



UNIVERSITI SAINS ISLAM MALAYSIA

جَامِعَةُ الْعُلُومِ الْإِسْلَامِيَّةِ الْمَالِيزِيَّةِ

ISLAMIC SCIENCE UNIVERSITY OF MALAYSIA

Islamic Law of Property

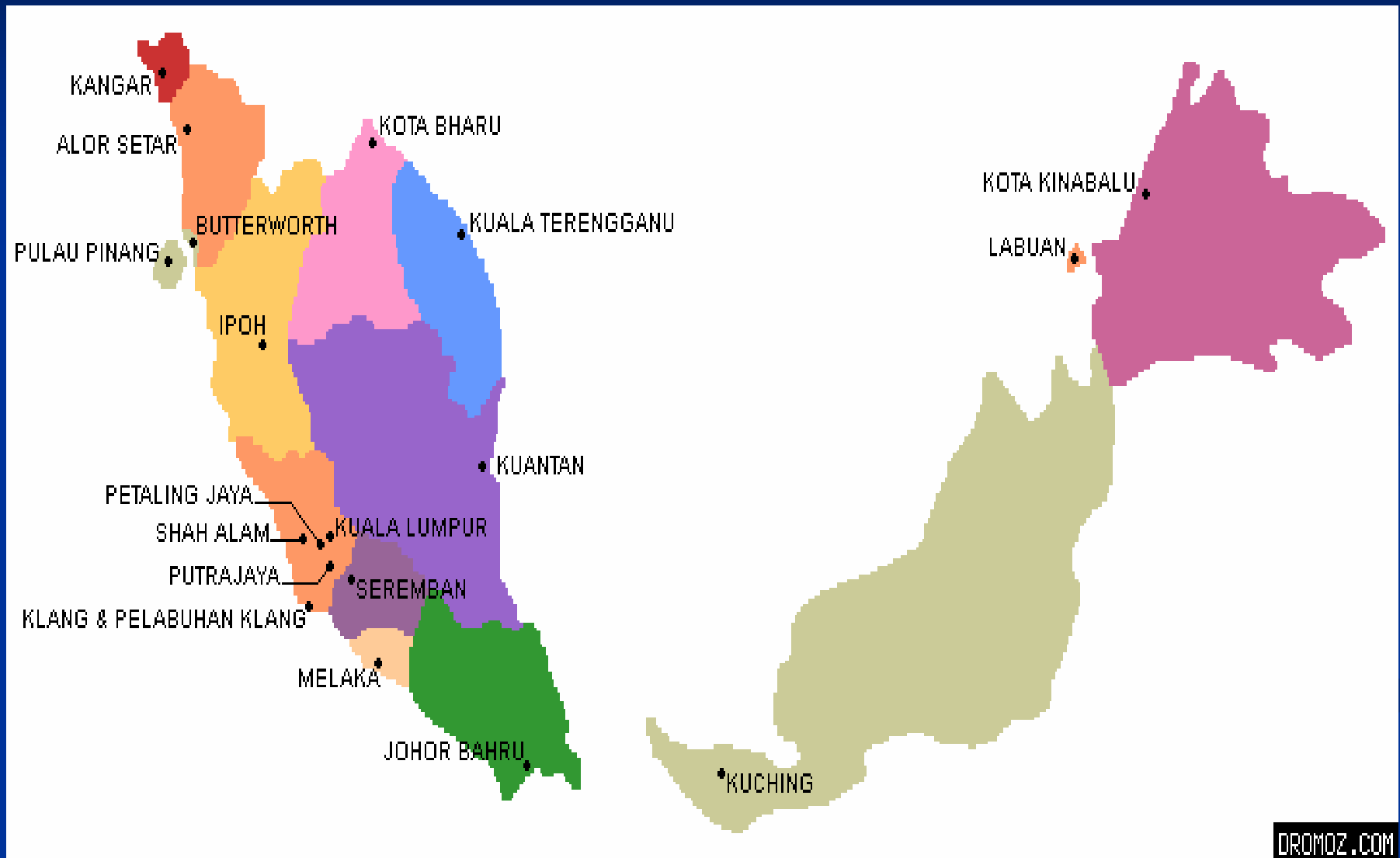
LAB2033

DR. ZULKIFLI HASAN

CONTENTS

- Introduction
- Concept of Waqf
- Historical
- Definition
- Important features
- Issues

336,700 square km. Over 35,727 hectares of *waqf* land and 20,735.61 acres of registered *waqf* lands.



