

A **WAKAF IN MALAYSIA: ITS LEGAL EVOLUTION AND DEVELOPMENT¹**

by

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&

DR ABDUL RANI KAMARUDIN³*International Islamic University, Malaysia*C **Introduction**

D Islam came to South-East Asia in the early 13th century,⁴ particularly to the current states forming Malaysia⁵ as is apparent from researches and findings of local scholars such as Ahmad Ibrahim,⁶ Syed Muhammad Naquib Al-Attas,⁷ and western legal scholar such as MB Hooker.⁸ The spread of Islam

1 Adapted from a paper presented at the International Legal History Conference (Mapping the Law), School of Law, University of Exeter, 3-5th April 2003

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G 4 Notwithstanding that, certain scholars opined that Islam had set its foot in the Malay archipelagos since the 7th century during the reign of the guided caliphs. This is the view of Professor Dr Hamka. See H Rusydi Hamka, *Hamka: Pujangga Islam, Kebanggaan Rumpun Melayu, Menatap Peribadi dan Marabatnya (Hamka: Muslim Philosopher, the Proud of the Malay Community, Looking Into His Personality and Dignity)*, Pustaka Dini Sdn Bhd Shah Alam, Malaysia, 2002, p 115-116.

5 These states consist of the states in the Peninsular Malaysia, namely Perlis, Kedah, Penang, Perak, Selangor, Negeri Sembilan, Johore, Pahang, Terengganu and Kelantan, and Sabah & Sarawak in Borneo.

H 6 Ahmad Ibrahim, *Towards A History of Law In Malaysia and Singapore*, Dewan Bahasa dan Pustaka, Ministry of Education Malaysia, Kuala Lumpur, 1992, chapter 1; See also Abdullah Alwi Haji Hassan, *The Administration of Islamic Law in Kelantan*, Dewan Bahasa dan Pustaka, 1996, Kuala Lumpur, chapter 1.

I 7 See generally, Syed Mohammad Naquib Al-Attas, *Preliminary Statement on a General Theory of the Islamization of the Malay-Indonesian Archipelago*, Kuala Lumpur, 1969; Syed Muhammad Naquib Al-Attas, *Islam Dalam Sejarah dan Kebudayaan Melayu* (translated: *Islam in the History and Culture of the Malay*), Petaling Jaya, ABIM, 1990.

8 See generally, MB Hooker, *The Personal Laws of Malaysia — An Introduction*, Kuala Lumpur, Oxford University Press, London, 1976, chapter 2.

was through propagation and preaching by the Arabs and Indian Muslim traders who came to trade with the Malay states. Some claimed that it was the Chinese Muslims from Southern China who came to the Malay Archipelago, initially to trade and forming business relationship with the indigenous people, but eventually they mingled, mixed and settled down with the indigenous people, with the result that Islam also became a way of life for the indigenous people.

When Islam was made as the official religion of these states, renowned Muslim scholars from the Middle East and the Indian sub-continent inevitably became the advisors and religious teachers to the rulers, the royal and dignitaries' families. Some of them occupied important posts in the administration of these states. According to Syed Muhammad Naquib Al-Attas, Islam dramatically changed the way of life, the thoughts and spiritual ideas of the indigenous people, who prior to the coming of Islam were Hindu and Buddhist. Some of the various important aspects or influences of Islam upon the locals then were its law and its legal administration in their society.⁹

⁹ See Syed Mohammad Naquib Al-Attas, *Preliminary Statement on a General Theory of the Islamization of the Malay-Indonesian Archipelago*, Kuala Lumpur, 1969, p 5.

A Objectives of the paper

This paper attempts to unveil the legal evolution of *wakaf*¹⁰ in Malaysia since the advent of Islam into Malaysia (earlier known as the Malaccan

- B 10 *Wakaf*, means 'detention' and connotes the tying up of property in perpetuity for the benefit of the public. According to an Islamic jurist, *wakaf* is the detention of a thing in the implied ownership of Almighty God, in such a way that its profits may be applied for the benefit of human beings. The beneficiaries of the *wakaf* may be the general public or a group of people. The *wakaf* properties may be immovable or movable. *Wakaf* involving lands or houses, are usually used for the settlement of the beneficiaries named or intended by the donor/settlor in his or her *wakaf*'s explicit term, or they may be rented 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 specified purpose. Movable property would include things such as books, fruit trees, even bonds, shares, debentures, unit trusts in company and corporate bodies. It cannot consist of foodstuffs or odoriferous plants or a slave or a coat unless the particulars of the thing are specified to the benefits of the beneficiaries/ recipients. Likewise, this also applies to one's own person nor a trained dog. Similarly, if the *wakaf* property consists of shares, debentures, bonds, or equity, the benefits arising from these will similarly be used for the benefit of the beneficiaries as named and intended by the *wakaf* donor/settlor. Usually the beneficiaries named are the needy, poor or orphan persons or even to the Muslim public, but sometimes, they may involve special beneficiaries, who might consist of the donor's/settlor's heirs and descendants. The typical practise of the Muslim community in Malaysia on *wakaf* is by stipulating that his or her land shall be used to build mosques or for Muslims' cemetery grounds. *Wakaf* can be effectuated by way of explicit term, for instance 'I make a *wakaf* of such a thing to such person/persons'. Likewise, it also can be created by way of implication, looking at the conducts and acts of the donor, even though there is no definite intention to create it. The moment the owner has done that, the detention then becomes absolute and perpetual in nature, and thereafter, the thing dedicated cannot be sold, given nor inherited. A proprietor/settlor who disposes his property as *wakaf*, no longer has the ownership over the property because his or her ownership or rights over it ceases immediately after the pronouncement of the *wakaf* terms, and is instantaneously divested into the hand of the *wakaf* administrator or a body entrusted by the Muslim community to administer and maintain the property for the benefit of the beneficiaries/recipients. In Malaysia, the administrator of the *wakaf* is often than not the respective State Muslim Religious Councils having their own departments and units and their experts and officials to carry out the due administration of the *wakaf* property for the benefits of the beneficiaries named in the *wakaf*, or if there is none, the beneficiaries will be those determined by the Islamic jurists based on the injunction of the Quran and tradition of the Prophet (peace be upon him — PBUH). See generally, Mahmud Saedon Awang Othman, *Peranan Wakaf di Dalam Pembangunan Ummah* (translated: The Role of Wakaf in the Development of the Muslim Society), Al-Ahkam, Jilid 6, Dewan Bahasa dan Pustaka, Kuala Lumpur, 1998, pp158-159; Syed Khalid Rashid, *Muslim Law*, Eastern Book Company, Not dated, Lucknow, chapter IX; See also Osman Sabran, *Pengurusan Harta Wakaf* (The Administration of Wakaf Property), Universiti Teknologi Malaysia, Skudai, 2002, pp 12-30.
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Sultanate, then as Malaya by the British colonial) up to the current times. However, this paper would only touch in brief the position of *wakaf* in Malaysia before independence, giving greater emphasis on its position after the independence days. A

The Legal History of Wakaf before Independence B

As Islam was the official religion of the land, the kingdoms in the Malay archipelagos, particularly the Malaccan Empire, the Johor-Riau Empire, and the autonomous Malay states such as Pahang, Kedah and Kelantan used Islamic principles as the legal codes governing their society. The first empire that declared Islam as its official religion and used its principles to govern disputes within its jurisdiction was the Malaccan Empire. Its legal code was known as 'Hukum Kanun Melaka' (Penal Laws of Malacca). Other instances of legal codes used by the aforesaid empires were, Hukum Kanun Pahang (Penal Law of Pahang), Undang-Undang Johore (Johore Law), Undang-Undang Riau (Riau Law). There were other laws which borrowed the Melaka Laws with major modifications made to them such as the Undang-Undang Kedah (Kedah Law) and Undang-Undang Lima Fasal Riau (Riau's Five Law's Articles). In addition to these laws, the laws that were also prevailing then were the Undang-Undang Sembilan Puloh Sembilan of Perak (Ninety Nine Laws of Perak), *Thammarat al-Muhimmah* (translated as 'Fruits of Virtues') and *Muqaddimah fi Intizam* (translated as: 'Introduction to Administration') both law applicable in Riau, and *Itqan al-Muluk bi ta'dil al-Suluk* (translated as 'Ways of Kings In Relation to Just Rulings') as the law applied in Trengganu. These latter laws were not copied and borrowed from the Melaka Laws but their contents were still Islamic in nature. C

