Jurnal Syariah, 9:2 [2001] 1-12

The Legal Principles of *Waqf*: An Analysis

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Abstrak

Prinsip yang penting dalam undang-undang wakaf menekankan bahawa setiap aset yang terlibat di dalam sesuatu perwakafan tidak boleh dilibatkan di dalam sebarang bentuk transaksi demi untuk memelihara elemen kekal (permanency or perpetuity) dalam perwakafan yang dibuat. Prinsip-prinsip ini antara lain menghalang mana-mana aset wakaf daripada ditukar ataupun dijualbeli dengan aset-aset lain. Walau bagaimanapun, meneliti kepada keperluan-keperluan semasa yang mendesak, paradigma ini perlu dinilai semula supaya institusi wakaf dapat dimartabatkan dengan sebaiknya. Dengan ini juga, tujuan sebenar perwakafan yang dibuat dapat direalisasikan dengan sewajarnya.

Introduction

Before going into further details about the topic under discussion, it may be helpful to elaborate the general concept and ideas about *waqf*.

Waqf, as used in Islamic law covers various terms. Among the *Mālikīs* in North and West Africa (including Morocco, Algiers and Tunis), the terminology

hubus (plural of *ḥabīs*) or the syncopated form *ḥubs* (plural *aḥbās*) predominates; it exists in French legal language as *habous*.[1] The term *boniyad* is used primarily in Iran.[2] In the East, the term *waqf* is used.[3] However, the term *waqf* itself has slight phonetic modifications; for instance, in Malaysia, it is pronounced as *wakaf*,[4] while in Java, it is used as *wakap*.[5] The word *vaqf* (plural *evqaf*) is used in Turkish.[6] In this writing, the term *waqf* (plural *awqāf*)[7] is used, based on its classical origin, since it is found in the *ḥadīth* literature and other works of Muslim jurists.

Commonly, *waqf* refers to a pious foundation, which is defined in various ways in the *Sharī'ah* by different schools of laws. The term *waqf* refers to things which are intact in themselves and yet produce an income or benefit, the owner of which foregoes his right of ownership on condition that the product serves charitable purpose. However, this legal process of dedication is not according to the popular meaning of the term, but rests on the endowment itself which is properly called *mawqūf, maḥbūs, muḥabbas* or *ḥabīs*.[8]

Definition of *Waqf*

Waqf (plural *awqāf*) or *ḥubs* (plural *aḥbās*) is an Arabic *maṣdar* which is derived from the word *waqafa* and literally means "detention"; "to prevent", "to restrain".[9] The term *awqafa*, which is the same meaning of *waqafa*, is very rare in the Arabic language.[10] In Islamic terminology, *waqf* means "a dedication of property either in express terms or by implication, for any charitable or religious object, or to secure any benefit to human beings".[11]

The Legal Principles of *Waqf*

The legal principles of *waqf* has been clearly stated in a Ḥadīth of Ibn 'Umar which mentions about the *waqf* of 'Umar Ibn al-Khaṭṭāb.

The above *waqf* occurred in the 7th AH.[12] It was started at the time of the Prophet (p.b.u.h.), when this second Caliph, at the partition of Khaybar acquired a piece of land named Thamgh,[13] which he treasured. He came to the Prophet (p.b.u.h.), seeking his advice about it. He said: "O Prophet! I have obtained a piece of land in Khaybar which is the best of all the properties I ever got. What is your opinion about putting it to use in the name of Allah?." The Prophet (p.b.u.h.) said: "If you wish, retain the real and devote its usufruct to pious purposes". 'Umar accordingly dedicated the property on condition that the land should neither be sold, nor made the subject of a gift or inheritance. The income alone should be spent on the poor and relatives and on freeing the slaves and on the services rendered to

travellers and on hospitality. The administrator (or manager) shall have the power to take some of its income and the rest of it for feeding others, not accumulating riches thereby".

