCEDURE FOR THE 'REGISTRATION'²⁷ OF WAQF LANDS AT THE LAND OFFICE A

As the protection of land ownership under the Malaysian *Torrens* system is obtained through registration of the land title into the name of the owner, in order to ensure that waqf land is permanently protected, the land offices have provided several procedures to ensure that the creation of *waqf* land is legally secured. One of the modes is the land must be registered under the name of the *waqf* administrator who acts for the benefit of the *ummah*. B

The general practice is that the transfer of land into the name of the State Islamic Religious Council (SIRC) or to the receiver of the *waqf* is effected using Form 14A to effect the transfer of waqf land, or a part only of it or a lease of such land (ss 215, 217, 218 of the NLC). The *mauqif* (person who creates the '*waqf*') will put his signature on the instrument of transfer using black ink before the Land Administrator and the SIRC (usually represented by three persons) will sign the instrument as the receiver of *waqf* and affix its official seal. The title of the transferor shall pass to and vest in the transferee upon the registration of the transfer (s 215(2)). C D

Other than using the transfer Form 14A, *waqf* land may also be effected by using Forms 12A and 12B. This is normally used in respect of land office titles (Mukim Grant, Mukim Lease). It is a process of the *waqif* surrendering the land to the state authority and the state authority re-alienating it to the SIRC. The application and simultaneous process under s 204 of the NLC is necessary to prevent delay and technical problems related to the re-alienation that could hinder the effectuation of the *waqf* land. There is also a practice under s 197 of the NLC to surrender the whole land and under Form 12B to surrender a part only in accordance with s 200 of the NLC. This is taken as the initial step for the purpose of reservation of land and the process is provided for under s 62 of the NLC to be approved by the state authority, but is most often delegated to the Chief Minister. The process that is taken to reserve the land normally takes a long time although such land has changed its status from alienated land to state land. A matter of concern is what shall happen if the land is not immediately reserved or *gazetted* as *waqf* land in a case where the *waqf* document goes missing from the land office or the office of the SIRC. There would no longer be any evidence to establish the *waqf* and thus the *waqf* status would be eliminated altogether. In the long process of reserving *waqf* land, all the interests in the land is given to the state authority and the SIRC will lose their interest in the land within this period. It is not impossible that within this E F G H

27 It is noted that the use of this term is a misnomer as under the National Land Code, only a dealing can be registered and *waqf* is *not* a dealing. The term is however, widely used by *waqf* administrators and the land office in respect of the act of endorsing the *waqf* status on the Register Document of Title. I

- A period when the land becomes State land, it can be subject to application for alienation by other parties. Furthermore, the process of surrender and re-alienation using Form 12A or 12B must involve the payment of the prescribed fee, preparation of plans as well as the document for *waqf* attestation. This may slow down the process of registration and creation of *waqf*.
- B Other than that, the existence of *waqf* land also involves an application for alienation of state land using the Schedule 1 Form (r 3) according to the NLC. Nevertheless, this process is only taken to be perfected once the land is *gazetted* as *waqf* land.²⁸ In the case of *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2008] 6 MLJ 488, the Court of Appeal rejected the application of the Selangor State Islamic Religious Council to declare a piece of land that was approved by the Shah Alam City Council as a cemetery based on *waqf* land on the ground that the said land had not been *gazetted* as *waqf* land. Judging from the decision of this case and looking into the current practices, although the
- C creation of *waqf* land emanates from Shariah principles, the validity and formal recognition of *waqf* is still subject to provisions of other written law.²⁹ This type of challenge may happen from time to time and would definitely affect sustainable development of *waqf* lands in Malaysia.
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- E Weaknesses arising from the mode of transfer of *waqf* land to the *waqf* administrator (SIRC) using Form 14A has been identified.³⁰ Firstly, the transfer of land cannot be effected if the *waqif* is dead. The same implications arise also where a *waqf* is created and registered under the name of Imam or Kadhi, or under the name of the head of village, and they die. There are also
- F problems where a *waqf* is created through word of mouth, or in a case where *waqf* land is registered under others as trustees. Problems also arise in the case of agricultural land which is less than 2/5 hectare and the cases of reluctance of the next of kin to release land for religious purposes. In addition to that, there are also problems relating to payment of arrears of quit rent. For example, the
- G completion of memorandum of transfer requires the wakif or the 'waqf' administrator to settle all arrears of quit rent (s 81 of the NLC), stamp duty and consent from other persons or bodies having registered interest over the land such as chargee, lessee must be secured before *waqf* can be created.³¹ Such a requirement under certain circumstances creates a burden on the *waqif* or his
- H representative.

