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## Addressing WAQF Disputes in Malaysian Court: Towards A New Arbitration Model

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### Abstract

*Waqf* is now an effective social finance mechanism. However, not all states follow the same *waqf* rule; some have enacted their own law to direct *waqf* through their *Waqf* State Enactment, while others continue to rely on the *Waqf* General Law to administer the Islamic Religious Enactment. The key objective of this article is to examine how the *waqf* rule is applied in *waqf* disputes in Malaysian courts, as well as the difficulties that litigants face in resolving *waqf* disputes. The qualitative data and content analysis method were used in this article. The Malaysian Court's uncertainty about *waqf*'s jurisdiction has posed a major challenge to *waqf* law. The *Waqf* Dispute Arbitration Model was proposed as a viable approach to the *waqf* dispute in this paper (WDAM).

**Keywords:** Waqf Disputes, Malaysian Court, Arbitration Model, Waqf Jurisdiction

### Introduction

*Waqf* is one of the most profound Islamic teachings. *Waqf* literally means "religious endowment," and it is recognised by Islamic teaching as a religious, pious, or charitable donation made solely in the name of Allah Subhanahuwa Taala (SWT).

Although there is no direct revelation of *waqf* in the Quran, a number of verses dealing with *sadaqa* have been used as a guide for Islamic jurists to uphold the concept of *waqf* in Islam. The verses concerning *sadaqa* were then supported by Prophet Muhammad's (peace be upon him) practise, and the practise of *waqf* was based on the Prophet's practise during the Prophet's time.

One of the most famous verses in the Quran is Al-Imran (3:92), in which Allah SWT says: 92.

*You will never attain Al-Birr (piety, righteousness - here it refers to Allāh's Reward, i.e. Paradise) unless you spend (in Allāh's Cause) of that which you love; and whatever of good you spend, Allāh knows.*

and Allah said in Al-Baqarah (2:261):

261. *"The likeness of those who spend their wealth in the Way of Allāh, is as the likeness of a grain (of corn); it grows seven ears, and each ear has a hundred grains. Allāh gives manifold increase to whom He wills. And Allāh is All-Sufficient for His creatures' needs, All-Knower."*

These verses are just a few of many in the Quran that encourage the act of *sadaqa*, which is highly recommended in Islamic teachings.

The concept of *sadaqa* was then expanded into the scope of *waqf*, whereby this type of charity, while made for the Muslim community's advantage, was done in the name of Allah with the hope of a return in the hereafter.

*Sadaqa* disputes have been recounted to Muslims throughout Islamic history in the verse Al-Maidah:27 (4:27)

27. *And (O Muhammad) interpret to them (the Jews) the story of the two sons of Adam (Hâbîl and Qâbîl-Abel and Cain) in truth; when each presented a sacrifice (to Allāh), it was recognized from the one but not from the other. The latter said to the former: "I will surely kill you.[1]" The former said: "Verily, Allāh accepts only from those who are Al-Muttaqûn (the pious - See V.2:2)."*

Muslims learn about the dispute between Hâbil and Qâbil, sons of Prophet Adam Alaihissalam, the earliest dispute in human history, when those two were fighting over whose *sadaqa* or *qorban* (sacrifices) Allah preferred. When Allah chose Qâbil's sacrifices over Hâbil's, jealousy arose, resulting in a bloodbath when Hâbil's murdered Qâbil.

Many other disputes occurred during Prophet Muhammad's time, and one incident occurred that resulted in another revelation in verse An-Nisa':65, when Allah said:(at 5:65)

65. *There will be no iman in their hearts (muslims) until they accept you (Prophet Muhammad peacebe upon him) as their Judge and there will be no iman in their hearts until they are content with what you have decided for them.*

In this verse, Allah instructs us on how to handle disagreements. The verse was revealed as a result of a disagreement between two of Prophet Muhammad's (Peace be upon him) companions. According to a hadith narrated by Zubbair Bin Awwam, he was involved in a dispute over who had the first right to water their orchard, and the Prophet (peace be upon him) made a ruling to give the first right to Zubbair, and the other companion questioned such decision, claiming that the Prophet made such declaration because Zubbair is Prophet's family. The Prophet then grants the other companion the first right to water the orchard. This storey was told to us as proof that Islam values peaceful resolution of disputes among Muslims.

Throughout Islamic history, *mufti* and *qadi* have played critical roles in resolving disputes between parties based on *mazhab* (Mohd Zakhiri, Hairuddin Megat Latif, 2019).

According to (Oseni, 2012), *sulh* and *tahkim* have been the foundation of the Islamic way of resolving disputes since the time of Prophet Muhammad, and this practise has been widely upheld during the glorious time of the Ottoman Empire.

