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PROCEEDING

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LAW AND SOCIETY

Yogyakarta, 04 – 07 April 2017

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2017
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Assalaamu’alaikumWarahmatullahiWabarakatuh,
In the Name of Allah, the most Gracious and the most Merciful. Peace and blessings be upon our Prophet Muhammad (S.A.W).

First and foremost, I felt honoured, on behalf of the university to be warmly welcomed and to be given the opportunity to work hand in hand, organizing a respectable conference. Indeed, this is a great achievement towards a warmers multilateral tie among UniversitasMuhammadiyah Yogyakarta (UMY), International Islamic University Malaysia (IIUM), UniversitiIslam Sultan Sharif Ali (UNISSA), Universiti Sultan ZainalAbidin Malaysia (UNiSZA), Fatoni University, Istanbul Univer-sity, Fatih Sultan Mehmet Vakif University and Istanbul Medeniyet University.

I believe that this is a great step to give more contribution the knowledge development and sharing not only for eight universities but also to the Muslim world. Improving academic quality and strengthening our position as the procedures of knowledge and wisdom will offer a meaningful contribution to the development of Islamic Civilization. This responsibility is particularly significant especially with the emergence of the information and knowledge society where value adding is mainly generated by the production and the dissemination of knowledge.

Today’s joint seminar signifies our attempts to shoulder this responsibility. I am confident to say that this program will be a giant leap for all of us to open other pathways of cooperation. I am also convinced that through strengthening our collaboration we can learn from each other and continue learning, as far as I am concerned, is a valuable ingredient to develop our universities. I sincerely wish you good luck and success in joining this program

I would also like to express my heartfelt thanks to the keynote speakers, committee, contributors, papers presenters and participants in this prestigious event.

This educational and cultural visit is not only and avenue to foster good relationship between organizations and individuals but also to learn as much from one another. The Islamic platform inculcated throughout the educational system namely the Islamization of knowledge, both theoretical and practical, will add value to us. Those comprehensive excellent we strived for must always be encouraged through conferences, seminars and intellectual-based activities in line with our lullaby: The journey of a thousand miles begin by a single step, the vision of centuries ahead must start from now.

Looking forward to a fruitful meeting.

Wassalamu’alaikumWarahmatullahiWabarakatuh
Alhamdulillah all praise be to Allah SWT for his mercy and blessings that has enabled the FakultasHukum, UniversitasMuhammadiyah Yogyakarta in organizing this Inaugral International Conference on Law and Society 6 (ICLAS 6).

This Conference will be providing us with the much needed academic platform to discuss the role of law in the society, and in the context of our two universities, the need to identify the role of law in furthering the progress and development of the Muslims. Muslim in Indonesia and all over the world have to deal with the ubiquity of internet in our daily lives life which bring with it the adventages of easy access of global communication that brings us closer. However, internet also brings with it the depraved and corrupted contents posing serious challenges to the moral fabric of our society. Nevertheless, we should be encouraged to exploit the technology for the benefit of the academics in the Asia region to crate a platform to collaborate for propelling the renaissance of scholarship amongst the Muslims.

This Conference marks the beginning of a strategically planned collaboration that must not be a one off event but the beginning of a series of events to provide the much needed platform for networking for the young Muslim scholars to nurture the development of the Muslim society.

UMY aims to be a World Class Islamic University and intend to assume an important role in reaching out to the Muslim ummah by organising conferences hosting prominent scholars to enrich the development of knowledge. This plan will only materialise with the continuous support and active participation of all of us. I would like to express sincere appreciation to the committee in organising and hosting this Conference.

---

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New Developments on Waqf Laws in Malaysia: Are They Comprehensive?

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ABSTRACT
Five (5) states in Malaysia have introduced their own waqf laws. The other five (5) states are working on new laws and the remaining states maintain waqf matters in the general statutes on administration of Islamic law. The new developments which took place in the 5 states are expected and most awaited after voluminous researches reveal that the legal framework has contributed to the slow development of waqf in Malaysia. Using the doctrinal approach and comparative analysis method, this study reviews the latest developments in the waqf enactments of Selangor, Perak and Terengganu and discusses how the changes in the laws have helped to improve the slow and restricted jurisdiction dealing with waqf. The findings show that the new Enactments have addressed most of the observations from the previous literatures especially with regards to challenges in waqf development. Observations also relate to the fast development of waqf which moves in tandem with various other aspects of the economy and finance. Waqf is now recognised as the third economic sector in several jurisdictions. In addition, the need to employ Islamic finance products as vehicles for waqf development has also been recognised by the stakeholders. Although new laws are welcomed, the awareness on the emerging new needs is vital.