28 The power to *gazette waqf* lands is only given to the SIRCs under the respective Administration of Islamic law Enactments.

I 29 Section 13 of the Wakaf (State of Selangor) Enactment 1999.

30 Manual Pengurusan Peletakhakan Tanah Wakaf, 2010

31 Nik Mohd Zain bin Hj Nik Yusof (1999), 'Prosedur Pendaftaran Tanah Wakaf di Bawah Kanun Tanah Negara' (Waqf Registration Procedures under the NLC), Paper presented in Seminar Institusi Wakaf Menuju ke Arah Baru, Organised by Land Administration and Geo-Information, Universiti Teknologi Malaysia, Skudai Johor, 8 July 1999.

It is noted that the Director of Land and Mines has issued a directive on 24 November 1999 (No 8/1999) stating that all *waqf* lands must be vested in the authority of SIRC by way of endorsement of the statutory vesting on the Register Document of Title. This procedure was inserted to the NLC via amendment Act A832/1993 to facilitate transfer of land to the *waqf* administrator through a new provision *ie* s 416C of the NLC. This provision allows the endorsement of the statutory vesting of *waqf* land on the SIRC to be endorsed on the Register Document of Title at the land office. Emphasis on the need to use s 416C is reiterated in the Manual for Management of Statutory Vesting of Wakaf Land 2010 produced by JAWHAR. This procedure also facilitates the provisions under the administration of Islamic law which recognises the SIRC as the sole administrator and ensures that SIRC remain the administrator.

The procedure for endorsement of statutory vesting under s 416C is as follows:

Diagram 1

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SIRC applies to the Registrar or Land Administrator (LA) in writing to endorse a statutory vesting on the RDT. Application must enclose the waqf deed or declaration of waqf and the section of the statute that vests the authority on SIRC as sole trustee.

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The Registrar or the LA receives the application and decides whether to accept the vesting order if he is satisfied that statutory vesting of such right has taken effect.
(S 416 C(1))

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Upon satisfaction, the Registrar shall endorse the statutory vesting on the Register Document of Title and the vesting shall subsist throughout the duration of the title and bind every subsequent proprietor (S 416C(2)).

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This method is simpler as compared to the earlier modes. There is no specified form but SIRC is required to make a written application to the Registrar or the land administrator accompanied by the documents or witnesses to attest the *waqf* creation. The statutory provision of the respective law indicating the SIRC as the sole trustee of *waqf* must also be attached. The note of *waqf* is needed in order to endorse such statutory vesting (s 416(1) of the NLC). The procedure for endorsement of statutory vesting under this section is in compliance with Shariah law and the NLC and above all, it is simple and fast. Moreover, the note '*waqf*' will further protect its *waqf* status.

As *waqf* land falls under the jurisdiction of each state in Malaysia, this has caused lack of standardised practices and inconsistency in implementation of some of the laws and policies. Hence, the directive to use the vesting order as the sole process of the endorsement of the vesting *waqf* on the SIRC is timely

although it merely provides a short term solution to *waqf* land. Furthermore, the procedures under s 416C offers double protection as it also provides that the registrar may only act after he is satisfied that the statutory vesting from the transferor to the transferee has taken effect. The registrar has the discretion to reject the application for endorsement if the basis for the application is illegal. The rejection must be conveyed to the applicant as soon as possible. The provision on statutory vesting aims to expedite the vesting process while facilitating *waqf* administration for the SIRC. This will go a long way in gaining the trust of members of the public in matters concerning management of *waqf* lands as a tool to gear up economic activities in line with the principles of Islamic law.