The coming of the British into these states eventually made them to become as British protectorates in the 1800s. The English colonialist, as a matter of course, brushed aside the aforesaid Islamic laws by replacing them with English laws and legal principles. This was evident from the Charter of Justices and the Civil Law Ordinances and Enactments, which clearly imposed upon these states to apply English laws. Accordingly, Islamic law was no longer important save on personal and family matters, and their ancillary matters relating to these aspects of law such as inheritance and wills. The administration of Islamic law was entrusted to the respective states' religious councils. Thus, these councils which then established the Islamic court must likewise be contented with its narrow and limited jurisdiction to determine and hear disputes only in matters such as the family law and personal offences. D

What Was The Law Which Governed *Wakaf* During These Periods? E

There is no record to indicate with certainty when *wakaf* began to be practised in the in the Malay Archipelago, particularly in the Malay states. The institution of *wakaf* inevitably came albeit gradually with the coming of F

A Islam which even till now is prevalent amongst Muslims the world over since doing a good deed is an act of worship which Islam strongly enjoined to its adherents.¹¹

B The Malaccan Sultanate (Melaka), though, a glorious kingdom in terms of its wealth due to its supremacy in maritime trade, there is, ironically, hardly any record to enlighten how *wakaf* was administered, and the applicable laws in relation to *wakaf*. As *wakaf* is a creature of Islamic law, it is submitted that only Islamic law could have governed and controlled any dispute arising from it since Islamic law was then the law of the land. Acton and Thorne JJs in *Ramah v Laton* held that Mohammedan law (Islamic Law) is not foreign law, but local law. As such, it was part of the law of the land.¹² As RJ Wilkinson said, 'There can be no doubt that Muslims laws would have been the laws of Malaya had not the British stepped in to check it.'¹³

C Similarly, during the post Melaka Empire ie during the Portuguese occupation and later the Dutch, there is also no record of the laws applicable to *wakaf* and its administration in respects of the Malay states in Peninsular Malaysia and in the Borneo States. It is similarly submitted that in these states, the prevailing law was inherently Islamic law, even though, they might not have followed the Melaka Law in *toto*. Accordingly, Islamic law had to be the law applicable in administering, governing and settling dispute involving *wakaf* during those material times.

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G 11 See Sabarudin Ali, *Institusi Wakaf Konsep dan Perlaksanaannya di Malaysia*, (translated: *Wakaf's Institution: Concept and Its Implementation in Malaysia*) Latihan Ilmiah Yang Dikemukakan Untuk Memenuhi Sebahagian Daripada Syarat Memperolehi Ijazah Sarjana Muda Undang-Undang Dengan Kepujian, Fakulti Undang-Undang, UKM, Bangi, 1991, p 32. See also Halimah Ibrahim, *Suatu Kajian Mengenai Wakaf di Bawah Majlis Ugama Islam Pulau Pinang di Seberang Perai* ('A Study on Wakaf Under the Religious Council of Penang in Province Wellesley'), Satu Kertas Projek Bagi Memenuhi Sebahagian Dari Kehendak-Kehendak Peraturan Untuk Mendapat Ijazah Sarjana Muda Undang-Undang, Universiti Malaya, December 1981 p 15.

H 12 (1927) 6 FMSLR 128, 129

I 13 *Papers on Malay Subject*, law Part 1 (Introductory Sketch), Kuala Lumpur, 1922, p 49 - quoted by Hamid Jusoh, *The Position of Islamic Law In the Malaysian Constitution with Special Reference to the Conversion Case in Family Law*, Dewan Bahasa Dan Pustaka, Kementerian Pendidikan Malaysia, Kuala Lumpur 1991.

During the British intervention, but before the 20th century, in the Malay and the Borneo States, there is no clear record to show how *wakaf* was administered apart from several records which showed that the administrations of *wakaf* were in the hands of the settlers or local society leaders such as the Kadhis (Islamic law judges and jurists), Imams (heads of mosque) and the Mosques' Committees whose main concerns were in religious matters.¹⁴ It is submitted that during these period, if there were disputes on matters pertaining to *wakaf*, the litigants would inevitably refer their disputes to these people or body for rulings (*fikah*). These experts would in turn refer to the Islamic legal texts to find the solutions. As the rulings were normally binding upon and accepted by all Muslims, there was no need to establish a fixed court to decide and try disputes concerning *wakaf*.¹⁵ These people may in the modern context be likened to ex-officio gistrates, and their courts were indeed open in the sense that the court is where disputes were adjudicated or considered. Indeed, during the Melaccan Empire, an Islamic legal text '*Fath al-Qarib*' written by Ibn al-Qassim al-Ghazzi, still exists till now, clearly contains rulings pertaining to *wakaf*, and had been used as a major reference for the settling of disputes according to the Islamic principles.¹⁶ Another text, the *Mejelle*, which was a Code used during the Ottoman Empire was in use for some time in the state of Johore. The text had been translated into Malay and enforced in several courts in the state of Johore.¹⁷ Meanwhile, in Kelantan, the Islamic legal texts that were used as references were *Bughyat al Mustarshidin* and *Mu'in al-Hukkam*.¹⁸ It goes to show that the governing law for *wakaf* had been the Islamic law during those material times. The incoherency of the physical status of these states by reason of the colonial masters, it is hardly unsurprising that no proper administrative set up could be established then for such a purpose by these states. These states were then more probably concerned or too preoccupied with the survival of their own physical existence from among themselves as much as against the colonialists.

14 Sabarudin Ali, *Institusi Wakaf Konsep dan Perlaksanaannya di Malaysia*, (translated: Wakaf's Institution: Concept and Its Implementation in Malaysia) Latihan Ilmiah Yang Dikemukakan Untuk Memenuhi Sebahagian Daripada Syarat Memperolehi Ijazah Sarjana Muda Undang-Undang Dengan Kepujian, Fakulti Undang-Undang, UKM, Bangi, 1991, p 33.

15 This practice was also prevalent at the time of the Prophet Muhammad, all the way back to 610–630 AD, where if there is a dispute, the companions would consult the Prophet for a ruling. See also Ahmad Ibrahim, *Towards A History of Law in Malaysia and Singapore*, Dewan Bahasa dan Pustaka, Ministry of Education, Malaysia, Kuala Lumpur, 1992, p 9. See also Abdullah Alwi Haji Hassan, *The Administration of Islamic Law in Kelantan*, Dewan Bahasa dan Pustaka, Kuala Lumpur, 1996, p 3.

16 Fang, LY, *Undang-Undang Melaka*, The Hague, 1976, p 35 quoted from Abdul Monir b Yaacob, *An Introduction to Malaysian Law*, Universiti Kebangsaan Malaysia, Bangi, 1989, p 184.

17 Ahmad Ibrahim, *Towards a History of Law in Malaysia and Singapore*, Dewan Bahasa dan Pustaka, Ministry of Education, 1989, p 71.

18 Abdullah Alwi Haji Hassan, *The Administration of Islamic Law In Kelantan*, Dewan Bahasa dan Pustaka, Kuala Lumpur, 1996, p 3.

