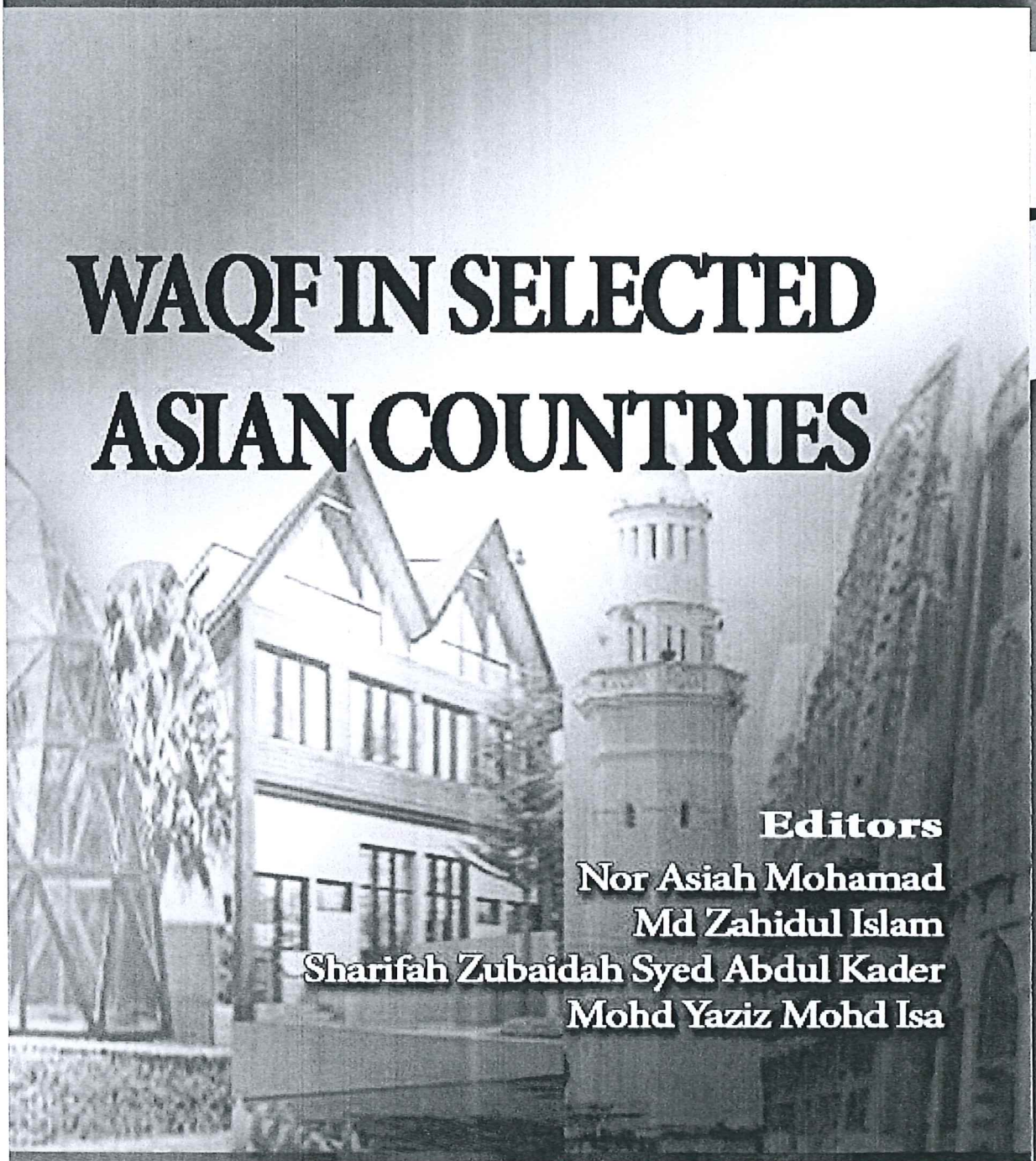
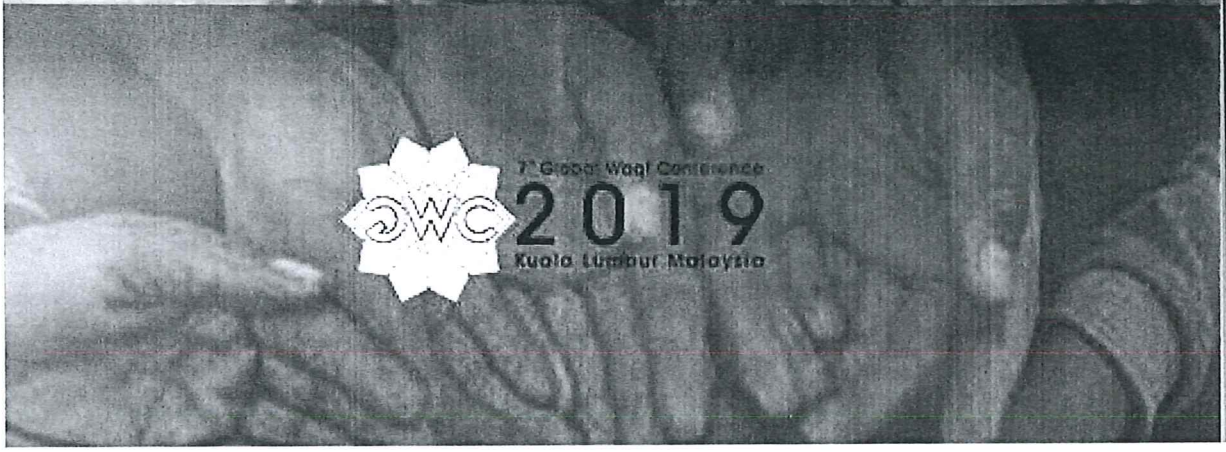
WAQF IN SELECTED ASIAN COUNTRIES



Editors
Nor Asiah Mohamad
Md Zahidul Islam
Sharifah Zubaidah Syed Abdul Kader
Mohd Yaziz Mohd Isa



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Md Zahidul Islam
Sharifah Zubaidah Syed Abdul Kader
Mohd Yaziz Mohd Isa

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PROTECTION OF PROPERTY THROUGH WAQF INSTITUTION: ANALYSIS OF COURT DECISIONS IN MALAYSIA PRE AND POST-INDEPENDENCE

Nor Asiah Mohamad

INTRODUCTION

The history of waqf (religious endowment or Islamic foundation) in Malaysia is traceable to the date of the coming of Islam into the Peninsula. Among the justifications for the contentions are; the traces of Islam in the states are based on the findings of old graveyards, tombstone, mosque, stone scripture (*batu bersurat*) as well as other items evidencing the Islamic transcript. Although there is no direct evidence of Waqf, '*wakoff*' or 'wakaf' in the Malay term, the Fatwa (edict) as well as court decisions ruled that mosques or graveyards are 'wakaf' and hence support the contention about the early traces of waqf in Malaysia.

