MANAGEMENT OF WAQF DISPUTES IN MALAYSIA: ISSUES AND RECOMMENDATIONS

BY

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ABSTRACT

Numerous issues surrounding the administration of Waqf and its legal framework have contributed to the occurrence of disputes and conflicts between the State Islamic Religious Councils (SIRCs) and interested parties. Even though there are only a relatively small number of Waqf disputes in Malaysia, failure to effectively manage the Waqf disputes will impair the confidence of the public on the Waqf administrators and therefore affect the growth and development of Waqf in the country. Solutions must therefore be formulated to ensure that these disputes are managed and resolved pragmatically and, if possible, amicably. It is therefore the main objective of this research to propose recommendations which could improve the Waqf dispute resolution framework in Malaysia. To achieve this objective, the nature and types of Waqf disputes often faced in Malaysia and the challenges faced by the parties during the resolution process were determined through an analysis of past Waqf cases and through interviews with relevant Waqf officers in Selangor, Penang and Terengganu. An examination of Malaysia’s Waqf legal framework observed that the SIRCs have been equipped with the necessary general powers to ensure that all Waqf disputes are properly addressed. With their given powers, it was found that the SIRCs held preference to amicable settlement before referring any matter to court. However, it has been further discovered that several issues are present throughout the dispute management process which had affected the parties’ chances for amicable settlement. The issue of conflict of jurisdiction between the civil and Syariah courts in hearing Waqf disputes was also observed and analysed in this research. Inspired by the best practices of Singapore and India and the benefits which Alternative Dispute Resolution (ADR) could bring, recommendations were proposed at the end of this research with the aim to improve the current dispute resolution process. The proposed recommendations cover the dispute prevention process as well as the resolution and settlement processes by the SIRCs and the courts. Among the key recommendations proposed were on the empowering of the Syariah Courts in hearing Waqf disputes through legal reforms as well as effective administrative strategies which would effectively prevent or mitigate Waqf disputes. It is believed that the recommendations proposed in this research could benefit the Waqf administration and Waqf dispute resolution framework in this country.
ملخص البحث

ساهمت العديد من القضايا المتعلقة بإدارة الوقف وإطاره القانوني في حدوث المنازعات والصراعات بين المجالس الدينية الإسلامية للولايات والأطراف المعنية. على الرغم من أن عدد منازعات الوقف في ماليزيا صغير نسبياً، غير أن الفشل في إدارة هذه المنازعات سبب ضعف ثقة الجمهور بالمسؤولين عن الوقف، مما يؤثر على تمظ وتطور الوقف في البلاد. وبالتالي ينبغي إيجاد حلول لضمان إدارة هذه المنازعات وحلها بشكل عملي، وإن أمكن، بطريقة ودية. وعليه فإن الهدف الرئيسي من هذا البحث هو اقتراح توصيات من شأنها تحسين إطار تسوية المنازعات الوقفية في ماليزيا. و لتحقيق هذا الهدف، تم تحديد طبيعة وأنواع منازعات الوقف التي غالباً ما واجهتها ماليزيا والتحديات التي واجهتها الأطراف المعنية أثناء عملية الحل، وذلك من خلال تحليل قضايا الوقف السابقة وإجراء مقابلات مع موظفي الوقف المعينين في ولايات سيلانجور وبيانج وترينجانو. يتضح من دراسة الإطار القانوني للوقف الماليزي أنه تم منح المجالس الدينية الإسلامية للولايات الصلاحية العامة اللازمة لضمان تسوية جميع منازعات الوقف على الوجه الأفضل. وعلى الرغم من منحهم لهذه الصلاحية، فإن المجالس الدينية الإسلامية للولايات تفضل النسوية الودية قبل إلحاق أي مسألة إلى المحكمة. ومع ذلك، فقد لوحظ وجود العديد من القضايا في جميع مراحل إدارة المنازعات التي أثرت على فرص الطرفين في التسوية الودية. وقد تم دراسة وتحليل مسألة تنازع الاختصاص بين المحاكم المدني والمحاكم الشرعية في النظر في منازعات الوقف في هذا البحث. وذلك باستلهام أفضل الممارسات في سنغافورة وهند، وبالنظر إلى الفوائد التي تحققت خلال البداية للمنازعات، والتصورات المقررة في محاولة هذا البحث لتحسين عملية تسوية المنازعات الوقفية. تنتمي التوصيات المقررة عملية تسوية المنازعات وكذلك عملية تسوية المنازعات وحلها من قبل المجالس الدينية الإسلامية للولايات والمحاكم. وإن من التوصيات الرئيسة المقررة منح المحاكم الشرعية صلاحية الوقف في منازعات الوقف من خلال إجراء إصلاحات قانونية، وكذلك وضع استراتيجيات إدارية فعالة من شأنها أن تمنع أو تخفف منازعات الوقف.