As far as Islamic law is concerned, this is the first legal and official institution of *waqf* in Islam proclaimed by the Prophet (p.b.u.h.) himself. In fact, the *waqf* of 'Umar has been supported by a great number of authorities to be the first in Islam.[14] Al-Nawawī, for example, in his commentary on the *Ṣaḥīḥ Muslim* has stated that this is the view of most jurists as well as his own.[15]

Nevertheless, the origin of *waqf* has been traced by other scholars[16] to the Prophet (p.b.u.h.) himself which in the first year of *Ḥijrah*. It was the land dedicated by the Banī Najjār to the Prophet (p.b.u.h.) for the construction of a mosque at Madinah.[17]

There are also those who believe that the Mosque of Qubā' was the first instance of a religious *waqf* which was also constituted by the Prophet (p.bu.h.)[18] on his arrival in Madinah[19] during the *Ḥijrah*. Later, the Prophet (p.b.u.h.) built the Mosque of *al-Nabawī* in the first year of *Ḥijrah*.[20]

Others regard the endowment of lands of Mukhayriq,[21] which were bequeathed to the Prophet (p.b.u.h.) as the first *waqf 'ām* in Islam. It was a list of seven *awqāf* instituted by the Prophet (p.b.u.h.) at Madinah.[22]

Keeping in view the narration of Ibn 'Umar regarding the above-mentioned *waqf* of 'Umar Ibn al-Khaṭṭāb, a question arose among the Companions whether the legal conditions laid down in this tradition, i.e. "not to be sold nor made it as a gift or inheritance", were the words of the Prophet (p.b.u.h.) or the words of 'Umar himself. Majority of them think that these conditions are the words of the Prophet (p.b.u.h.) himself, whereas a few scholars think that these are the words of 'Umar, based on the conversation with the Prophet (p.b.u.h.) when he consulted him for his property of Khaybar, Thamgh.

In point of fact, the above tradition has several narratives; one can find that in *Ṣaḥīḥ Bukhārī* itself, there are three versions i.e. the first version is related by Hārūn al-Ash'ath who reported it from Abū Sa'īd, the client of Banī Hāshim, who heard it from Sakhr bin Juwayriyyah.[23] The second version is related by Musaddad, who reported it from Yazīd Ibn Zarī', who heard it from Ibn 'Awn[24] and the third version is related by Abū 'Āṣim, who reported it from Ibn 'Awn.[25] These three versions have been transmitted by Nāfi' who collated all the authorities on Ibn 'Umar. From the first version, (The Prophet p.b.u.h. said, *"Give it in charity with its land and trees on the condition that the land and the trees will neither be sold nor given as a gift, nor bequeathed")* it is clear that the conditions were imposed by the

Prophet (p.b.u.h.) himself, while in the other two versions, the conditions (... So, 'Umar gave the land in charity on the condition that the land would neither be sold nor given as a gift, nor bequeathed..." and "So, 'Umar gave it in charity, the yield of which was to be used for the welfare of the poor...") were laid down by 'Umar Ibn al-Khaṭṭāb. The same position can also be found in a version of the *Ṣaḥīḥ Muslim* (... So, 'Umar gave it in charity on condition that the land would neither be sold, nor bequeathed nor given as a gift..."), which is related by Yaḥyā Ibn Yaḥyā al-Tamīmī, who reported it from Sulaym b. Akhdar, who heard it from Ibn 'Awn; and the latter transmitted it from Nāfi', who based his report on the authority of Ibn 'Umar.[26]

In this regard, according to al-Shawkānī (1255/1839) in *Nayl al-Awṭār,* the conditions "Give it in charity with its produce and detain its substance on the condition that it is not to be sold nor made as an inheritance" which was derived from a narration of al-Bayhaqī (458/1065) may have been propounded by the Prophet (p.b.u.h.) himself. The reason is that these conditions could be reconciled on the grounds that 'Umar Ibn al-Khaṭṭāb may have made the conditions on the basis of directions which he received from the Prophet (p.b.u.h.).[27] The remaining traditions seem to indicate that these were the words of 'Umar.[28]

Analysis of the Legal Principles of *Waqf*

The previous ḥadīth of Ibn 'Umar clearly defines the three legal principles of *waqf*, i.e.:

a) Awqāf assets cannot be sold

b) Awqāf assets cannot be given as a gift

c) Awqāf assets cannot be bequeathed

Thus, it is very important to analyse whether the above mentioned principles could ensure the permanent interests of *awqāf* assets and support the wellbeing of the institution of *waqf* in Malaysia.

One of the major conflicts which surrounds *awqāf* assets at present is the question of the inalienability rules of *waqf* as stated in the above legal principles. These rules stress the idea that once a property has been dedicated as a *waqf*, it can no longer be subjected to any transfer or alienation.[29] The aim of this 'non-transferable' and 'non-heritable' principles is to ensure the permanent character of the endowments.