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A survey on the registration of *waqf* lands in a few selected state land offices shows that different states use different modes of registration. Although the practice of registration differs from one state to another, there is not much change in terms of procedures and law as ultimately reference will be made to the National Land Code. For example, the Penang SIRC uses Form 30A as a vesting instrument for the registration of *waqf* land. While the common procedure in Gombak land office is to use Form 14A while other forms of registration may be carried out on request. Form 30A of the NLC provides for registration of statutory vesting of registered and registrable interest in land in the name of the transferee. Although this provision may provide a similar effect for registration of *waqf* land nevertheless, the scope of the properties is more general and confined only to registered and registrable interests in *waqf* land.

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LEGAL CHALLENGES IN THE MANAGEMENT OF WAQF LANDS IN MALAYSIA

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Some states in Malaysia have made a commitment to introduce law to specifically deal with *waqf*. This is in line with the existence of a saving clause under s 4(2)(e) of the National Land Code as mentioned earlier in this paper. Nevertheless the provisions of the law, if any, are submitted as inadequate. For example, s 4(1) of the Wakaf (State of Selangor) Enactment explicitly clarifies that the effective date of *waqf* is when all the conditions and pillars for *waqf* are fulfilled unless stated otherwise; such as the '*waqf*' shall only take effect after the *waqif* dies, then it shall work as such. The problem may arise in cases when the *waqif* or the witness of *waqf* dies without having any other documents to prove land is *waqf* land. In the absence of any document evidencing the land as *waqf* land, the land will be administered according to laws relating to land and will be treated as alienated or private land only. This has also resulted in *waqf* lands

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A being subjected to land acquisition under the Land Acquisition Act 1960 as has been researched and documented in Terengganu.³²

B Having emphasised the view, it shows that there is urgency to have specific law governing the administration of *waqf* as the current laws either as enacted by the state or the federal government relating to *waqf* lands are not in harmony and will open all *waqf* lands for challenge. Nevertheless, the provision for vesting order using s 416C is seen as the best temporary measure to give better protection for *waqf* land within the existing land system in Malaysia.

C The office of the Director of Lands and Mines (Federal) is also of the opinion that it is more appropriate for the SIRC to introduce their own laws governing *waqf* including *waqf* land by virtue of art 74 of the Federal Constitution. While AGC is of the view that having specific law on *waqf* is an advantage as it shall release SIRC from any other laws that may relate to *waqf* properties, the office of the Director of Land and Mines is of the view that *waqf* land is still subject to be registered in the land office in order to give SIRC an indefeasible right as a 'registered owner' to deal with *waqf* land.³³

E One suggestion for improvement is the SIRC should exercise their powers to regulate and introduce rules on *waqf*³⁴ without having to enact new law as that will take a longer process. On the other hand, the Land Administrator should take heed of any direction received from SIRC on *waqf* land and Standard Operating Procedures ('SOP') are needed to expedite the whole process. At present, the administrative procedures on *waqf* differ to some extent, among all the states. The grey areas on *waqf* are most of the time, referred to the civil court for decision while the state provision clearly says that 'court' means Shariah Court. For example, in *G Rethinasamy lwn Majlis Ugama Islam, Pulau Pinang dan satu yang lain* [1993] 2 MLJ 166, the Land Administrator was held as having no power to transfer *waqf* land to the plaintiff who is a non-Muslim. The amendment to art 121 of the Federal Constitution which has clearly delineated the jurisdiction of the Shariah Courts has helped

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I 32 See Mohd Afandi bin Mat Rani, Abdul Rahman bin Mohd Sha'ary; 'Implementation of *Istibdal* in the State Islamic Religious Councils: A Case Study of Waqf Lands Acquisition by the State Authority in Terengganu', conference paper delivered at The ASEAN Endowment Seminar (*Muktamar Waqf Iqlimi*) 2014 organised by Universiti Sains Islam Malaysia (USIM) on 29 April 2014.

33 Seminar Transformasi Perletakhakan Tanah Wakaf, 2012.

34 Provision for this already exists in the State Wakaf Enactments, see s 47 (Selangor), s 52 (Negeri Sembilan), s 49 (Malacca).

to resolve the issue of redundancy of jurisdictions on *waqf*.³⁵ In the recent case of *Ajar bt Taib dan lain-lain lwn Majlis Agama Islam dan Adat Istiadat Melayu Perlis* [2014] 9 MLJ 321, for example, the High Court in Kangar (Perlis) acknowledged that it had no power to decide on the issue of who should manage *waqf* lands and rights to recover *waqf* lands as these matters are governed by Islamic law and comes within the exclusive jurisdiction of the Shariah Courts.