من المعتقد أن التوصيات المقررة في هذا البحث يمكن أن تفيد الجهات المسؤولة عن إدارة الوقف وإطار تسوية المنازعات الوقفية في هذه البلاد.
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DECLARATION

I hereby declare that this thesis is the result of my own investigation, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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Penal Code (Act 574)

Rules of the High Court 1980 (PU(A) 50/1980)

Specific Relief Act 1950 (Act 137)

Syariah Court Civil Procedure (State of Selangor) Enactment 2003 (Selangor Enactment No. 4 of 2003)
Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355)

Syariah Court Civil Procedure (Sulh) (Federal Territories) Rules 2004 (P.U.(A) 18/2004)

Trustee Act 1949 (Act 208)

Wakaf Enactment (State of Negeri Sembilan) 2005 (Negeri Sembilan Enactment No. 5 of 2005)

Wakaf Enactment (State of Perak) 2015 (Perak Enactment No. 9 of 2015)

Wakaf Enactment (State of Selangor) 1999 (Selangor Enactment No. 7 of 1999)

Wakaf Enactment (State of Selangor) 2015 (Selangor Enactment No. 15 of 2015)

Wakaf Enactment (State of Terengganu) 2016 (Terengganu Enactment No. 1 of 2016)

Wakf Act 1954 (India)

Wakf Act 1995 (India)

Waqf Act 1995 (Waqf Amendment Act, 2013) (India)

Waqf Prohibition Enactment 1911
**LIST OF ABBREVIATIONS**

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<th>Abbreviation</th>
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<tr>
<td>SIRC</td>
<td>State Islamic Religious Councils</td>
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<td>ADR</td>
<td>Alternative Dispute Resolution</td>
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<td>NLC</td>
<td>National Land Code</td>
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<td>JAWHAR</td>
<td>Jabatan Wakaf, Zakat dan Haji</td>
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<td>JKSM</td>
<td>Syariah Judiciary Department of Malaysia</td>
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<td>MAIS</td>
<td>Majlis Agama Islam Selangor</td>
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<td>PWS</td>
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<td>MAIDAM</td>
<td>Majlis Agama Islam dan Adat Melayu Terengganu</td>
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<td>MAINPP</td>
<td>Majlis Agama Islam Pulau Pinang</td>
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<td>MAIWP</td>
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<td>AMLA</td>
<td>The Administration of Muslim Law Act</td>
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<td>NAWADCO</td>
<td>National Waqf Development Corporations</td>
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<td>SOP</td>
<td>Standard Operating Procedure</td>
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CHAPTER ONE
INTRODUCTION

1.1 BACKGROUND OF RESEARCH

With the diversification of approaches in developing the Waqf institution, it is foreseeable that its growth in Malaysia will continue in leaps and bounds. New ideas and innovations are being developed to further expand this charitable institution from its classical interpretation to a modern institution which can be integrated with present socio-economic practices.

