

## CURRENT LEGAL ISSUES CONCERNING *AWQAF* IN MALAYSIA

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*Waqf* falls under the jurisdiction of the Syariah Court according to List II of the Ninth Schedule to the Federal Constitution. This is further entrenched in the Administration of Islamic Law Enactments of the respective states in Malaysia. Nevertheless, from judicial decisions, '*waqf*' is still, until today, being determined by the civil courts. In some judicial decisions, *waqf* issues have been marginalized by the civil courts as they are considered side issues. In consequence, the persons having interest in *waqf* under Islamic law are deprived of their rights. This paper will elaborate on the series of decided cases involving *waqf* in Malaysia, examine the issues raised, and will also analyze the judicial decisions made. Such analysis will assist in formulating a future framework for the management and development of *waqf* lands in Malaysia.

**Keywords: *waqf* in Malaysia – legal issues – jurisdiction and powers of court - judicial decisions – management and development**

### INTRODUCTION

*Waqf* is an important institution in Islam, aimed at achieving social justice through a person ('*waqif*') making his property a charitable endowment for the ongoing benefit of a certain class of persons or the public at large.<sup>1</sup>

The coming of Islam to Peninsular Malaysia in the 14<sup>th</sup> century brought dramatic consequences to this region, particularly to the way of life and world view of its inhabitants. This includes the practice of *waqf* in Peninsular Malaysia.<sup>2</sup>

After Merdeka Day, Islam has again been placed in the highest position, pursuant to provisions in the Federal Constitution.<sup>3</sup> Nonetheless, Islam only finds prominence in the

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<sup>1</sup> *Waqf* is a legacy from the tradition of the Prophet Muhammad s.a.w. when he said: "When the son of Adam dies, all his good deeds come to an end except three: ongoing charity, knowledge from which others may benefit after he is gone, and a righteous son who will pray for him." (*Sahih Muslim*) 'Ongoing charity' in the said hadith is the basis of *waqf*.

<sup>2</sup> Nuarrual Hilal Md. Dahlan, Abdul Rani Kamarudin, *Wakaf in Malaysia: Its Legal Evolution and Development* [2006] 1 ShLR, 81 and Siti Mashitoh Mahamood, *Waqf in Malaysia: Legal and Administrative Perspectives*, University Malaya Press, 2006, 27-38.

rituals and customary practices of the Malays, not in the true sense as it should be (i.e in all spheres of life such as laws, business, administration, economic, politics and government policies). The common law and the laws (common law suited to local needs), passed by the legislature represent the foundations of the law in Malaysia, not Islamic law. Islamic law is limited in its application to family, inheritance and ancillary matters as provided in the Federal Constitution and the respective states' administration of Islamic law enactments.

In the earlier days of the Malay States, *waqf* was normally administered by community leaders such as the *Kadis*, *Imams*, *bilals* and the *penghulus*. After the coming of the British in the 17<sup>th</sup> century, before Merdeka Day, in the Straits Settlements, Federated and Unfederated Malay States, official trustees were appointed, either by the British-led-administration or the states' religious councils, to administer and govern *waqf*. Several laws were passed relating to the administration of *waqf*. These include the Mahommaden and Hindu Endowments Ordinance, Selangor Administration of Muslim Law Enactment 1952, Pahang Administration of the Religion of Islam Enactment 1956, Terengganu Administration of Islamic Law Enactment 1955, Kelantan Majlis Ugama Islam dan Adat Istiadat Melayu Enactment 1938 and the Johore Wakaf Prohibition Enactment 1911.

After Merdeka Day, all *waqf* property falls under the jurisdiction and power of the respective states' religious councils to manage pursuant to the respective Administration of Islamic Law enactments. These enactments include the Malacca Administration of Muslim Law Enactment 1959, Kedah Administration of Muslim Law Enactment 1962, Perlis Administration of Muslim Law Enactment 1963, Perak Control of Wakaf Rules 1959 and Perak Administration of Muslim Law Enactment 1965.

*Waqf* comprises various kinds of assets, including the following:<sup>4</sup>

- 1) Mosques, *suraus*, religious schools, etc;
- 2) Land for commercial or agricultural purposes;
- 3) Land for mosques, *suraus*, religious schools, cemeteries and orphanages;
- 4) Funds for the maintenance and upkeep of mosques, *suraus*, religious schools, etc;  
and
- 5) Commercial and residential buildings.

## THE MEANING OF *WAQF*<sup>5</sup>

*Waqf*, means 'detention' and connotes the tying up of property in perpetuity for the benefit of the public. According to jurist, *waqf* 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 *waqf* may be the general public or a group of people. *Waqf*

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<sup>3</sup> Pursuant to Article 3(1) of the Federal Constitution that makes Islam the official religion of the Federation.

<sup>4</sup> See Siti Mashitoh Mahamood, 45.

<sup>5</sup> 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, Lucknow, 1996, chapter IX.

properties may be immovable or movable. *Waqf* involving lands or houses, are usually used for the settlement of the beneficiaries named or intended by the donor/settlor in his or her *waqf*'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 properties would include things such as books, fruit trees, even bonds, shares, debentures, unit trusts in company and corporate bodies. They 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, these also apply to one's own person and a trained dog. Similarly, if the *waqf* 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 *waqf* donor/settlor. Usually the beneficiaries named are the needy, poor or orphans or even the Muslim public, but sometimes, they may involve special beneficiaries, who might consist of the donor's/settlor's heirs and descendants. The typical practice of the Muslim community in Malaysia on *waqf* is by stipulating that his or her land shall be used to build mosques or for Muslims' burial grounds.<sup>6</sup>

*Waqf* can be effectuated by way of explicit term, for instance 'I make a *waqf* of such a thing to such person/persons'. Likewise, it also can be created by way of implication, by looking at the conduct 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 or inherited. A proprietor/settlor who disposes his property as *waqf*, no longer has ownership over the property because his or her ownership or rights over it ceases immediately after the pronouncement of the *waqf* terms, and is instantaneously divested into the hands of the *waqf* 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 *waqf* is more 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 *waqf* property for the benefits of the beneficiaries named in the *waqf*. If no beneficiaries are stated, this will be determined by the Islamic jurists based on the injunctions of the al-Quran and traditions of the Prophet Muhammad (peace be upon him - PBUH).

## **OBJECTIVES OF THE PAPER**

This paper highlights problems relating to *waqf* as decided by courts in Malaysia. The problems relate to:

- 1) The jurisdiction and power of the courts (civil and shariah) on *waqf*; and
- 2) Other problems affecting vested interests and rights of the muslim public on *waqf*, emanating from the decisions of the courts and administration of *waqf* in Malaysia.

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<sup>6</sup> Syed Khalid Rashid, *ibid*.

It should be noted that there are other types of problems involving *waqf* as explained by a scholar, *viz*<sup>7</sup>:

- 1) The issue of one-third rule of *waqf* assets. Islamic law of *waqf* empowers the creator of *waqf* to dispose the whole of his assets as *waqf*, unless when he decides this during his death illness or by way of will. In the latter situation (during death illness or by way of will), he can only affect it to the extent of a third. Nonetheless, the *waqf* will take effect as a whole if his heirs have given their consent to the remainder. Be that as it may, the provisions in section 61 of the Terengganu Administration of Islamic Law Enactment 1955 lacks the provision in respect of *waqf inter vivos* (the whole *waqf*). Section 61 only specifies that *waqf* can only be made in respect of one third of the property. Similarly, this is the position in section 78(1) of the Administration Islamic Law Enactment 1992 of Perak;
- 2) The National Land Code 1965 (NLC) does not provide specific provisions pertaining to *waqf* lands, compared to special provisions in respect of trusts. The person administering *waqf* has not been included in section 43 of the NLC as one of the receiving parties which the State Authority may dispose land to. This is the main reason that the proprietorship grants of all *waqf* lands have not been endorsed with a title that acknowledges the *waqf*. Thus, the status of *waqf* lands is vague and the possibility of such lands being converted to other purposes by irresponsible parties is very real. If this problem occurs, then the continuation of the fulfillment of the founders' intention will surely be adversely interfered with. This would in turn contradict the perpetuity requirement for the formation of a *waqf* according to Islamic law;
- 3) Although the provisions under Part 12 of the NLC (the Surrender of Title), Part 14 (Transfer), Part 30 (Registration of Statutory Vesting) can be used to create *waqf* land, these provisions are lengthy and contain complicated procedures to create *waqf* and may not guarantee that the intended land will ultimately be taken as *waqf* land;
- 4) The State Authority has the power to grant leases of any land. Nonetheless, to what extent will the proceeds of the lease be applied to the *waqf* purposes, or will be put in the State Government's Consolidated Fund? If *waqf* is to be put under the State Government's Consolidated Fund, this would create uncertainty as to the purpose of the *waqf* itself;
- 5) Pursuant to section 64 of the NLC, the State Authority can revoke a *waqf* land under section 64 category, at any time (as the maximum period for grant of lease under section 64 is 21 years), either in respect of the whole land or part thereof. This also may affect the nature of inherent perpetuity of *waqf*, and thus would be contrary to Islamic law;
- 6) The problem of reducing the land revenue payable to the State Authority is also one of the problems in the creation of *waqf* in Malaysia. Section 196(1)(a) of the NLC provides "No surrender, whether of the whole or a part of any alienated land shall be approved...unless...no item of land revenue is outstanding in respect of the land". Thus, the surrender of land (for the purpose of *waqf*) may