## Waqf Disputes in Malaysia

However, there is no uniform *Waqf* law in Malaysia, and some states have enacted their own law to guide *Waqf* through their *Waqf* State Enactment, while others continue to rely on the *Waqf* General Law in their administration of the Islamic Religious Enactment. Despite the fact that *Waqf* is one of the items on the Federal Constitution's State Lists, many *Waqf* disputes have still been brought before the Civil Court, where they have been heard and decided by the Civil Court Judges. (Abdul Kader and Md Dahlan, 2009) argued that civil courts have jurisdiction to hear all civil proceedings, including *waqf*, under Section 23 of the Court Judiciary Act.

The table below lists *Waqf* cases that have been brought to civil court by parties, mentioning the jurisdictional problem among litigants in this field.

Table 1 shows a selection of *Waqf* cases decided by the Civil Court between 2003 and 2017.

Year	Case	Court
2003	<i>Majlis Agama Islam Pulau Pinang dan Seberang Perai v. Shaik Zolkaffily bin Shaik Natar &amp; ors</i>	Penang High Court Malaysia Court of Appeal Federal Court
2006	<i>Majlis Agama Islam Negeri Selangor v. Bong Boon Chuen &amp; Ors</i>	Shah Alam High Court Malaysia Court of Appeal
2011	<i>Seberang Baru Sdn Bhd. V. Majlis Agama Islam Pulau Pinang dan Seberang Perai</i>	Penang High Court Malaysia Court of Appeal
2016	<i>Dalam Perkara Permohonan Ahmad Yahya v. Majlis Agama Islam Negeri Pulau Pinang</i>	Penang High Court
2017	<i>Majlis Agama Islam Negeri Pulau Pinang v. Abdul Latiff Hassan &amp; anor</i>	Penang High Court

The table shows that the number of cases in *Waqf* disputes filed in Civil Court is currently increasing, despite the fact that a finding in the case of *Majlis Agama Islam Pulau Pinang dan Seberang Perai v. Shaik Zolkaffily bin Shaik Natar & ors* has a binding effect on all Civil courts based on the stare decisis principle.

In *Shaik Zolkaffily's case*, the Federal Court decided that a "subject matter" method, rather than a "remedy" method, should be used to determine which jurisdiction a case should fall under. Based on the subject matter of the claim, the court also decided that *Waqf* is a matter that falls under Syariah court jurisdiction in this case.

In deciding the appropriate jurisdiction, the court referred to the case of *Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur*. When the Judge in this case made a ruling concerning Syariah court, the court took a broader method to jurisdiction. According to Abdul Kadir Sulaiman J, "the fact that the Plaintiff may not have a remedy in the Syariah court does not make the civil court's jurisdiction exercisable."

In the case of *Lim Chan Seng v. Pengarah Jabatan Agama Islam Pulau Pinang*, it was determined that the Civil court lacks jurisdiction over matters that are exclusively the domain of the Syariah court. The court also stated that the Syariah court is not a product of Syariah law. It exists because of the written laws of Parliament and state legislatures. To determine the question of Syariah court jurisdiction, it is necessary to consult these laws and determine whether a civil court or Syariah court has jurisdiction over a specific matter.

Based on these cases, it is possible to conclude that there is still no clear law and absolute jurisdiction when it comes to *waqf* disputes.

Arbitration in waqf disputes thus comes at an ideal time when a constant dispute leads to encroachment of jurisdiction between Syariah and civil courts. Arbitration and mediation have been widely accepted in England since the Civil Procedure Rules were amended in 1998. Arbitration and mediation were introduced to the Court of Appeal, High Court of Justice, and County Court in order to cover the entire country of England and Wales. In Recommendation No. 302, Lord Woolf stated that when there is a satisfactory alternative to the resolution of disputes in court, the use of which would benefit the litigants, the court should encourage the use of such alternative.

## Objectives

The main purpose of this article is to investigate the application of Waqf law in the Waqf dispute in Malaysian courts, as well as the difficulties litigants face in resolving the *waqf* dispute. The uncertainty in *waqf*'s jurisdiction in Malaysian courts has posed a significant challenge to *waqf* law, and the goal of this research is to determine a viable answer to the *waqf* dispute through "alternative dispute resolution" (ADR) in the form of *Waqf* Dispute Arbitration.

## Methodology

The qualitative research methodology was used in this article. The data for this study was gathered through a library method from Islamic literature and a civil courts database. The content analysis method was used to analyse the data. The comparative analysis methods were used to compare the jurisdiction of courts in hearing Waqf disputes and the Arbitration practise in England and Malaysia, as well as the practise from an Islamic and civil law perspective.

## Significance

This study will add to a series of studies being conducted in Malaysia, particularly in the legal field. The goal of this study is to provide an alternative solution to the *waqf* dispute in Malaysia while also providing a harmonised solution to all parties involved.