The above inalienability principles of *waqf* involve, *inter alia,* the application of *istibdāl*, where in its technical sense, the substance of an endowed asset is exchanged with other asset, and the latter would be made *waqf*, substituting for the

former.[30] All the conditions laid down by the founder in his *waqf* deed shall be applied to the latter.

According to the general rules of *istibdāl*, it can only be effected if this has been stipulated by the founder, i.e. the *wāqif* in his *waqf* deed. Otherwise, the *istibdāl* cannot be effected even though the *mawqūf* may have been destroyed,[31] or the *istibdāl* would give better prospects to the *waqf*.[32] In these situations, the *istibdāl* can only be effected with the permission of the *qādi*, who will decide the matters if he thinks it can be of advantage to the *waqf*.[33] The reason is that a *waqf* does not demand profits, and its implication stands on perpetuity which cannot be sold. Thus, if the founder can vary the investments any time he pleases, it would lead to the *waqf* being sold,[34] and this apparently contradicts the requirements of the purpose of its creation.

The above application of *istibdāl* has not been preferred by the Muslim jurists in the past, and even by some of the present *muftis*, trustees, scholars and others, as it is concerned with the modification of the stipulation of a founder. This cautious preservation is good in one sense, that it could prevent the people engaged in the trusteeship of *waqf* from any mismanagement and misuse of its assets, but from another point of view, it has proved to be problematic. The extent and location of *awqāf* assets, the financial and legal constraints, are always subjects of concern. It is for some of these reasons that the Ottoman Algiers, towards the end of the 18th century, exchanged the non-urban *awqāf* assets to its town, so as to make effective control over them much easier.[35] This phenomenon has been presented by Miriam Hoexter in her article entitled "*Adaptation to Changing Circumstances: Perpetual Leases and Exchange Transactions in Waqf Property in Ottoman Algiers*".[36] She has pointed out at the beginning of this article that the strict application of the inalienability rule of *waqf* has proved to be problematic, as it is not always compatible with either the needs of society or the interests of the *waqf*.

Awqāf lands in Malaysia can be found massively neglected and dilapidated as the result of preserving the inalienability principles of *waqf*. Some are covered with refuse, or inhabited by squatters. In Penang, there are *awqāf* lands which have been marginalised and surrounded by Chinese temples and Chinese trade premises. Some have been used for refuse materials and are overgrown. Others are old and dilapidated. In addition, there are other cases where some of them in other states have been inhabited by squatters and foreigners.[37] No action could be taken as provision is not made for this in the related enactments.

There are only five states which provide a penalty for trespass or illegal occupation of *waqf* property. These states are Johore, Terengganu, Malacca, Sarawak and Selangor. Some of these states allocate the penalty provision in their Islamic

Administrative Legislations, while others put it in their Syariah Criminal Legislations. The State of Selangor puts the provision in its new Wakaf Enactment (State of Selangor), 1999.[38] In Johore, the offender of such an offence shall be punished with a fine not exceeding one thousand ringgit or with imprisonment for a term not exceeding six months, or to both fine and imprisonment.[39] In Terengganu, the penalty is a fine not exceeding three thousand ringgit or with imprisonment for a term not exceeding one year, or to both fine and imprisonment.[40] Heavier punishment can be found in the State of Sarawak, Negeri Sembilan, Malacca and Selangor where the penalties are of a fine not exceeding five thousand ringgit or imprisonment for a term not exceeding three years, or to both fine and imprisonment.[41] No such provision is found in other states.

In relation to the neglected *awqāf* lands in Malaysia, Datuk Paduka Dr. Abdul Hamid Othman, the then Minister in the Prime Minister's Department, has observed that:[42]

> "We should be brave and reform (the conditions of) the wakaf lands, lest they be neglected and become a forest."