A Available Records on *Wakaf* in the Malay States and the Borneo States in 1900s to Independence (1957)

- B** *Wakaf* being a matter concerning Muslim religion would be incompatible to English Law and equity. Instead the respective states' Religious Councils codified their *wakaf* law for their own respective administration. It may well be that prior to the appointment of the British Residents/Advisors, the administration of law including *wakaf* was not organised and systematic. It was probably after the British intervention that the law concerning matters on Islam including *wakaf* that there was a proper and systematic legal system. Hence, it is noted that before Malaysia's Independence in 1957, in
- C** Selangor, Kelantan, Terengganu and Pahang, the Islamic Law Courts (Syariah courts) of the Chief Kadhi (Judge) and the Courts of Kadhi were given power to hear and determine all actions in which all the parties were Muslims. *Wakaf* was also included in the jurisdiction of these courts.¹⁹
- D** Based on the Rules and Enactments of the administration of Islamic law of these states, what is clear to us is that the religious council shall be the trustee of all the *wakaf* property. The function of the trustee included the administration and the due management of the *wakaf* for the benefit of the beneficiaries. What is disheartening is that, there is no record indicating that the Islamic Law court did adjudicate disputes concerning *wakaf*, thus, they would enlighten on issues pertaining to Islamic law courts' jurisdiction and
- E** the applicable laws. Nevertheless, it is submitted that in the event of any disputes on religious matters, including *wakaf*, the inevitable practice must have been that the Muslims, as a matter of course, would refer them to the Islamic jurists and experts for rulings. These experts would inevitably be guided by the Islamic legal texts, for examples, books written by the previous Islamic scholars such as al-Ghazalli (1059-1111), al-Rafei (-1228), al-Nawawi (1233-1277), al-Isfihani (-1106), al-Syirazi (1083), al-Asnawi (1305-1370), al-Subki (1326-1459) etc.²⁰
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G 19 Section 45(3) of the Selangor Administration of Muslim Law Enactment 1952; s48(1) of the Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment 1953; s25(1) of the Trengganu Administration of Islamic Law Enactment, 1955; s37(3) of the Pahang Administration of the Law of the Religion of Islam Enactment 1956; s40(3) of the Malacca Administration of Muslim Law Enactment 1959; s40(3) of the Penang Administration of Muslim Law Enactment 1959; s41(3) of the Kedah Administration of Muslim Law Enactment 1962 and s11(4) of the Perlis Administration of Muslim Law Enactment 1965. In Perak and Johore, actions relating to *wakaf* may be dealt with by Kathis if so provided for in their *kuasa* (power) or *tauliah* (mandate), but such actions may in any case be heard and determined by the ordinary courts (civil courts). See Ahmad Ibrahim, *Islamic Law In Malaya*, Edited by Shile Gordon, Malaysian Sociological Research Institute Ltd, Kuala Lumpur, 1965, p 282.

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I 20 See Mohamad Jajuli Abd. Rahman, *Teks Undang-Undang Melayu Pertengahan Abad Kelapan Belas*, (translated: the Malay Legal Texts in the Middle of the 18th Century), Dewan Bahasa dan Pustaka, Kementerian Pendidikan Malaysia, Kuala Lumpur, 1994, p viii.

There were certain rules and regulations on the administration of *wakaf* in the Malay States prior to the Enactment of the Administration of Islamic Affairs in 1965. In Perak for example, *wakaf* was administered pursuant to the provisions in the *Wakaf Regulations* of 1951, in particular, by virtue of Art 192, Schedule 3, No 8/51, and *Wakaf Regulation*, and after independence, by virtue of Rules 1959 and Additional Regulations on *Wakaf* of 1959.²¹ These rules and regulations were enacted to govern and control the administration of *wakaf* in Perak.²²

In Penang, there is no available record on the administration of *wakaf* prior to the colonial rule.²³ However, during the colonial administration, some *wakaf* properties were administered under the 'Hindu and Muslim Endowment Board' since early 1900s, and it was governed and controlled by Ordinance No XVIII of 1906.²⁴ The Board had special and specific rules relating to procedures of taking over of all *wakaf* properties in Penang and Province Wellesley.²⁵ The *wakaf* properties were governed and determined by the Board vide the 'Order-in-Council', and were later gazetted in the state government gazette. The gazetted order would then be submitted to the Council for its due execution and administrative purposes.²⁶ However, there were also unregistered *wakafs* that were not under the control and supervision of the Board. These *wakafs* were voluntarily made by the

21 See Sabarudin bin Ali, *Institusi Wakaf Konsep and Perlaksanaannya di Malaysia*, (translated: *Wakaf Institution, Concept and Its Implementation in Malaysia*) Latihan Ilmiah yang Dikemukakan Untuk Memenuhi Sebahagian Daripada Syarat Memperolehi Ijazah Sarjana Muda Undang-Undang Dengan Kepujian, Fakulti Undang-Undang, UKM, Bangi, 1991, p 37. See also Halimah Ibrahim, *Suatu Kajian Mengenai Wakaf di Bawah Majlis Ugama Islam Pulau Pinang di Seberang Perai* ('*A Study on Wakaf Under the Religious Council of Penang in Province Wellesley*'), Satu Kertas Projek Bagi Memenuhi Sebahagian Dari Kehendak-Kehendak Peraturan Untuk Mendapat Ijazah Sarjana Muda Undang-Undang, Universiti Malaya, December 1981 p 36.

22 *Ibid*, p 38. These Acts and Regulations contained provisions in regard to the administration of *wakaf* for instance on the rights of the Qaryah (district), Religious Department, appointed committees to administer *wakaf*, supervision on the collection of *wakaf* am (general) fund, power to inform the course of administration of *wakaf* and mosques in Perak, appointment of *wakaf* manager, conditions and eligibility of managers, duties of managers, wages and salaries of managers and officers in charge, offences and punishment of the managers in case of default and misappropriation of *wakaf* money and property.

23 Ghazali bin Eusoff, *Pentadbiran Wakaf Pengalaman Pulau Pinang*, (translated: *Administration of Wakaf - Penang's Experience*) Persidangan Penyelarasan Undang-Undang Syarak/sivil Kali Ke-VIII, 3-5 November, 1995, Organised by Bahagian Hal Ehwal Islam, Jabatan Perdana Menteri and Kerajaan Negeri Pulau Pinang, p 2.

24 *Ibid*, p 3.

25 *Ibid*.

26 *Ibid*.

- A settlors themselves with the intention of getting reward from God, and were privately controlled and managed by them for the benefit of the intended recipients.²⁷ After independence, with the coming into effect of the Penang's Administration of Islamic Affairs Enactment 1959,²⁸ a body known as the 'Religious Council of Penang and Province Wellesley' ('Religious Council') was established in 1959. Pursuant to s 89(2) of the
- B Enactment, the Religious Council was conferred power and authority to act as 'the sole trustee' for the administration and due execution of all *wakaf* properties for the benefit of the Muslim public.²⁹

- C In Selangor, according to certain studies, it was found that prior to the promulgation of the Administration of Islamic Affairs Enactment of 1952 which spelt out the power and jurisdiction of the Religious Council to supervise and manage *wakafs*, there was no rules and regulations relating to the same. Instead, *wakafs* were effected by the settlors/donors themselves in accordance with Islamic law. This may be done through a trust deed and then have it registered in the appropriate land office where the land is
- D situated. Normally, the Kadhis, Imams and influential people would be appointed to become the administrators of the *wakafs* so created.³⁰

- E In Terengganu, likewise, it is hard to set out when exactly *wakaf* was initially practised. However, it evolved gradually with the coming of Islam in Terengganu since the 13th century. There were many *wakaf* properties that were designated as schools for Islamic studies.³¹ Before 1920s, *wakaf* properties were scattered throughout the state without being properly managed and controlled by a specific body. In 1920s onward, the religious

- F 27 Halimah Ibrahim, *Suatu Kajian Mengenai Wakaf di Bawah Majlis Ugama Islam Pulau Pinang di Seberang Perai* ('A Study on Wakaf Under the Religious Council of Penang in Province Wellesley'), Satu Kertas Projek Bagi Memenuhi Sebahagian Dari Kehendak-Kehendak Peraturan Untuk Mendapat Ijazah Sarjana Muda Undang-Undang, Universiti Malaya, December 1981 pp 46,47.
- G 28 This Enactment was later repealed and replaced by the Penang Administration of the Religion of Islam Affairs Enactment 1993.
- G 29 Ghazali bin Eusoff, *Pentadbiran Waqaf Pengalaman Pulau Pinang*, (translated: Administration of Wakaf - Penang's Experience), Persidangan Penyelarasan Undang-Undang Syarak/Sivil Kali Ke-VIII, 3-5 November, 1995, Organised by Bahagian Hal Ehwal Islam, Jabatan Perdana Menteri and Kerajaan Negeri Pulau Pinang, p 4.
- H 30 Hamidah Marsono, *Pentadbiran Wakaf dan Baitul Mal di Negeri Selangor* ('The Administration of Wakaf and Baitul Mal in Selangor') - Satu Kertas Projek Bagi Memenuhi Sebahagian Dari Kehendak-Kehendak Peraturan Untuk Mendapat Ijazah Sarjana Muda Undang-Undang, Fakulti Undang-Undang, Universiti Malaya, 1980/81, pp 5, 6.
- I 31 Jaafar Jusoh, *Undang-Undang Wakaf dan Pentadbirannya di Trengganu* ('Wakaf Laws and its Administration in Trengganu'), Satu Kertas Projek Bagi Memenuhi Sebahagian Dari Kehendak-Kehendak Peraturan Untuk Mendapat Ijazah Sarjana Muda Undang-Undang, Fakulti Undang-Undang, Universiti Malaya, 1982, p 8.