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The present weaknesses of the NLC in dealing with *waqf* can be improved with amendments of some of the provisions. Presently, the *waqf* manager has not been included in s 43 to be among the persons who can deal with *waqf* land. Therefore, the SIRC being the sole trustee for *waqf* lands may be clearly mentioned as a person entitled to deal with land.

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The SIRC as the sole trustee and registered owner of the *waqf* land has a role to maximise the benefit of *waqf* land according to the intention of the *waqf* creator. Thus, the sustainability of *waqf* land depends on the proper registration of the *waqf* so it stands as a caveat to inform others on the status of the land. Section 64(1)(2) of the NLC gives power to the state authority to revoke any land reserved for public purpose or to revoke any lease for the same purpose. Hence, leased *waqf* land is also subjected to the same procedures and actions thus it runs against the spirit of *waqf* which is meant to be perpetual.

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The necessity for clear legal provisions providing for the permanent status of *waqf* lands is more imminent in Malaysia given the multifarious cultures and religious beliefs of its people. Without having a specific law, *waqf* lands faces the danger of having its status changed or ignored by those in authority who refuse or are reluctant to understand and thus protect the belief of others. Provisions and policies on *waqf* must take the approach that the principles relating to *waqf* must take priority over any other law or policy that contradicts the principles of *waqf*. For example, the principles relating to *istibdal* (replacement of intention of *waqf*) is vital in ensuring the sustainability of *waqf* lands³⁶ and should be recognised under laws providing for compulsory acquisition of lands like the Land Acquisition Act 1960. Studies have shown that when the state authority compulsorily acquires *waqf* lands under such Act,

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35 Article 121(1A) of the Federal Constitution 1957, which was amended on 10 June 1988 provides that the civil courts shall have no jurisdiction in respect of any matter within the jurisdiction of the Shariah Courts. The amendment, among others, aims to prevent any conflict between the decisions of the Shariah Courts and the civil courts which had occurred in a number of cases before.

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36 *Istibdal* is the sale of all or a part of *waqf* land to purchase another piece of land dedicated as *waqf* for similar purposes. This practice is accepted by the majority of Muslim jurists, see Kahf M: 'Financing the Development of Awqaf Property', paper presented at the Seminar on Development of Awqaf, IRTI, March 2–4, 1998, Kuala Lumpur.

A only monetary compensation is provided to the SIRC's but there is no replacement of the *waqf* land so taken as is required under the concept of *istibdal*.³⁷

B The proposal to use the vesting order under s 416C of the NLC has been promoted by the Federal Department of Lands and Mines and sent to all states in Malaysia (Government Circular No 8/1999). Nevertheless, a survey of the practices at land offices in Perlis, Penang and Selangor has indicated that the SIRC's still apply for transfer of *waqf* lands using Form 14A despite such circular. There could be three reasons for the general reluctance to adhere to the circular. First, the SIRC's prefer the *waqf* lands to be registered in their names for ease of management of such *waqf* lands in the future to facilitate dealings.³⁸ Second, the land administrators at the land office only have administrative powers in respect of the registration of dealings on land and cannot question the SIRC on the appropriateness of using Form 14A in the 'registration' of *waqf* lands. Thirdly, the SIRC's do not generally feel bound by the circular of the Federal Department of Lands and Mines as land is a 'state matter'. This state of affairs has contributed significantly to the impasse in the effort to vest *waqf* lands in the SIRC's.

E Another hurdle faced in the implementation of statutory vesting under the NLC is caused by the handicap in the implementation of the computerised land system. The recording system under the new system is designed to print only the whole area of *waqf* land and not for part of the *waqf* land. As a result, a correction is to be manually done by invoking s 380 of the NLC to cater to errors done by the land administrator. To date, the improvement to the system is ongoing with the introduction of a better version of the software used for the registration of land titles or interests over land including *waqf* lands.