The above statement indicates the serious and acute problem of the neglected *awqāf* lands in Malaysia. It is this reason which has motivated the YAPEIM to make effort to develop the *awqāf* lands, estimated to be 3,154 hectares in extent under its National Wakaf Development Scheme *(Skim Pembangunan Wakaf Nasional).*[43]

In the light of the foregoing statements, the present writer believes that the strict application of the inalienability of *waqf* must be revised, in order to be compatible with the needs of the community and the interests of the *awqāf* concerned. Adhering to this strict inalienability concept of *waqf* has proved to be problematic.[44] In this regard, the Islamic Religious Councils, acting as the sole trustees of *awqāf* assets in Malaysia, should bring any controversial issues involving these assets before the Muftīs, so as to find pragmatic solutions to overcome the problems, particularly those related to the deteriorated and neglected *awqāf* lands. In fact, there are considerable numbers of traditional sources of Islamic law books which discuss about this issue, such as *Mughnī al-Muḥtāj* by al-Sharbīnī al-Khaṭīb, *Nihāyah al-Muḥtāj* by al-Ramlī, *al-Mughnī* by Ibn Qudamah and *Radd al-Muḥtār Ḥāshiyah* by Ibn 'Ābidīn.

One should be aware of the effective solutions which are offered in the Principles of Islamic Jurisprudence (*al-qawā'id al-fiqhiyyah*) which could overcome the present *awqāf* problems. The principle of *al-ḍarar yuzāl* (the obstacle should be removed), together with its effective principles,[45] is obviously relevant.

One of the characteristics of Islamic jurisprudence itself, that of flexibility, emphasises that Islamic law can be applied in accordance to changes of time and place.[46] This also shows that all the solutions which are based on the primary and subsidiary sources of Islamic law is in conformity with the *Sharī'ah.*

In connection with the above matter, Mahmood Zuhdi has observed that:[47]

> "There are limited authoritative sources of the *Sharī'ah* regarding the rulings on *waqf.* They were determined by the Muslim jurists in the past, based on their own *ijtihād.* Thus, its judgement was different, as it accorded only with that particular time. Hence, there is a need to formulate *fatwā*s that are compatible with present intellectual and legal values and circumstances."

With respect to the revision of the inalienability principles of *waqf*, it undoubtedly, demands a revaluation of the judgements of *waqf* so as to comply with the changes in socio-economic circumstances in a manner which could accommodate the interests of a *waqf* and the needs of the community. This revaluation involves the institution of *qādīs* or *muftīs*, or whoever may control the jurisdiction, issuing judgements regarding unresolved and contemporary problems of *waqf.* The primary and subsidiary sources of Islamic law might have been referred to.

As a matter of fact, the concept of strict Islamic law which is mainly covered by the Qur'ān and the *Sunnah* is generally applied in all cases. If there are any provisions which do not agree with contemporary necessities and needs, thus, other sources of Islamic law, i.e. the *ijmā'*, *qiyās*, *maṣlaḥah*, *istiḥsān*, *istiṣḥāb* and so forth would be applied to those cases. Nevertheless, one has to remember that this flexibility cannot be regarded as the general law for all practices or cases. This is because each case should be judged only according to its merits. Thus, the permissibility of such modifications is restricted to a particular extent without necessarily being applied to other cases, unless their situation were the same.

It is worth noting here that the above application may well be adopted by the ruler of a state as the basis of his political system or what is called *siyāsah.* However, this system might not be the same under all regimes; rather, it differs according to the time and the needs of the society.

The preceding sections indicate that the universality of Islamic law has caused it to be applied in all places and circumstances, and yet to be flexible over time. Its sources are not only limited to the Qur'ān and the *Sunnah* of the Prophet (p.b.u.h.), but include other extended (subsidiary) sources, as mentioned above. The above modifications have exploited these extended sources, especially the concept of *qiyās*, *istiḥsān* and *maṣlaḥah.* In fact, some of the classical jurists, such as

Muḥammad al-Shaybānī (189 AH/804 CE)[48] and Abū Yūsuf, (182/798)[49] the disciples of Abū Ḥanīfah (150/767)[50] and also other jurists reached the same conclusions. Therefore, all the modifications which have been recognized as developments still stand within the scope of Islamic law and do not contravene its principles.

One can see various juristic concepts and rules in *waqf* which had been formulated by Muslim jurists with the assistance of the above-mentioned sources. This formulation, which involves the method of *ijtihād,* covers various aspects of *waqf,* including those which could be adopted nowadays. Aḥmad Ibn Ḥanbal, i.e. the founder of the Hanbalī school of law for example, propounds that a mosque can be sold when the intended purposes of creating it can no longer be realized, as when its space becomes too small to hold the members of the congregation.[51] Regarding the issue of *waqf* from movable assets, Ibn 'Ābidīn believes that the *waqf* of money is lawful although the profit cannot be retained by its own substance, but it still can be realized by converting it into something else, for example through investment.[52] In fact, the *waqf* of money is common in Muslim countries all over the world, especially at present. The principles of *istiḥsān* and *maṣlaḥah* have been adopted in the *ijtihād*s of these Muslim jurists for the two cases.