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<sup>7</sup> See Siti Mashitoh Mahamood, pp. 61-71.

not be effected unless the outstanding land revenue has been settled by the creator of the *waqf*. Due to this reason, the proprietors of land are reluctant to donate their lands as *waqf* land as they could not afford to pay the costs of the land revenue, particularly of lands which are situated in urban and strategic areas as the revenues are higher than those in the rural areas;

- 7) Alienation of land by the State Authority nowadays is in the form of lease hold, no longer in perpetuity (freehold) to private individuals and corporation. A perpetuity grant could only be made for the purpose of public welfare or to satisfy the requirements made by the Federal Government to be applied for federal purposes or even to satisfy any special circumstances which the State Authority thinks necessary. Hence, by virtue of this provision, *waqf* lands which were given with a leasehold title will revert to the State Authority after the expiration of the lease period. It follows that *waqf* status would automatically void, contrary to the perpetual nature of *waqf* under Islamic law;
- 8) Section 136(1)(f)(i) of the NLC is an obstacle to the development of *waqf* assets. It prevents the subdivision of any portion of agricultural land of less than two-fifth (2/5) of a hectare. Hence, no separate title can be released for the purpose of the exclusive development and proprietorship of the *waqf* land;
- 9) Problem of no exemption from the local authority rates pursuant to the Local Government Act 1976. Exemption of rates is only applicable to premises or buildings which are used for religious worship, public schools and burial grounds. Thus, *waqf* properties which are categorized under these premises are exempted from rates but not other types of *waqf* properties such as commercial buildings;
- 10) *Waqf* properties may still be subject to acquisition by the State Authority for the purpose of public utility and the economic development of Malaysia, pursuant to the provisions of the Land Acquisition Act 1960. Such compulsory acquisition will diminish the rights and interests of the stakeholders under Islamic law relating to *waqf*; and,
- 11) *Waqf* is still subject to the scrutiny and jurisdiction of the civil courts. The civil courts are usually presided by judges who may not be conversant with Islamic law. Thus, they may tend to decide disputes on *waqf* and may give decisions which are contrary to the principles of Islamic law on *waqf*. They may be circumstances whereby expert evidence will be called to the court to guide the court in respect of Islamic law matters on *waqf*, for example, a mufti. However, the civil court is not duty bound to follow the opinions of the mufti. This can be seen in *Commissioner of Religious Affairs Terengganu v Tengku Mariam* [1970] 1 MLJ 222.

The authors will only elaborate problems concerning waqf in respect of the jurisdiction of the courts and the problems arising from the disputes over *waqf* as decided by courts in Malaysia.

## **FIRST ISSUE: THE JURISDICTION AND POWER OF THE COURTS (CIVIL AND SHARIAH) ON *WAQF***

### **1. Jurisdiction<sup>8</sup> of the High Court<sup>9</sup> (Civil Court) On *Waqf***

The jurisdiction of the High Court (civil court) is provided in the Federal Constitution ('FC') and the Court of Judicature Act 1964 ('CJA'). The foundation and establishment of the High Court originates from article 121<sup>10</sup>, 122AA and 122AB (Composition of the High Court) of the FC. From these provisions, the power and jurisdiction of the High Court<sup>11</sup> are

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<sup>8</sup> Jurisdiction means the extent of the authority of a court to administer justice, not only with reference to the subject matter of the action but also to the local and pecuniary limits within which the court has power to entertain the action presented before it. Jurisdiction may be classified into three categories:

- i) Jurisdiction over subject matter;
- ii) Local or Territorial Jurisdiction; and,
- iii) Pecuniary Jurisdiction.

See Hamid Sultan bin Abu Backer, *Janab's Series to "Law, Practice and Legal Remedies"*, Vol. 1, Janab (M) Sdn. Bhd, Kuala Lumpur, 2005, 29.

<sup>9</sup> The jurisdiction of the other courts namely the Federal Court, Court of Appeal and the Subordinate Courts are not dealt with in this paper. This is because the primary court in relation to land matters is the High Court. The Federal Court and the Court of Appeal, are specialized courts concerned mostly with the hearing of appeals and on certain matters of utmost importance, which the High Court does not possess, such as the jurisdiction of the Federal Court to hear matters involving the interpretation of the FC on the request of the Yang Di Pertuan Agong (YDPA) pursuant to section 128(1)(2) of the Court of Judicature Act 1964 (CJA). The establishment of the Federal Court is made pursuant to article 121(2) and 122 (composition of the Federal Court) of the FC and its rules of procedures are contained in the Rules of the Federal Court 1995 whilst the establishment of the Court of Appeal is made pursuant to article 121 (1B) and section 122A (composition of the Court of Appeal) of the FC. The procedures to be followed in the Court of Appeal are enumerated in the Rules of the Court of Appeal 1994. The jurisdiction and composition of both courts are provided in the CJA particularly sections 38 – 102. In respect of the subordinate courts which consist of the Magistrate Court and the Session Courts, their establishment is similar to that of the High Court *viz* by virtue of article 121 of the FC. Unlike the High Court, Court of Appeal and the Federal Court, their jurisdictions are specifically provided in the Subordinate Court Act 1948 (SCA) whilst their rules of procedure are contained in the Subordinate Court Rules 1955. It should be noted that there are times that the procedures of these courts could be varied as they are subject to the practice directions issued by their respective registrars and judges.

<sup>10</sup> Article 121 of the Constitution reads: There shall be two High Courts of co-ordinate jurisdiction and status, namely-

- (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and,
- (b) one in the Borneo States, which shall be known as the High Court in Borneo and shall have its principal registry at such place in the Borneo States as the Yang di-Pertuan Agung may determine; and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

<sup>11</sup> See *Foo Say Koh & Ors v Chua Seng Seng & Ors* (1986) 1 MLJ 501, that courts of competent jurisdiction are the High Court and the subordinate courts – Magistrate and Session Courts. See also section 3 of the CJA. The jurisdictions and powers of the subordinate courts are specifically provided in the SCA 1948.

further clarified by the CJA pursuant to its sections 22<sup>12</sup>, 23<sup>13</sup> and 24<sup>14</sup> which set out in broad terms the criminal and civil jurisdiction of the High Court. Section 25(1) of the CJA provides that the High Court:

*‘...shall in the exercise of its jurisdiction have all powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.’*

The High Court has unlimited original jurisdiction to hear all matters. Section 7 of the Court of Judicature Act 1964 so provides. The term ‘original jurisdiction’ generally means the right to consider the subject matter of the action, suits or proceedings in the first instance.<sup>15</sup>

The statute that governs and controls the rules of practice in the High Court is the Rules of the High Court 1980.

### **The Applicable Law in the Civil Courts**

As regards the law applicable to the civil courts, Civil Law Act 1956 provides that pursuant to section 3(1)(a), in West Malaysia, the law that shall be applied are the written laws in force in Malaysia and where if there is none, then the common law of England and the rules of equity as administered in England as at 7 April 1956. However, pursuant to section 3(1)(a) and (b) respectively, in Sabah and Sarawak, apart from common law and rules of equity, the civil courts shall apply, provided that there is no written law, the statutes of general application as administered or in force in England. The limitation of application of these sources of law is that, only those which are practised and applied in England as at 1 December, 1951 are applicable to Sabah. On the other hand, only those as practiced in England as at 12 December, 1949 are applicable to Sarawak. However, the application of these sources of law is subject to the proviso ‘so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary’. This caveat is provided pursuant to the *proviso* to section 3(1) of the Civil Law Act 1956.

Meanwhile as regards the applicable law in respect of commercial law, this is enunciated by section 5(1) of the CLA, which states - unless a written law on the subject matter is available, the law to be applied on partnership, corporations, banks, banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance and

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<sup>12</sup> Section 22 of the CJA provides the criminal jurisdiction of the High Court.

<sup>13</sup> Section 23 of the CJA provides the general civil jurisdiction.

<sup>14</sup> Section 24 of the CJA provides the specific civil jurisdiction. Section 23(1) states: ‘Subject to the limitation contained in article 128 of the Constitution the High Court shall have jurisdiction to try ALL civil proceedings where:...’