In the past, Waqf practices in the states of Malaya were commonly confined to surrendering plots of land for purposes of building mosques or suraus, religious institutions and burial sites. These types of dedication however have since expanded to other types of endowment; assets both tangible and intangible in nature are now recognized and accepted as Waqf assets as long as they are permissible, beneficial and have value. Cash, shares, stocks, bonds, professional services and intellectual properties are now widely accepted and legally recognised as Waqf assets (Mawquf).

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3 Under the Waqf Enactment (State of Selangor) 2015, Waqf property has been interpreted under section 2 as to include moveable property, immoveable property or intellectual property. Benefits, interest and rights in connection to the property as well as expertise and services which has value and in accordance with Islamic Law is also recognized as a Waqf property under this enactment. See Raji Fauziah, Muhammad Tahir Sabit Muhammad, and Ismail Omar, “Intellectual Property as an Asset For Awqaf,” International Journal of Real Estate Studies, vol. 9, no. 1 (2015): 5.
The colonization by the British marked a significant change in the administration of Waqf in Malaysia. Through a series of laws, the state Islamic religious councils (SIRC)⁴ were recognized as the sole trustees and administrator (Mutawalli) for Waqf in the state regardless of any prior arrangements made by the Wakif on the administration of the Waqf. Effectively, all Waqf properties were deemed to be vested under the name of each SIRC as trustee.⁵ This practice continued even after the period of colonization which ended in the year 1957.⁶

The shift in Waqf administration however has not curbed the participation of interested parties who wish to establish their own endowment either for sustainability or philanthropic purposes. Since Waqf has been identified as a viable fund generator for social economic sustainability projects,⁷ Malaysia has witnessed increased participation of various bodies such as corporations⁸, educational institutions⁹ and charitable foundations in this sector. These bodies are now recognized as potential Wakifs, Nazhir (managers) and Mawquf ‘alayh (beneficiaries), a position previously held by individuals.

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⁴ Malaysia consists of fourteen states in total. The administration of Islam of each state are under the jurisdiction of their respective SIRCs. As such, there are fourteen SIRCs which administers Waqf in Malaysia.

⁵ Previously, the Mutawallis were appointed among the Imams (head of mosque), Bilal or Penghulus. See Mohamad Isa Abd Jalil, Sofri Yahya, and Anwar Pitchay, “The Contemporary Model of Waqf Structure,” in A Perspective on Islamic Wealth Management: Waqf, Hibah, Wasiyah, Estate Distribution, ed. Mohammad Tahir Sabit Mohammad and Ismail Omar (Johor Bahru: Penerbit UTHM, 2017), 15.

⁶ Murat Cizakca, A History of Philanthropic Foundations: The Islamic World from the 7th Century to the Present, (İstanbul: Boğaziçi University Press, 2002), 118.


However, with the growth and diversification of stakeholders, coupled with the creation of various Waqf schemes by the SIRC s, it is expected that interaction between these interested parties may bring about friction and disputes. If not managed and resolved effectively, these disputes could potentially diminish the trust between the parties involved and inadvertently affect the development of Waqf in the country.

As the SIRC s are the Mutawallis and sole trustees for Waqf in the state, they would also be responsible in overseeing any Waqf disputes occurring in the state. To enable them to properly execute their duties, SIRC s are now granted more power through their state Waqf laws. New provisions are also introduced to ensure the smooth administration of Waqf in the state and to prevent potential disputes. It is however hypothesized that the current Waqf framework of this country is still developing and is inadequate in addressing present and future Waqf disputes which may arise. Parties’ access to justice is also limited due to the limitations imposed on the courts in determining Waqf cases and in issuing appropriate remedies. This is evident in reported Waqf cases which shows the apparent conflict of jurisdiction between the civil and

10 Stakeholders are explained as constituencies in an organization’s environment that are affected by the organization’s decisions and actions. See Fazian Hashim and Sabariah Eni, “An Overview of Waqf Management,” in A Perspective on Islamic Wealth Management: Waqf, Hibah, Wasiyah, Estate Distribution, ed. Mohammad Tahir Sabit Mohammad and Ismail Omar (Johor Bahru: Penerbit UTHM, 2017), 31.