It may be admitted that these *ijtihāds* were most probably formulated in accordance with the previously mentioned features. In fact, the rules of *ijtihād* in Islam stipulate that an *ijtihād* may vary according to changed surroundings, circumstances, customs and needs.[53] Moreover, traditional Muslim jurists were likely to safeguard the pure precedents as laid down by their predecessors. Nevertheless, some of these precedents can no longer hold good today, as they might be detrimental to the future of *waqf* and oppose changes in the socio-economic circumstances of the Muslim community.

End Note

1. Fayzee, Asaf A. A., *Outlines of Muhammadan Law*, 4th edition, Delhi: Oxford University Press, 1974, p. 277; Demombynes, Maurice Gaudefroy, *Muslim Institutions*, (translated from the French by John P. Mac Gregor), London: George Allen and Unwin Ltd., 1950, p. 143.
2. Cizakca, Murat, "*Awqāf* In History and Implications for Modern Islamic Economics", *International Seminar on Awqāf and Economic Development,* KL, 2-4 March, 1998, p. 2.
3. Demombynes, 1950, p. 143.

4. Cf. for example, Schedule 9, 2(1) of the Federal Constitution of Malaysia; cf. also s.2(1) of the Administration of Islamic Law (Federal Territories) Act, 1993, Act 505.

5. Mohd. Zain Hj. Othman, *Islamic Law with Special Reference to the Institution of Waqf*, 1st edition, KL: Prime Minister's Department, 1982, p. 21.

6. Effendi, Omer Hilmi, *A Gift to Posterity on the Laws of Evqaf*, translated by Tyser, C.R. and Demetriades, D.G., 2nd edition, Cyprus: Government Printing Office, Nicosia, 1922, p. 1.

7. The same word (*awqāf*) would also be used for dual category.

8. Ibn al-Humām, Kamāl al-Din Muḥammad b. 'Abd al-Wāḥid al-Siwasī al-Sakandarī, *Sharḥ Fatḥ al-Qadīr*, 1st edition, vol. 5, Bulāq (Egypt): al-Kubrā al-Amīriyyah, 1316 AH, p. 37.

9. Al-Sarakhsī, Shams al-Dīn, *al-Mabsūṭ*, vol. 12, Beirut: Dār al-Ma'rifah, 1986, p. 27.

10. Ibn Manzūr, Abū al-Faḍl Jamāl al-Dīn Muḥammad b. Mukarram, *Lisān al-'Arab*, vol. 9, Beirut: Dār Ṣadīr, 1956, pp. 359-360; cf. also al-Khaṭīb, Muḥammad al-Sharbīnī, *Mughnī al-Muḥtāj ilā Ma'rifah Ma'ānī Alfāẓ al-Minhāj*, vol. 2, Egypt: Muṣṭafā al-Bābī al-Ḥalabī wa Awlāduh, 1958, p. 376.

11. This meaning is an inference from the definitions of Muslim jurists; cf. for example, Ibn Qudāmah, Muwaffiq al-Dīn Abū Muḥammad 'Abd Allāh b. Aḥmad b. Muḥammad (d.630 AH), *al-Mughnī*, vol. 6, Beirut: Dār al-Kitāb al-'Arabī, 1972, p.190; Al-Bujayrimī, al-Shaykh Sulaymān, *Bujayrimī 'alā al-Khaṭīb*, last edition, vol. 3, Egypt: Muṣṭafā al-Bābi al-Ḥalabī wa Awlāduh, 1951, p. 202.

12. Al-Dhahabī, Shams al-Dīn (d. 748 AH), *Tārīkh al-Islām*, 1st edition, revised by Muḥammad M. Hamdān, Cairo: Dār al-Kitāb al-Miṣrī and Beirut: Dar al-Kitab al-Lubnānī, 1985, p. 236; cf. also Donner, Fred Mc Graw, *The Early Islamic Conquest*, New Jersey: Princeton University Press, 1981, p. 63.