<sup>15</sup> Hamid Sultan bin Abu Backer, 30.

which respect to mercantile law generally, on states other than Melaka, Penang, Sarawak and Sabah, shall be the laws as that administered England in the like case at the date of coming into force of the CLA that is as at 7 April 1956. Whereas if the same matter were to arise in Melaka, Penang, Sabah and Sarawak, provided that there is no written law on the subject matter, the law to be administered shall be the same as would be administered in England in the like case at the corresponding period, if such question or issue had arisen or had to be decided in England.<sup>16</sup>

### **The Jurisdiction to Hear *Waqf***

There is no provision in the FC nor in the CJA which confers the civil courts the jurisdiction to adjudicate *waqf*. However, in the Malay states, *waqf* was regarded as a type of trust. This was the finding of Shariff J in *Ashabee & Ors v. Mahomed Hashim & Anor*<sup>17</sup> which was decided in 1887. Since then this finding still remains intact, throughout the next 100 years.<sup>18</sup> Since *waqf* is regarded as a trust then it is subject to the Trustee Act 1949. According to this case, this act specifies and recognizes, by virtues of section 2, only the High Courts of Malaya and Borneo, to have the jurisdiction to try and decide on trust. The jurisdiction of the syariah court is thus excluded. Therefore based on this provision, according to Professor Ahmad Ibrahim, *waqf* falls within the jurisdiction of the civil courts and not the syariah courts.<sup>19</sup>

The other argument which lends support to the contention that *waqf* falls within the jurisdiction of the civil courts is section 23(1) of the CJA which states ‘...the High Court shall have the jurisdiction to try ALL civil proceedings...’. By this provision, it ensues that the civil court (High Court) shall have the ability to hear ALL civil matters, including *waqf*, unless the matters are specifically provided in any written law so as to oust the jurisdiction of the civil courts over them, for instance, matters that fall within the jurisdiction of the

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<sup>16</sup> Note that under this provision (section 5) of the Civil Law Act 1956, there is no caveat as to the *proviso* to section 3(1) which provides the right of the Malaysian inhabitants to approve or not to the approve laws imported from England.

<sup>17</sup> [1887] 4 Ky 213.

<sup>18</sup> See in *Haji Embong bin Lain-Lain v Tengku Maimunah* [1980] MLJ 286, *Re Dato Bentara Luar* [1982] MLJ 264, *Majlis Agama Islam Pulau Pinang v Isa Abdul Rahman & Anor* [1992] 2 MLJ 244, *G Rethinasamy v Majlis Ugama Islam, Pulau Pinang & Anor* [1993] 2 MLJ 166, *Shaik Zolkaffily bin Shaik Natar & Ors (sued as trustees of the estate of Sheik Eusoff bin Sheik Latiff, deceased) v Majlis Agama Islam Pulau Pinang dan Seberang Perai* [1997] 3 MLJ 281 and in *Barkath Ali bin Abu Backer v Anwar Kabir bin Abu Backer & Ors* [1997] 4 MLJ 389.

<sup>19</sup> Ahmad Ibrahim, *The Future of The Shariah and The Shariah Courts in Malaysia*, Journal of Malaysian and Comparative Law, Volume 20, 1993, Faculty of Law, University of Malaya, p. 52. However, there are cases which have decided that *waqf* falls within the jurisdiction of the civil courts not on this ground but on others. For examples in *Shaik Zolkaffily bin Shaik Natar & Ors (sued as trustees of the estate of Sheik Eusoff bin Sheik Latiff, Deceased)* [1997] 3 MLJ 281, *G Rethinasamy* [1993] 2 MLJ 166 and *Isa Abdul Rahman* [1992] 2 MLJ 244.

Syariah Court pursuant to List II of the 9<sup>th</sup> Schedule<sup>20</sup> of the FC and pursuant to the provisions in the respective states' administration of Islamic law enactments.<sup>21</sup>

However, it should be noted that, in certain federal statutes, the civil law or the principles of English law shall not be applicable to *waqf*, viz they (the civil laws) are ousted from having any application on *waqf*. This is made into effect pursuant to section 4(2)(e) of the National Land Code 1965 (NLC), which spells out that nothing in the NLC shall effect laws relating to *waqf*. Based on this provision, NLC cannot overrule laws relating to *waqf*. Instead, the law applicable to *waqf* is the law 'for the time being in force'. It is submitted that, this law is Islamic Law.<sup>22</sup>

Although the provisions in the FC and the CJA are, so far, short of any conferred jurisdiction for determining *waqf* disputes on the civil court, yet according to the decision in *Ashabee* read together with section 2 of the Trustees Act 1949 and section 23(1) of the CJA, it is clear that, *waqf* also, inevitably, falls within the ambit of the civil court viz the High Court of Malaya and the High Court of Borneo. Where *waqf* involves land, the law applicable in respect of *waqf* land is Islamic Law and not the provisions of the NLC 1965.<sup>23</sup>

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<sup>20</sup> Which provides: 'Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; **Wakafs** and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom' (emphasis added).

<sup>21</sup> For example, see section 61(3)(b)(vii) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 (Enactment No. 1 2003), enforced since 8 July 2003, vide Government of Selangor Gazette, Jil.56, No. 15, 24 July, 2003, Tambahan No. 1 Enakmen.

<sup>22</sup> However, it is surprised to note that in the preliminary trial, in *Pesuruhjaya Hal Ehwal Agama dan Lain-Lain v Tengku Mariam* (1970) 2 MLJ, 222 it was submitted that the law 'for the time being in force' was Terengganu Administration of Islamic Law Enactment 1955 yet it was held not applicable. Instead, the court referred to Privy Council decisions on cases from India. However, in the Federal Court this was overruled but based on a different reason, ie that the parties had subjected themselves to follow the fatwa of the local Mufti.

<sup>23</sup> However one can argue nevertheless that the NLC is also applicable in respect of *waqf* lands as all *waqf* lands are registered in the Land Office following the Torrens System and is virtually governed by the provisions of the NLC. For example the registration of *waqf* land and the indefeasibility of title of the owner. However, if one were to look into the provisions relating to Torrens System, we could say that almost all the provisions are complying with the spirit of Islamic Law except on some issues for example on the concept of '*Ihya Al-Mawat*' – an Islamic law concept, which is quite different from the Torrens system, in that in the Torrens System, registration is everything. Once one's ownership is registered in the land grant, one's title on the land is indefeasible regardless of whether the land has been utilized or not except where there is any event that renders the title defeasible pursuant to section 340(2) NLC. Whereas, according to Islamic Law (the

However, as land is within the jurisdiction of the High Court pursuant to section 23(1)(d) of the CJA and section 5 of the NLC that likewise, recognizes only the High Court<sup>24</sup> to have the competence to adjudicate land disputes, it is indispensable that *waqf* land ought to have fallen also, within the High Court's purview.

## 2. Jurisdiction of The Syariah Court On *Waqf*

In Islam, the establishment and the administration of courts and the judicial process are generally originated from and made by, the injunctions of Al-Quran and Al-Sunnah.<sup>25</sup> These two sources are the highest and the supreme law. Through these two sources, the jurisdiction of the Syariah Court<sup>26</sup> can be found and it is indeed wide. It covers all human aspects in life.<sup>27</sup> This includes *hudud*<sup>28</sup>, *qisas*<sup>29</sup>, *diah*<sup>30</sup>, *ta'zir*<sup>31</sup>, *jarimah*<sup>32</sup>, offences involving family, transactions, crime and further it concerns rights of God, human rights or mixture of rights of God and human rights<sup>33</sup> and also includes *waqf*. During Prophet

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concept of *Ihya' Al-Mawat*), if the proprietor of the land has not utilized or worked on the land for some duration of time, the land could be forfeited by the state. See Salleh Buang, *Malaysian Torren System*, Dewan Bahasa dan Pustaka, Kementerian Pendidikan Malaysia, Kuala Lumpur, 1989, Chapter 14.

<sup>24</sup> Similar provision is found in Sabah and Sarawak that only confers upon the High Court of Borneo based on the corresponding statutes on land available in there.

<sup>25</sup> There are various Quranic verses and traditions of the Prophet Muhammad (PBUH) which enjoin people to do justice and adjudicate disputes. The law applied, must be based on these two sources. See Wahbah al-Zuhaili, *Al-Fiqhul Islami Wa Adilla Tuhu*, Volume 6, Darul Fikr, 1985, Egypt, p. 480.

<sup>26</sup> Originally there is no such label that such a court is syariah or not in nature. In the time of Prophet Muhammad (PBUH), he was the sole judge and the rule of law was Al-Quran and Al-Sunnah. Similar to the Malay states prior to the coming of the British, the courts were governed by Islamic Law and no such label was ever made. Only, after the coming of the British in Malaysia, the courts were divided into two *viz* civil and syariah.