This chapter studies the evolution of waqf institution and its roles in protecting its assets. The study traces the court decisions and came across judgments pertaining to Islam, mosque, graveyard, perpetual trust, as well as the waqf itself. The cut off dates for this discussion is the period when the British ruled in this country where most of the court decisions are only accessible during this period. The author uses the keywords waqf, 'wakaf' and charitable trust with special reference to perpetual trust. The result shows most of the decisions originates from the Straits Settlements (i.e. Penang) when it relates to pre-Merdeka (Independence Day) and covers the other parts of Peninsular Malaysia when it includes post-independence.

Waqf Evidencing Islam as a Source of Law in the Malay States

It has been accepted and proved in *Sahrip v Mitchell & Anor* [1870] JSBRAS xxxviii and *Tengku Haji Jaafar Ibni al Marhum Tengku Muda Ali & Anor v Government of Pahang* [1987] 2 MLJ 74 that Islam has influenced and formed part of the sources of the Malay customary tenure. It is evidenced in the early practices of land alienation which were presented in the principle of *tanah hidup* (active land) and *tanah mati* (dead land), the practice of land security as can be seen in cases involving *jual janji,* land valuation applying the basis of *pulang belanja* and also the payment of land tax known as *ushr.* Historically, it is considerable to argue that there are court decisions showing a mixed stand in recognising Waqf or perpetual charitable act created by Muslims as a Waqf institution based on Shariah. Even the concept and the name Waqf have been perceived differently, perhaps, with or without purpose. The court decisions show that some of the earlier cases were reported as either as 'wakaf' or perpetual charitable act or trust. For example, the court in *Haji Salleh b Haji Ismail & Anor v Haji Abdullah bin Haji Mohammad Salleh* (1935) 4 MLJ 26 held that the usage as a mosque is presumptive evidence of a charitable trust. The word charitable trust, if looked from a local perspective refers to Waqf. Nevertheless, as early as 1923 in *Re Syed Shah Alkaff* (1923) 2 MC 38, the word 'wakaf' was used and defined as "wakaf....signifies the dedication or consecration of property". The definition sets the criteria of Waqf, which reflects the perpetual dedication of property to be benefitted by others.

The attempt to outplace Waqf happened during the colonial period. One of the grounds argued in court to disregard waqf is to deny the validity of the perpetual charitable trust. Nevertheless, a stronghold to the principle of Islam and the anti-colonial spirit saved the position and practice of waqf. For example, in Johor, in *Koh Cheng Seah Administrator of the Estate of Tan Hiok Nee, Decd v. Syed Hasan & Anor* [1930] 1 MC 180 it was held that the English common law rule against perpetuities was not part of the law of the State of Johore, and accordingly the deed of Wakaf was valid. This case shows that there was an effort to dis-recognise waqf by using the English law against the rule of perpetuities and public policy as a ground of contention but rejected by the court. The plaintiff relied on earlier cases in which the court held that the rule against perpetuities which was upheld in England was relevant and applicable to the Straits Settlements. One of the cases that referred to Waqf was *Yeap Cheah Neo v Ong Cheng Neo (1872) 1 Ky 326,* where the court held that the principles of rule against perpetuities was founded on public policy and thus prevented the creation of Wakaf in the Colony.

Another ground to displace waqf in the Malay states can be seen in the judgement of *Ashabee & Ors v Mahomed Hashim & Ors* (1887) 4 Ky 213. The court regarded Waqf as a trust and ruled that it shall fall under the jurisdiction of the civil court and English law applied. Earlier in Selangor in 1930, the same judge Thorne J in *Ramah binti Taat v. Laton binti Malim Sutan* (1927) 6 FMSLR 128 held that Muslim law is not foreign law but local law and the law of the land. The court must take judicial notice of it and must propound the law. The same stance was emphasised about 10 years later in *Re Ismail bin Rentah, Decd Haji Hussain bin Singah v Liah binti Lerang & 3 Ors.* [1940] 9 MLJ 98. In this case, the court held that Islamic law was part of the common law of the land, as far as the Malays are concerned. This decision evidenced and strengthened the position of Islam and the Malay customary practice on land matters before the coming of the colonials to the Malay States.

The earlier discussion and findings also reveal that although Islam is recognised as a source of the law in the Malay states, there were efforts to challenge the position of Islamic law or custom in the legal system of the Malay States. The policy makers, lawyers and judges chose to apply English law when there were clear English principles on the matter even though the principle was in obvious contradiction to Islam. Hence, Waqf or 'wakaf' was in many instances argued as reinstating rule against perpetuities under the English law of trust and was thus held to be void and of no effect. The British-trained judges and lawyers' attempts to apply English principles of trust were certainly against the *Maqasid al Shariah* (objectives of al Shariah) to protect the property for the benefit of the public or the relatives of the donor. The importation of English rules to this country and ignoring the local circumstances are clearly in breach of the law that allows the colonial officers and the judges to apply English law as stated in the three Charters of Justice 1807 and later marked in section 3 (1) and (2) of the Civil Law Enactment No 3 of 1937. Section 2(ii) clearly stated that the application of English common law and equity was "..subject to such express provision of any other Enactment, in the event of conflict or variance between such common law and such rules of equity with reference to the same matter, such rules of equity shall prevail in all courts in the Federated Malay States so far as the matters to which those rules relate are cognizable by those courts.." The issue here is to what extent had the English judges and lawyers recognized the rules of equity as originating from Islamic principles and local custom? Hence, failure to appreciate this has influenced and changed the position of Islam and local custom in the history of the evolution of law in this country. Waqf institution is not an exception.

