WAQF HISTORY AND LEGISLATION IN MALAYSIA: A CONTEMPORARY PERSPECTIVE

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ABSTRACT

Waqf (Islamic endowments) is one of the most important socio-economic institutions in Islam. It falls under the category of sadaqah (charity) and is recurring in nature. The jurisdictions (shari’ah) for waqf are derived from the Al Qur’an and the Sunnah of the Prophet (peace be upon him). There are several types of waqf namely waqf khayri (general), waqf fi ahli (family), waqf mushtarak (mixed), waqf istibdal(exchange) and cash waqf or waqf share. All involved immovable properties except for cash waqf or waqf share where the cash is endowed as waqf. Only waqf fi ahli (family trust) is not available in Malaysia. Waqf falls under the state jurisdiction as stated in the Federal Constitution of the country that all Islamic matters is under the state, only Islamic matters in the Federal Territories are under the Federal Government. Although Malaysia was recently announced as one of the Islamic state, it practices a dual legal system i.e. the common law and the shari’ah law. The paper also discusses a few cases in waqf to get a clear picture of the problem when the civil law clashes with the shari’ah law. The study hopes that the current legal framework is improved to be more compatible with the Islamic shari’ah especially in waqf legislations.

Keywords: cash waqf, mutawalli, sadaqah, Shari’ah, waqf, waqif

1. Introduction

It is very important for any Islamic study that the source or authority be discussed and reiterated to ensure the body of knowledge is within the shari’ah framework, otherwise the objective of such studies would not be considered legitimate in Islamic scholarship (Yaacob, 2006). Having said that, the sources of the waqf are derived from the Al Qur’an and the Sunnah
(ahadith) of the Prophet (peace be upon him), which is presented in the next section. Al Qur’an and Sunnah of the Prophet (peace be upon him) is the primary source of the shari‘ah while the secondary source is derived from human reasoning and interpretation (Ijtihad) by Islamic jurists that is Ijma’ (consensus among the ulama’) and Qiyas (views of individual jurists) (Ahmad Ibrahim, 2000).

Waqf is different from zakat in the sense that zakat is compulsory and waqf is voluntary. Zakat beneficiaries are clearly mentioned in the Al Quran (the eight asnaf or category). Where recipients of waqf funds are not clearly stated; the purpose of waqf should be for any pious purposes, as long as it does not contravene the shari‘ah. In the past, waqf properties are used for education, healthcare and financing of public amenities. Salaries of teachers are paid using the waqf fund. Students are given scholarship to pursue higher education. Cost of medicine and healthcare are also taken care with the fund (Nahar and Yaacob, 2011).

The paper is organized as follow: The next section will discuss the shari‘ah of waqf. Types of waqf are presented in Section 3. Section 4 presents History of waqf in Malaysia and Section 5 discusses some legal issues pertaining to waqf in Malaysia. Section 6 concludes the paper.

2. Shari’ah of Waqf

Although charitable endowments have been practiced by earlier civilizations i.e. Mesopotamia, Greece and Rome, there was no comprehensive legislation governing charitable endowments unlike the Islamic jurisdiction on waqf (Zain, 1982). Even though there is not a single verse in the Qur’an that deals specifically with waqf, Islamic scholars and jurists (the four prominent schools of thought, Shafie, Hanbali, Maliki and Hanafi) have agreed that a few of the following verses are to be referred to as the source of the subject matter (Hassan, 1984). In Surah Al Imran, verse 92, Allah (s.w.t.) says, “By no means shall ye attain righteousness unless ye give (freely) of that which ye love; and whatever ye give, of a truth God knoweth it well”. The verse states that Muslims will not be rewarded with goodness unless they are willing to give their best to others. The gift must be of value and which is dear to the giver. The perfect example of the value of a gift may be learnt from the history of the sons of Prophet Adam (a.s.), Qabil and Habil who prepared sacrifices or qurban in the name of Allah (s.w.t.). One gave some defective items and was rejected, whereas the other gave the most healthy and beloved animals and was
accepted by Allah (s.w.t.). A good Muslim should give anything that is good, useful and valuable to achieve the pleasure of Allah (s.w.t.) (Imtiaz, 1988).