department of Terengganu was established and was entrusted to keep, control and manage *wakaf* properties. Since then, laws on *wakaf* were gradually enacted with the intention to ensure due governance and management of *wakaf* properties. Finally, in 1955, an enactment known as the 'Enactment of the Administration of Islamic Affairs' was passed by the Terengganu State's Legislative Assembly, which gave power to the Religious Council to manage and control all *wakafs* in Terengganu pursuant to its s 59.³²

In Perak before the promulgation of its Administration of Islamic Affairs Enactment of 1965, *wakaf* was administered by virtue of the *Wakaf* Enactment of 1951. Under this Enactment, *wakafs* were administered and controlled either by the Kadhis, Penghulus, religious teachers, dignitaries or the settlers/donors themselves. The Religious Council had no say on *wakaf* properties unless they specifically applied to make the Religious Council as the administrator.³³

In Johore, the first legislation to govern *wakaf* was the *Wakaf* Enactment No 11 of 1911 which stipulated that *wakaf* properties shall be under the control and supervision of the religious council. Prior to the Enactment, *wakaf* properties were specifically administered by the administrators appointed by the settlers/donors. The Enactment No 11 had undergone numbers of improvisation through several amendments such as the *Wakaf* Enactment No 5 of 1935 and the *Wakaf* Enactment No 11 of 1973. All these Enactments were then consolidated and revised as the *Islamic Affairs* Enactment, No 14 of 1978 to ensure the due administration of *wakaf* properties in accordance with the changing times and conditions.³⁴

Decided Cases on *Wakaf* before Independence

It must be reiterated that prior to independence, the states that now comprised the modern Malaysia can be classified into four (4) divisions: the Federated Malay States; the Unfederated Malay States; the States of Straits Settlement (*vis-a-vis* Penang, Singapore and Malacca); and the Borneo States. The principle adopted, based on the reports from the Straits Settlement Courts, in dealing with wills and trusts was the rule against perpetuity. For example, amongst the earliest reported case on *wakaf*,

³² *Ibid*, p 10.

³³ Kamarul Ariffin Othman, *Pentadbiran Baitul Mal & Wakaf di Perak* ('The Administration of Baitul Mal & Wakaf in Perak'), Satu Kertas Projek Bagi Memenuhi Sebahagian Dari Kehendak-Kehendak Peraturan Untuk Mendapat Ijazah Sarjana Muda Undang-Undang, Fakulti Undang-Undang, Universiti Malaya, 1978/79, p 17.

³⁴ Abdul Kohar Kamari, *Undang-Undang Wakaf dan Pentadbirannya di Johore* (*Wakaf Law and Its Administration in Johor*), Satu Kertas Kerja Bagi Memenuhi Sebahagian Dari Kehendak-Kehendak Peraturan Untuk Mendapat Ijazah Sarjana Muda Undang-Undang, Fakulti Undang-Undang, Universiti Malaya, 1979, p 9.

- A decided in 1887 by the civil court in Johore was *Ashabee & Ors v Mahomed Hashim & Anor*.³⁵ In this case, the court did not recognise the *wakaf khas* (special/ private *wakaf*) under Islamic law, but regarded it as charitable trusts according to the English common law, which prohibited a charitable trust in perpetuity. English law, the duration and the beneficiaries for the *wakaf* must be certain and fixed, not too remote or illusory. This English law on trusts was
- B applied in *Re The Estate of Haji Abdul Latif bin Haji Tamby*,³⁶ in *The Matter of The Trusts of the Will of Hadjee Haroun bin Tamby Kechik (Deceased)*,³⁷ *Sheikh Salman bin Abdul Shaik bin Mohamed Shamee*,³⁸ *Re the Settlement of Sheik Salleh bin Obeid Abda*,³⁹ and in *Re Ena Mohamed Tamby Deceased*.⁴⁰
- C English Law also provides that a purpose is not charitable unless it is made for the benefit of the public, with a minor exception in the case of relief of poverty, where it has been held that a gift for the relief of poverty amongst the donor's relatives is charitable.⁴¹ This principle provides that where a trustee has a discretion as to the distribution of the property and some of the
- D possible objects are non-charitable, the rules of private trusts must be complied with. According to this rule, the objects of the trust must be closely defined so that it is possible to tell whether any payment made would be a breach of the trust or not. This is to ensure its certainty and to ensure that the administrator and the beneficiaries legally know the width and breath of the benefits accruing to them under the trust. Further, the trust
- E must also observe the rule against perpetuities.⁴² Thus, a gift of a property for 'charitable or benevolent objects' has been held to be void on the basis that (a) not all of the benevolent objects are charitable; and, (b) it is impossible to tell whether all of the objects are benevolent or not.⁴³ This principle had been applied in *Re Hadjee Haroun bin Tamby Kechik*,⁴⁴ *Re Syed Sheik Alkaff*,⁴⁵ *Re Syed Abdul Rahman bin Sheikh Abdul Rahman Alkaff*,⁴⁶
- F *Fatimah v Logan*,⁴⁷ *Re Hadjee Ismail bin Kassim*,⁴⁸ *Re Shaik Salleh bin Obeid*

35 (1887) 4 Ky 213.

36 (1932) MLJ 46.

37 (1949) MLJ 143.

G 38 (1935) MLJ 200. It was held that a trust in a settlement providing for distribution of the corpus after the expiration of the period of twenty-one years was invalid as it infringed the rule against perpetuities.

39 (1954) MLJ 8.

40 (1937) MLJ 49.

H 41 Ahmad bin Mohamed Ibrahim, *The Legal Status of the Muslims in Singapore*, Malayan Law Journal Sdn Bhd, Singapore, 1965, p38.

42 *Ibid.*

43 *Ibid.*

44 (1949) MLJ 143.

45 (1923) 2 Malayan Cases 38.

I 46 (1953) MLJ 68.

47 (1871) MLJ 8.

48 (1911) 12 SSLR 74.

Abdat,⁴⁹ *Re Alsagoff's Trusts*,⁵⁰ *Re Shaik Salman bin Abdul Shaikh bin Mohammed Shamee*,⁵¹ *Ashabee v Mohammed Hashim*,⁵² *Mustan Bee v Shina Tamby*,⁵³ *Re Hadjee Ismail bin Kassim*,⁵⁴ *Re Hadjee Daeing Tahira binte Daeing Tedlallah*,⁵⁵ *Sheik Lebby v Fatimah*,⁵⁶ *Aisha v Udmanshah*,⁵⁷ *Haji Salleh v Haji Abdullah*,⁵⁸ and *the Shrine of Habib Noh*.⁵⁹ These cases were decided by the civil courts applying English Law, not Islamic law. However, in *Koh Cheng Seah Administrator of the Estate of Tan Hiok Nee Decd v Syed Hassan & Anor*,⁶⁰ even though the case was tried before the civil court, yet 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 *wakaf* was valid. At that material time, the law governing *wakaf* in Johore was Islamic law which recognised private *wakaf* (*wakaf khas*), and the rule against perpetuities.

It is dismal to note that there were no reported cases on *wakaf* decided in the Kadhi's Courts. According to one study, the dearth of reports on *wakaf* was because most of the cases involving disputes on *wakaf* were eventually settled out of court upon advices given by the Islamic experts.⁶¹ Therefore, we could not see the trend of developments on *wakaf* adjudicated by the Kadhi's Courts, which would, as a matter of course, had applied the Islamic Law. The dearth of cases on *wakaf* by the Islamic courts may well be better understood by looking into the history of the Malay states. Since the fall of the Malaccan Empire to the Portuguese in 1511, the Malay States continued to be under the rule of foreign power. After the Portuguese, it was the Dutch, and finally by the British till 1957 when Malaysia (there was no Malaysia as yet then) gained her independence. Technically, there could not be any Malay rulers who could set up a systematic government with proper administrative and judicial system till the arrival of the British. Being too preoccupied with the need to deal with the Portuguese and the Dutch, if there was any Malay rulers, they must have retreated to places outside Malaya such as in Sumatra and in the Riau Islands. Thus, in Malaya, the

49 (1954) MLJ 8.