Keywords: Waqf, laws, Islamic finance, third sector economy

I. Introduction
This paper reviews the latest waqf enactments in Malaysia. The latest waqf enactments refer to the Enactment introduced from 2015 and 2016. During this period, three (3) states have made proactive efforts towards enhancing the application of waqf laws, replacing the old enactments as well as the provisions on waqf in some Administration of Islamic Law Enactments. The discussion involves three Enactments introduced in three states i.e. Selangor, Perak and Terengganu. It is noted that the first wave of change on waqf laws has taken place earlier in 1999-2005 involving the states of Selangor (1999), Negeri Sembilan (2005) and Melaka (2005). It is acknowledged that the first attempt has to a certain extent contributed to mould a basis for a new paradigm shift in waqf management in Malaysia. Nevertheless, the fast development of waqf especially in the corporate sector demands a wider role to be assumed by all waqf stakeholders. This research is important in providing reference for the administration and management of waqf laws, in Malaysia and other Muslim countries. While the administration is different between the states, the similarities are worth reference.

1.1 Literature Review
Mohammad Tahir Sabit (undated) was of the opinion that the past changes that took place involving waqf laws in Negeri Sembilan and Melaka are still lacking in a few matters. Firstly, it was argued that an effective organisational administration, appropriate assets management, and innovative Shariah compliant financial mechanisms are needed to further strengthen the waqf institu-
tion. Mohammad Tahir also focuses his proposal on five main aspects; recognition of legal personality for individual waqf - the corporation and Majlis; the new institutional structure for waqf management; the nature of waqf instrument and its effect; the management of waqf properties and accounting thereof. Other minor proposals are made too, which are discussed on sections relating to registration, creation of new waqf offences, monitoring and power of courts.

Nor Asiah, Sharifah Zubaidah and Zuraidah (2012) observed that legal reform for waqf is necessary in order to provide for an enabling legal environment dealing with specific provisions for the creation of waqf and provide specific law relating to waqf to guarantee the sustainability of the development of waqf lands in Malaysia. Specifically, Nor Asiah (2015) commented on the provisions of the NLC which in her opinion cannot provide a better management and sustainable protection of waqf land. It lacks specific and clear provisions on waqf which has resulted in different practices among the States in Malaysia.

Sohaimi and Syarqawi (2008) highlighted that one of the major issues in waqf administration in Malaysia is lack of waqf enactment in many States. Norilawati Ismail (2012) observed among the legal challenges in waqf is that without a specific waqf enactment, Shariah Court judges will face problems in hearing waqf cases. One of the obstacles is that the judges have no reference in substantive, procedural and administration aspects.

Abu Bakar, M. (2007) asserted that among the challenges in the development of waqf properties in Malaysia are legal issues, management issues, location, small size of land and lack of experts in strategizing effective development of waqf. On an extreme note, Murat Cizakca (2000) observed that in Malaysia, the waqf centralized system by the state has resulted in the appointed trustees by the waqif has to be replaced by the Majlis or transferred to the appointed trustee by the Majlis.

1.2 Important Areas in the New Waqf Laws

The Selangor Waqf Enactment 2015 replaces the Selangor Waqf Enactment 1999, the first waqf enactment in Malaysia. The 2015 enactment is an improved and more comprehensive version compared to the 1999 enactment. Perak passed its first waqf enactment in December 2015 while Terengganu passed its waqf enactment in November of the following year.

Table 1: New Enactments On Waqf In Malaysia 2015-2016

<table>
<thead>
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<th>STATE</th>
<th>DATES OF Gazette</th>
<th>NEW LAWS</th>
<th>PREVIOUS LAWS</th>
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<td>1 Selangor</td>
<td>19 October 2015</td>
<td>Wakaf (State of Selangor) Enactment, 2015. (Enactment no 15)</td>
<td>Wakaf (State of Selangor) Enactment 1999 (Enactment No 7 of 1999) repealed</td>
</tr>
<tr>
<td>3 Terengganu</td>
<td>Passed by the State Legislative Assembly on 24 November 2016.</td>
<td>Wakaf (State of Terengganu) Enactment, 2016</td>
<td>Administration of Islamic Law Enactment No.2. 2001 (Sec 63-69)</td>
</tr>
</tbody>
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A comparison of the scheme of new waqf laws above reveal that to date the Terengganu Waqf Enactment 2016, being the latest waqf enactment amongst the three, has the most provisions including provisions for offences and penalties and enforcement and investigations.
II. Discussion