In a verse of Surah Al Hajj, (77), “O ye who believe! Bow down, prostrate yourselves, and adore your Lord; and do good; that ye may prosper”. Allah (s.w.t.) commanded human beings to do good things (waqf will provide benefits for the maslahah, thus it is considered a righteous deed) only then will mankind live in prosperity. So, doing good things is also considered as an act of worship or ibadah towards Allah (s.w.t.). Allah (s.w.t.) further says in Surah Al Nahl, verse 97, “Whoever works righteousness, man or woman, and has Faith, verily, to him will We give a new Life, a life that is good and pure and We will bestow on such their reward according to the best of their actions”. Allah (s.w.t.) will reward all believers, irrespective of man or woman handsomely for all their good deeds. It can be inferred here that the act of waqf is not constrained to Muslim men but is also open to women and verily Allah (s.w.t.) is the Most Gracious and the Most Merciful.

Another motivation is a hadith related by Abu Da’ud, where the Prophet (peace be upon him) says, “Paradise is the home of the generous” (Ghazi and Ghazi, 1991). Muslims are encouraged to give a portion of their wealth to the poor and needy not just in terms of zakat but for other good causes such as waqf in the form of building of Masjid (Mosque), hospitals and schools. Consequently, such Muslims will be rewarded with Jannah (paradise) as their home in the hereafter (Ghazi and Ghazi, 1991). There is also the hadith of Umar who acquires a piece of land in Khaibar and then goes to see the Prophet (peace be upon him) about his new asset. He tells the Prophet (peace be upon him) that he has acquired a good piece of land in Khaibar and he asks what he should do with it. The Prophet (peace be upon him) tells him to keep the land if he likes it. However, if he held the land for charity (to sadaqah the usufruct) it is much better for him and Allah (s.w.t.) Knows best. So, Umar declared the piece of land as a waqf and denoted part of the usufruct for his descendants and another part for charities (Hadith narrated by Al Bukhari, Kitab 55 Chapter 28 in Sahih Al Bukhari; Baharuddin, 1998; Mahmood, 1999; Zain, 1982).

The practice was then followed by other sahabah like Abu Thalhah as narrated by Anas ibn Malik, ‘Abu Thalhah was one of the richest sahabah who owned an exquisite date garden called Birhaaa. The Holy Prophet (peace be upon him) used to go there for a drink from its cool and clean water. Then, came the revelation of the verse, “you will not attain complete
righteousness, before you give some of your beloved belonging”. Abu Thalhah went to see the Prophet (peace be upon him) and declared the Birhaa garden as a sadaqah. The Holy Prophet (peace be upon him) was really happy on hearing him and asked him to sadaqah the garden to his children and relatives’ (Hassan, 1984; Imam Malik, undated, hadith no. 1828).

Therefore, as mentioned above, one’s wealth can be rightfully spent on one’s children and relatives; and considered a good deed, through the establishment of waqf. Abu Bakr, Muaz ibn Jabal and Saad ibn Waqas were among the sahabah who had also established earlier waqf (Hashmi, 1984). Hasanuddin (1998) in his study argues that the institution of waqf developed in the first hijri year and gained its legal form in the second hijri year. There are several types of waqf. Two of the types will be discussed in the following paragraphs. One is in relation to spending towards one’s family, and other is regarding one of the earliest kinds of waqf.

The following ahadith are related to the waqf fi ahli (family waqf) or the waqf al awlad (waqf for children). This type of waqf is neither practiced nor legal in Malaysia. It has also been abolished in India, Algeria and many other Muslim countries due to foreign occupation. Islam regards highly those who are excellent in spending on their own family and servants, and considers it a sin if one neglects or withholds their subsistence. Abu Huraira reported that Allah’s Messenger (peace be upon him.) said: of a dinar you spend as a contribution in Allah’s path, or to set free a slave, or as a sadaqah given to a needy person, or to support your family, the one yielding the greatest reward is that which you spend on your family (Sahih Muslim, hadith no. 2181). It is also reported that Allah’s Messenger (peace be upon him) said: The most excellent dinar is one that a person spends on his family, and the dinar which he spends on his animal in Allah’s path, and the dinar which he spends on his companions in Allah’s path (Sahih Muslim, hadith no. 2180). Thus, the practice of waqf is considered a sadaqah, which is highly valued by Allah (s.w.t.) and is confirmed to receive the greatest reward as mentioned by the Prophet Muhammad (peace be upon him).