<sup>27</sup> See Dr. Mahmud Saedon bin Awang Othman, *Bidangkuasa Mahkamah Syariah*, JH(1410) Jilid vii bhg I, p.3.

<sup>28</sup> Punishments stipulated in the Al-Quran: See Muhammad Rawwas Qal'arji & Hamid Sadiq Qunaybi, *Mu'jam Lughatul Fuqaha'*, Arabi – Inggelizi Ma'a Kasshaf Inggelizi – Arabi Bil Mustalahat Al-Waridah Fi Al-Mu'jam, Darul Nafaiz, 1985, Beirut, p. 176.

<sup>29</sup> Punishment by retaliation: see *ibid*, p. 364.

<sup>30</sup> Blood money, to be paid as compensation to the family of the murdered: see *ibid*, p. 212.

<sup>31</sup> Discretionary punishment: see *ibid*, p. 136.

<sup>32</sup> Criminal acts: see Muhammad Idris Abdul Rauf Al-Marbawi, *Kamus Al-Marbawi*, Vol. 1, Pustaka Nasional, not dated, Singapore. 'All criminal acts punishable by laws': see Dr. Ibrahim Anis, Dr. Abdul Halim Muntasir, A'tiyah Al-Sawwa Lami & Muhammad Khalafullah Ahmad, *Al-Mu'jam Al-Wasit*, Vol. 1, 1972, Cairo, p. 118.

<sup>33</sup> Mahmud Saedon A. Othman, *Bidang Kuasa Mahkamah Syariah*, JH(1410), Jld VII Bhg 1, Syaaban 1410, p. 2 & 3.

Muhammad's (Peace Be Upon Him (PBUH) time, he acted as the sole judge and settled disputes based on the revelations from God. There were many occasions where the Muslim public had called on him to consider certain problems faced for rulings. He gave orders, injunctions and declaratory judgments so as to settle the disputes which plagued the Muslim public. Upon his demise, this practice was resumed but the judicial functions were carried out mostly not by the administrators but by the appointed judges. They were responsible to settle disputes based on the teachings of the Prophet (PBUH). The settlements include injunctions, declarations, settlements, judgments and solutions.<sup>34</sup>

In Malaysia however, the establishment and jurisdiction of the syariah court is the concern of the respective states. The respective states are responsible to make laws relating to matters that fall within List II of the 9<sup>th</sup> Schedule to the FC. This power or grant is stated in article 74 (2) of the FC which reads:

*'Without prejudice to any power to make laws conferred on it by any other Article the legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List'*

However article 74(3) qualifies the operation of section 74(2) in that the power to make laws is subject to conditions or restrictions imposed by the FC.

Article 77 of the FC states that the legislature of a state shall have power to make laws with respect to any matter not enumerated in any of the Lists set out in the Ninth Schedule, viz matters that do not fall within the Parliament's purview.

The State list, that is List II (1) of the Ninth Schedule to the FC, as regards *waqf*, reads as follows:

*Except with respect to the Federal Territories of Kuala Lumpur and Labuan, Islamic law and personal...wakaf...the determination of matters of Islamic Law...'*

Thus based on this list, *waqf* is one of the state matters. The jurisdiction and power of the respective states syariah courts are founded in the respective administration of Islamic affairs enactments of each state. For example in Penang, the jurisdiction for the Syariah High Court to hear and determine *waqf* is founded on section 48(2)(b)(vii)<sup>35</sup> of the Penang Islamic Religious Affairs Enactment of the State of Penang, 1993, in Kedah pursuant to section 9(2)(b)(vii)<sup>36</sup> of the Syariah Court Enactment 1993, in the Federal Territories

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<sup>34</sup> See *ibid*, pp. 3 & 4.

<sup>35</sup> 'A Syariah Court shall: (b) in its civil jurisdiction, hear and determine all actions and proceedings in which all the parties are Muslims and which relate to-...(vii) wakaf...'

<sup>36</sup> 'A Syariah High Court shall...(b) in its civil jurisdiction, hear and determine all actions and proceedings in which all the parties are Muslims and which relate to-...(vii) wakaf...'

pursuant to section 46(2)(b)(vii) of the Administration of Islamic Law (Federal Territories) Act 1993 and in Selangor pursuant to section 61(3)(vii)<sup>37</sup> of the Administration of the Religion of Islam (State of Selangor) 2003 (Enactment No. 1 2003) ('Selangor Enactment').

Similarly, the Kedah Syariah Subordinate Court, pursuant to section 10(2)(b) of the Kedah Enactment, possesses the jurisdictions as that of the Syariah High Court. The difference between the Syariah Subordinate Court and the Syariah High Court is that the Syariah Subordinate Court can only hear claims arising from the aforesaid matters involving amount or value which does not exceed RM 50,000.00.

For Penang and the Federal Territories, the aforesaid jurisdiction in respect of the their Syariah High Courts, are spelt out in section 48(2)(b)(vii) of the Administration of Islamic Religious Affairs Enactment of the State of Penang, 1993 ('Penang Enactment') and section 46(2)(b)(vii) of the Administration of Islamic Law (Federal Territories) Act 1993('FT Act').

Meanwhile their respective provisions on the Syariah Subordinate Courts are provided in section 49(2)(b) of the Penang Enactment, section 47(2)(b) of the FT Act and section 62(2)(b) of the Selangor Enactment.

The duty of the syariah court to refer to Islamic Law is provided in the respective states' administration of Islamic law and syariah civil procedures enactments. For example by virtue of section 273 of the Kedah Syariah Civil Procedure Enactment 1979 and Kelantan Syariah Civil Procedure Enactment 1984 and section 245 (1)(2) of the Federal Territory Syariah Civil Procedures Enactment 1998, if any provision and interpretation of the provision in the enactments is contrary to Islamic Law, it shall be void to the extent of its inconsistency. Further, according to the respective sections of these enactments by virtue of their respective clause 2, any matter which the enactments have not provided for or is not clearly spelt out, the court shall follow Islamic Law. Similar provisions are found in section 244(1)(2) of the Penang Syariah Civil Procedure Enactment 1999, section 130(1)(2) of the Penang Syariah Evidence Enactment 1996 and section 253 of the Selangor Syariah Civil Procedure Code 1991.

Thus, it can be opined that, in Islamic Law, the jurisdiction to hear and decide *waqf* is recognized and acceptable not only based on the practices of the Prophet (PBUH), his companions and the later generations of the Muslims after them but also as provided in the respective provisions of the states' administration of Islamic affairs enactments and the FC. It is therefore submitted that the syariah court has such a jurisdiction.

This contention could further be expanded in that, as Islamic Law is not a written law passed after Merdeka day, it follows that this law should not be made subordinate to the provisions of the FC. This is because, article 4(1) of the FC states that the FC is the

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<sup>37</sup> 'The Syariah High Court shall...(b) in its civil jurisdiction, hear and determine all actions and proceedings if all the parties to the actions or proceedings are Muslims and the actions or proceedings relate to - ...(vii) wakaf...?'

supreme law of the land and any law passed after Merdeka day and found to be inconsistent to the constitution, such law shall be void, to the extent of its inconsistency. By this provision, it can be submitted that, article 4(1) affects only written laws passed after Merdeka day. Since Islamic Law is not a written law passed after Merdeka day, Islamic Law should not be subjected to article 4(1) and thus, if there is inconsistency with any provision in the FC, it is submitted that Islamic Law shall not be affected as the purview or the gravity of article 4(1) FC only concerns written laws passed by the Parliament or the State Legislatures after Merdeka day.<sup>38</sup>

### **Article 121 (1A) of the Federal Constitution**

Since the inclusion of clause 1A of article 121 to the Federal Constitution ('FC'), the civil courts – courts other than the Syariah courts, shall have no jurisdiction to try and decide matters which fall within the jurisdiction of the syariah courts. The civil courts shall have no jurisdiction if the parties involved are Muslims and the disputed matters are within the jurisdiction of the Syariah Courts. This new amendment to the FC came into force from 10th June, 1988. The rationale of having such an amendment is to allow the syariah court to carry out its functions within the jurisdiction conferred by law without any interference from the civil courts. Previously there were cases found to be within the syariah court's jurisdiction, yet they were dealt with by the civil court. The effect of this amendment is to prevent any future conflict between the decisions of the syariah court and the civil court which had occurred previously in a number of cases for example *Myriam v Ariff*,<sup>39</sup> *Commissioners for Religious Affairs Trengganu & Ors v Tengku Mariam*<sup>40</sup>, *Ainan bin Mahmud v Syed Abu Bakar*<sup>41</sup> *Nafsiah v Abdul Majid*<sup>42</sup>, *Roberts v Ummi Kalthom*<sup>43</sup>, *Boto' binti Taha v Jaafar bin Muhammad*<sup>44</sup>, *Re Syed Shaik Alkaff*<sup>45</sup> and in *Re Alsagoff's Trust*<sup>46</sup>.