2.1 Preliminary on Prerogative Saving Clause

It is interesting to note that both the Selangor Waqf Enactment (SWE) and Terengganu Waqf Enactment (TWE) have a saving prerogative clause declaring the rights of the Sultan being the Head of Religion on matters pertaining to Islam. The Perak Waqf Enactment (PWE) lacks this provision. It is thus understood that although the Sultan is also the Head of the Majlis, but the Sultan has a prerogative power to decide on any matters pertaining to Islam in which waqf is one of the matters. The source of this power is enshrined in the Federal and State Constitution. The implication is that if there is any matter concerning waqf which is vague or falls contrast to the interest of Islam, Sultan may decide on his capacity as the Head of Religion, provided that the decision is not contrary to hukm syarak.

2.2 Types of Mawquf

While most enactments provide definitions for mawquf in the definition section, each enactment has dedicated different Parts for mawquf with separate headings, and the scope of mawquf differs. For example, SWE has clearer and detailed provisions on mawquf supporting the literal meaning of mawquf in the definition section. SWE has further detailed the types of mawquf which consist of some jurisprudential principles on waqf. For example, types of waqf under SWE include moveable property, immoveable property, the benefits, intellectual property or expertise or services. This detailed illustration reconciles various opinions of jurists on what can be a subject matter of waqf or otherwise.
2.3 Powers

There are many issues arising from the several provisions on power of the *Majlis* on waqf. Under PWE, powers of the *Majlis* cover the *Majlis* to be the sole trustee, power to purchase property, claim on rental, usufruct, or benefit of *mawquf*. Powers on *istibdal* is dealt with under Part VI on *istibdal*. The law which provides for the *Majlis* as sole *Mutawalli* for all waqf properties in their respective states has been criticised as contributing to the slow development of waqf. In fact, it is further provided that any person or body found managing waqf property without the approval of *Majlis* commits an offence and can be fined to the maximum RM5000 or maximum 3 years jail or both. While some jurisdictions such as Singapore and the Middle East countries encourage or retain the existence of private trustees, the legal framework in Malaysia does not appear to be so.

The *Majlis* can be the *mawquf alaih* for any *mawquf* situated in and outside the respective states. This is positive for a better management of *awqaf* properties. This will also give a chance to the trustee to be appointed as trustee by *Majlis* in other states. This will encourage positive competition among the *Majlis* to approve and appoint other bodies as waqf trustees. Indirectly, it rationalises the common perception that *Majlis* is controlling and monopolising the role as sole trustee thus contributing to hampering or slowing down the management of waqf in Malaysia.

Under the new enactments, the law has made clear that any waqf relating to land needs to be vested under the *Majlis* by virtue of section 416C of the National Land Code 1965. Previously, the Director-General of Land and Mines has issued a circular to the same effect but such circular has not been followed by the *Majlis* or the land office of the particular state as it is merely directory and has no legal effect. Furthermore, land is a state matter, each state has its own discretion to decide and the same principle is also adopted for land matters where the State Authority is the highest decision making body. As such, they are not obliged to adopt any circular issued at the Federal level by a Federal agency.

There is a clear provision for the *Majlis* to be the beneficiaries of any *mawquf* of waqf in the respective state as well as for any *mawquf* situated elsewhere. *Majlis* as sole trustee, may be made a *mawquf alaih* for any *mawquf* (s. 4(1)(b) of TWE and s 4(1)(d)). This is a proactive provision which allows healthy competition among the *Mutawalli*.

2.4 Can *Majlis* delegate its power to a corporation?

The next issue concerns the power of the *Majlis* to delegate its power to its body corporate created under its authority. Section 8(1) of SWE clearly says that the *Majlis* may delegate its power subject to the conditions and restrictions as it deems fit. Ironically, the other enactments do not use the term delegation, thus there is no such similar provision on delegation. Perhaps, one consideration may be looked under the administrative law principle there is a maxim says *Delegata potestas non potest delegari* which means in “no delegated powers can be further delegated.” Or also known as *delegatus non potest delegare* which means “one to whom power is delegated cannot himself further delegate that power”. A review of various authorities under American law and English law on this issue provides pro and contra views. We may however reconcile this by taking the approach that the delegatee may be made to perform certain tasks but such trustee, in this case the *Majlis* as the sole *Mutawalli* may not delegate its personal responsibility to oversee the administration of the waqf. The exercise of discretion by the trustee in making prudent delegations allows him to be more flexible and, perhaps pragmatic, in furthering the goals of the waqf than under a more restrictive view.
2.5 Waqf Scheme
While TWE (s.4(1)(f)) and PWE allow the Majlis or any institution to establish and manage or approve a waqf scheme by dedicating a specific provision on waqf schemes, SWE has no such similar and straightforward provision for the approval of waqf scheme. Nevertheless, it is argued that such similar power may be exercised by the Majlis in Selangor under section 4(1)(4) of the Enactment.