Hence, the first waqf in the Islamic jurisprudence was set by the Prophet Muhammad (peace be upon him) himself who built the Masjid Quba’ in the hijrah to Madinah. The Masjid Nabawi followed this, which is also in Madinah (Hasanuddin, 1998). Meanwhile, the first waqf khayri is the waqf of seven gardens by a sahabah, a Jew named Mukhayriq who was killed in the battle of Uhud. He made a will that in the event of his death; all his property would go to Prophet Muhammad (peace be upon him). The Holy Prophet (peace be upon him) accepted the
waqf and named Mukhayriq as the best of Jews (Mohd Daud, 1999). Moshe (1998) provides a comprehensive review of the history of the earlier waqf, tracing the sources and events, which led to most waqf by the earlier Muslims in the Holy Prophet’s (peace be upon him) era. Moshe (1998) also argues that Abu Bakr pioneered the waqf fi ahli by declaring his house as a waqf for his descendants.

After introducing the most benefic and the earliest types of waqf, the elements of waqf are discussed. Four conditions or elements must be fulfilled (1) Waqif – the person who will be the endower or the founder: Waqif must have attained the age of baligh and be of sound mind, the act of doing waqf must also be done voluntarily; (2) Mauquf - the property or capital – existing property or capital must be completely owned by the waqif and be free from any encumbrances. Yedyyildiz (1996) asserts that in order to dedicate a property for a waqf, it must be under the absolute ownership of the waqif, in Islam, earning and owning a property relates to the human effort and work; (3) Mauquf ‘alaih - beneficiaries – whether family members, descendants, or the poor and the public (Ummah), the recipients must not be of, say, the enemy of Islam; and (4) Sighah - ijab and qabul of waqf (offer and acceptance) (Alabij, 1989; Nik Mohd Zain and Azimuddin, 1999; Syed Othman, 1986; Yaacob, 2006; Zain, 1982).

The waqf will be administered and managed by the mutawalli (deemed as the manager of the waqf) appointed by the waqif. Mutawalli must have the following conditions (1) sound mind; (2) baligh; (3) amanah; and (4) has the ability to administer and manage the waqf property. All of these conditions must be fulfilled otherwise a new mutawalli has to be appointed to have a better supervision of the waqf property (Syed Othman, 1986).

The Indian Waqf Act, 1995 defines mutawalli as “any persons appointed either verbally or under any deed or instrument by which a waqf has been created or any custom or who is a naib-mutawalli….or any other persons appointed by the mutawalli to perform duties of a mutawalli…” (Hasanuddin, 1998). The act (section 44) required every mutawalli to prepare an annual budget for the next financial year showing the estimated receipts and expenditures during that financial year and submit it to the Waqf Board for approval. Imtiaz (1988) asserts that it is the moral and religious duties of the mutawalli to manage, maintain and improve the waqf honestly and efficiently; otherwise they are liable for any misconduct in a court of law.

At the early stage of the developments of waqf regulations, the founder is allowed to designate himself and/or his family and descendants as the trustee and/or beneficiaries of his
waqf. Only after the extinction of his line would the revenues are allocated to certain pious purposes (Cizakca, 1998; Hoexter, 1998; Kahf, 1999; Van Leeuwen, 1999). In Malaysia, the manager of the waqf is only rendered valid by the law (for example, the Federal Territories State Islamic Enactments, 1993) to be the SIRC of each state. The waqf property is not to be sold, transferred nor inherited because the *waqif* has relinquished his claim on the said waqf property. Once the property is surrendered to waqf, it will become perpetual, it remains so until the Day of Judgment, and no one can change it later on. The principle of perpetuity is protected in the *Shari‘ah* by a series of rulings such as the prohibition of disposition of the waqf assets through sale and other contracts. Please refer to Kahf (1999) for further elaboration on the principle of perpetuity of waqf properties. Next, the types of waqf are discussed.

### 3.0 Types of waqf

According to Kahf (1998), there are three types of waqf. One is the pure religious waqf, for example, the property used for worship such as *Masjid* or *musalla*. Second is the philanthropic waqf i.e. a school or a hospital, and third, the family (*waqf fi ahli*) or posterity waqf (*waqf al awlad*). The third is argued as a pure Islamic invention, which started from the companions of the Prophet Muhammad (peace be upon him) and prospered during the reign of the second caliph, Umar Al Khattab (Kahf, 1999).

