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الجامعة الإسلامية العالمية ماليزيا
INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA
يُونِث بَرُوسِيَّتِي اِسْلَامِيَّةً اِنْتَبَاهًا رَاجِحِيًّا مِلِّيَّتِيًّا

IJTIHAD ON ISSUE OF WAQF IN MALAYSIA WITH A SPECIAL REFERENCE TO LEGAL AUTHORITY IN ADMINISTRATION OF WAQF PROPERTY

Badruddin bin Hj Ibrahim
badruddin@iium.edu.my

&

Mahamad Arifin
mahamad@iium.edu.my

Ahmad Ibrahim Kulliyyah of Laws
International Islamic University Malaysia

Issue

- Is ijtiḥād exercised by Malaysian authority in giving the power to Religious Council as a sole trustee to administer waqf property in Malaysia brought about the benefit (*maslahah*) and in line with the spirit of Islamic law (*Ruh al-Shari'ah*)?
- In another words: whether *siyasaḥ shar'iyyah* exercised by Malaysian authority on this issue is sound and acceptable that brings benefit to the society.

Objective of the Study

- To examine the position of Islamic law with respect to legal authority in administration of waqf property.
- To suggest an improvement on administration of waqf in Malaysia.

Meaning of Ijtihad

- Ijtihad: literally means to make an effort in order to obtain something.
- Technically: an effort made by the jurists in order to find out the law (Islamic law).

Form of ijtihad

- Ijtihad can take place in various forms:
 - Ijtihad in the form of legislation.
 - Ijtihad in the form of fatwa (legal opinion)
 - Ijtihad in the form of research

Meaning of Siyasa Shar'iyah

- Siyasa literally means good administration.
- Shar'iyah is attributed to divine law.
- Siyasa Shar'iyah technically means: rule and regulation issued or action taken by those in authority in administration of various affairs of ummah, whether such rule and action are clearly or not clearly stated by the text; and such rule and action bring the benefit and are in line with the spirit of Islamic law.

Legal authority on waqf property

- Legal authority on waqf property means the authority that enables a person to keep, protect and administer the waqf property and devotes its income to beneficiaries.
- A person who possesses such authority is called in Islamic terminology as Nazir or Mutawalli or Qayyum i.e. the administrator of waqf
- Thus the administrator of waqf is a person who has power to protect and manage the waqf property and distribute its benefit to the beneficiary.

Who is administrator of waqf under Islamic Law?

- There is no authority from the Qur'an and Sunah that indicates on this matter.
- Thus this matter falls under the purview ijtiḥad.

The position of Muslim jurists

- The Muslim jurists of four well known school of law have differences of opinion:

The position of Hanafi school

- According to Abu Yusuf, a person who firstly has authority on waqf property is the proprietor himself as long as he is alive.
- This is in case if he names himself or he names another person as the administrator of waqf or he does not name anyone as the administrator of waqf during the making of waqf.

The position of Hanafi jurists

- In case if he is disqualified because of insanity, or he is prevented from managing his own property because of spendthrift, such authority will transfer to the judge (court).
- Secondly, the authority on waqf property will be the person who is named by proprietor. This in case of the death of proprietor.
- Thirdly, the authority on waqf will transfer to proprietor's executor if any. This in case if the proprietor does not appoint anyone.
- Lastly, the authority will transfer to the court. This in case if the proprietor does not appoint executor.

The position of Maliki jurists

- According to Maliki jurists, a proprietor may appoint any qualified person to be administrator of his waqf.
- In case of the death of administrator and the proprietor is still alive, he shall appoint a new one as he deems fit.
- And if the proprietor also dies, the authority will be on his executor if any.
- In case if there is no executor, the authority will be on beneficiary if the beneficiary is specific person and matured. If the beneficiary is not matured, his guardian will be the administrator of waqf.
- If the waqf is not for specific person or waqf to institution, the authority will be on the court.

The position of Shafi'i jurists

- The Shafi'i jurists agree with Abu Yusuf that a proprietor shall be the administrator of waqf, that is in case where he names himself as administrator during the time of making waqf.
- In case if he does not name himself as the administrator, they have three different of opinions;
 - i. The proprietor himself shall be the administrator
 - ii. The beneficiary as administrator.
 - iii. The court shall be the administrator. This is the preferable view of the school.