2.6 The Position of Mufti as a member in Wakaf Management Committee.
While PWE and SWE do not have a Second Schedule which lists down members of the Wakaf Management Committee, the TWE which is similar to Wakaf Enactment Melaka provides a detailed Schedule for that matter. The issue is the Mufti is one of the members in the Committee while at the same time he is also a member in the State Fatwa Committee. The query is what happens if there is any issue raised with regard to matters concerning hukm syarak which was decided by the Wakaf Management Committee, and this matter needs to be brought to the State Fatwa Committee? Will there be issue of conflict of interest? Furthermore, any person who is not satisfied with any decision of Majlis or Wakaf Management Committee may need to refer the matter to the Mufti for a clarification or refer the matter to the State Fatwa Committee for deliberation. It may be awkward since the Mufti happens to be a member in both bodies.

2.7 Tribunal or Court?
The Enactments clearly provide that if there is any ambiguity concerning the instrument or declaration of waqf, thus reference must be made to the court. By definition, the court refers to both, the Shariah court and the civil court. It is unfortunate that the option has not been made to other means of alternative dispute resolution or Tribunal for waqf. When waqf is special in character and law, it is best to refer to a specialized Tribunal for any conflict rather than to the Court. This would also be able to preserve the good name of the Majlis, rather than seen as being embroiled in various litigations involving waqf.

2.8 Appointment of Wakaf Management Committee
Both PWE and TWE have a clear provision allowing the establishment of a Wakaf Management Committee. Unlike PWE and TWE, SWE does not dedicate a clear provision to that effect. This creates a few questions as to whether Majlis under SWE relies on provisions on the establishment of corporation to assume a similar role with Wakaf Management Committee. A comparison on the functions and roles of Perbadanan Wakaf Selangor (PWS) and the roles of the Wakaf Management Committee under the TWE shows some similarities in feature, thus it could be concluded that by having a clear provision on delegation of powers from Majlis to corporation, the PWS has assumed a wide duty and function similar to a Wakaf Management Committee in other states. Nevertheless, under TWE the provisions on Wakaf Management Committee are more detailed and clearer in terms of appointment, terms, termination, benefits and other administrative matters (Schedule 2). Unlike TWE, although the PWE has a provision allowing for the establishment of a Wakaf Management Committee, it lacks details in which case reference must be made to the power of Majlis. Having stated the establishment of a corporation under the SWE, it is noted that TWE (s 4(1)(c) and PWE also have provisions for the establishment of corporation or companies by the Majlis for the purpose of carrying out any activity of the Majlis.
2.9 Promoting Waqf as Third Economic Sector

It is a known fact that the government and private sectors are the main players in providing infrastructure and facilities for the people. Similarly, it is recently acknowledged that waqf is contributing and supports the government in performing the same responsibilities. As such, it is necessary for law to be designed towards realising the same vision and mission. Thus, it is observed that the new Wakaf Enactments in the three selected states have provided a wider scope of waqf, and a clearer role of Mutawalli especially in ensuring the working of corporate waqf within the existing legal framework. The Enactments have provisions on investment of waqf, gathering of waqf capital, accounting requirements, waqf scheme, waqf share, etc. What is needed in addition to that is laws to govern the professionalism of the waqf trustee either through specific provision in the waqf enactments or to bind them through their professional body’s work ethics.