Waqf lands in Malaysia

State	Specific Waqf (Acres)	General Waqf (Acres)	Total (Acres)
Kelantan	171.54	133.12	304.66
Federal Territories	5.47	22.07	27.54
Terengganu	204.43	43.01	247.44
Sarawak	236.929	-	236.929
Pahang	3985	-	3985
Sabah	4.178	25.42	29.598
Johor	1951	3976	5928
Perlis	218.69	8.75	227.44
Melaka	773.39	69.97	843.34
Kedah	420	423.34	843.34
Negeri Sembilan	1727.35	61.25	1788.60
Selangor	621.10	442.15	1063.25
Perak	4474	647	5122
Pulau Pinang	22.21	67.05	89.26
TOTAL	14,815.787	5919.83	20,735.61

Introduction

- Historically, *awqaf* played a significant role to bring about economic growth and socio-economic justice in Muslim societies
- *Awqaf* is stagnant during contemporary times, both as a concept and in practice
- The role of third sector in promoting growth and welfare is increasingly becoming important
- *Waqf* is not contributing in the growth of economies in general and third sector in particular

Cont...

- Allah decreed :
- “O you who have believed, bow and prostrate and worship your Lord and do good that you may succeed.” (Al-Haj 17:77)
- “Never will you attain the good [reward] until you spend [in the way of Allah] from that which you love. And whatever you spend - indeed, Allah is Knowing of it.” (Al-Imran 4:92)

Hadith on Waqf

- Ibn 'Umar reported,
- 'Umar ibn al-Khattab got land in Khaibar; so he came to the Prophet, peace and blessings of Allah be on him, to consult him about it. He said, O Messenger of Allah! I have got land in Khaibar than which I have never obtained more valuable property; what dost thou advise about it? He said: "If thou likest, make the property itself to remain inalienable, and give (the profit from) it in charity."
- So 'Umar made it a charity on the condition that it shall not be sold, nor given away as a gift, nor inherited, and made it a charity among the needy and the relatives and to set free slaves and in the way of Allah and for the travellers and to entertain guests, there being no blame on him who managed it if he ate out of it and made (others) eat, not accumulating wealth thereby (Sahih Muslim)

Historical Background

- The first *waqf* created by the Prophet (PBUH) was *Masjid* in Medinah
- Other than these, the first known *awqaf* were established for social purposes
 - Umar bin Khattab—land of Khaybar
 - Uthman bin Affan—well in Madinah
- Thereafter many different kinds of *waqf* were created
 - Public utilities, education and research, health care, etc.
 - Property, cash, grains for seeds, etc.

Cont...

- Ibnu Battutah visited Damascus in 726 A.H., and observed the practices of waqf there:
- ‘The variety and expenditure of waqf at Damascus are beyond computation’
 - aid of persons who cannot undertake the pilgrimage
 - supplying wedding gifts to girls whose families are unable to provide them
 - freeing of prisoners.
 - for travellers out of revenues of which they are given good clothing, and the expenses of conveyance to their countries.
 - for the improvement and paving of the streets

Cont...

- At the dissolution of Ottoman empire— $\frac{3}{4}$ of the land and buildings in some Turkish towns were *awqaf*
- In some Muslim countries *awqaf* reached 1/3rd or more of cultivable land
- At the beginning of 20th century
 - In Palestine, 233 *waqf* deeds recorded (owning 890 properties) compared to 92 private ownership deeds (with 108 properties)
 - al Quds had 64 operating schools supported by *awqaf* (more than the no. of mosques)

Waqf During Contemporary Times

- Due to different reasons, *awqaf* have degenerated now—both as a *concept* and *in practice*
- The concept of *waqf* is corrupted:
 - *Waqf* is only for religious purposes
 - *Waqf* can be established in real estate only
 - Lack of awareness that *waqf* can be productive asset/organization used for social/philanthropic purposes

Cont...