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<sup>38</sup> Professor Ahmad Ibrahim, *Kedudukan Islam Dalam Perlembagaan Malaysia*, JH(1419) Jilid X Bhg II, p. 145.

<sup>39</sup> [1971] 1 MLJ 265. The issue in this case was whether the widow who had married 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 section 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.

<sup>40</sup> [1969] 1 MLJ 110, where there was an issue concerning *waqf*. In the beginning, the parties had consulted the Mufti to have a decision on whether *waqf* made by Tengku Chik for the benefit of his family was legal or not. The Mufti had approved such *waqf*. However, the learned judge in that case refused to accept such fatwa but followed the 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 Bahshuwen* [1952] A.C. 1.

<sup>41</sup> [1939] MLJ 209. This case involved a child which was delivered four months after marriage. The court held that according to section 112 of the Evidence Enactment, such a child was a legitimate child for the couple, even though it is illegitimate according to Islamic Law.

<sup>42</sup> [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 decision clearly disregarded the provision of section 119 of the Islamic Law Administration Enactment of Melaka 1959 which provides special statutory provisions for betrothal among Muslims.

## Case Law after the Promulgation of Article 121 (1A) of the FC

Despite the amendment made to article 121 of the FC, based on judicial decisions, surprisingly, disputes over *waqf* still fall under the jurisdiction and power of the civil law courts (High Courts). This position is seen in the following cases, namely:

- 1) *Majlis Ugama Islam Pulau Pinang v Isa Abdul Rahman* [1992] 3 CLJ 1675<sup>47</sup>;
- 2) *G Rethinasamy v Religious Council of Penang* [1993] 2 CLJ 605<sup>48</sup>;

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<sup>43</sup> [1966] 1 MLJ 163. This case involved issue of *Harta Sepencarian*, which is clearly within the jurisdiction of the syariah court.

<sup>44</sup> [1985] 2 MLJ 98. This case involved the issue of *Harta Sepencarian*.

<sup>45</sup> [1923] 2 MC 38. This case involved *waqf* where it was held that the provision for estate assumed by a sound Muslim man which is good and valid according to Islamic law may not necessarily be accepted as charitable in the eyes of English Law. Similarly, the usages of 'wakaf' or '*amal al khaira*' 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.

<sup>46</sup> [1956] MLJ 244. Where it was held that monetary provisions as gift to the poor people reciting Al-Quran on the graves of the deceased was not valid. This is because the court is bound to follow section 101 of the Evidence Act 1950 which provides that will and trust deeds shall be interpreted in accordance with the English law.

<sup>47</sup> In this case the first plaintiff was the heir to a settlor of a will for a *waqf* land located at Jalan Macalister, Penang. On the land there was a mosque (Masjid Jamek Haji Wahab/Masjid Simpang Enam). The second plaintiffs were members of the committee of the mosque. The defendant, the Penang Religious Council contended that according to the Religion of Islam Enactment 1969, the mosque together with the surrounding land were vested in the council and that an order to that effect had been made by the High Court on 1 December 1989. The defendant (the religious council) had decided to demolish the said mosque for them to erect a five storey building on the land replacing the mosque. The first to the third floor would be used as bank offices, while the fourth and the fifth floors were to be made as a mosque. The plaintiffs resisted the decision of the defendant on the ground that the decision was made without the blessings and consent of the beneficiaries and the Muslims of Penang including the plaintiff. One of the issues raised in this case was whether the syariah court had the power and jurisdiction to determine this case as it involves a dispute on *waqf*.

<sup>48</sup> In this case the plaintiff purchased a land from one Leong Kah Choon (LKC) in 1980. The plaintiff's name was registered as the proprietor of this land on 20 February 1981. This land was previously alienated to a Muslim in 1836 and was thereafter owned by Muslims until 1927. Part A of this land was used for Muslim religious purposes (*inter alia*, a mosque and Muslim cemetery). In 1927, this land (part A and other parts of the land) was transferred to a Chinese man (LKC). In 1975, the Penang Registrar of Titles, on an application of LKC, issued an order that this land (the whole and including part A) be registered under LKC's name. On the note of investigation, the mosque committee had acknowledged LKC's interest and that LKC had given an assurance that the Muslim cemetery which existed in part A would not be disturbed. Later the plaintiff wanted to develop the land (including Part A, where a mosque and the cemetery were located). The plaintiff requested the defendant (Penang Religious Council) as the trustee of *waqf* of part A of the land to demolish the mosque and the cemetery in order to allow development to be carried out on part A. The plaintiff sought for a declaration that he was entitled to vacant possession and possession without interference of the land he had purchased, damages, interests and costs. The defendant claimed that part A of the land was 'wakaf' and that the previous owner of the land (LKC) had given an undertaking not to disturb the cemetery. This was

- 3) *Shaik Zolkaffily bin Shaik Natar & Ors v Majlis Ugama Islam Pulau Pinang dan Seberang Perai* [2003] 3 MLJ 705 (FC)<sup>49</sup>;
- 4) *Barkath Ali bin Abu Backer v Anwar Kabir bin Abu Backer & Ors* [1997] 2 CLJ Supp 295<sup>50</sup>; and,
- 5) *Tegas Sepakat Sdn Bhd v. Mohamed Faizal Tan* JH [1415] Jld. Lx, Bhg. II<sup>51</sup>.

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also mentioned in the plaintiff's sales and purchase agreement. The defendant counter claimed for a declaration that part A was 'waqf' land and for an order that that part be separated from the rest of the land and a separate title be issued. One of the issues in this case was whether the civil court has the jurisdiction to entertain this case as it involved *waqf*. The court also held that part A was a *waqf* land and thus was vested in the defendant as the trustee to the *waqf* land in Penang. The plaintiff's title over part A to the land was defeasible.

<sup>49</sup> The respondents/plaintiffs were Muslims and the appellant/defendant was a body established under the Administration of Islamic Religious Affairs Enactment of the State of Penang 1993. In the respondents' writ action at the High Court, Pulau Pinang, they sought, *inter alia*: (a) a declaration that certain pieces of land in Pulau Pinang ('the said lands') be surrendered to the estate of Sheik Eusoff bin Shaik Latiff, deceased; and (b) a further order that the said lands be vested upon the respondents as executors of the deceased's estate. The appellant raised a preliminary objection that the High Court did not have jurisdiction to hear the respondents' action. Arising from its stand, the appellant filed an application under O 18 r 19(1)(a) of the Rules of the High Court 1980 and the inherent jurisdiction of the court to strike out the respondents' action. The application was heard by the senior assistant registrar who dismissed the same with costs. On appeal by the appellant, the learned judge dismissed it with costs and affirmed the order of the SAR. In dismissing the appellant's appeal, the High Court judge held that the Syariah Court had no jurisdiction to issue the injunction applied for by the respondents and had no power to adjudicate on the will and the deed of settlement. The learned High Court judge relied on the case of *Majlis Agama Islam Pulau Pinang lwn Isa Abdul Rahman & Satu Yang Lain* [1992] 2 MLJ 244 as authority for the proposition that the approach to be taken in determining whether the Syariah Court had jurisdiction was to look at the relief sought instead of the subject matter. The appeal of the appellant before the Court of Appeal was also dismissed with costs. They appealed to the Federal Court (FC). The FC allowed the appeal to the effect that the syariah court has the jurisdiction to determine *waqf* based on the 'subject matter' approach.

<sup>50</sup> The settlor (the plaintiff's mother who passed away in 1989), an Indian national domiciled in India, had created a trust deed and appointed the plaintiff as lawful attorney with the powers to take possession of all assets in Malaysia, Singapore and other countries. The plaintiff filed an application to determine whether the assets in Malaysia and Singapore formed the subject matter of a valid and subsisting trust or whether those assets were never validly transferred to the trust and therefore formed part of the settlor's residuary estate to be distributed amongst her beneficiaries in accordance with Islamic religious law. In the trust deed, the settlor declared that the trust was a 'wakaf-au-alad' and shall not fall within the jurisdiction of the "wakaf board". Counsel for the third defendant, relying on art 121(1A) of the Federal Constitution, raised the preliminary objection that only the syariah court had the jurisdiction to determine the questions put forward by the plaintiff. The plaintiff and his siblings (the first and second defendants), however, contended that the High Court had jurisdiction and that the syariah court had none. Counsel for the second defendant submitted further that although the High Court had jurisdiction to determine the matter raised by the plaintiff, he urged the court not to exercise that jurisdiction as the appropriate forum and proper law to determine the matter was India and the law of India. He urged the court to stay this proceeding so that an application could be made to the Indian courts. The High Court held that the Syariah court has no jurisdiction to hear the case as according to the Specific Relief Act 1950 and Order 15 rule 16 of the RHC, the power to grant a declaratory decree was that of the High Court.