2.10 Corporate Waqf and Islamic Finance Products

The most applauded effort in introducing a new package of Waqf Enactment is the need to keep abreast with the new developments in Islamic finance, Islamic capital market, Takaful and waqf. It has been realised that waqf or waqf products need the product of Islamic finance, Islamic capital market and takaful as vehicles for development since the Majlis is known for not being an income generating institution. In fact, in most cases, the Majlis has to raise capital to maintain waqf properties. The new Enactments have ventured for cooperation and collaboration of Islamic finance institutions either as a partner or pioneer to generate income for development or purchasing of properties for waqf purposes. Apart from the improvement on the definition and scope of waqf, recognising the various types of waqf including recognition of waqf muaqqat or temporal waqf or waqf musytarak, the Enactments also allow the Majlis to utilize money from other sources allowed by Hukm Syarak. In Malaysia, there are examples like Waqf Hj Ahmad Dowjee Dadabhoy where the two acres plot of land in the middle of Kuala Lumpur was developed as multi-storey offices and an in-house mosque.

The main challenge of raising funds to finance waqf lands has been resolved with various Islamic products such as sukuk, waqf an nuqud, waqf share etc. Nevertheless, despite new changes, the challenge continues in this sector. Making waqf a third or fourth sector is far from reality. In fact, taking cash waqf for example, the enactments merely provide a definition and give some authority to the Majlis to collect or receive cash waqf. The question is what is next? How can the cash waqf be further dealt with to make it a sustainable source of mawquf and remain competitive in the global market? In fact, it may be argued that the existing legal framework is inadequate thus making matters pertaining to the waqf market extra legal.

2.11 Illegal Occupation on Waqf land

TWE has made a special PART to cover matters on how to deal with illegal occupation on waqf land while the SWE and PWE deal with illegal occupation under General Provisions relates to the power of Majlis. (s 42 PWE). As this area is sensitive and touches on various issues including universal principles of human rights, politics and religion, it is advisable for the Majlis to provide details in the provisions on methods of eviction and their remedies, taking into account some universal principles prepared by the United Nations. This can be achieved through a Schedule or adoption of procedures in the Manual prepared by JAWHAR (Department of Waqf, Hajj and Zakat).
2.12 Enforcement, Investigation and Penalties

The PWE clearly gives power to the Majlis to take actions against any person who illegally or without permission from the Majlis, enters, inhabits or occupies any waqf land. (s 42 PWE). Their acts vary to include erecting, demolishing, ploughing, takes, destroy, letting of cattle straying on waqf land etc. PWE also gives power to the Chief Registrar of Wakaf or Registrar of Wakaf or their representative to have access to all waqf properties for the purpose of the implementation or enforcement of the Enactment or the related regulations.(s 33 PWE).

2.13 Family Waqf

Recent researches show that there are calls for revival of family waqf in many jurisdictions. Reference to family waqf may fall under the terms ‘private waqf’ or ‘wakaf khas’. The legacy of the colonials in prohibiting or restricting family waqf is concurred and Malaysian law on waqf is not an exception. There is no clear provision for reviving family waqf in the Enactments. Some Enactments continue to emphasise that wakaf khas for family or descendants or heirs of the waqif is invalid. Some specify that the effect of such waqf is subject to the approval of the Majlis (s 14 SWE). The PWE clearly states that administration or management of wakaf khas without the permission of the Majlis is an offence and upon conviction shall be subject to penalty. Under SWE, any person who manages wakaf khas without the permission of the Majlis or Corporation commits an offence be liable to a fine not exceeding RM1000 or imprisonment not exceeding 6 months. It is a missed opportunity for the Malaysian legal framework for not recognising private waqf or family waqf while the need is there among the Muslim. In the eyes of Shariah, there is no essential difference between public welfare waqf and a waqf created for the benefit of individuals such as family members (A. Rahman Sadiq, 2017). It is high time to consider allowing the founders or waqif to administer their own waqf and for the Majlis acts as the supervisory body that can punish the trustee for failure to uphold the trust honestly. In fact, the Muslim has an option to create family waqf under the Labuan Islamic Services and Securities Act 2010.

III. Conclusion

The emergence of various new waqf enactments is welcomed. The Malaysian legal framework on matters pertaining to Islam and land has resulted in various Enactments being introduced in various states, including waqf enactments. To some extent, there are different headings with different wordings used in the Enactments. The differences are comprehensible as it facilitates the current needs of the jurisdictions. Some states may experience a fast and vast aspect of waqf development thus requiring urgent solutions to the problems. Some states are slow due to less demand for new legal and juristic opinion. Nevertheless, they learn from each other. It is observed that Malaysia is fast in catching up with the latest developments in waqf administration covering almost all aspects of economy, social, welfare, Islamic finance, takaful or even tax law. The waqf enactments are the product of continuous efforts to improve and making Malaysian waqf law to be held in high regard in the eyes of the world and towards becoming a waqf hub in the region.

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