13. *Ṣaḥīḥ Bukhārī, (kitab al-wasāyā)*, vol.2, n.d., p. 131; cf. also al-Nasā'ī, *(bab aḥbās)*, vol. 6, Beirut: Dār al-Kutub al-'Ilmiyyah, n.d., p. 232; *Ṣaḥīḥ Muslim bi Sharḥ al-Nawawī, (bab al-wasāyā)*, vol. 11, no place, n.d., p. 86; al-Sarakhsī, 1986, p. 31.

14. Al-Shawkānī, Muḥammad b. 'Alī b. Muḥammad (d.1255AH), *Nayl al-Awṭār Sharḥ Muntaqā al-Akhbār*, vol. 5, n.p.: Dār al-Fikr, n.d., p. 129.; al-Dāruquṭnī, 'Alī b. 'Umar (d.385AH), Sunan al-Dāruquṭnī, *(bab al-aḥbās)*, vol. 4, 4th edition, Beirut: 'Alam al-Kutub, 1986, p. 186; al-Ramlī, Shams al-Dīn Muḥammad b. Abī al-'Abbās Aḥmad b. Hamzah ibn Shihāb al-Dīn, *Nihāyah al-Muḥtāj ilā Sharḥ al-Minhāj*, last edition, vol. 5, Egypt: Muṣṭafā al-Bābī al-Ḥalabī wa Awlāduh, 1967, p. 359; al-Khaṭīb, 1958, p. 376; Ibn Qudāmah, 1972, p. 185.

15. *Ṣaḥīḥ Muslim bi Sharḥ al-Nawawī, (bab al-waqf)*, vol. 11, n.d., p. 86.

16. Cf. for example, Haque, Muhammad Nazamul, "A Critique of the Law of Waqf in Bangladesh", Ph.D. thesis, Department of Law, SOAS, University of London, 1982,

p. 2; cf. also the opinion of Shibli Naumani in Rashid, S. Khalid, *Waqf Administration in India,* New Delhi: Vikas Publishing House Pvt. Ltd, 1978, p. xvii.

17. *Ṣaḥīḥ Bukhārī, (kitāb al-waṣāyā)*, vol. 2, n.d., p. 131.
18. Al-Zarqā', Muṣṭafā Aḥmad, *Aḥkām al-Awqāf*, 1st edition, 'Ammān: Dār 'Ammār, 1997, p. 11.
19. i.e., before entering Madīnah; *ibid.*
20. Al-Zarqā', 1997, p. 11.
21. He was a Jewish man who was said to have been the wealthiest of the Jews of the Banū Qaynuqā'; some believe that he was of the Banū Nadīr. He was killed in the Battle of 'Uhud 32 months after the *Hijrah* of the Prophet (p.b.u.h.) to Madīnah; cf. al-Zarqā', *ibid.*; al-Tarabulsī, Burhān al-Dīn Ibrāhīm b. Mūsā b. Abī Bakr Ibn al-Shaykh 'Alī, *al-Is'āf fī Aḥkām al-Awqāf*, Beirut: Dār al-Rā'id al-'Arabi, 1981, pp. 9-10; al-Kabisī, Muḥammad 'Ubayd, *al-Waqf fī al-Sharī'ah al-Islāmiyyah*, Lubnān: al-Maktabah al-Ḥadīthah, n.d., p. 4; cf. also Gil, Moshe, "The Earliest *Waqf* Foundations", *Journal of Near Eastern Studies*, no. 2, vol. 57, 1998, p. 136.
22. Al-Shawkānī, n.d., p. 129; al-Zarqā', *ibid.*
23. *Ṣaḥīḥ Bukhārī, (bab al-wasaya)*, vol. 2, n.d., p. 131.
24. *Ibid.*, p. 132.
25. *Ibid.*
26. *Ṣaḥīḥ Muslim, (bab al-waṣāyā)*, vol. 2, n.d., p. 86.
27. Al-Dāruquṭnī, 1986, p. 186; cf. also al-Shawkānī, n.d., pp. 128-129.
28. Cf. for example, narrations of Nāfi' who related all the authorities to Ibn 'Umar in *Ṣaḥīḥ Bukhārī, (bab al-waṣāyā)*, vol.2, n.d., p. 132 and a narration in *Ṣaḥīḥ Muslim, (bab al-waṣāyā)*, vol. 2, n.d., p. 86.
29. This is in accordance with a *ḥadīth* of the Prophet (p.b.u.h.) as narrated by Ibn 'Umar which says: "...Give it as charity on condition that it should neither be sold, nor made the subject of gift nor inheritance..."; cf. this in *Ṣaḥīḥ al-Bukhārī, (kitāb al-waṣāyā)*, vol. 2, Beirut: Dār al-Ma'rifah, n.d., p. 132.
30. Sha'bān, Zakī al-Dīn (Dr.) and al-Ghandur, Aḥmad (Dr.), *Aḥkām al-Waṣiyyah wa al-Mirāth wa al-Waqf fī al-Sharī'ah al-Islāmiyyah* , Kuwait: Maktabah al-Fallā, 2nd edition, 1989, p. 534.
31. For example, if the land of a *waqf* becomes salty and can no longer produce any yield; cf. al-Zarqā', 1997, p. 171; al-Tarabulsī, 1981, p. 36; *Fatāwā Hindiyyah*, 4th edition, vol. 2, Beirut: Dār Iḥyā' al-Turāth al-'Arabī, n.d., p. 401.
32. Hilāl, 1316AH, p. 94, al-Zarqā', *ibid.*
33. Ibn 'Ābidīn, 1966, p. 386; Ibn al-Humām, 1316AH, p. 59; al-Zarqā', *ibid.*; al-Tarabulsī, 1981, p. 36; *Fatāwā Hindiyyah*, n.d., p. 401.
34. Hilāl, 1316AH, p. 95.