11 Disputes have been described as disagreements which are specific and involve disagreements which are capable of resolution by negotiation, mediation or third party adjudication. Henry Brown and Arthur Marriott, ADR Principles and Practice, (London: Sweet & Maxwell, 2011), 7.

12 Among the improvement in Waqf governance can be seen through the promulgation of Waqf laws which necessitates the registration of Waqf properties, creation of a Waqf registry and to appoint a Waqf registrar to manage the Waqf registry. Apart from promoting transparency and accountability on the SIRC s, it will also prevent the possibility of dispute pertaining to the status of a Waqf. See section 15 of Waqf Enactment (State of Selangor) 2015.
Syariah courts\textsuperscript{13} and the appearance of damaging media reports on disputes involving Waqf properties and the SIRCs as \textit{Mutawallis}.\textsuperscript{14}

It has been recorded by Umar Oseni that Waqf disputes in Malaysia revolved mainly around Waqf lands. However, it has also been shown that the evolution of Waqf practices and the increased participation by other stakeholders has given rise to new categories of disputes and conflicts.\textsuperscript{15} As the Waqf institution is projected to grow in scale even further in the near future, it can safely be presumed that such expansion will also give rise to future disputes of different natures. Measures to improve the current dispute resolution framework are therefore needed to prepare the Waqf administrators in facing the future Waqf cases and to enable them to effectively manage current disputes.

Apart from the issue involving the jurisdiction of courts and the negative media coverage on Waqf cases, issues which affect the management of Waqf disputes in Malaysia also include; lack of comprehensive laws on Waqf,\textsuperscript{16} exorbitant costs and delays in the event of litigation\textsuperscript{17} and the lack of expertise by the SIRCs to handle the

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\textsuperscript{13} Ibid.

\textsuperscript{14} An example of media reports which are potentially damaging to the SIRCs can be seen in the case of Wakaf Sheik Eusoff Sheik Latiff. See \textit{Free Malaysia Today}, "Penang Islamic Authority turned land into wakaf without heirs’ consent, court hears", <https://www.freemalaysiatoday.com/category/nation/2019/11/21/penang-islamic-authority-turned-land-into-wakaf-without-heirs-consent-court-hears/>(accessed 12 December, 2019).

\textsuperscript{15} Umar A Oseni, "Shari'ah Court-annexed ADR: The Need for Effective Dispute Management in Waqf, Hibah and Wasiyyah Cases in Malaysia" in \textit{14th Annual Conference of the Shari'ah Legal Officers of Malaysia} organized by Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia, (Langkawi, November 2012), 9.


disputes.\textsuperscript{18} These issues have been cited by scholars as factors which have impeded the efforts of the Waqf administrators when dealing with Waqf disputes. Pragmatic solutions which address these issues must therefore be formulated to ensure Waqf disputes in Malaysia can be properly addressed and better still, be prevented. The negative impact of poor dispute management could result in deterioration in the reputation and good name of the SIRCs as Waqf administrators and lack of trust by the public on the potential of Waqf as an instrument for social welfare.

To revive the Waqf institution and return it to its glory, Adi Setia believes that the administration of Waqf needs to be creative, anticipative, proactive and systematic.\textsuperscript{19} A similar approach should also be adopted in the context of managing Waqf disputes. In this light, it is therefore the main objective of this research to propose recommendations which could improve the Waqf dispute resolution framework in Malaysia. To achieve this objective, the nature and types of Waqf disputes often faced in Malaysia were determined while also analysing the issues and challenges faced by the parties during the process of managing these disputes. With this information, recommendations based on the current societal needs and future expectations were proposed with the hope that it could improve the current Waqf dispute resolution framework in the country.