THE SANCTITY OF SHARIAH AND THE INFLUENCE OF ENGLISH *STARE DECISIS* PRINCIPLE

One of the major principles contributing to the flip-flop of court decisions on waqf institution is the conflict of principles in the sanctity of Shariah and the *stare decisis* principle under English law. The sanctity of Shariah means the Shariah is the law of the land and any rule or principle of law conflicting with the Shariah would be void and the Shariah prevails. *Stare decisis* is an English law doctrine where a court is bound to follow previous decisions of the higher courts unless the decisions are wrong (*Butterworth Australian Legal Dictionary*, 1997).

Malaysia was a British Colony and this fact greatly influenced the development of the law in Malaysia. Matters pertaining to Islam are of no exception. The English judges and the local but English trained judges, the ignorance of Shariah, and the lack of spirit to uphold Shariah are among the factors that have contributed to the application of English principles to waqf. As a result, it causes uncertainty to the position of waqf which occurred before independence of Malaya and continued till after independence. For example, Azmi LP sitting at the Federal Court in *Commissioner for Religious Affairs v Tengku Mariam* [1970] I MLJ 222 viewed that the courts in Malaysia are bound by the judgement of the Privy Council in *Abdul Fata Muhamad Ishak v Russomoy Dhar Chowdhry* [1894] 22 I.A 76. The facts in *Abdul Fata* relate to family Waqf. The decision of the court curtailed the application of family Wakaf in Malaysia. Suffian LP in this case, held the opinion: " I have examined the Wakaf instrument and the authorities mentioned in the learned judge's judgement and those cited before us and I am satisfied that 'Wakaf' here was eventually for the benefit of Tengku Chik's family and that the gifts to charity were illusory and that on the authority of the Privy Council decisions cited to us, the learned judge was bound and we are bound to hold that the Wakaf was therefore void, notwithstanding the Mufti's ruling to the contrary." This decision legally changed the scenario of Waqf in the Malay States, as it upheld the English principles by invoking the *stare decisis* rule. It undermined the position of waqf and disregarded the *fatwa* as a source of laws in Malaysia, thus undermining the position of administration of Islam in this country.

A different stand was taken by the Federal Court in *Re Dato' Bentara Luar Decd. Haji Yahya & Anor v Hasan & Anor [1982] 2 MLJ 264.* The Federal Court was of the opinion that Johor only received the rules against perpetuities by the Court Enactment 1931 whilst Wakaf in this case was created in 1909. As such, the applicable law was the Muslim law and the Privy Council decisions did not apply in this case.

Under the *stare decisis* principle, the court is bound to follow the higher court decision such as the Privy Council decision or others as shown earlier. The complication and misunderstanding brought by *Tengku Mariam's* case was commented in detail by Professor Ahmad Ibrahim in his article published in [1971] 2 MLJ vii. Prof Ahmad considered the decision of Azmi LP and Suffian LP as *obiter* and submitted that the views are not correct, taking into account the difference in the law applicable in Terengganu and in India. The Judicial Committee can be regarded as a Malaysian court, if at all, if it is hearing an appeal from Malaysia. Professor Ahmad was of the view that a decision of the Judicial Committee on a question of English common law is not binding on the courts of Malaysia unless it is given on an appeal from Malaysia. (A. Ibrahim, 1971). He further wrote that the decision of the Judicial Committee on the interpretation of statutes from other countries than Malaysia

would be binding in Malaysia if the statute is in *pari materia* with a statute in Malaysia (*ibid*). This stand was given due consideration by the later courts thus, the Malaysian court decisions on *wakaf* was no more tied up with the Privy Council decision in *Abdul Fata* or *Fatumah binti Mohamed Salim* [1952] AC 1 from Africa.

In addition to importation of rules against perpetuities concerning charitable act to waqf cases by the judges, the development of waqf in Malaysia is also influenced by the courts' stands on the matter concerning the jurisdiction of the courts as well as the position of *Fatwa* on waqf. Issues relating to court jurisdiction are divided into the contention of whether waqf falls under the Syariah court or the civil court and the *stare decisis* principle.

CONFLICT OF JURISDICTION BETWEEN SHARIAH AND CIVIL COURT

The first principle of Maqasid al Shariah is the protection of religion (*ad deen*). Court decisions on waqf reveal many attempts to undermine the sanctity of Shariah by highlighting the issue related to conflict of jurisdiction between Shariah and civil. This issue occurred during pre and post-independence. Before independence, the conflict existed and remained until the amendment of the Article 121(A) of the Federal Constitution. The amendment to Article 121 was done in order to avoid overlapping of jurisdiction between Syariah and civil court. It clearly states that matters concerning Islam falls under the jurisdiction of the Syariah court. Thus, in this article, it is a better approach to discuss the development from the pre-amendment and post amendment of Article 121A.

i. Waqf is a matter under the State List and Shariah Court

Before the amendment, it has been deliberated that there were two stands i.e. the matters pertaining to Waqf being a subject matter of Muslim law thus should be decided based on *hukum syarak*. Nevertheless, the conflict remains especially with issues or matters that fall under both civil and Syariah courts. Some of the view that if the conflict exists, the preference is the civil court prevails as the civil court was enacted through the Federal Laws while Syariah court was enacted through States law.

Article 74 of the Federal Constitution; read together with the State List, prescribes that Islamic law and Islamic matters including the establishment of Syariah courts fall under the jurisdiction of the State. According to the State List, the legislative power of the State assembly to legislate on Islamic law and Malay customs includes 26 matters:

a. Succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts;

b. Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State;

c. Malay customs;

d. Zakat, Fitrah and Baitulmal or similar Islamic religious revenue;

e. Mosques or any Islamic public places of worship;

f. Creation and punishment of offences by persons professing the religion of Islam against precepts of that religion; and

g. Constitution, organisation and procedure of the Syariah courts.

The position of the law was clear even before the amendment to Article 121 of the Federal Constitution that "wakaf' is a different matter from 'trust'. Thus, any policy or law on Waqf must not be seen from the perspective of trust, in the non-Islamic or civil sense.

The historical amendment, which was made in June 1988, inserted the new clause, 1(A), to article 121, which reads as follows:

(1) There shall be two High Courts of coordinate jurisdiction and status, namely

(a) One in the States of Malaya, which shall be known as the High Court in Malaya and that shall have its principal registry in Kuala Lumpur; and

(b) One in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the states of Sabah and Sarawak as the Yang di-Pertuan Agong may determine; and such inferior courts as may be provided by Federal Law; and the High Courts and inferior courts shall have jurisdiction and powers as may be conferred by or under the federal law. (1A). The courts referred to in clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.