- In practice—many *awqaf* have become unproductive assets
 - *Waqf* not created for socio-economic purposes
 - Lack of institutional/organizational development
 - Lack of supporting institutions
 - Many *waqf* assets lost

Definition

- *Waqf*—”Stand still, hold still, not to let go” or “to protect something, by preventing it from becoming the property of a third person”
- *Waqf*: religious endowment
- *Waqf established* by founder (*waqif*) by dedicating an asset for benefit of a defined group
- Property in which the proprietary right is wholly relinquished and which is concentrated in such a manner to the service of God that it may be to the benefit of man

Cont..

- *waqf* is irrevocable gift of a corporeal property ('*ain*) for the benefit of donor's family or someone else or something, in perpetuity, as a charity promised and executed normally during the life-time of the donor, which is not capable of transfer, gift, and transmission thereafter.
- *Waqf* deed determines:
 - Objectives for which *waqf* is created
 - Way(s) its revenues/fruits/services can be used
 - Management process and procedures of succession of managers (*mutawalli*)

Features inherent in waqf

- 1. collective ownership of the religious community is fully expressed in waqf, even in cases where one person alone has the management of it.
- 2. the inalienability of the basic objects of the waqf.
- 3. collective usage is noticed residually in waqf, in that it has the basic purpose of providing for charity, schools, mosques, public water supplies and other establishments - and not for individual usage.
- 4. waqf is frequently concentrated in zones in which the institution of protection operates fully

Important Features

- Good objective or *birr* – good intention
- “...as if ownership belongs to God”
- *Waqf* is usually perpetual—but can be temporary and partial
- Can be created for various objectives
 - Philanthropic or public (*khayri* or *aam*)
 - Family or private (*ahli* or *khass*)
 - Mixed (*mushtarak*)
 - Religious and charitable/social

1. Irrevocability

- the lack of power of the settler (*waqif*) to revoke his donation at any time
- Jumhur: effective and binding as soon as the declaration is made by the donor without any need for delivery of possession to the beneficiary. The property is transferred from the ownership of the settler to the ‘ownership’ of Allah and hence irrevocable.

Cont...

- In Msia: S4 (1) A wakaf shall immediately come into effect once all the requirements and conditions of the wakaf had been fulfilled, unless it is expressly provided that it shall commence only after the death of the waqif.
- (2) A wakaf which has come into effect cannot be sold or transferred by the waqif or be inherited by any person.

Cont..

- *Haji Salleh Bin Haji Ismail & Anor V Haji Abdullah Bin Haji Mohamed Salleh & Ors* [1935] 1 MLJ 26, Whitley, J. “The ownership of the thing immobilised is transferred to God; which means that such object ceases, for men, to be subject to the right of the private property, and that it henceforth belongs neither to the founder nor to the beneficiary
- *Re Dato Bentara Luar Decd Haji Yahya Bin Yusof & Anor V. Hassan Bin Othman & Anor* [1982] 2 MLJ 264, 1 LNS 16, Salleh Abas FJ: A valid wakaf, like the one under appeal, takes effect immediately from the moment of its creation.

2. Perpetuity

- *ta'bid*;
- 1. once the declaration of *waqf* is made by the donor, a legally binding *waqf* is automatically effected.
- 2. *waqf* cannot be constrained by time and temporariness.
- 3. the subject matter of the *waqf* should remain so forever.
- Jumhur: Perpetuity on immovable property.

3. Inalienability

- after a valid declaration is made, the subject matter of the *waqf* ‘passes out of the ownership of the *waqif* and it cannot be alienated or transferred either by the *waqif* or the *mutawalli* nor do their heirs can take it by way of inheritance.
- prohibit the administrator from mortgaging or pledging the *waqf* property as security for a loan, simply because whatever cannot be sold cannot be mortgaged too
- Section 4 (2), all properties are vested in the Majlis and prohibits any conveyance, assignment, or transfer whatever’ affecting *waqf*

Issues on Perpetuity

- perpetuity is one of the main cause of underdevelopment.
- A shortcoming inherent in the concept of perpetuity is non-liquidity of the assets.
- majority of the *waqf* institutions have a large number of real estate but little cash,
- Due to the idea of perpetuity, the administrator neither can sell the property nor aggressively seek financing for its development through mortgage.
- it gives rise to the prohibition of temporal *waqf*.