<sup>51</sup> The plaintiff in this case, purchased a piece of land from a registered trustee. The land was vested under a *waqf* deed made in 1909 by Mohamed Salleh bin Perang, Dato Bentara Luar, Johor, deceased to his two children (Othman and Kalthom). Although the formation of the said *waqf* was disputed but the High Court and the Federal Court decided that the *waqf* had been validly made. The respondent who acted on behalf of the sole heir, being the daughter to Suleiman Mohamed Salleh. Suleiman was one of Mohamad Salleh's (the

The reasons for the above decisions were as follows:

- 1) The Syariah Court has no power to hear an application for a perpetual injunction. This power is one of the special powers conferred on the High Court (civil courts) by the Specific Relief Act 1950 (*Isa Abdul Rahman*);
- 2) One of the parties to the proceedings was not a Muslim. As such the Syariah Court did not have the power to deal with the issues that arose by virtue of section 40 of the Penang Administration of Islamic Religious Affairs Enactment 1959 and List II of the 9<sup>th</sup> Schedule to the Federal Constitution. Further, the Syariah Court does not have the power to grant vacant possession, damages, interests and costs as prayed for by the parties. In addition, the defence of estoppel was not within the jurisdiction of the syariah court to consider. (*G Rethinasamy*);
- 3) There were several cases, namely *G Rethinasamy*, *Lim Chan Seng*, *Barkath Ali* and *Isa Abdul Rahman* which decided that in an issue involving *waqf*, the High Court (civil court) still has jurisdiction. The syariah court was handicapped in not having power to grant declarations, vesting orders or other alternative relief. Such orders and relief are entrenched under the power and jurisdiction of the High Court (civil court). (*Shaik Zolkaffily*).
- 4) The application of the parties was for declaratory relief over which the syariah court lacks power. Only the High Court (civil court) has such power. (*Barkath Ali*);
- 5) The court applied the principle that once the civil court has decided on certain issues, the issues are final and cannot be revoked – *functus officio*. (*Tegas Sepakat*).

### **Justifications that the Above Cases Dealing With *Waqf* Should Have Been Dealt With Solely and Exclusively By the Syariah Court**

Based on the above position it is clear that the syariah court has very limited power and jurisdiction to hear *waqf*<sup>52</sup> cases. However, alternatively, it could be submitted that, even though there is clearly no express provision in the States' Administration of Islamic law Enactments, that confer on the Syariah Court the powers and jurisdictions to issue certain

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deceased) children, whose name had not been named in the said *waqf*. The respondent entered a caveat to protect Suleiman's interest and also claimed to have an interest in the said *waqf* land. The respondent relied on the new fatwa (religious decree) issued by the decree committee (Lujnah Fatwa) that the purported *waqf* was actually void. Thus, according to the respondent, the said land should be distributed according to the Islamic law of inheritance (*faraid*). The High Court held that the said *waqf* was valid as the court was bound by the decision of the Federal Court. The High Court refused to be bound by the new fatwa.

<sup>52</sup> But provided that the parties in *waqf* disputes are all Muslims and the reliefs and prayers sought do not exclusively fall within the power and jurisdiction of the civil courts pursuant to the Specific Relief Act 1950.

prayers and orders,<sup>53</sup> and there are no corresponding Islamic statutes that can be referred to by the Syariah court to legitimize the issuance of these relief and orders, nevertheless, pursuant to the List II of the 9<sup>th</sup> Schedule to the FC, there is a sentence which reads ‘...determination of matters of Islamic law...’. Thus, it is submitted that by this provision, this could warrant the Syariah court the intended jurisdiction and power to issue these orders and reliefs by invoking this inherent power and jurisdiction to refer to Islamic law, which has laid down sufficient legal logistics to necessitate the issuance of these orders and reliefs.

The above liberal view had been adopted by Abdul Kadir Sulaiman J in *Md. Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1998] 1 MLJ 681. In this case, there involved an issue where nothing was expressly provided in the Federal Territories (FT) Act on the Administration of Islamic Law, concerning the power of the Syariah Court to hear a matter involving the issue of renunciation from the religion of Islam. However, it was decided that by way of implication of List II<sup>54</sup> of the 9<sup>th</sup> Schedule to the FC, the syariah court still has the jurisdiction to determine and deal with the issue.

Similar approach was taken by Mohamed Dzaidin FCJ in *Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489 and the judge in *Tan Sung Mooi v. Too Miew Kim* [1994] 3 MLJ 117, dealing with a similar issue.

Nonetheless, this liberal approach was obstinately rejected by Eusoff Chin J in *Ng Wan Chin v. Majlis Ugama Islam Wilayah Persekutuan & Anor (No. 2)*[1991] 3 MLJ 487 and Abdul Hamid J in *Lim Chan Seng v. Pengarah Jabatan Agama Islam Pulau Pinang & Satu Tindakan Yang Lain* [1996] 3 CLJ 231, *Barkath Ali bin Abu Backer v. Anwar Kabir bin Abu Backer & Ors* [1997] 4 MLJ 389 and *The Estate of Tunku Abdul Rahman Putra ibni Almarhum Sultan Abdul Hamid* [1998] 4 MLJ 623 on the reason that, if there is no express provision in the states’ enactments in respect of certain matters purportedly conferring on the Syariah Court the jurisdiction over it. Thus, the Syariah Court is not entitled to deal with the issue. Consequently, this would be *ultra vires* the FC. It follows that as there is a lack of jurisdiction on part of the Syariah Court to hear and issue the necessary reliefs and orders in respect of *waqf*, such as the jurisdiction to issue injunctions, declaratory orders, vacant possession, damages, interests, costs, vesting order or other alternative relief as these reliefs fall exclusively within the jurisdiction of the Civil Court pursuant to the above statutory provisions. In addition, the Civil Courts shall also have the right to try ALL civil proceedings, unless ousted by specific written law, pursuant to section 24 of <sup>55</sup>the CJA. This view was taken by Eusoff Chin J in *Ng Wan Chan v. Majlis Ugama Islam Wilayah Persekutuan & Anor*.

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<sup>53</sup> For example the power to issue injunction, declaratory orders, vacant possession, damages, interests, costs, vesting order or other alternative relief as these orders and reliefs are specifically given to the civil courts pursuant to the Specific Relief Act 1950

<sup>54</sup> ‘...the determination of matters of Islamic Law...’

<sup>55</sup> Such as on the matters enumerated in the List II of the 9<sup>th</sup> Schedule to the FC and the provisions of the respective states’ administration of Islamic law enactments.

The question remains, can we invoke the general provision in List II of the 9<sup>th</sup> Schedule to the FC which gives the state legislative assembly or the state, which inevitably will include as well, the Syariah Court, the jurisdiction and power to deal with Islamic law<sup>56</sup>, to validate and legitimize the suggestion that the Syariah Court can thus decide and grant ancillary orders in matters involving the aforesaid relief by lending support to the liberal view expressed by Abdul Kadir Sulaiman J and Mohamed Dzaiddin FCJ in the above cases? However, should this contention be acceptable, there is another problem in that, what would be the case for non-Muslim litigants? Would not this (the involvement of non-Muslims) negate the Syariah court's jurisdiction to hear *waqf*, let alone to grant above peripheral reliefs?

There is another recent case law decided by the Court of Appeal and the Federal Court – *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101 (Federal Court) and *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2006] 4 MLJ 705. In this case the issue was: whether the joint accounts form part of the estate of the deceased depended on whether there was a gift *inter vivos* (*hibah* in Islamic law)? The Federal Court held that the question as to whether a specific property forms part of the assets of an estate of a deceased person who is a Muslim in the petition for a letter of administration in the civil High Court, depends on whether there was a gift *inter vivos* or not, and that question shall be determined in accordance with Islamic Law of gift *inter vivos* or '*hibah*'. The determination of such issue and the beneficiary or beneficiaries entitled to it and in what proportion, if relevant, is within the jurisdiction of the Syariah Court. The civil court shall only give effect the decision of the Syariah Court in respect of the purported gift *inter vivos* in the grant of a letter of administration and in distributing the estate.

Thus, following the above case law (*Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor*), it is opined, provided that the parties to the proceedings are Muslim, when there is a dispute concerning the validity, nature or the formation of *waqf*, the correct forum to determine such issues is the syariah court. Only the syariah court has the power and jurisdiction to endorse or to make a declaration or order as to the status of certain properties to be regarded as *waqf*. This is to give effect to the provision in the FC and the respective states' administration of Islamic laws (for otherwise, it would be otiose).