Perhaps, the crux of the issue arises from the question: what falls within "the jurisdiction of the Syariah Courts?" The judges in the civil courts and the Syariah courts have been competing to interpret this "clause" in their convenient way.

After 20 years of the amendment, the position on the conflict of jurisdiction is not settled. The decision involving waqf cases is not an exception. In *G Rethinasamy v Majlis Ugama Islam Pulau Pinang* [1993] 2 MLJ 166, issues on jurisdiction appeared again. The related issue arising in this case is whether the court has jurisdiction to decide based on Shariah law where the issues involve both, Shariah and civil law? The court held that the plaintiff's claim was a matter within the jurisdiction of the civil court, including 'estoppel' which could only be determined by such a court. The claim was not within the jurisdiction of the Syariah Court and moreover, the plaintiff being a non-Muslim, could not bring an action in the Syariah Court.

While cases in which the parties are Muslim and non-Muslim may seem to suggest no best option for both except the civil courts, a similar issue was again discussed in *Shaik Zolkafly bin Shaik Natar & Ors v Religious Council of Penang* [1997] 3 MLJ 281 where both parties were Muslims. In this case, the plaintiffs brought their case to the High Court Pulau Pinang seeking for a declaration that certain pieces of land have to be surrendered and vested upon them, being executors of the deceased property. The Majlis Ugama Islam Pulau Pinang as the respondent, raised a preliminary objection that the High Court did not have jurisdiction to hear the case as it concerned a waqf. The High Court judge held that the Syariah Court had no jurisdiction to issue the injunction as applied by the respondent and had no power to adjudicate on wills and deeds of settlement. The learned High Court judge relied on the case of *Majlis Agama Islam Pulau Pinang v Isa Abdul Rahman & Satu Yang Lain* [1992] 2 MLJ 244. In the latter case, the issue relates to the approach to

be taken in determining whether the Syariah Court had jurisdiction to look at the 'relief sought' instead of the 'subject matter'. So in this case, even though the subject matter is waqf which is supposed to fall under the jurisdiction of the Syariah Court but because the appellant sought for a declaration and injunctions which are in the nature of equitable reliefs that fall under the civil court, thus, the High Court should have the right to hear the case. This is the basis for the court to hold that the Syariah Court had no jurisdiction to issue an injunction.

On appeal, the judge addressed the issue of the 'subject matter approach' and the 'remedy prayed for" approach. This was the approach used by the court in *Soon Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Ano*r [1999] 1 MLJ 489. The court was of the opinion that the fact that the 'remedy prayed for' was for a declaration, did not remove the case from the jurisdiction of the Syariah Court. It was suggested that the judge should adopt the 'subject matter approach' to determine whether the Syariah court has jurisdiction or otherwise. This approach is in line with the amendment to Art 121A of the Federal Constitution.

In one recent case on waqf, the Lordship High Court judge, Amarjit Singh has reiterated in his decision involving a waqf land in Pulau Pinang, known as Abdul Cauder Wakaf that 'Wakaf' is a subject matter under the jurisdiction of the civil court. (sundaily.com)

ii. Syariah Court only deals with Muslim party

Matters that fall under List II of the Ninth Schedule are considered as State List matters. Among others, it stipulates that the Syariah court is to have jurisdiction only over persons professing the religion of Islam and in respect only of the above matters. It also provides that the Syariah court shall not have any jurisdiction in respect of offences unless conferred by federal law. This provision adds additional issues to waqf since there are cases involving non Muslim parties.

Court decisions show that waqf litigation involving Muslim and non Muslim parties have occurred since the English period in Malaya especially during the Straits Settlement. *Hajee Abdullah & Ors v Khoo Tean Tek & Anor Kyshe* [June 15, 1881] 500, involved a dispute related to unlawful entry to a land belonging to a mosque in Chulia Street, Penang. The Imam, *khatib* and the elders who were responsible in managing the mosque sued the defendant and obtained an injunction restraining them from continuing erection of a building. It was later shown that no trustee had been legally appointed to manage the land, there were no nominees and the fee simple was registered in the Crown. Thus it was argued by the Defendant that the land belonged to the Crown and the Plaintiffs had no *locus standi* in the suit. The court also agreed with the argument by the Defendant, and ruled that the appropriate Plaintiff in this case was the Attorney General. The court held that the injunction remained and leave was given to the plaintiffs to amend their claim. While one may argue the issue of court may not carry much weight in determining the right decision for any case, but the judges can play a role and may influence the decision. During the colonial period, the concept of waqf could not be differentiated from the concept of charitable trust under English law, hence, the decisions had to a certain extent, completely undermined the basic principles of waqf.

In *Lechman Chetty v Hasan Kudus & Ors In re Khoo Thean Poh & Anor* Kyshe [1885-1890] Vol. IV, 675 a dispute related to a case of waqf land (*wakoff*) being subject to Bill of Sale to a non-Muslim. Interestingly, the mortgagors were a Malay and a Chinese whom

mortgaged a brick house built on *wakoff* land. A document showed that the trustee of the *wakoff* land had granted the original builder of the houses "leave and license to occupy, build and pay of a ground rent of six dollars per year". The evidence also showed that the house was always dealt as separate from the land and thus, a personal chattel. This case shows that any building built on Waqf land does not amount to permanent structures (fixture) and thus can be subject to a sale or a mortgag,e even to non-Muslim parties.