Syed Othman (1986) also divided the waqf into three categories. The first category is *waqf khayri* or general waqf (for public purposes). This waqf is dedicated to supporting the general good and welfare of the poor, the needy, public utilities such as schools, colleges for education, scientific research, shelter houses for orphans and wayfarers and hospitals which provide free services for the sick and poor. In other words, if the recipients of the benefits are the public, it will be classified as *waqf khayri* (general waqf) (Baharuddin, 1998; Hassan, 1984). The waqf deed does not specify specific recipients of the benefit of waqf and it would depend on the administrator of the waqf to distribute the usufructs. It serves the interest of the whole of society or the major part of it (Kahf, 1999). This waqf is said to be in line with the spirit of *ibadah* where the *waqif* will receive the rewards for the good deeds even after he dies as Abu Huraira reported that the Holy Prophet (*peace be upon him*) said “when a man dies, all his acts come to an end, but three; recurring charity (*sadaqah jarriyah*), or knowledge (by which people benefit), or a pious offspring who prays for him”.

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It is argued that the combination of recurring charity and *sadaqah jarriyah* constitute the essence of the Islamic waqf (Cizakca, 1998). Cizakca (1998) further says:

“*Muslims needed an institution that would enable them to perform all three of these good deeds. The institution was the waqf which can, indeed, assure ongoing, recurring charity for many years, even centuries, after the death of the founder; it can finance scholars whose lasting word would benefit mankind for a long period and the sawabs (good deeds) that would accrue to them would be shared by the waqf’s founder who had provided for their sustenance in the first place; finally the management of the waqf can be entrusted to the offspring of the founder so that while, on the one hand careful and loyal management is assured, on the other, the offspring would pray for the deceased for, thanks to his waqf, he or she is not in destitute*” (Cizakca, 1998 p.9)

This waqf may also be enjoyed by the majority of the public and also provides a strong basis for the socio economic condition of the *Ummah* (Syed Othman, 1986). Yedyyildiz (1996) as quoted from ancient words of wisdom encourages the practice of waqf by Muslims:

“The good deeds (sevab) of a person who does the following do not stop and continue until his death: teaching knowledge, bringing water to settlements, digging a well, planting fruit trees, building a Masjid, leaving behind a copy of the Qur’an, and bringing up a child who prays to God for the forgiveness of his mother and father”

The second category is the *waqf fi ahli* (family waqf) or *waqf zurri* (*dhuriyyah*-offspring). Kahf (1999) terms it as private waqf. In India it is known as *waqf al awlad* (waqf for children; singular-*walad* or child). In other words, the beneficiaries are either a specific person or persons characterized by the founder or any other specific persons. This type of waqf is endowed initially upon oneself, one’s children and one’s relatives (Hassan, 1984). It is legal in the *shari’ah* as its origin is from the Holy Prophet (peace be upon him) and his companions. It means that majority of the usufruct (*manfaa’*) of the waqf assets is allocated to the owner, family or/and descendants (Hasanuddin, 1998). However, a certain amount is specifically dedicated
from the usufruct for the public or for general use (Hassan, 1984). When the descendants of the *waqif* no longer exist, the *waqf* usufructs will be given to the distant relatives or will be converted to be *waqf khayri* by the authorities (Kahf, 1999).

Kahf (1999) further argues that this type of *waqf* serves an important social objective as the property left to posterity helps keep them off the social welfare and zakat recipient lists, while the property develops and grows through capital accumulation. He emphasized that in the West, especially in the United States, it is known as a family trust and these trusts receive several tax privileges. On the contrary, this type of *waqf* is banned in most Islamic countries like Egypt and Syria. Meanwhile, in Lebanon it is limited to two generations only and after that it will be liquidated (Kahf, 1999).

The third category is *Waqf Mushtarak* (Combination), which is actually a combination of *waqf khayri* (general *waqf*) and *waqf zurri* (*waqf fi ahli/waqf al awlad*). Usually, under this type of *waqf*, the endower (*waqif*) will specify the target beneficiary (usually the descendants) and later assign the benefit for broader welfare purposes (Hassan, 1984). In this case, *waqf mushtarak* will take the legal conditions from the *waqf khayri* (general *waqf*) and *waqf zurri*. In Malaysia, only the *waqf khayri*, pure religious *waqf* (termed as *waqf khas*) and cash/share *waqf* is available. The existence of *waqf zurri* (*waqf fi ahli, waqf al awlad*) and *waqf mushtarak* is hardly traceable in Malaysia (Abdul Rahim, Mohamad Daud and Yusuf, 1999).