50 (1956) MLJ 244.

51 (1953) MLJ 200.

52 (1887) 4 Kyshe 255.

53 (1882) 1 Kyshe 580.

54 (1911) 12 SSLR 74.

55 (1948) MLJ 62.

56 (1928) SSLR 37.

57 1 Kyshe 255.

58 (1935) MLJ 26.

59 (1957) MLJ 139.

60 (1930) 1 MC 180.

61 Halimah Ibrahim, *Suatu Kajian Mengenai Wakaf di Bawah Majlis Ugama Islam Pulau Pinang di Seberang Perai* ('A Study on Wakaf Under the Religious Council of Penang in Province Wellesley'), Satu Kertas Projek Bagi Memenuhi Sebahagian Dari Kehendak-Kehendak Peraturan Untuk Mendapat Ijazah Sarjana Muda Undang-Undang, Universiti Malaya, December 1981, p. 63.

- A rule of the Malay rulers if there was one, its physical existence was rudimentary, and its administration must have been haphazardly shaped till the British arrival who subsequently established their own administrative and judicial system in the Malay states. *Wakafs* were, therefore, prior to the British, done through Sultans' dignitaries, village chiefs, Imams of the mosques and the like. There was no need for formal instruments and registrations for none could properly be established yet. Disputes were settled in open court (not settled out of court) by these men applying Islamic law as a matter of course. Decision could take the form of letter signed by the decision maker and reporting was quite unnecessary given the circumstances they were in then. In a small community, a decision by these so called judges would be known by all as a matter of course; not that there was no Islamic court, only that these courts were devoid of a proper administrative infrastructure and system.

Wakaf After Independence

- D The Federation of Malaya gained independence in 1957. Initially this Federation consisted of the Federated Malay States, the Unfederated Malay States, the States of Straits Settlement – Penang, Melaka and Singapore. Later in 1963, Sabah and Sarawak joined the Federation of Malaya. However, in 1965, Singapore left Malaysia and formed its own system of government. Malaysia's supreme law is the Federal Constitution. Amongst other matters enunciated in the Constitution is the jurisdiction of the civil law courts (non-islamic courts) and syariah courts (Islamic Law Courts).

Amendment to the Federal Constitution

- F Pursuant to cl 121(1A)⁶² of the Federal Constitution, the civil court shall have no jurisdiction to try and decide matters within the jurisdiction of the Islamic law court. This new amendment was made with effect from 10 June 1988. However, to what extent does this clause actually apply?

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I ⁶² Article 121(1A) of the Constitution provides that: 'The courts referred to in clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Islamic Law court'. This clause was inserted by the Constitution (Amendment) Act 1988 (Act A704) section 8, with effect from 10 June 1988.

The reason for having such an amendment is to allow the Islamic law court to carry out its functions within the jurisdiction conferred by law to it without any interference from the civil courts as evident in quite numbers of cases such as *Myriam v Ariff*,⁶³ *Commissioners for Religious Affairs Trengganu & Ors v Tengku Mariam*,⁶⁴ *Ainan bin Mahmud v Syed Abu Bakar*,⁶⁵ *Nafsiah v Abdul Majid*,⁶⁶ *Roberts v Ummi Kalthom*,⁶⁷ *Boto' binti Taha v Jaafar bin Muhammad*,⁶⁸ *Re Syed Shaik Alkaff*⁶⁹ and in *Re Alsagoff's Trust*.⁷⁰ Let us further see the chronology of cases decided in order to

- 63 (1971) 1MLJ 265. The issue on this case was whether the widow who had married to another man could be given custody of her child from her previous marriage. The court set the decision of the Kathi aside on the ground of s 45(6) of the Selangor Administration of Muslim Law Act 1952 and the jurisdiction granted to the High Court pursuant to the Guardianship of Infants Act 1961.
- 64 (1969) 1 MLJ 110, where there was issue of wakaf. In the preliminary of the trial, the parties had consulted the Mufti for a fatwa and decision on whether wakaf made by Tengku Chik for the benefit of his family (special wakaf) was legal or not. The Mufti had approved such wakaf. However, the learned judge in that case refused to accept such fatwa but follow decision of the Privy Council in *Abdul Fata Mohamed Ishak v Rasamaya Dhur Chowdhury* (1894)L.R. 221A 76 and *Fatimah binti Mohamad v Salim Bahshuwan* (1952) AC 1.
- 65 (1939) MLJ 209. Where it involved a child which had been born four months after marriage. The court held that according to s 112 of the Evidence Enactment, such a child is a legitimate child for the couple, even though it is illegitimate according to Islamic Law.
- 66 [1969] 2 MLJ 174. Where the plaintiff in this case claimed damages against the defendant for having breached the contract to marry and further alleged that damages must be added as she had been persuaded to have sexual intercourse with the defendant. Consequently, she gave birth. The learned judge in this case held that the High Court had power and jurisdiction to hear and determine the case. This clearly disregarded s 119 of the Islamic Law Administration Enactment of Melaka 1959 which provided special statutory provisions for betrothal among Muslims.
- 67 [1966] 1 MLJ 163. This case involved issue of Harta Sepencarian (jointly acquired property), which was clearly within the jurisdiction of the Islamic court.
- 68 [1985] 2 MLJ 98. This case involved issue of Harta Sepencarian.
- 69 (1923) 2 MC 38. This case involved issue of wakaf. In this case it was held that provision for estate assumed by a sound Muslim man as good and valid according to Islamic law does not necessarily be accepted as charitable in the eye of the English Law. Similarly, the usages of 'wakaf' or 'amal al khaira' (good deeds) does not necessarily show the general charitable intention. Thus provisions made to spend the balance of estates for amal al khaira (good deeds) in Tahrim, Mekah and Madinah according to the discretion of the donor (wasi) was held not valid.
- 70 [1956] MLJ 244. Where it was held that monetary provision as gift to the poor people reciting Al-Quran on the graves of the deceased was not valid. This is because the court are bound to follow s 101 of the Evidence Act 1950 which provides that will and trust deeds shall be interpreted in accordance with the English law.

- A observe and comment on the facts and lines of reasoning adopted. The cases on *wakaf*, can be classified into two (2) epoches:
- (1) Cases after the enforcement of Federal Constitution (FC) but before the constitutional amendment on Art 121; and,
 - (2) Cases after the constitutional amendment on Art 121 *viz* article 121(1A).

Cases after the Enforcement of Federal Constitution but Before Constitutional Amendment on Art 121

- C The reported cases that dealt with *wakaf* were as follows:
- (1) *Commissioner of Religious Affairs, Trengganu v Tengku Mariam*;⁷¹
 - (2) *Haji Embong bin Ibrahim & Ors v Tengku Maimunah*;⁷²
 - (3) *Re Dato Bentara Luar Decd Haji Yahya bin Yusof & Anor v Hassan bin Othman & Anor*;⁷³
 - (4) *Tengku Abdul Kadir bin Tengku Chik & Anor v Religious Council of Kelantan*;⁷⁴
 - (5) *Sahul Hamid & Anor v Negri Sembilan Religious Council & Ors*;⁷⁵ and,
 - (6) *Haji Hassan v Nik Abdullah & Ors*.⁷⁶

The issue involved in the case of *Tengku Mariam*, was whether Islamic law or English law was the applicable law to settle the *wakaf* disputes. The issue