It follows that if the decision in the Federal Court in *Latifah's* case is correct, then the decisions in *Shaik Zolkaffily bin Shaik Natar*, *Isa Abdul Rahman*, *Tegas Sepakat Sdn. Bhd.* and *Barkath Ali bin Abu Backer*, where the parties were all Muslims, being cases decided after the Constitutional Amendment on Article 121(1A) of the FC, it is opined, had been wrongly decided.<sup>57</sup> The decisions in these cases has caused the provisions in the respective states' administration of Islamic Law enactments and the provisions in the FC otiose and *ultra vires* the FC and the respective states' administration of Islamic law enactments.

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<sup>56</sup> See List II of the Ninth Schedule to the FC which states '...the determination of matters of Islamic Law or doctrine...'

<sup>57</sup> It follows that *Tegas Sepakat* which had been decided by the Syariah Court is correct.

On the other hand, to say that the decision in *G Rethinasamy* was correct to the effect that the civil court has the power and jurisdiction to determine *waqf*, as the case involves non-muslims is equally, in the opinion of the authors, wrong. This is because if *G Rethinasamy* is deemed to be correct, this would create dual conflicting powers and jurisdiction and may cause further complications to both courts, civil and syariah courts. In the opinion of the authors, *waqf* matters and disputes should be exclusively dealt with by the Syariah courts in the protection of the Muslims' rights and interests in Malaysia and full and exclusive privilege and full opportunity should be given to the Malaysian Muslims to 'practice in peace and harmony in any part of the Federation' their religion being the 'official religion of the Federation'. It follows that certain amendments to effect this suggestion should be made to the FC and the respective states' administration of Islamic law enactments.

## **SECOND ISSUE: PROBLEMS EMANATING FROM THE DECISIONS OF THE COURTS OVER DISPUTES ON *WAQF***

The authors will elaborate the above heading based on the court's decision in *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2008] 6 MLJ 488.

The above case involves an appeal from the Majlis Agama Islam Selangor (MAIS)<sup>58</sup> against the decision of the Shah Alam High Court dismissing MAIS's application for leave to intervene in the judicial review proceedings filed by the owners (Bong Choon Chuen and others) of the residential units in Kota Kemuning and Kemuning Greenville, Shah Alam, Selangor ('the applicant'). The applicant sought at the High Court, *inter alia*, to review the decision of the Majlis Bandaraya Shah Alam (MBSA) in allowing a vacant land in Kota Kemuning, Shah Alam to be used as a Muslim burial ground<sup>59</sup>. It should be noted that the purported land had yet been gazetted as *waqf* by the Land Office pursuant to section 62 of the NLC. Further, application of MAIS for a declaration that the said land is a *waqf* in the Shah Alam High Court has yet to be determined.

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<sup>58</sup> MAIS is a body established under section 4 of the Administration of the Religion of Islam (State of Selangor), Enactment 2003.

<sup>59</sup> According to the affidavit in reply made by Abdul Halem Hapiz bin Salihin, the Deputy Secretary of MAIS, affirmed on 21 December 2007, this Muslim burial ground was allocated by a developer by name of Hicom-Gamuda Development Sdn. Bhd comprising of 13.54 acres of land for the use and benefit of the Muslim residents in the area of Kota Kemuning. The Majlis Bandaraya Shah Alam had approved a development plan for the Muslim burial ground. Even though Jabatan Agama Islam Selangor had made an application to the Land Administrator in Klang for the said purported Muslim burial ground to be registered and gazetted under section 62 of the NLC as a Muslim burial ground, but the application still has not been approved by the Land Administrator. Nonetheless, despite the fact that the burial ground had not been gazetted and approved as a Muslim burial ground, the land has been used since 2006, as an active Muslim burial ground. The non-muslim residents of the Kota Kemuning and Kemuning Greenville townships objected and they preferred that the Muslim burial ground be relocated to another area. Abdul Halem further deposed that MAIS had filed an action in the Syariah High Court at Shah Alam for a declaration that the 13.54 acres of land be declared as *waqf* land and be registered in accordance with the Enakmen Wakaf (Negeri Selangor) 1999. However, at the hearing of this case in the Court of Appeal, this application has yet been disposed of by the Shah Alam Syariah High Court.

On the other hand, MAIS's application to intervene was based on the fact that MAIS had commenced an action in the Shah Alam Shariah High Court for a declaration that the vacant land was a *waqf* land and the Shariah High Court of having an exclusive jurisdiction to decide on the issue of *waqf*. In the Shah Alam High Court, MAIS's application to intervene was dismissed on the ground that MAIS had failed to satisfy the requirements of Order 15 rule 6(2) of the Rules of the High Court 1980. Under this order, the court has power to include any parties, on its own motion or on application, to be joined as a party of any proceedings, if the court thinks just.

In the High Court, MAIS argued, *inter alia*, that pursuant to section 7(1) of the Administration of Religion of Islam (State of Selangor) Enactment 2003, MAIS has a duty 'to promote, stimulate, facilitate and undertake the economic and social development of the Muslim community in the State of Selangor consistent with *hukum syarak*'. In light of this provision, MAIS contended that they have a legal interest in the judicial review proceedings. Otherwise, the interests of all Muslim citizens in Selangor would be prejudiced and that would affect the integrity of MAIS. Further, it was contended by MAIS that MAIS as a body responsible to advise His Royal Highness the Sultan of Selangor in respect of all matters relating to the religion of Islam in the State of Selangor, should be directly involved in these proceedings so that it would be in a better position to understand the whole case and, consequently, be able to acquire a better perspective of those proceedings and ultimately be in a better position to advise His Royal Highness the Sultan of Selangor effectively.

The Court of Appeal in majority 2 to 1 (Raus Sharif and Hasan Lah JJCA but Abdul Malik Ishak JCA, dissenting) dismissed the appeal of MAIS on the ground that Order 15 rule 6(2) of the Rules of the High Court 1980 is not applicable to judicial review proceedings. Instead the correct order to be applied is Order 52 rule 8(1), for MAIS to be made as an intervener in judicial review proceedings.

Secondly, the Court of Appeal opined that in judicial review proceedings, the courts are only concerned with the decision-making process of a public body and not the decision itself. In other words, the courts are not going to substitute a fairer or just decision of that public body. If the decisions made are administratively sound, the courts have no power at all to interfere with the decisions made.

Thirdly, even if Order 15 rule 6 (2)(b) of the RHC is applicable to a judicial review proceeding, the MAIS application has still failed to satisfy the judicial review requirements. This is because the issue of *waqf* as raised by MAIS is not just and convenient to determine within the judicial review proceedings. In fact, it is wholly unrelated to the core issue brought by the applicants in the judicial review proceedings. By raising the issue of *waqf*, MAIS was in effect, attempting to introduce an entirely independent and new cause into a judicial review proceeding. This is not permitted under Order 15 rule 6(2)(b) of the RHC.

In the opinion of the authors, in this case, eventhough the land was contended to have become *waqf* land, it has yet to be so. The said land had not yet been gazetted as *waqf* land

by the land office pursuant to provision under section 62 of the NLC. Thus, it is opined that the act of MAIS to intervene is premature. Further, section 13(e) of the Wakaf (State of Selangor Enactment) 1999 (Enactment No. 7 of 1999) provides: ‘A wakaf is invalid if... (e) it is inconsistent with Hukum Syarak or any written law’.<sup>60</sup> Thus, referring to the above case law, even though according to Hukum Syarak that particular land can be considered *waqf* land, the said land still could not be considered as such because the said land has not yet been gazetted as a *waqf* land pursuant to section 62 of the NLC. It is opined that the word ‘written law’ under section 13(e) of the Wakaf (State of Selangor Enactment) 1999, in this case, is the National Land Code 1965.

The above contention may be further supported by section 4(2)(e) of the NLC itself, which reads: ‘Except in so far as it is expressly provided to the contrary, nothing in this Act shall affect the provisions of – (a)...(e) any law for the time being in force relating to *wakaf*...’. Thus, even though there has been a purported *waqf* land by the religious council according to Islamic Law, if the *waqf* has not been gazetted pursuant to section 62 of the NLC, the *waqf* is still not a valid *waqf*. This is so bearing on the provision in section 13(e) of the Wakaf (State of Selangor Enactment) 1999 and the sentence ‘Except in so far as it is expressly provided to the contrary’, under section 4(2)(e) of the NLC. On the contrary, in *G Rethinasamy* and *Shaik Zolkaffily bin Shaik Natar*, in Penang during the course of litigation of this case there was no similar provision as section 13(e) of the above enactment in Penang, even though *waqf* had not been gazetted under section 62 NLC, the purported *waqfs* were still considered valid *waqfs* by the courts and the provisions under the NLC has no application on *waqf* pursuant to section 4(2)(e) of the NLC.