The *waqf* discussed above are the more traditional types of *waqf*. However, they are two more types of *waqf* which are relatively new. They are *waqf istibdal* and cash *waqf*. *Waqf istibdal* happens when there is an exchange of existing *waqf* assets with other assets (may be in another place) or due to certain reasons such as the *waqf* assets becoming unproductive or unprofitable (Yaacob et al., 2012). The property would be sold and the proceeds would be used to buy more profitable assets for the *waqf*. Although warranted, *istibdal* is sometimes misused in some cases (Deguilhem, 2003). Deguilhem (2003) provides some examples in the French Mandate Syria and French-held 19th and 20th century Algeria where individual *waqf* administrators as well as states representatives abused the process of *istibdal* by removing property from *waqf* by putting them in the market for sale. *Istibdal* was commonly practiced by the *waqf* of *haramayn* in Algiers during the years 1700 until 1830 (Hoexter, 1998). It has the sanction from the Hanafi jurists; however, strict regulations are attached to it to avoid misuse or embezzlement. However, the Shafie school of thought does not encourage *waqf istibdal*.  

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Cash waqf is a special type of endowment and it differs from the ordinary real estate waqf in that its original capital, *asl- al- mal* or *corpus* consisted, purely or partially, of cash (Nahar and Yaacob, 2011). The earliest origins of the cash waqf may be traced back to the eighth century. Cash waqf is also known in Europe where real estate foundation is originally in the form of endowment, but, eventually, it became possible to make endowment with movables. Unfortunately, there is a huge gap of knowledge concerning the history of cash waqf from the eighth until the fifteenth century (Cizakca, 1998; Razali, 2004).

Meanwhile, cash waqf is usually formed as a financing method to develop waqf property or to support and build an educational institution (schools or universities) or orphanage houses. The waqf will receive cash instead of property or land and will use it for the financing instead of relying on banks or financial institutions (Sadeq, 2002). In Malaysia, the cash waqf is also known as share waqf (*waqf saham*). The cash endowments are pooled and the money is used for pious purposes such as helping the poor and needy and as educational aids. A few states’ SIRCs (i.e. Penang, Johor, Pahang and Selangor) have this type of waqf. It was found that the financial reporting for cash waqf (especially in Singapore) is better because it has a complete financial statement with a note on the amount spent for the various activities (Nahar & Yaacob, 2011; Yaacob *et al.*, 2012). History of waqf in Malaysia is presented next.

### 4.0 History of Waqf in Malaysia

The institution of waqf in Malaysia is believed to have been in existence for more than eight hundred years (Syed Othman, 1986). It is believed to have started when the Arab Muslim traders brought Islam to the land in the tenth century. The earliest record available is a stone tablet found in Terengganu. It dated from the early thirteenth century, which records the Islamic *shari’ah* presence in previously Malay Federated State (Tanah Melayu) (Ahmad Ibrahim, 2000; Mahmood, 2000, as quoted from Muhammad Salleh (1983), “*Terengganu dari bentuk sejarah hingga tahun 1918* (Terengganu in historical perspective until 1918)”. Religious education is the main factor of waqf being developed in Tanah Melayu, especially in Terengganu. This is evidenced by one of the early nineteenth century waqf deeds by Sultan Umar; the ruler of the state, stating the object of his waqf is to promote education and the dissemination of knowledge to the public (Mahmood, 2000).

During the earlier period, Muslims who wished to waqf their property would go to see the village head or *Penghulu* and they would be the trustee of the waqf. Therefore, no records are
made as it is only based on verbal transactions. Problems occurred when the Penghulu passed away and another person became the Penghulu; the descendants of the deceased sometimes did not declare the waqf property and used them as their private property (Baharuddin, 1998). However, there are no written documents regarding the first establishment of the waqf institution in Malaysia before the nineteenth century as stated above, except for the establishment of the waqf of Masjid Capitan Kling in Penang in 1801, followed by the waqf by a member of the Aceh royalty, also in Penang (Nasution, 2002).