- F 71 [1970] 1 MLJ 222. In this case, the deceased had effected a special wakaf on certain lands, in favour of his family descendants in perpetuity. Whether the wakaf was valid?
- 72 [1980] 1 MLJ 286. The donor in this case was, initially made a wakaf of certain lands for the Muslim public and the religious council was to be its administrator and manager. Nonetheless, the donor later intended to revoke the wakaf made, with a view to convey the lands to certain company. The issue here, whether wakaf made the donor was valid and could not be revoked?
- G 73 [1982] 2 MLJ 264. The donor effected a special wakaf lands in favour of his family. Whether this special wakaf was valid?
- 74 JH Nov 1995 Jld X Bhg.1. The donor had made special wakaf lands in favour of his certain family members and neglecting the others. The neglected family members dissatisfied with the wakaf and requested the court to revoke the wakaf and order the lands to be distributed in accordance with Islamic law of inheritance, so that they could as well be benefitted.
- H 75 JH (1417) H Jilid X Bhg. II. A deceased had built up a mosque since 1918. However, there was not expressed or implied intention on his part that the mosque was to be wakaf. The question remained, could it be wakaf by implication?
- I 76 (1969) 2 JH 124. A stranded land was presumed to be a wakaf land by people around it. The issue in this case, whether there was or was not any iota of evidence that lent support to such a conclusion?

emanated from the fatwa (religious edict) pronounced by the Mufti of Terengganu that the special *wakaf* made in favour of the deceased family's descendant was valid. However, this was contrary to English law as trust should not be a perpetual family settlement and its ultimate gift must not be illusory and too remote. The judge in the High court in this case vehemently rejected the fatwa of the Mufti, following *Abdul Fata*⁷⁷ and *Fatuma*⁷⁸ case (the Privy Council cases from India) that special family settlement (special *wakaf*) was invalid. In the result, English law was applicable to the case, not Islamic law as that given by the Mufti. However, upon such disfavouring result, the appellant appealed to the then Federal court. The majority of the judges (Ali and Suffian FJJ with Azmi LP dissented) in the Federal court decided that the application of *Abdul Fata* and *Fatuma* was invalid by the act of the parties who are estopped since they had at the outset undertook to follow the fatwa of the Mufti: The fatwa was contrary to the findings made in *Abdul Fata* and *Fatuma*. However, it is interesting to note the opinion of Ali FJ in regard to the very jurisdiction of the civil court on the subject matter (*wakaf*). According to Ali FJ, the civil court (High Court) should have no jurisdiction on *wakaf*. In regard the law of *wakaf* and position of the civil court having exercised its jurisdiction on it, his lordship made up his opinion on the following grounds:

- (1) The court is duty bound to propound local law, following the decisions in *Ramah binti Ta'at v Laton binti Malim Sutan*⁷⁹ and *Patimah binti Haniz v Haji Ismail bin Tamim*.⁸⁰ These cases held that the court is bound to propound local law. Local law here means the fatwa of the Mufti. This fatwa at that time bound all Muslims in Terengganu on matters relating to Islamic Law pursuant to ss 20⁸¹ and 21⁸² of the Terengganu Administration of Islamic Law No 4 of 1955;

⁷⁷ *Abdul Fata Mohamad Ishak v Rasamaya Dhur Chowdhuri* (1894) LR 221A 76.

⁷⁸ *Fatuma binti Mohamad bin Salim Bakhshurwen and anor v Mohamed bin Salim Bakhshurwen* (1952) AC1.

⁷⁹ (1927) 6 FMLSR 128.

⁸⁰ (1939) MLJ 134.

⁸¹ Section 20(1) of the Trengganu Administration fo Islamic Law Enactment No. 4 of 1955: 'Any person, Court, Civil Court, Department or Institution, may, by letter addressed to the Commissioner requesting the issue of a fatwa or ruling on any point of Islamic Law, or doctrine, or Malay Customary Law'.

⁸² Section 21(3): 'Any ruling shall, if the Majlis so determines or if His Highness of Sultan so directs, be published by notification in the Gazette and shall thereupon be binding on all Muslims resident in the State: Provided that a fatwa on Malay custom shall be binding only on Muslims of the Malay race resident in the State'

- A (2) The fatwa of the Mufti binds the court as stated in s 20(1),(3)⁸³ and s 21(3) of the Trengganu Administration of Islamic Law Enactment No 4 of 1955; and,
- B (3) The provisions in s 4 and 25 of the Trengganu Administration of Islamic Law Enactment No 4 of 1955 which, according to Ali FJ, conferring the prevailing jurisdiction on the civil court, over the court of Kadhi (Islamic court) were only served as general provision. These provisions were subject to the specific provisions namely s 20(1)(3) and s 21(3) of the same Enactment. Thus, the respondents were precluded from challenging the validity of the *wakaf* because an authoritative ruling binding on them had been given by the Mufti and thus the civil court had in the circumstances no jurisdiction to hear the cases.
- C

Nonetheless, the rest of the above cases did not follow *Tengku Mariam*.

- D Instead, these cases, contrary to *Tengku Mariam*, recognised that special *wakaf* — *wakaf* made in favour of the descendant of the deceased or certain named donee was valid. The grounds of judgment, were that, the States' Administration of Islamic Law Enactments specifically provide that *wakaf* shall be governed by Islamic law and this was reinforced by the provision in the Civil Law Act 1956, in particular s 3 that the application of English law was ousted if written law on a particular issue had been available or Islamic law was specifically be the governing law on certain issue, thus, exempting the matter from being subject to English law.
- E

- F As far as the court's having jurisdiction on *wakaf* is concerned, it is clear that *wakaf* can be brought to either the civil court or the Syariah court. However, the limitation on the Syariah court was that the parties must be Muslims. This condition is succinctly stated in the various provisions of the States' Administration of Islamic Law Enactments for examples, s 45(3) of the Selangor Administration of Muslim Law Enactment 1952, s 48(1) of the Kelantan Council of Religion and Malay Custom and Kathis Courts Enactment 1953, s 25(1) of the Trengganu Administration of Islamic Law Enactment, 1955, s 37(3) of the Pahang Administration of the Law of the Religion of Islam Enactment 1956, s 40(3) of the Malacca Administration of Muslim Law Enactment 1959, s 40(3) of the Penang Administration of Muslim Law Enactment 1959, s 41(3) of the Kedah Administration of Muslim Law Enactment 1962 and s 11(4) of the Perlis Administration of Muslim Law Enactment 1965 and the blanket provision of List II(1) of the Ninth Schedule to the Federal Constitution, which reads as follows:
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- I 83 Section 20(3): 'The Mufti and the Majlis respectively shall consider every such request submitted to them and shall, unless the point referred be considered to be frivolous or for other reason ought not to be answered, prepare a ruling thereon. The Mufti may in preparing his ruling consult the Committee but shall not be obliged to accept their advice'

Except with respect to the Federal Territories of Kuala Lumpur and Labuan, Islamic law and personal...*wakaf*...the constitution, organization and procedure of Syariah courts which shall have jurisdiction *only over persons professing the religion of Islam*...the determination of matters of Islamic Law...'

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Sahul Hamid and *Haji Hassan* cases were dealt with by the syariah courts. As regards other cases (*Tengku Mariam*, *Haji Embong*, *Re Dato Bentara Luar* and *Tengku Abdul Kadir*) none of the parties objected to their cases being brought to the civil courts notwithstanding that they are Muslims.

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Cases after the Constitutional Amendment on Art 121 viz Art 121(1A)

The cases that had been decided during this period were:

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- (1) *Penang Religious Council v Isa Abdul Rahman & Anor*,⁸⁴
- (2) *G Rethinasamy v Religious Council of Penang*,⁸⁵
- (3) *Shaik Zolkaffly bin Shaik Natar & Ors v Religious Council of Penang*,⁸⁶
- (4) *Barkath Ali bin Abu Backer v Anwar Kabir bin Abu Backer & Ors*,⁸⁷ and,
- (5) *Tegas Sepakat Sdn Bhd v Mohamed Faizal Tan*.⁸⁸

D

By virtue of Art 121(1A), it is literally understood that matters within the jurisdiction of the Shariah court's shall not be heard and decided by the civil courts. Again, it is repeated that the matters that fall under the jurisdiction of the Shariah courts are that specifically stated in the states' administration of Islamic law enactments⁸⁹ as specified under the List II(1) of the Ninth Schedule to the FC (State's list). However, based on the above five cases, notwithstanding that all parties are Muslims, the civil court still exercised jurisdiction over *wakaf* cases. This is because, the Syariah court did not have the power to hear and pass orders or directions involving peripheral relief such as injunction, vacant possession, damages, interest, costs, dealing on issue of estoppels, declarations, vesting orders etc. These reliefs are specifically given to the ordinary civil court, in particular the High Court, via the Specific Relief Act, Civil Law Act and Rules of High Courts and Subordinate Court. Further, there is no corresponding statute and legislation that conferred the Shariah court with the power to issue such relief. In the result, the law that is English based was invoked to settle the

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⁸⁴ [1996] 2 MLJ 244.