Thus following the above case law (*Majlis Agama Islam Selangor v Bong Boon Chuen & Ors*), the purported *waqf* in *Sahul Hamid & Anor v Negri Sembilan Religious Council & Ors* JH [1417] H Jilid X Bhd II and *Haji Hassan v Nik Abdullah & Ors* [1969] 2 JH 124, may not be a true and valid *waqf* protected under the Malaysian laws, even if the said purported *waqf* is recognized by Islamic law as it has still not been gazetted under the NLC. If these cases were to occur in Selangor now, the *waqf* occurring in *Sahul Hamid & Anor v Negri Sembilan Religious Council & Ors* and *Haji Hassan v Nik Abdullah & Ors*, may not be considered valid *waqf*, in the eyes of the Malaysian laws (for instance under the NLC).<sup>61</sup> However, as there is no similar provision of section 13(e) of the Wakaf (State of Selangor Enactment) 1999 in other states, except Malacca, the authors opine that similar disputes as occurring in *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* might occur again in

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<sup>60</sup> The full provision is as follows:

Section 13: A wakaf is invalid if:

- a) in the case of wakaf taklik, before the required conditions have been fulfilled during his life, the waqif dies;
- b) it is made for any immoral purpose;
- c) it is made to any person for a purpose which is not for devotion to Allah;
- d) it is made for self benefit or interest; or
- e) it is inconsistent with Hukum Syarak or any written law. (emphasis added).

See also section 13 of the Wakaf (State of Malacca) Enactment 2005.

<sup>61</sup> See also *Tan Kim Luan lwn Sabariah binti Md. Noor* [1995] 1 CLJ 323, where there was no proof that the *waqf* asset had been gazetted under the NLC.

the future in other states in Malaysia, unless there is an efficient administration and clear law which can govern *waqf* and its validity as well as to protect the *waqf*'s stakeholders and beneficiaries.

## CONCLUSION

Even where the parties in *waqf* disputes are all, *ipso facto*, Muslims, it is submitted that, the new constitutional amendment made to article 121 of the FC – article 121(1A), which gives exclusive jurisdiction and power to the syariah courts to try and hear its own matters including *waqf*, without interference from the civil courts is far from enough. Regardless of the fact that respective states' administration of Islamic affairs enactments and FC's provisions have conferred on the syariah court the jurisdiction to hear and decide on *waqf*, these provisions still have not warranted free exercise of the syariah courts to deal with *waqf* cases either. According to Professor Ahmad Ibrahim, this is partly because there is no specific legislation on *waqf* passed by the state legislative council (except for Selangor, Malacca and Negeri Sembilan<sup>62</sup>) nor the Parliament, which could define and bestow on the syariah court the comprehensive rules of judicial administration, power and jurisdiction to adjudicate *waqf*.<sup>63</sup> Thus due to this handicapped status, the syariah court has no power and jurisdiction, whatsoever, to hear and determine issues on *waqf*. This is because although *waqf* falls within the jurisdiction of the syariah court pursuant to the respective states' Administration of Islamic Law Enactments<sup>64</sup> and List II of the 9<sup>th</sup> Schedule to the FC, yet based on the above decided cases, as the prayers and relief sought by the parties are not within the jurisdiction of the Syariah Court. Further, if there is any non-muslim party to the proceedings involving the question of *waqf*, equally the syariah court too has no jurisdiction and power to deal with the same. These *lacunae* in the law has thus prevented the Syariah Court from hearing *waqf* cases. Secondly, due to the fact that the Syariah Court lacks the necessary power and jurisdiction, such *waqf* cases will indispensably fall back on the civil courts (High Court). This is because pursuant to section 23 of the CJA, the civil courts shall have the jurisdiction to hear ALL civil proceedings, including *waqf*. Further, as *waqf* is still regarded by the civil courts as one type of trusts (*amanah*) which is subject to the Trustee Act 1949, and due to the fact that trusts, falls under the jurisdiction of the civil courts, this follows that *waqf* cases shall, likewise, inevitably fall under their domain.

## SUGGESTIONS

According to Professor Ahmad Ibrahim, apart from having specific legislation on *waqf*, section 2 of the Trustee Act 1949 also must be amended, in that the definition of courts should include syariah court. Waqf also, it is submitted should be exempted from the

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<sup>62</sup> In Negeri Sembilan there is Wakaf (Negeri Sembilan) Enactment 2005.

<sup>63</sup> Professor Tan Sri Datuk Ahmad bin Mohamed Ibrahim, *Kedudukan Undang-Undang Islam di Malaysia*, JH(1418) H, Jilid xi bhg. II, hlm. 128.

<sup>64</sup> For instance, section 48 of the Penang Administration of Religion of Islam Affairs Enactment 1993.

definition of trust in the said act, similar to that of section 4 of the National Land Code 1965 which excludes waqf from its purview, allowing it to be governed by Islamic Law.<sup>65</sup>

It is the authors' view that until and unless, the above cases are corrected or some legislative amendment is made to the Trustees Act 1949<sup>66</sup>, Specific Relief Act 1950<sup>67</sup>, the respective states on the Administration of Islamic Affairs Enactments<sup>68</sup>, and especially an exclusive Waqf Administration Act and Syariah Specific Relief Act/Enactment (which should contain the power to issue injunctions, declarations and vesting orders, specific relief etc) is either passed by Parliament or State Legislatures and other federal statutes (for example, the Court Judicature Act 1964<sup>69</sup>, Civil Law Act 1956<sup>70</sup>, National Land Code 1965 (see the problems as discussed above relating to the NLC), Rules of the High Courts 1980<sup>71</sup>, Local Government Act 1976<sup>72</sup> or even the Federal Constitution<sup>73</sup> itself, so as to

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<sup>65</sup> Professor Ahmad Ibrahim, *Undang-Undang Islam dan Undang-Undang Barat – Satu Perbandingan*, JH(1410) H Jilid VI Bhg. II p. 213.

<sup>66</sup> Section 2 of the Act should be amended so as to include syariah court and waqf should be excluded from the definition of 'trust'.

<sup>67</sup> This act should contain provisions which could confer on the syariah court the right to apply specific reliefs such as specific performance, declaratory order and injunction. However, if we were to dive into detail, none in the provisions of this act which restrict the application of the relief only to the civil courts. This act only mentions 'court' without qualifying the syariah court. Query, can syariah court also be included in the definition of such 'court'?

<sup>68</sup> For example by deleting the provision that in waqf disputes and proceedings the parties must all be Muslims.

<sup>69</sup> This act, it is submitted, must also mention on the existence of the syariah court and define its jurisdictions.

<sup>70</sup> 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<sup>st</sup>. December, 1951 (for Sabah) and 12<sup>th</sup> 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 todate, reliance on the English cases and laws is made even all of these laws are passed after 7 April 1956 or 1<sup>st</sup>. December 1951 or 12<sup>th</sup> December, 1949. Accordingly, in order to legitimize 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, *ultra vires* nor void either?

<sup>71</sup> The provisions in this rule which confers jurisdiction on 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 syariah courts so as to shackle the syariah court's judicial administrations and executions.

<sup>72</sup> According to this Act, the assessment fee charged on the *waqf* properties are too high and add up with low rental payment received, it would render the *waqf* properties not viable and economical for the religious councils to administer. What more could the revenue be collected from the rental premise for distributions to and benefits of 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.

<sup>73</sup> Article 160 it is submitted must include 'Islamic Law' as well for clearance. However, the existing definition in article 160 on the definitions of 'law' and 'written law' are not exhaustive, in which it is

facilitate the due functions of the syariah court, the comprehensive jurisdiction to adjudicate *waqf* would still be in the province of the civil court (High Court). The above counter arguments put forward by the authors are to justify that *waqf* should exclusively be within the ambit and jurisdiction of the syariah court and not the civil court, based on the existing facts, law and expediency especially pursuant to List II of the Ninth Schedule to the FC and the respective states' Administration of Islamic Affairs Enactments. Finally, the authors with due respect to the decisions of the above cases, submit that, based on limited statutory provisions available, *waqf* should appositely be within the exclusive province of the syariah court.

Finally, the trustee of the *waqf* assets, namely the respective states' religious councils must also fully comprehend and comply with the Malaysian laws, particular the NLC, the Companies Act 1965 etc in the carrying out due governance of *waqf*. Further, the administration of *waqf*, on part of the religions councils, must be efficient and should be logistically and professionally sufficient to warrant the due execution of the *waqf* properties. Finally, special *waqf* laws (either federal or state law) must be enacted in Malaysia to govern *waqf*, in order to render the *waqf* made are valid and effectual to the benefits of the Muslim public. These approaches and suggestions are to avoid similar problems from happening again as in *Bong Boon Chuen* and other case law as explained above.

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submitted would include Islamic Law as well as this law can also be regarded as 'usages and customs' applicable in the Federation. Secondly, by deleting the provision that in *waqf* disputes and proceedings the parties must all be Muslims.