As Malaysia is a federation, in the federal structure, matters of Islamic law are (except Federal Territories) placed in the State List. The Federal Constitution of Malaysia puts Islam as the religion of the federation (Item 3). The Ninth Schedule List II (State List) of the Federal Constitution states the powers of the State (Ahmad Ibrahim, 2000) except for the Federal Territories. In a state that has a Ruler (King), the Ruler is the head of the religion (Islam), while in the case of a state without a Ruler; the Yang Di Pertuan Agong is the head of the religion (Islam). In each state, an SIRC is formed to advise the Rulers on all Islamic matters and each state has enacted its own Islamic legislation. The state Islamic department will enforce all the legislation accordingly. Basically, different states will have a different set of legislations (Ahmad Ibrahim, 2000; Ridzuan, 1994).

As stipulated in the Malaysian Constitution [section 74 (2) and (3)], the religion of Islam has been identified as within the jurisdiction of the state (Abdul Rahim and Goddard, 1998). As mentioned above, in every state, the SIRC was established to administer all the Islamic religious matters. This includes zakat collection and disbursement, and waqf. However, the waqf institution has long been neglected and nearly forgotten by the Islamic community in Malaysia as compared to the other Islamic institutions (Abdul Rahim et al., 1999; Baharuddin, 1998). In the case of waqf, the SIRC in each state is the sole trustee to manage all the waqf assets. However, under the law, the waqif or founder may specify in the foundation deed, the beneficiaries or the purpose of use, or the purpose for which the waqf is created. The SIRC is given the authority and accountability to manage the waqf properties in the interest of waqif as specified in the foundation deed.

Earlier on, the practice of waqf by Muslims in Tanah Melayu was not properly documented. Community leaders who were directly involved with the Islamic affairs such as Qadis, Imams even the head of the village or area or a certain community’s committee i.e. the
Masjid Committee, are appointed to administer and manage waqf (Kamarudin, 1992). They acted as the trustee or the mutawalli until the enforcement of the Islamic enactment by the states. However, many problems arose because of the lack of documentation and lack of accountability of the people responsible (Baharuddin, 1998).

The earlier documents about the waqf practices could only be seen in “Waqf Prohibition Enactment 1911” where the state of Johor introduced written laws regarding this issue. This was followed by the State of Perak which introduced the “Control of Waqf Enactment, 1951”. Other states started much later with their own waqf enactments (Baharuddin, 1998). The following section outlined some of the legal issues pertaining to waqf.

5.0 Legal issues pertaining to waqf

Originally, old provisions in the Malay legislations were influenced by the principles of Islamic shari’ah especially on the land law, and this is evident from the Malacca Sultanate in the fourteenth century. The Portuguese who conquered Malacca in 1511 did not touch the existing Islamic law of the Malays. The same went for the Dutch who colonized Malacca in 1641 and the British from 1795 until 1824 (Ridzuan, 1994).

Although the waqf is under the state jurisdiction, many of the waqf cases are in fact heard by the civil court, and tried based on civil law (common law in the United Kingdom). The judicial structure in the Federal Constitution of Malaysia states that the civil court has higher authority than the shari‘ah court. This creates many differences between the Islamic matters that should only be dealt with by the shari‘ah court, being brought to the civil court and having judges incompetent in Islamic shari‘ah because they are trained in common law (mostly in the United Kingdom) (Abdul Hamid, 2003; Ahmad Ibrahim, 2000). However, we cannot say much in this instance because the Federal Constitution is a secular constitution and though Article 3 (1) provides a clause saying that Islam is the religion of the Federation, it has mentioned nothing on the need to follow the Islamic shari‘ah and principles in the motherland.

Even the first Prime Minister of Malaysia, Tunku Abdul Rahman had insisted that Malaysia was a secular state and his view has been accepted by many of its leaders (Ahmad Ibrahim, 2000). However, the previous Prime Minister Abdullah Badawi provided a rebuttal to Tunku Abdul Rahman’s view by alleging that Malaysia is an Islamic state (Yousif, 2004). He further asserted in May 2005 that Malaysia is a moderate Islamic state, not an extremist or fundamentalist Islamic state. The notions that Malaysia is a secular state basically resulted from
the majority of constitution preparers were non-Muslim (Ahmad Ibrahim, 2000). Furthermore, the current Malaysian land law is based on the English Torrens System of South Africa and Australia. Although not all provisions are adopted, many are in contravention of the Islamic principles of land law according to the Islamic shari’ah especially with regards to waqf land (Ridzuan, 1994). The above facts are taken into consideration as the third objective of this study is to put forward some recommendations for waqf accounting best practices and it may have some legal implications such as the recognition of waqf lands as the waqf assets though the title of the land might not have been transferred yet to the SIRC.