35. Hoexter, Miriam, "Adaptation to Changing Circumstances: Perpetual Leases and Exchange Transactions in *Waqf* Property in Ottoman Algiers", *Islamic Law and Society*, vol. 4, no. 3, October 1997, pp. 329-330.
36. *Ibid.*, pp. 319-333.
37. Siti Mashitoh Mahamood, "The Administration of Waqf, Pious Endowment in Islam: A Critical Study of the Role of the State Islamic Religious Councils as the Sole Trustees of Awqāf Assets and the Implementation of Istibdāl in Malaysia With Special Reference to the Federal Territory of Kuala Lumpur", Ph.D. thesis, University of Birmingham, 2000, pp. 200-201.
38. Enactment no. 7 of 1999.
39. S. 50(1) of the Administration of Islamic Law Enactment, 1978, Johore, no. 14 of 1978.
40. S.214 of the Administration of Islamic Religious Affairs Enactment, 1986, Terengganu, no. 12 of 1986.
41. S. 39 of Syariah Criminal Offences Ordinance, Sarawak,1991, no. 6 of 1991; s. 110 of Syariah Criminal (Negeri Sembilan) Enactment, 1992, no. 4 of 1992; s. 78 of the Syariah Criminal Offences (Malacca) Enactment, 1991, no. 6 of 1991 and Wakaf Enactment (State of Selangor), 1999, no. 7 of 1999.
42. See this in "YPEIM Maju Tanah Wakaf", *Berita Harian*, 23 September, 1995. The text is translated by the present writer from the original Malay.
43. This scheme was introduced on 22 September, 1995 and aimed to collect subscription from the community to develop the *awqāf* lands. Cf. the information contributed by Tuan Hj. Tarmizi Mohd Saad, Executive Director of Wakaf Development Corporation (Malaysia) Sdn. Bhd., Kuala Lumpur on 5 March, 1999.
44. Cf. for example, the experiences of the *Awqāf* al-Ḥaramayn of the Ottoman Algiers in the end of the 18th century as mentioned before (see p. 9).
45. Cf. for example, the principle of *al-ḥājah tunazzal manzilah al-ḍarūrah* in al-Suyūṭī, Jalāl al-Dīn, *Al-Ashbāh wa al-Naẓā'ir fī Qawā'id wa Furū' al-Shāfi'iyyah*, vol. 1, 1st edition, Egypt: Dār al-Salam, 1998, p. 218; cf. also Ibn Nujaym, al-Shaykh Zayn al-'Ābidīn b. Ibrāhīm, *Al-Ashbāh wa al-Naẓā'ir*, Beirut: Dār al-Kutub al-'Ilmiyyah, 1980, pp. 91-92.
46. Cf. for example, Fād Allāh, Mahdī, *al-Ijtihād wa al-Mantiq al-Fiqhī fī al-Islām*, Beirut: Dār al-Ṭali'ah, 1st edition, 1987, p. 23.
47. Mahmood Zuhdi b. Hj. Ab. Majid, (Dato' Prof. Dr.), " *Kefahaman Konsep dan Amalan Wakaf di Malaysia Hari Ini* ", in his speech at the *Seminar Konsep dan Pelaksanaan Wakaf di Malaysia* held at *IKIM* on 24-25 March, 1999. His text is translated by the present researcher from the original Malay.
48. Muḥammad b. al-Ḥasan b. Farqad Abū 'Abd Allāh al-Shaybānī, the great disciple of Imām Abū Ḥanīfah and Imām Abū Yūsuf, was the master of Banī Shaybān, born in 102AH at Kūfah. Imām Muḥammad was an expert in the Is-