⁸⁵ [1993] 2 MLJ 166.

⁸⁶ [1997] 3 MLJ 281.

⁸⁷ [1997] 4 MLJ 389.

⁸⁸ (JH (1415) Jld. Ix Bhg. II).

⁸⁹ For example s 48(2)(b)(vii) of the Penang Administration of Islamic Religious Affairs Enactment 1993, s 9(2)(b)(vii) of the Kedah Syariah Court Enactment 1993 and s 46(2)(b)(vii) of the Federal Territories' Administration of Islamic Law Act 1993.

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- A issue, and the civil courts, when deciding disputes or issues involving Islamic law on *wakaf* were aided by expert evidence.

B It is worthwhile to look into, ponder and study the arguments put forth and the decisions made by the civil court in respect of its jurisdiction on '*wakaf*' in *Shaik Zolkaffily* case. This case is important as it looked into the 'fate' of the Shariah court to exercise jurisdiction over matters specifically spelt out in the State Enactments and the Federal Constitution as well as reinterpret and revitalise its special and exclusive jurisdiction over such matters without any interference from the civil court as enjoined by Art 121(1A) of the Federal Constitution.

C *Shaik Zolkaffily bin Shaik Natar & Ors v Religious Council of Penang*.⁹⁰

D The facts of this case are as follows: The plaintiff claimed that they were the trustees and the beneficiaries of the estate of the deceased (Sheik Eusoff bin Sheik Latiff). They sought, *inter alia*, for a declaration that some lots of land be reverted to the estate of the deceased, further order that vesting order be made to the plaintiffs as the trustees of the deceased or in the alternative damages and an injunction to restrain the defendants and its agents or servants from disposing, interfering or otherwise dealing with the lands until final disposal of the action. The grounds of the plaintiffs' claims were that

E the deceased had left a will dated 30 December 1892 and grant of probate of the estate of the deceased was extracted and granted on 22 October 1894 to the widow of the deceased, who also had died. According to the plaintiffs, the will contained the wish of the deceased that upon his death, his estates would be held in trust for the benefits of his widow and his son and daughters (all were eight). Further, according to the will, the estate should

F reserve as a '*wakoff*' (*wakaf*) during the 21 years period from the demise of the last survivor of his children. According to the plaintiffs, the deceased's children all had died and the said 21 years had lapsed. Thus, accordingly the plaintiffs wanted back the estates (lands) and to hold the land as trusts. Unfortunately, the defendants failed to adhere to their request. Thus, the

G plaintiffs commenced the action against the defendants seeking the said relief. The defendants in their defence contended that, *inter alia*, the High Court (civil court) has no jurisdiction to try the claim and according to the Penang Administration of the Religion of Islam Affairs Enactment 1993 (Enactment No. 7 of 1993) ('1993 Enactment'), all *wakaf* and trusts in Penang and all mosques together with immovable properties erected on

H them are vested in the Council. Secondly, by a deed of settlement No. 84/1980 dated 26th June, 1980 the deceased had made a confession that the said land shall be '*wakafkan*' as a cemetery for the deceased, his family and

I ⁹⁰ Initially this case was brought to the High Court of Penang, reported in the MLJ with the citation [1997] 3 MLJ 281. Later the appellant appealed to the Court of Appeal which also rejected their appeal — see [2002] 4 MLJ 130. Finally the case was brought to the Federal Court which reversed the decisions of the lower courts — see [2003] 3 CLJ 289.

for persons professing Islamic faith in Penang. On this, the defendants negated that the deceased had ever made a will as contended by the plaintiffs. The defendants filed a summon to strike out the plaintiff's statement of claim pursuant to order 18 rule 19(1)(a) of the Rules of the High Court 1980 and under the inherent jurisdiction of the court. The issue raised by the defendant's counsel was whether the High Court (Civil court) has jurisdiction to try and hear issues relating to *wakaf*? The judge (Jeffrey Tan J) interposed that once the defendant had filed a conditional appearance, the defendants had waived any irregularities and is a submission to the jurisdiction of the court. The judge referred to *Tengku Ali ibni Almarhum Sultan Ismail v Kerajaan Negeri Terengganu Darul Iman* [1994] 2 MLJ 83 and 10 Halsbury's Laws of England (4th Ed) para 718. On this structure, the same question resurfaced again, viz whether the High Court has the jurisdiction to entertain the case, which involved *wakaf*, a matter which is exclusively given to the Shariah court? According to the judge, the jurisdiction of the Shariah court is given by the state laws, or for the Federal Territories, by an Act of Parliament, over any matter in the State List (List II) of the Ninth Schedule to the Federal Constitution. However, according to the judge, if the case-law does not confer Shariah court any jurisdiction to deal with any matters in the State List, the Shariah is precluded from dealing with the matter and jurisdiction cannot be derived by implication. The problem arose, where *wakaf* is also being regarded as falling within the jurisdiction of the Shariah court pursuant to the List II and s 48(2)(vii) of the Penang 1993 Enactment. However, the judge rejected the contention of the defendant's counsels on the following lines:

- (1) There are several cases before this case which had adjudicated matters which in the preliminary were brought to fall within the jurisdiction of the Shariah court, yet the civil court could still adjudicate the same. The cases are *G Rethinasamy*, *Lim Chan Seng*, *Barkath Ali* and *Isa Abdul Rahman*;
- (2) The Shariah court has no jurisdiction to adjudicate this case by reasons that there is no jurisdiction granted to the Shariah court to grant the declaration, the vesting order or in the alternative relief, the jurisdiction to adjudicate and interpret wills and deeds of settlement. These jurisdictions are only exclusively given to the civil court.

Dissatisfied with the above decision, the appellants appealed to the court of appeal.⁹¹ However, their appeal was again rejected by the court of appeal on the grounds similar to that of the judge in the High court. However, when the case was brought for further appeal to the Federal Court, the Federal Court overruled the decisions made by the High Court and the Court of Appeal to the effect that the Syariah Court does have the jurisdiction to hear the matter (*wakaf* and Islamic wills) notwithstanding that there is no express provision in the Penang Enactment 1993 nor specific legislations that grant

⁹¹ *Majlis Ugama Islam Pulau Pinang lwn Shaik Zolkaffly bin Shaik Natar dan lain-lain* [2002] 4 MLJ 130.

- A the Shariah Court the power to grant specific relief such as declaration, the vesting order or in the alternative relief, the jurisdiction to adjudicate and interpret wills and deeds of settlement, following the ratio of Abdul Kadir Sulaiman, J in *Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1998] 1 MLJ 681, which emphasised the 'wider/liberal approach or subject matter approach' in looking into the jurisdiction of the
- B Shariah court in light of the constitutional list II (State List) which gives 'inherent power and jurisdiction' to the state, which would eventually include the Shariah court, to invoke Islamic law, and further his lordships agreed with the opinion of Abdul Kadir Sulaiman J, that 'the fact that the plaintiff may not have his remedy in the Syariah court would not make the
- C jurisdiction exercisable by the civil court'. Whilst the opinion of Harun Hashim SCJ in *Mohamed Habibullah v Faridah bte Dato' Talib* [1993] 1 CLJ 264, which adopted the 'narrow approach or remedy approach' whereby, if there is no statutory provisions granting the Shariah court with power to exercise any specific relief remedies, notwithstanding that the matter falls exclusively within the Syariah court's purview such as *wakaf* or wills, the
- D matter would still be under the civil court's jurisdiction.