Additionally, the case of G. *Rethinasamy v. Penang SIRC & Anor.* [1993] 2 MLJ 166 relates to the issue involving non-Muslim parties. A portion of land was used as a mosque and a burial ground for a long time. The plaintiff, a non-Muslim, bought a piece of land next to the mosque and claimed the right of ownership over the whole land, including the Waqf land. The respondent claimed that the portion of the land used for the purposes of the mosque and for the burial ground are waqf land. The respondent being a non-Muslim party brought the case to the civil court. The High Court held that it has the jurisdiction to hear the case as one of the parties to the action was a non-Muslim and the question of the title of the land and the issue of estoppel came within the jurisdiction of the civil court. It clearly shows that despite the amendment to Article 121A of the Federal Constitution, the civil court is not precluded from deciding on matters concerning waqf since Article 121 (1A) has no provision to state that the civil court cannot make a decision affecting the *Hukum Syarak.*

An issue whether a company is considered a 'Muslim person' arose in the case of *Majlis Agama Islam and Adat Istiadat Melayu Terengganu v Tis "Ata 'Ashar Sdn Bhd* [2010] 2 Sh LR 181. In this case, the applicant brought the case to Syariah High Court and sought for a declaration that the land identified, as 'Chenderong concession' was a Waqf land thus cannot be transferred or dealt with except according to *Hukm Syarak.* The court also has to determine whether a company falls under the definition of 'Muslim person' thus comes under the jurisdiction of the Syariah court. The Lordship Judge of the Syariah High Court opined that Islam is the religion of the Federation thus, when a company is a party as in this case, has not been proved as non-Muslim company or person, thus, it is Shariah compliant. This is based on the maxim that "anything is considered permissible till proven otherwise". The judge also referred to the Interpretation Acts 1948 and 1967 where the term 'person'; includes a body or persons, corporate or unincorporated. The applicant and the respondent were considered as professing Islam as required under s 11(3) of the Syariah Court (Terengganu) Enactment 2001.

A similar issue arose in *Tengku Zainul Akmal bin Tengku Besar Mahmud & Anor v Majlis Agama Islam and Adat Melayu Terengganu & Anor* [2012] 3 Sh LR 39. The case involved 'Chenderong concession' as well. Nevertheless, a new principle in determining whether a company is a Muslim party thus subject to the jurisdiction of Syariah Court was developed by the judge. The judge, YA Ismail Yahya Sh. HC extended the methodology in determining whether a company is a Muslim party or otherwise. According to the affidavits of the case, the shareholders as well as the Board Directors and staff are non-Muslim Chinese. Hence, it was ruled out that the company was a non- Muslim company thus this case fell outside the jurisdiction of the Syariah Court as clearly stipulated under Article 121A of the Federal Constitution and the Syariah Court Enactment (Terengganu) 2001.

The foregoing discussion shows that despite the amendment to Article 121 of the Federal Constitution to strengthen the position of Islamic law and Syariah Court in order to minimise conflict of laws between civil and Shariah, the status quo remains. Protection of

religion through progressive waqf is vital. It is high time to include Waqf in the forefront of economic agenda of the *ummah*, Muslim and non-Muslim alike. Thus, even though Islam does not prohibit waqf by the non-Muslim, issues of jurisdiction need to be made clear and consistent. The emphasis that waqf falls under the jurisdiction of Syariah Court will avoid disputes on waqf being brought to civil court even if the party is a non-Muslim. The Federal Constitution, the court system and the traditions are well recorded. It is up to the judges to play their roles and uphold the rule of law when cases involving 'matters of Islam' reach their courts.

DEFINITION OF WAQF

Salleh Abbas F.J.: *Haji Embong v. Tengku Nik Maimunah Hajjah* (1980) 1 MLJ 286 said that "Wakaf am means a dedication in perpetuity of the capital and income of property for religious or charitable purposes recognized by Islamic Law, and includes the property so dedicated". While "Wakaf Khas means a dedication in perpetuity of the capital of property for religious or charitable purposes recognized by Islamic Law, and includes the property so dedicated, the income of which is to be paid to a person or persons for purposes prescribed in the wakaf". At that time, such definition is a great assistance to understand the concept of waqf since there was no specific waqf law explaining waqf in its clear sense.

DEALINGS INVOLVING WAQF LAND

The interpretation of preservation and protection of property as promoted in Maqasid al Shariah is obvious in waqf pillars as derived from the hadith of the Prophet (peace be upon him) and Saydina Umar on his most loved land in Khaybar. In the hadith, the Prophet (p.b.u.h.) advised Saydina Umar to preserve the property and distribute the proceeds (Al bukhari, n.d, no 2620; Ibn Hajar, 5/502-507). Thus, there was a clear message that *mawquf* (subject matter of waqf) cannot be disposed to others.

Under the Malaysian law, dealings to an extent of effecting transfer, charge or lease of waqf land is prohibited by the law irrespective whether it involves Muslim or non-Muslim party (Section 13(2) Wakaf (state of Selangor) Enactment, 2015). Some of the case laws reveal that such transactions do occur. In *Majlis Agama Islam Pulau Pinang v Abdul Latiff bin Hassan (as executor of the estate of Hj Mohammad bin Hj Abdul Rashid, deceased) & Anor.* [2018] 2 Sh LR 15 the case involved a sale of waqf land by the first defendant to the second defendant who was a non-Malay entity. *Majlis Agama Islam Pulau Pinang* being the Plaintiff has applied to set aside all dealings by the Defendants and the registration of waqf land in the name of the second Defendant to be deleted. Section 89 and 90 of the Administration of Islamic Law Pulau Pinang states that Majlis (State Islamic Religious Council) is the sole trustee of waqf properties in the State. Thus, any act to the effect contravenes to this provision is invalid, null and void and to be set aside. The court also ruled that section 4 (2)(e) of the National Land Code 1965 clearly provided that the provision did not apply to *wakaf.*

Historically, there were efforts by the British judges to circumvent the creation of waqf which has the effect in perpetuity or having the element of non-alienation. In *Mustan Bee & Ors. v Shina Tomby & anor*(1882) Kyshe Vol. 1, 580, the court held that a devise of a shop as a Wakoff, which was not to be sold but the rents to go for its repairs, and

the balance thereof for Kandoories for the testator's benefit, is void as being in restraint of alienation and tending to a perpetuity. A similar decision was founded in *Mahomed Ghouse v Hajee Mahomed Saiboo & anor* (1885) Ky. Vol 4,101. There was a provision in the deed of Wakoff which stated that "they will take the produce thereof, and divide and take in equal shares, but they shall not sell nor mortgage the land". In this case, the court held that the whole clause was not void for tending to a perpetuity, but the restraint on alienation alone was void.