## Findings And Analysis

Many proposals have recently been made for disputes in Islamic Law to be settled amicably through Alternative Dispute Resolution in order to avoid any rancorous litigations. Arbitration has proven to be one of the most effective approaches of alternative dispute resolution.

### Arbitration as Waqf Dispute Settlement.

The parties to ADR can both present their facts to the arbitrator without fear of conflicting law. Instead of arguing about the law and the technical nature of the jurisdiction to hear the Waqf dispute, the Arbitrator must decide and recommend a decision based on the facts of the case.

Arbitration is consistent with the Islamic principle of *al-siyasah al-shari'iyah*, which states that disputes should be settled in the best interests of the parties involved and the public at large. According to the law, it is permissible.

During the reign of Umar B. Al-Khattab as the second caliph in Islamic history, Caliph Umar wrote a famous letter to Abu Musa al-Ashaari in which he expressly stated the importance of Judges managing the case before them effectively and Judges are reminded to avoid a bitter and sore dispute by using an amicable settlement method (of what is known as arbitration in today's time).

### Sulh and Tahkim as Model for Dispute Resolution

From 2008 to 2012, the Syariah High Court in Terengganu set a good example and model for Waqf dispute settlement in the case of *Tengku Zainal Akmal Tengku Besar and Tengku Hidayah Tengku Habib v. Majlis Agama Islam and Adat Melayu Terengganu (Summons No: 11200-099-0400-2008)*, also known as Chendrong's case. Given the parties involved and the nature of the dispute, the Judge has ordered that the case be referred to *majlis al-sulh* in order to avoid negative public and media coverage and to preserve the Islamic image in this country. Despite the fact that the *sulh* has travelled a long and winding road, the outcome of this case has resulted in an amicable settlement between the parties. As a result of this experience, the Terengganu State Religious Council has proposed the formation of a body comprised of both beneficiaries' and the Council's representatives to settle disputes involving Islamic issues.

The practise of *sulh* and *tahkim* in the form of arbitration is not foreign to Islamic Jurisprudence, as it was widely used by Prophet Muhammad and his companions. However, in Malaysia's current legal system, such practise has been prohibited. It is interesting to note that England, which introduced and drew our legal system, has reverted to arbitration as an essential part of their Civil Procedure litigation, and that the United States of

America has introduced Alternative Dispute Resolution and arbitration in almost all of their trade disputes pursuant to the Alternative Dispute Resolution Act 1998.

Arbitration in the resolution of waqf disputes shall eliminate any conflict of jurisdiction and provide a harmonious method of resolving disputes between the State Islamic Religious Council as Trustee to *waqf* in Malaysia and parties who are also Muslims.

### **Reform for Syariah Court in Dispute Resolution**

Apart from adhering to the current practise of developed nations such as the United Kingdom and the United States, arbitration is an Islamic method of resolving disputes in Islam. As a result, there is a need for a major reform in Syariah Court in resolving disputes by enhancing the role of the *sulh* officer and establishing a Sulh Council in all Syariah Court throughout the country. *Sulh* Councils can play an important role in *waqf* Disputes if they are properly managed by appointing professionals to sit on them.

Waqf Disputes frequently involve the issue of beneficiaries, the validity of *waqf*, and the dispute over *waqf* land. As a result, experts in those fields must be appointed to promote public confidence and trust.

Judges in Syariah Court must always make room for the practise of *sulh* in *waqf* Disputes, and Judges can play a significant role in reforming the settlement through alternative dispute resolution.

To successfully reform the Syariah Court, disputing parties must be preached and encouraged to return to the true teachings of Islam and open their hearts to accept the way of Prophet Muhammad's (peace be upon him) teachings, so that we can increase our Imaan with what the Prophet has decided for us.

### **Conclusions**

*Waqf* disputes in court are always bitter, and arbitration will prevent this from becoming an ugly legal battle. *Waqf* is a beautiful Islamic tradition that must be preserved, even if there is a conflict between the parties. Arbitration will show Muslim communities that even though there is a conflict, Islam teaches us to live in peace and harmony. As a result, tolerance is a genuine value in the administration of the Islamic justice system. As part of Syariah Court reform, judges in Syariah Court must encourage the use of arbitration and *Sulh* in *Waqf* Dispute. To conclude, it is critical that a *Sulh* Council be established in the country as part of the Arbitration Model in *Waqf* Disputes. It is the responsibility of executives and government functionaries to improve the Islamic economic system (Mohd Zakhiri, 2017)

### **Acknowledgement**

This article is part of the fulfilment of the requirement for Doctoral Studies (Ph.D) by Universiti Utara Malaysia. The main author would like to thank the supervisors for supporting this article.

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