Conclusion

- E Islamic law has been well entrenched in the Malay Archipelagos since the 13th century according to records and scholars is not disputed.⁹² *Wakaf* is believed to have been practised by the early Muslims of Malaya since the coming of Islam, and the institutions which resolved disputes matters pertaining to *wakaf*, normally was not the court as we know now, but by the teachings and religious edicts/decrees given by the Islamic experts — an open court. After the coming and intervention of the British in the middle of 1800
 - F in particular after the enforcement of the Civil Law Ordinances and Enactments into the Malay states, the administration of justice was made on the advise of the British Residents/Advisors, on which the advise given was binding on the rulers except pertaining to the Malay customs and Muslim religion. However, evidence indicated that their advice, by and large, encroached upon the Muslim religion as well, for example on *wakaf* in *Ashbee*
 - G (1887) where the English law on trust was applied by the civil courts even though the law of the land applicable to *wakaf* in Johore at the time was Islamic law. It was 100 years later that the law applicable reverted to Islamic law. However, the forum was officially still the civil courts not Islamic law courts, even though, provisions provided that *wakaf* shall be under the Islamic Law courts' jurisdiction. After independence, similar policy was
 - H adopted. However, by early 1990s, the insertion and amendment to the Federal Constitution, theoretically, the Islamic law courts could make a comeback by fully stretching its muscle in their own jurisdiction without intervention by the civil courts, yet, it was otherwise, in that some matters for instance *wakaf*, even though, is within the Islamic courts' purview, the civil
- I 92 But even that some scholar such as Hamka opined that Islam was brought to this part of the world earlier than that, viz since the 7th century. See *infra* at foot note 3.

courts continued to exercise jurisdiction on it. It is indeed true that some *wakaf* cases had been dealt with by the Islamic law courts, but the judgments of the civil courts seem to suggest that there are two forums capable of hearing matters on *wakaf*, thus negating the significance and importance of Art 121(1A) of the Federal Constitution. Before the landmark case decided by the Federal Court in 2003 in *Shaik Zolkaffly*, none of the above decided cases, except in *Sahul Hamid & Anor v Majlis Ugama Islam, Negeri Sembilan & ors* and *Haji Hassan v Nik Abdullah & Ors*, had the Islamic Law Court been held as the proper forum to decide *wakaf*. Such attempt is far from enough in view of the constitutional amendment made to Art 121 of the Federal Constitution: Art 121(1A) gives exclusive jurisdiction and power to the Islamic Law courts to try and hear their own matters without interference from the civil courts. According to Ahmad Ibrahim, this is partly because there is no specific legislation on *wakaf* either passed by the state legislative council or by Parliament, which could define and bestow on the Islamic Law courts the jurisdiction to adjudicate *wakaf*.⁹³ Thus, on this melancholic and handicapped status, the Islamic Law court has no power and jurisdiction to hear and determine issues on *wakaf*. This is because, albeit *wakaf* falls within the jurisdiction of the Islamic Law court pursuant to the respective states' Administration of Islamic Affairs Enactments⁹⁴ and List II of the 9th Schedule to the Federal Constitution, yet based on the decided cases, *wakaf* is still regarded by the civil court as one type of trusts (*amanah*) which is subject to Trustee Act 1949. Only the High Court of Malaya and the High Court of Borneo (civil courts) are conferred the 'permission' to adjudicate *wakaf*. This finding could have been easily and successfully challenged in view of the fact that *wakaf* falls within state matters and for which if there are *wakaf* laws enacted by the state legislative assembly (which they are empowered to do) empowering the Islamic Law courts with the jurisdiction, the Islamic Law court would have the exclusive jurisdiction to hear and determine matters relating to *wakaf*, thereby, excluding the jurisdiction of the civil courts once and for all. Any attempt by the civil courts to assume jurisdiction would in that case be *ultra vires* the Constitution. Moreover, the NLC clearly provides that its provisions shall not apply to *wakaf*. The Civil Law Act lends support to this view that the application of English law shall be applied only in so far as it does not come into conflict with the local customs and Islamic law, hence excluding outrightly English charitable trusts... It is suggested that the Islamic law court should be the exclusive forum to hear and deal with *wakaf*, provided that all parties are Muslims, so as to give effect to the Art 121(1A) for otherwise these provisions would be nugatory and a mockery to the provisions in the Federal Constitution and the respective states' enactments on the administration of Islamic Law.

The decision and stance of the Federal Court in *Shaik Zolkaffly* should make it clear that the Shariah court is the proper forum to adjudicate *wakaf*, provided the parties are Muslims. Matters which exclusively fall within the

93 Professor Tan Sri Datuk Ahmad bin Mohamed Ibrahim, *Kedudukan Undang-Undang Islam di Malaysia* (translated: The Position of Islamic Law in Malaysia), JH (1418) H, Jilid xi bhg II, p 128.

94 For instance, s 48 of the Penang Administration of Religion of Islam Affairs Enactment-1993.

- A Shariah courts' matters as expressly spelt out in the State Administration of Islamic Law Enactment and the state list under the Federal Constitution List II, shall be adjudicated by the Shariah court, notwithstanding that the Shariah Court lacks the power to issue specific relief such as to issue declaratory order, injunctions etc.
- B It follows that in order to consolidate and strengthen the development and the free exercise of the Shariah Court in Malaysia over its own matters, it is suggested that a specific legislation be passed by the legislature in Malaysia under their respective Administration of Muslim law Enactment providing the Shariah court with the necessary power and jurisdiction to grant and issue such aforesaid reliefs. In relation to this, it is suggested that it is high time that prevailing and existing legislations such as the Court Judicature Act 1964,⁹⁵ Civil Law Act 1956,⁹⁶ National Land Code 1965, Rules of the High Courts 1980,⁹⁷ Rent Controlled Act 1976,⁹⁸ Local Government Act 1976⁹⁹ or even the Federal Constitution¹⁰⁰ be 'tuned' to accommodate the need to equip the Shariah court with power to determine and hear matter involving *wakaf*, and to generally, facilitate the due functions of the Shariah
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95 This act, it is submitted, must also mention on the existence of the Shariah court and define its jurisdictions.

96 The provisions in this act which impose on the civil courts the duty to apply laws of England as administered in England at 7 April 1956 (for West Malaysia) or 1 December 1951 (for Sabah) and 12 December 1949 (for Sarawak) must be amended so as to allow Islamic law or at least Malaysian common law to be used. Even, the provisions in this act, it is submitted, are not fully adhered to nor comprehended by the civil courts in Malaysia in that in most cases, until to date, reliance on the English cases and laws is made even all of these laws had been decided and adopted after 7 April 1956 or 1. December 1951 or 12 December 1949. Accordingly, in order to legitimise this policy, the civil courts regard these laws to be 'persuasive' which in fact actually 'binding' on the cases tried before them. Thus, is this not unconstitutional nor void either?

97 The provisions in this rule which confers jurisdiction to the civil court to have the power to issue declaratory order and other orders must not in anyway prejudicial to similar judicial exercise by the Shariah courts so as to shackle the Shariah court's judicial administrations and executions.

98 Most of the wakaf properties in Malaysia are subject to this act, which restricts the ceiling rate of rental payment. Most of the rents charged were too low. This would not give much revenue to the Religious Council. See Ghazali bin Eusoff, *Pentadbiran Waqaf Pengalaman Pulau Pinang*, Persidangan Penyelarasan Undang-Undang Syarak/ sivil Kali Ke-VIII, 3-5 November, 1995, Organised by Bahagian Hal Ehwal Islam, Jabatan Perdana Menteri and Kerajaan Negeri Pulau Pinang, pp 16 and 26.

99 According to this Act, the assessment fee charged on the wakaf properties are too high and add up with low rental payment received, it would render the wakaf properties not viable and economical for the Religious Council to administer. More so could the revenue collected from the rental premise could be distributed to the Muslim public. See Ghazali bin Eusoff, *Pentadbiran Waqaf Pengalaman Pulau Pinang*, Persidangan Penyelarasan Undang-Undang Syarak/ sivil Kali Ke-VIII, 3-5 November, 1995, Organised by Bahagian Hal Ehwal Islam, Jabatan Perdana Menteri and Kerajaan Negeri Pulau Pinang, pp 17, 18 and 26.

100 Article 160: it is submitted that it must include 'Islamic Law' as well for clearance. However, the existing definition in Art 160 on the definitions of 'law' and 'written law' are not exhaustive, in which it is submitted that it would include Islamic Law as well as this law can also be regarded as 'usages and customs' applicable in the Federation.

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