G The NLC provides for 99 years as the ceiling for disposal of state land and this policy may give adverse effect to the creation of *waqf* land which is permanent in nature. An amendment can be done to s 76(aa) to include *waqf* land as land that should be disposed in perpetuity (as freehold land). Moreover, the computerised land system cannot register *waqf* land for a part only of land

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37 See Mat Rani MA, 'Mekanisme *Istibdal* dalam Pembangunan Tanah Wakaf: Kajian Terhadap isu Pengambilan Tanah Wakaf di Malaysia oleh Pihak Berkuasa Negeri', Jurnal Pengurusan JAWHAR, Kuala Lumpur, 4(1):3.

I 38 There is danger in this approach as *waqf* lands are not endorsed as *waqf* lands upon transfer of *waqf* lands using Form 14A. SIRC's named as transferee could be treated under the law as the absolute owner of such *waqf* lands with no hindrance at all to enter into further dealings on the land although this goes against the principles of *waqf* itself. Also such lands could be treated as a fixed asset of the SIRC's when it is in actual fact *waqf* land.

as there is no special provision to cater for such application. Hence, currently all endorsements or registrations are done manually which may be prone to mistakes.

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Waqf land may also be compulsorily acquired by the state authority under the Land Acquisition Act 1960. This is again a result of not having adequate laws dealing with the identification and registration of *waqf* lands. As such there is no legal provision that clearly states that any acquisition of *waqf* land must be replaced with another land of similar nature and value. While there is an enactment to protect the Malay Reservation Lands, it is believed that such provision for replacement of land is more crucial in regard to *waqf* lands because the creation of *waqf* over land indicates an act of submission to God ('ibadah) and the benefits are not only confined to the Creator but the whole community and the government can also enjoy the fruits of *waqf* land if it is efficiently managed.

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The issue on the 'spirit of *waqf*' arose in *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2008] 6 MLJ 488. The *waqf* relates to land reserved for a Muslim cemetery but the residents of the apartment which was later developed near the area raised an objection and the court made a decision that the cemetery was not formalised as *waqf* land as it has yet to be *gazetted* by the state government. The priority of the formality seems to take priority against the religiously created *waqf* which is already completed as far as Shariah requirement is concerned but lacked formal recognition as far as the NLC is concerned. Thus, the decision of the Court of Appeal failed to uphold the principle as well as the spirit of *waqf*. Unless and until there is a provision for compulsory replacement of *waqf* land in the event when there are provisions to degazette or cancel the intention of the *waqf* creator to accommodate the implementation of other laws such as the Land Acquisition Act 1960, *waqf* land remains prone to such adverse decisions.³⁹

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As a result of not having a proper mechanism to register *waqf* land and when *waqf* land involves properties subject to law of inheritance or *faraid*, the officer in charge adopts various ways of resolving the issues. Firstly, the property which is proven as *waqf* land shall be vested to the SIRC using Form E (Small Estates (Distribution) Act 1955 (Act 98)). This is done with the consent from all beneficiaries in the presence of the representative of SIRC to record the information about the land and types of land use. Secondly, a special order is issued to appoint any of the beneficiaries as the estate administrator using Form F. The estate administrator is instructed to give consent to vest the property to the SIRC for the purpose of *waqf*. Similarly, the consent from all beneficiaries

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39 The National Fatwa Council has deliberated on the issue on 22 April 1999, in Muzakarah, Jawatankuasa Fatwa, No 46.

- A is required but the process can be done with or without the presence of the representative of SIRC. Thirdly, an order is made where the *'waqf'* land is transferred into the name of the beneficiaries and the beneficiary is ordered to transfer the land to the SIRC subject to consent of all beneficiaries. One of the reasons for this practice is sometimes some land offices do not allow the estate administrator to deal with transfer of land. As such, the beneficiary is required to deal with the land office and transfer the land to SIRC. Fourthly, by order, one of the beneficiaries will be appointed as the estate administrator and he is instructed to surrender the land to the state authority either by using Forms 12A or 12B. The state authority will then *gazette* the land as *waqf* land.