The following three cases clearly demonstrate the superiority of the civil court over the shari’ah court. In Penang SIRC v Isa Abdul Rahman and anor. (1992), (Abdul Hamid, 2003; Ahmad Ibrahim, 2000). The matter concerns a Masjid (mosque), which was built in 1889. The land on which it was built was made a waqf by the owner. The Masjid was later vested in the Penang SIRC as the trustee of all Masjids in the state. The SIRC proposes to demolish the Masjid and erect a building in its place to be used partly for commercial purposes. The respondents claim to have inherited the land from the original landowner and he brought an action for a declaration that the proposal of the SIRC to demolish the Masjid was contrary to the law and the Hukum Syarak; and an injunction was issued to prevent the SIRC from demolishing the Masjid.

The SIRC applied to set aside the writ of summons and the respondent’s claim. The senior assistant registrar of the high court dismissed the application and an appeal to judge was also dismissed. The SIRC appealed to the Supreme Court. The Supreme Court dismissed the appeal and held that the shari’ah court had no jurisdiction to issue the injunction as applied by the respondents and it was clear, therefore, that the claim of the injunction could only be heard by the Civil High Court.

In G. Rethinasamy v Penang SIRC and another, 1993 (Abdul Hamid, 2003; Ahmad Ibrahim, 2000), the plaintiff bought a piece of land next to a Masjid. A portion of the land had been occupied and used for the purposes of the Masjid and a burial ground for a long time. The plaintiff claimed the right of ownership over the whole land, and the defendant claimed that the portion of the land used for the purposes of the Masjid and for the burial ground had become a waqf. 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 estoppels came
within the jurisdiction of the civil court. Although the matter concerns a waqf, which was within the jurisdiction of the *shari’ah* court, this did not preclude the civil court from deciding whether there was a valid waqf as Article 121 (1A) has no provision to state that the civil court cannot make a decision affecting the *Hukum Syarak*.

In Commission of Religious Affairs v. Tengku Mariam (1970) (Abdul Hamid, 2003), the Federal Court held that the civil courts were not bound by the gazetted ‘fatwa’ of the Mufti of Terengganu and followed Privy Council Judgments to hold that the waqf in question was void. Dissatisfaction with decisions of the civil courts arose similar to what happened much earlier in Penang. It can be seen that the provision of the law in Malaysia did not truly separate the civil and the *shari’ah* jurisdiction. Thus, the civil courts using un-Islamic principles differ from the *shari’ah* and are seen to be superior to the *shari’ah* courts. This is in contrast with countries such as Pakistan, where there is a clear juristic division from a series of reforms resulting in the provision that all Islamic matters will be heard only by the *shari’ah* court, for example, on waqf and *zakat* matters. The next section provides the summary and conclusion.

### 6.0 CONCLUSION

The sources of the *shari’ah* on waqf are the verses of the *Qur’an* and the *ahadith* of the Prophet Muhammad (peace be upon him). Some of them are general and some are specific especially when categorizing the waqf as a *sadaqah* (Mohd Daud, 1999). The supplementary source is the *Ijtihad* in the form of *ijma’* and *qiyas* by the Islamic jurists. There are different types of waqf as discussed above; however, not all are practiced in Malaysia for example the *waqf fi ahli*, *waqf al awlad* or *mushtarak* although there is a clear jurisdiction in the Islamic *shari’ah* where the Holy Prophet (peace be upon him) himself instructed his fellow *sahabah* i.e. Umar, to form the said waqf.

Waqf in Malaysia is governed by the states and each state is having its own regulations. As a result, there are some differences between the state’s enactments. It is hoped that with the formation of the Department of Awqaf under the Prime Minister department can help to ‘ease’ the differences and helps the State Islamic Religious Councils to administer and safeguards the waqf properties. Nevertheless, the clash between the secular legal system and the Islamic religion in the country’s legislation is still in existence. Therefore, any changes in the federal constitution for the improvement of waqf law are not easy to achieve as Malaysia is a multi-religion country. However, this paper would like to further argue that the law of the land should
be improved so that it will be more compatible, if not fully, in the case of waqf, to the shari‘ah requirements.

References