The above decision shows that the British judges failed to appreciate the special features of waqf instead, applied the English rules against perpetuities in English law of trust as a basis to decide a case invoving the Muslim practice of waqf. With a very few exceptions as in *Koh Cheng Seah Administrator of the Estate of Tan Hiok Nee, Decd. v. Syed Hassan & anor* (1930) 1MC 180, they declared waqf as void. In *G Rethinasamy v Majlis Agama Islam Pulau Pinang & Anor*. Waqf land was sold and registered under a non-Muslim's name who claimed to have an indefeasible title of the land and sought vacant possession over the land. The non-Muslim owner had also asked for the mosque built on the land to be moved or demolished. The judge held among others that the purchaser was not a bona fide purchaser because he has knowledge about the existence of mosque on the land. His title became defeasible.

THE POSITION OF FATWA ON WAQF

The court decisions on waqf also reveal the position of Fatwa under the Malaysian legal system as well as its contribution to the development of waqf in Malaysia. Fatwa refers to Islamic edict or verdict produced by a group of experts, majority of them are Muslim jurists. Fatwa in Malaysia has been institutionalised and plays a significant role to clarify, modify as well as harmonise *Hukum Syarak*. It is not a mere individual making process by a Qadhi or Mufti but the result of deliberation through consensus among Muslim jurists after a thorough research on the issue done by qualified personnel.

The earlier waqf administration especially before Independence showed that Waqf has its place under the administration of Islamic law even though the word Kathi court was made known only in later time while the history shows that matters pertaining to Islam were heard or judged in Balai (Ahmad Ibrahim, undated). When the colonial came, especially the British, most of cases heard in civil courts. On matters pertaining to Islam, if the expected remedies were available in the civil court, the parties opted to file their cases in the court. In handling matters outside their expertise, the civil court judges would seek the opinion of the experts such as the *Kathi* or the *Imam*. This *Imam* will deliberate and give opinion but subject to the discretion of the civil court judge to accept or otherwise. Some cases require opinion from the Muslim jurists and known as *fatwa* (an edict). Nevertheless, there were some cases where the English judges or the local English trained judges who preferred their decisions be based on their understanding or by referring to the cases from the colonial country or decided to get expert opinion but left the decision to their discretion. This has contributed to the 'in limbo' state of waqf, in particular,

It is important to understand that Fatwa in Malaysia is beyond a mere decision of a Mufti. Since fatwa has been institutionalised, it thus requires publication in the Gazette before it becomes a binding legal rule or principle. Despite this position, the evolution of waqf based on court decisions shows that *fatwa* has been questioned and challenged in court a

few times and sometimes, such position of *fatwa* was rejected by the civil court. The civil courts have, many a time, argued that Fatwa is not binding on them. [6]This raises an issue that if waqf has been held to fall within the jurisdiction of civil court thus, will the judges recognise *fatwa* as a source of law which bind them? Or does question on jurisdiction mark a deeper issue of rejection or non-recognition of Shariah as a source of law in this country?

Moving forward and with respect to the amendment of Article 121 (1A) of the Federal Constitution, the civil court and the judges must uphold that matters on waqf fall under the jurisdiction of the Syariah Court and civil court should not decide on that matter. If the parties are non-Muslim, the matter can be heard at the civil court and the component of judges must come from the waqf expert as well as others.

THE CREATION OF WAQF

i. By Deeds

A creation and effectiveness of the creation of waqf is important to be determined. The Shariah validity of waqf is determined based on the pillars or condition of Waqf. Pillars of waqf are *waqif* (donor), *mawquf* (subject matter of waqf), *mawquf alaih* (beneficiaries) and Sighah (expression of the contractual formula). Once a waqf complies with the condition of waqf, thus the waqf is effective. Most of the Waqf Enactments stipulate as such. Section 13 of the Wakaf (State of Selangor) Enactment 2015 clearly provides that a *wakaf* shall commence when all pillars and conditions for the creation of a *wakaf* pursuant to Hukum Syarak have been fulfilled.

In addition to pillars of waqf, the Muslim jurists have also identified condition attached to the creation of a waqf. The Muslim jurists agree that a waqf cannot be revoked or alienated by way of transfer, sale, charge or any other means that indicate ownership other that Allah (SWT) as well as the waqf must be perpetual.

A *mawquf* which has taken effect shall not be sold, given by way of *hibah* or inherited by any person. Nevertheless, the court has added another requirement for effectiveness of waqf of certain properties in Malaysia. For example, an issue whether waqf must comply with other validity of Malaysian law was raised in *Sahul Hamid Ismail & anor v. Haji Abdullah b Haji Mohammad Salleh* (1935) 4 MLJ 26, *Sahul Hamid & Negri Sembilan Religious Council & Others* JH (1417) JIlid X Part II as well as in *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2008] 6 MLJ 488. In these cases, it is learnt that the validity and effectiveness of waqf is subject to the fulfilment of other requirements imposed by other laws in Malaysia. All the waqf land were not gazetted, thus its creation is not complete. The Court in *Bong Boon Chuen*'s case referred to Section 13 (e) of the Selangor Wakaf Enactment 1999 in which the law requires for fulfilment of *Hukm Syarak* and other laws before waqf is complete and effective. This has created a complicated problem in which a Muslim cemetery which was already in use, has to be replaced and cancelled due to protest by a certain group of people. A similar problem may arise if a similar stand goes on in dealing with waqf land which has to fulfil the requirements under the National Land Code 1965 and others, whichever is relevant.

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[6] See, Terengganu Islamic Religious Council v Tg Mariam (1970)

The Selangor government and the Selangor State Islamic Religious Council were quick and sensitive in handling this issue. As a result, an amendment was made to the law thus when the Wakaf (State of Selangor) Enactment 2015 was enacted, section 13 of the Enactment appeared without having the provision: " A Wakaf is invalid if...it is inconsistent with Hukum Syarak or any written law".

ii. By Long User/ Act

Although the Muslim jurists agree that there are four pillars on waqf and the creation and effectiveness of waqf is upon the completion of the four pillars, nevertheless, the Muslim jurist through the Council of Fatwa and case laws in approval that waqf by act or through long user is valid. In *G Rethinasamy*'s case the Judge held that waqf for cemeteries and mosques can exist through long user. Furthermore, the judge in *Haji Salleh b Haji Ismail & Anor v Haji Abdullah bin Haji Mohammad Salleh* (1935) 4 MLJ 26 held that the evidence of usage as a mosque is presumptive evidence of a charitable trust.

iii. By document

The initiative to upgrade the procedures on creation of waqf continues. Some states in Malaysia have introduced a statutory form to create waqf. For example, section 15 of the Enactment of Wakaf (Selangor) 2015 clearly states any person who wishes to Wakaf his property may do so by completing a form as may be determined by the Corporation. Technically, the word 'may' is used which indicates that filling up the statutory form is not made a compulsory requirement for validity of waqf. Similarly, if the *mawquf* is 'land', thus it raises a question whether registration as required under the National Land Code 1965 is also compulsory. This stance is adopted would have significant effect on indefeasibility of title of waqf land as seen in the tussle between the court decisions in *Boonsom Boonyanit v Adorna Properties* [2001] 1 MLJ 241 (FC) and *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1.