The position of Shafi'i jurists

- The Shafi'is are also of the view that the proprietor shall appoint another person as administrator
- In case of the death of the administrator and the proprietor is still alive, they have different opinion as similar to the case where the proprietor does not name himself as discussed.

The position of Hanbali jurists

- The Hanbalis agree with the Shafi'is that the proprietor shall be the administrator of waqf in case if he names himself as the administrator.
- If he does not name himself as administrator during the time of making waqf, they are of the view that the beneficiary shall be the administrator of waqf if the waqf is for specific person.
- In case if the waqf is made in favour of institution, the court shall be the administrator of waqf.

Position of Muslim Jurists

- The discussion shows that according to majority of Muslim jurists, the proprietor shall be the administrator of waqf property in case if he named himself as administrator.
- In case if the proprietor does not name himself as administrator, the Muslim jurists differ: between proprietor himself, beneficiary and the judge (court).
- It seems that the judge should be a right person to be administrator of waqf in this situation. Since the court is one of the organs of the state that deals with the administration of justice.
- This in line with Sunnah of the Prophet which states... "Thus the Sultan is guardian for those who have no guardian."

Position of Muslim Jurists

- The Muslim jurists also agree that the proprietor have a power to appoint any qualified person to be administrator of waqf.

Provisions of Islamic Law in Malaysia on administrator of waqf

- All provisions of state enactments in Malaysia with respect to 13 states and the provision of the Act with respect to Federal Territories provide that the Islamic Religious Council of the state and Federal Territories respectively shall be the sole trustee of all waqf, whether waqf am or waqf khas and be responsible for its management and development.
- For example: Section 61 of the Administration of Islamic Law (Federal Territories) Act 1993 provides:
“Notwithstanding any provision to the contrary contained in any instrument or declaration creating, governing or affecting the same, the Majlis shall be the sole trustee of all wakaf, whether wakaf ‘am or wakaf khas...”

Provisions of Islamic Law in Malaysia...

- The provision clearly shows that no person or body of person shall be appointed by a proprietor as the administrator of waqf.
- Thus the sole administrator of waqf property in Malaysia is vested with the Islamic Religious Council.

Fatwa on administration of waqf

- The 77th Dialogue of the Fatwa Committee of National Council for Islamic Religious Affairs Malaysia held on 10th-12th April 2007 has discussed the ruling regarding the development of waqf land under Ninth Malaysian Plan.
- Among the decision has been decided by committee:
- “The issue of state religious council as the sole trustee of waqf properties is not a shariah issue but rather a matter of policy involving the administration.”

Islamic Religious Council

- Islamic Religious Council is a body which has been constituted under the provision of Administration of the Religion of Islam Enactment or Administration of Islamic Religious Affairs Enactment or the Administration of Islamic Law Enactment with respect to the state and the Administration of Islamic Law Act with respect to federal territories.
- The Islamic Religious Council is a corporate body, having perpetual succession and a corporate seal for use in the exercise of its function.

Islamic Religious Council

- It may sue and may be sued in its corporate name and may enter into contract etc. and deals with any movable or immovable property vested in it.
- It may form corporation to carry out any project, scheme or enterprise.
- It may also form company to carry out business activities.

Advantages of having IRC as the trustee

- There are many advantages:
 - no situation where waqf property shall have no administrator because of the death of its administrator or for any other reasons.
 - Waqf properties are well protected and no interference from outsiders.

Disadvantages of having the IRC as the trustee

- It make waqf more difficult.
- In some case waqf property can not be developed due to:
 - un-sufficient of man power to manage waqf properties
 - lack of fund
 - lack of expertise

Suggestion

- To make waqf more simple by allowing a person to appoint administrator of waqf of his/her own choice. But it should be under the supervision of IRC.
- To entrust to other relevant body or institution like a corporate body or financial institution to assist in management of waqf property. This in case if the IRC having certain constraint with respect man power and financing

Conclusion

- The provision of the law on waqf should be more flexible. This is in order:
 - To encourage the public to make more waqf.
 - To enable a waqf property be developed and fully utilized. So that its benefit shall be distributed to the beneficiary.