Istibdal

- Hanafi and Hanbali schools have devised several schemes to counter the negative effect of perpetuity by allowing the exchange of estates or sell (*ibdal* and *istibdal*).
- Hanbali jurists especially Ibn Taymiyah allowed mosques to be sold and exchanged if that is beneficial to the community
- Eg. selling part of the *waqf* property to develop the remaining of the same property, selling bundle of *waqf* properties and buying new one in exchange to be used for the same purposes of the sold properties, selling one *waqf* and buying another having common purpose and selling a handful properties belonging to various *waqf* and buying a new property which has higher income and the same revenue

Problems with istibdal

- the method of barter and selling one property in order to purchase another seems difficult as it takes along period of time to replace the given *waqf* property with a comparable one,
- need the assessment of the valuers, suitability of location, bargain and consent of the owner of the targeted land, clearance from fatwa council for selling the *waqf* property

Perpetuity: Revisit

- The concept of perpetuity is not expressly established in the *sunnah*, It is only deduced by Muslim jurists from the Prophet's *hadith* about the *waqf* of the sayidina Umar (r) that the land should not be sold, given as gift or inherited.
- 1. *hadith* of Umar (r), concerning *habs* is a form of *sadaqah jariyah* and if read together with other hadiths of *sadaqah* it will become clear that a *sadaqah* that recurs after the death of the donor is also a *habs* as long as the donation keeps benefiting Muslims(as long as it exists).

Cont...

- 2. the reported hadith must be read as a whole including the part saying: ‘if you wish you can detain the corpus and let its benefits go to welfare’. The *hadith* in this way gives liberty (which also implies the permission of other forms of *waqf*) to the owner of the property to perpetually give his property in *waqf*.

Cont..

- 3. the rule is permissibility until there is evidence against its validity
- Since *waqf* is for the benefit of *ummah* and there is no restriction on donors, all types of *waqf* should be allowed.

Temporal Waqf is allowed

- Temporal *waqf* is allowed by Imam Abu Yusuf and Malikis , and currently recognised in Sudan and by Egyptian law of *waqf*.
- Imam Zufar and Ibnu Taymiyah have allowed cash waqf. The majority of Malikis allowed cash and food stuff.
- Some Shafi'I jurist allowed the dedication of dog for purposes of *waqf*.
- Al-Subki, *manfa'ah* or benefit might be the object of *waqf* and, therefore, as long *something can be used recurrently* and benefits can be received, it can be the subject matter of *waqf*.

Practice in Malaysia

- the idea of perpetuity of the subject matter seems to have lost its ground
- S 2: “include any movable or immovable property and any interest in any right, interest, title, claim, chose in action, whether present or future or which is otherwise of value in accordance with *Hukum Syarak*;”
- *waqf* as “the dedication of any property form which its usufruct or benefit may be used for any charitable purpose whether as *waqf am* or *waqf khas* according to *Hukum Syarak*, ...”.

Waqf: Redefine

- holding a *maal* (an asset) and preventing its consumption for the purpose of repeatedly extracting its usufruct for the benefit of an objective representing righteousness and philanthropy
- waqf should be identified as the perpetual dedication of benefits of a valuable, the value of which is amortized subsequently, and its proceeds or revenue are later spent on welfare of the named beneficiaries.

Types of Waqf

- *waqf ahli*, the waqf property is held for the family of its founder, until the distinction of his or her descendants
- *waqf khairi* involves the permanent dedication of property to charitable purposes.

Potential of *Waqf* in Enhancing Welfare

Type	Religious	Philanthropic/ Social
Beneficiaries		
Family	A	B
General Public	C	D

- Type A—Not too common (tombs)
- Type B—*Waqf* for family members
- Type C—Mosques, graveyards, etc.
- Type D—*Waqf* for enhancing welfare