GAZETTE AS A REQUIREMENT TO COMPLETE A DEDICATION OF WAQF

The issue about the importance of gazette for the administration and completeness of waqf was highlighted in a provision of such effect in Section 13(e) of the Administration of Islamic Law (State of Selangor) 1999. Unfortunately, the setback of the provision surfaced in *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2009] 6 MLJ 307. In this case, under its planning laws, the Majlis Bandaraya Shah Alam ('MBSA) had decided to allocate land in the Kota Kemuning area in Shah Alam for setting up a Muslim burial ground. The neighbouring residents to the proposed burial ground, respondents 1 to 147, objected to this decision and filed an application to challenge MBSA's decision. At the Court of Appeal, with majority 2 to 1, the court dismissed the appeal from Selangor State Religious Council on several technical grounds on the basis that the land in question was yet to be considered Waqf land until it has been gazetted according to Section 62 of the National Land Code. The Court also distinguished the different law in Penang, which contributed to the decision in *G Rethinasamy*'s case as well as *Shaikh Zolkaffily bin Shaik Natar's* case. There was no similar provision of section 13(e) in Penang thus even though Gazette has not been done, waqf was considered valid in these two cases.

This state of affair resulted from the existence of clear legal provision, which subjected waqf to other laws. Thus, the Wakaf (State of Selangor) Enactment 2015 has amended the section 13(e) hence, waqf is considered valid and enforceable once all requirements based on *Hukum Syarak* have been fulfilled. This position is very much in line with Section 4(2) (e) of the National Land Code 1965 and minimise issues arising from the effect of registration and indefeasibility of title upon registration.

In *Sahul Hamid & Anor v Negeri Sembilan Religious Council & Ors* JH (1417H), Vol X Part 11, the issue on validity of waqf which failed to be gazetted has resurfaced. Nevertheless, this case must be distinguished from Bong Boon Chuen's case since when the court made its decision in *Bong Boon Chuen*'s case (*ibid*), the court was tied up with Section 13(e) of Wakaf (State of Selangor) Enactment 1999. Thus, in Negeri Sembilan, the creation of waqf is valid even though before the Gazette as required under section 62 of the National Land Code 1965.

THE POSITION OF FAMILY WAQF (*WAQF AL AWLAD*)

Another important development from the case law is its influence in shaping the law pertaining to family waqf. In Islam, charity begins from home. There are many verses in the Quran in which Allah (SWT) reminded the Muslim to give priority to his kins and relatives when doing charity. In fact, it is discouraged for a Muslim to leave his family in poverty. The teaching of Islam provides that it is discouraging to give preference to do charitable acts for others while your own family is in destitute state. It is very much encouraged to plan for a sustainable basis for living. The features of waqf which emphasise on the elements of irrevocable, inalienable and perpetual fit to the maintenance and management of property in sustainable manner. The Muslim has categorised waqf into *Waqf khas* and *Waqf Am* based on the purpose of use of *mawquf* and intention of the donors. As such, there are many waqf created specifically for a fixed and identifiable objective or with a mix intention in which the benefits of waqf are to be distributed among the *waqif*'s family members and the general public. The creation of family waqf in which the intention is solely to benefit family members of the donors is categorised under *waqf khas*. The colonials for several reasons rejected this type of waqf. Firstly, it is against the English principles of charity, which the benefit should be for donor's own family members. Secondly, waqf is for perpetuity in contrast to trust, which is against perpetuities and the principles or intention can be amended or changed. Thirdly, the creation of family waqf was done on purpose to avoid tax to the authority controlled by the colonial. This policy has been widely accepted and upheld in Egypt and India hence, has reached Malaysia by virtue of case law. Thus, the court's decisions in *Abdul Fata*'s case from India and Fatuma's case from Kenya have changed the traditional and religious based waqf practices in Malaysia. The increase in numbers of mismanagement of waqf property by the donors' appointed trustee or *Mutawalli* further support the justification for prohibition of family waqf. Similarly, the colonial judges' decisions showed that a trend of non-recognition of family waqf had taken place in various Muslim countries.

There was a very important mark from the Federal Court regarding the position of family waqf. In *Haji Embong bin Ibrahim v. Tengku Nik Maimumah Hajjah Binti Almarhum Sultan Zainal Abidin* (1980) 1 MLJ 286 it was held that family wakaf created in Terengganu was valid by virtue of the Islamic Wakaf Validating Enactment, 1972 notwithstanding the 1/3 limitation contained in section 61, of the Administration of Islamic Law Enactment, 1955.

In *Re Dato Bentara Luar Decd Haji Yahya & Anor v Hasan & Anor.*, [1982] 2 MLJ 264, the appellants who were the administrators of the deceased property, sought for a declaration the waqf created for the two sons of the deceased was void. It was argued that the waqf was dedicated only for some family members of the *waqif* thus void based on the Privy Council decisions in *Abul Fata Mohamed Ishak's* case and *Mohamed Ahsanulla Chowdhry v. Amarchand Kundu* (1889) 17 I.A 76. Counsel for the respondent argued that the waqf was valid under Islamic law and the Privy Council's decisions were inapplicable to Johore which had passed its Johore's Wakaf Prohibition Enactment, 1911. In other words, the English principle of rules against perpetuities was unheard when the *waqif* made his waqf in 1909. The Federal Court (delivered by Salleh Abas F.C.J.) held that the law applicable to determine the validity of the waqf in this case was Islamic law as interpreted by Muslim scholars learned in Islamic jurisprudence. This rule is unaffected by the English law of trust's principle known as the rule against perpetuity. In fact, the Federal Court considered the principle as a concept alien to that system of jurisprudence.