lamic Jurisprudence (*fiqh*) as well as in the Arabic Language and he wrote many books. He depended on traditions even more than his colleague, Abū Yūsuf. He died in Ray and was buried in the year of 189AH/804CE at the age of 58. Cf. al-Zirikli, Khayr al-Din, *al-'A'lām*, vol. 3, Egypt: al-Maṭba'ah al-'Arabiyyah, 1928, p. 882; al-Shirāzī, Abū Isḥāq (d.476 AH), *Ṭabaqāt al-Fuqahā'*, Beirut: Dār al-Qalam, n.d., p. 142; al-Khawārizmi, Muḥammad b. Maḥmūd b. Muḥammad (d.665 AH), *Jāmi' Masānid al-Imām al-'Aẓam*, vol. 1, 1st edition, India: Majlis al-Dā'irah al-Mā'arif al-Nizāmiyyah al-Ka'inah, 1332 AH, p.358; al-Munjid, Salāh al-Din (Dr.), *Sharḥ Kitāb al-Siyar al-Kabīr*, vol. 1, n.p.: Sharikah al-'I'lanāt al-Sharqiyyah, 1971, pp. 9-10.

49. i.e. Ya'qūb b. Ibrāhim b. Ḥabīb Ibn Sa'd b. Ḥamid al-Anṣārī was one of the children of Abū Dujānah, born in 113AH. Abū Yūsuf was a disciple of Imām Abū Ḥanifah and the companion of Imām Muḥammad al-Shaybāni. He was appointed as the *qāḍī* of Baghdād in 782AH at the time of Hārun al-Rashid. The most prominent peculiarity of his legal thought is that he depended more on traditions than even his master, Imam Abū Ḥanifah and also used his own legal judgement as his master had done. He died in 182AH/798CE in Baghdād. Cf. al-Zirikli, *ibid.*, p. 1166; al-Shirāzī, *ibid.*, p. 141.

50. Al-Nu'mān b. Thābit, was one of the adherent legists *(fuqahā' al-tābi'in)* of Kūfah, born in 80AH. He was the founder of the *Hanafi* school, which is named after him. He had a deep knowledge of theology especially in the jurisprudence of Islam. Abū Hanifah was a prominent scholar. He used the rationalistic method in establishing the rules pertaining to the matters of *fiqh*. Thus, he depended little on tradition, but independently followed his own judgement. He died in Kufah in 150 AH/ 767 A.D at the age of 70. Cf. al-Zirikli, *ibid.*, p. 1106; al-Shirāzi, *ibid.*, p. 87; Ibn Qādi Shuhbah, Abū Bakr b. Aḥmad b. Muḥammad b. 'Umar b. Muḥammad Taqi al-Din, *Ṭabaqāt al-Shāfi'iyyah*, vol. 1, 1st ed., Beirut: 'Ālim Al-Kutub, 1987, p. 9; H.A.R.Gibb and J. H. Kramers (eds.), *Shorter Encyclopaedia of Islam*, Leiden: E.J. Brill, 1953, pp. 9-10.

51. Al-Najdi, 'Abd al-Raḥmān b. Muḥammad b. Qāsim al-'Āṣimi, *Majmū' Fatāwā Shaykh al-Islām Aḥmad b. Taymiyyah,* vol. 31, Egypt: Maktabah Ibn Taymiyyah, pp. 213 and 220.

52. Ibn 'Ābidin, 1966, p. 364.

53. Cf. for example, Sālih, Subhi (Dr.), *Ma'ālim al-Shari'ah al-Islāmiyyah*, Beirut: Dār li al-Malāyin, 2nd edition, 1982, p. 36.