- C An analysis of all the above methods shows that the whole process of registration of land and later to *waqf* land is a time consuming process. It is more cumbersome if land dedicated for *waqf* involves only part of agricultural land of which as a result of division according to *waqf*, the land becomes less than the required size allowed under the NLC (s 136(1)(f)(i)). Following this, registration of statutory vesting directly into name of SIRC is the most appropriate for *waqf* resulting from estate distribution. Nonetheless, there are a few other issues involving the registration of *waqf* land to the SIRC especially in cases involving a case of the *waqif* dying intestate and no consensus from the beneficiaries on the creation of *waqf*. Hence, in cases where there is no *waqf* enactment, an amendment to the Small Estates (Distribution) Act 1955 (Act 98) is necessary to allow SIRC to become one of the applicants (beneficiaries) for the estate of the deceased (*waqif*).

F **RECOMMENDATIONS AND CONCLUSION**

- G The legal regime for the administration of *waqf* in Malaysia has seen the SIRC's being put in the position of sole trustee (*mutawalli/nazir*) of *waqf* lands in the state. *Waqf* lands in Malaysia can thus be said to have been put indirectly under state control through the SIRC's.

- H The federal government has taken a positive step by establishing JAWHAR at federal level as a body to hopefully oversee the streamlining of *waqf* management and administration in Malaysia. It remains to be seen however, whether the states will cooperate effectively with JAWHAR in regard to the formulation of a better and uniform legal framework for the management and administration of *waqf*.

- I The management of *waqf* land requires coordinated administrative procedures and legal coherence. Having acknowledged the need for a Wakaf Enactment for every state in Malaysia, under the current practices, there is urgency to make compulsory the registration of all *waqf* lands or other landed properties in order to protect and manage the *waqf* properties efficiently. The recording system of *waqf* land as practiced in the land office in Malaysia must

be improved to facilitate the national development agenda of *waqf* lands. This can be achieved through a large scale *waqf* land registration exercise affecting the whole nation. A

At present, any conflict is resolved with the help of the fatwa institution which certainly takes longer time and the decision of the Fatwa Council is not binding on other parties except to the party seeking to find an authoritative opinion on any issue. Hence, all the parties involved in the administration of *waqf* lands such as the SIRC, the Ministry of Land and Natural Resources, the Attorney General's office, and JAWHAR should cohesively work towards having a standardised law on *waqf*. Such law would be an authoritative vehicle in resolving any conflict between *waqf* law and other related laws. B C

The establishment of a Wakaf Department and the Malaysia Wakaf Foundation at national level is timely especially in materialising a *Waqf* Master Plan as a guideline for any project involving *waqf* lands. This approach is important to ensure sustainable protection of *waqf* properties since the public is the main contributor. The establishment of *waqf* foundations has seen success in Selangor, with good track records in their management and activities.⁴⁰ Malaysia Wakaf Foundation was established in 2008 with a mandate to manage all the *waqf* sources in Malaysia, and to generate high economic potential for the benefit of *ummah*. On 28 September 2012 The Honourable Prime Minister in his 2013 Budget Speech announced that the Foundation will be responsible to formulate the Corporate Wakaf Master Plan taking into consideration the State Islamic Religious Councils' Legislative Structure. D E F

The management of *waqf* lands requires concerted efforts from various agencies and the public. There is clearly a need for a standardised and comprehensive *waqf* law towards the sustainable administration and management of *waqf* lands. Nevertheless, having recognised the weaknesses in the current administration of *waqf* lands, the effort to increase public contribution for the creation as well as the development of *waqf* lands should become the main agenda of all the SIRC in Malaysia or in any part of the Muslim countries. Obviously, there is urgency to enhance as well as to create innovative products for *waqf* as well as *waqf* lands in order to attract the interest of the public about the importance of *waqf* lands and its roles for the Muslims in Malaysia. The effort for improvement should focus on improving the image of *waqf* in order to gain the trust of the public as well as giving priority to projects that give more value to the land. In this respect, any dispute and I

40 MAIS (SIRC) Meeting No 3/2010 on 29 June 2010 has made a decision to establish Wakaf Selangor Foundation (Perbadanan Wakaf Selangor) by virtue of s 8 of the Administration of Islamic Law Enactment (Selangor) 2003, 2008 Amendment.

A uncertainty on *waqf* management and development must be resolved with the commitment to uphold *waqf* institutions and products.

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