Tun Salleh Abas also gave a similar interpretation in the case of *Tengku Haji Jaafar Ibni Almarhum Tengku Muda Ali & Anor v. Government of Pahang* (1985) concerning the gift of the land, which was given by the Sultan of Pahang to his daughter. Salleh Abas, in delivering the judgment, said that the gift was void by referring to the Islamic law laid down in a popular book of reference to the Shafie school followers. In 1970, the Mufti of Johore has made a Fatwa that *Wakaf Ahli* or *Waqf al Awlad* is valid.

THE POSITION OF *ISTIBDAL* AND LAND ACQUISITION

Waqf has a strict principle that once created, it cannot be revoked or sold and it has to be perpetual. This requirement may become a burden for the *Mutawalli* especially if the *mauquf* is less valuable due to its location or condition of the land. Under very strict circumstances, the Muslim jurists opined that a *mauquf* can be exchanged or replaced with a better or a more suitable *mauquf* without decreasing the value of the property.

There is a considerable development on waqf pertaining to *Istibdal.* Some of the issues related to the need for *Istibdal* of waqf land when it is compulsorily acquired by virtue of the Land Acquisition Act 1960. Although the general principle based on *Syarak* does not allow for waqf land to be cancelled or changed but being still in the nature of an alienated land, waqf land is also subject to the law relating to compulsory land acquisition. The law on land acquisition in Malaysia does not permit any act to challenge the validity of compulsory land acquisition unless on technical error. Similar to other positions requiring for surrender of waqf land to facilitate development for public purposes, acquisition of waqf land is unavoidable. Thus, the Fatwa Committee Melaka in 1994 and Fatwa Committee Pulau Pinang in 2003 agreed that any acquisition of waqf land for public purposes must be paid with adequate compensation and land must be replaced with other lands of equal size or value. The Majlis has the duty to fulfil the intention of the *waqif.*

CREATION OF WAQF INVOLVING ONE THIRD (1/3) OF THE PROPERTY

The issue arose in *Haji Embong bin Ibrahim v Tengku Nik Maimunah* [1982] 1 MLJ 21 (FC). In this case, the late Sultan Zainal Abidin of Terengganu had granted land known as Chenderong concession to his daughter, Tengku Nik Maimunah and her husband. Tengku

Maimunah later created a waqf deed dedicating all her share in the properties to her adopted daughters and relatives. Nine years later she wanted to revoke the deed but subsequently, a fatwa was issued declaring her waqf as a valid waqf. At the High Court, an issue arose whether a creation of more than 1/3 of property is valid. At the Federal Court, it was held that waqf involving more than 1/3 is valid since it was created during the lifetime of the donor. The limitation of 1/3 is applicable only for *Waqf Wasiyya*.

Waqf Wasiyya is statutorily enacted in the Waqf Enactment (Section 33 and 34 of the Wakaf (State of Selangor) Enactment, 2015). A *mawquf* created by way of Will (*wasiyya*) to non-heirs shall not exceed one third of the *waqif*'s estate except with the agreement from all heirs.

DOES TEMPORARY WAQF HAVE A PLACE IN MALAYSIA?

The latest issue on waqf relates to temporary waqf. One of the issues appeared in social media concerned waqf of the family of the late Shaik Eusoff. The relatives of Shaikh Eusoff claimed that their great grandpa had made a will that the plot of land in dispute to be used as waqf and the will last till 21 years after the last offspring died. Thus, the relatives claimed that the waqf has ended in 1953, when the last daughter of Shaik Eusoff died in 1932.

In the year 2000, the Majlis Fatwa Pulau Pinang has made a *Fatwa* that a will made for waqf of Shaik Eusoff was in valid since the *waqif* is no more the owner of the land once a waqf is made. The Fatwa also rejected the argument for temporary waqf and upheld the opinion that waqf must be forever. The decision of this case is yet to be made by the court. It is much awaited decision since it shall put a benchmark to see the moving forward of temporary waqf in Malaysia.

In Arabic, temporary waqf refers to *Waqf Muaqqat* in contrast to *Waqf Muaabad* (perpetual Waqf). *Waqf Muaqqat* refers to a waqf in which the period of waqf is not perpetual. It subjects to a certain identified duration determined clearly by the *waqif*. Although the majority Muslim jurists in the opinion that *waqf* must be permanent, nevertheless, there is a minority opinion led by Imam Malik and strongly supported by Abu Zahrah, a contemporary jurists that temporary *waqf* should be allowed and it is practical and relevant for current practices (Abu Zahrah, 2005).

RECOMMENDATIONS AND CONCLUSION

In conclusion, there are many issues arose from case laws. The various decisions have contributed to the development of waqf institution in Malaysia. Some of the issues deliberated by the courts include how to create waqf, court jurisdiction on waqf, *fatwa*, *Istibdal* and family waqf. Undoubtedly this has helped to clarify the position of waqf under the Malaysian laws despite waqf is a state matter. Having acknowledged the challenges, waqf is no doubt a mechanism to protect *ad deen* (the religion of Islam) as well as property as prescribed in the *Maqasid al Shariah* and the Federal Constitution (Article 13). Nevertheless, issues such as the conflict of jurisdiction between Shariah and civil law, non-Muslim parties and upholding the sanctity of Shariah by the civil court remain a matter of concern. In addition to law, knowledge, recognition and respect for Shariah and the Federal Constitution, Shariah

court and harmonisation of laws are crucial for a better waqf governance in Malaysia. What may be suggested are, firstly, it is vital for all states in Malaysia to enact a standardised and comprehensive law on waqf. The law shall minimise issues of waqf being subject to various other laws and policies, which certainly would create confusion and discrepancies. Secondly, when there is any conflict of law, if the matter involves non-Muslim parties, the case should be brought to the civil court, but the hearing must be heard by a combination of judges who are well versed in the Shariah and civil law. Both parties must have confidence on the ability of the judges to deliberate on their cases. Similarly, there must be an end to the conflict between the Shariah and civil law. As long as it is a waqf, the Shariah court should be entrusted to deal with it. It is also acknowledged that although waqf is a Shariah matter, and the sources of law may be derived from Hukum Syarak, the Federal Constitution as well as the laws on waqf, the *Fatwa* and decisions of the courts must be upheld as long as they are not in conflict with the principles of the Shariah.

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