

CHAPTER V

1. Wakaf

Wakaf is defined as a dedication in perpetuity any property or any portion thereof by the owner for religious purposes in accordance with Islamic law. There are two kinds of Wakaf; Wakaf Am means a Wakaf which benefits the public and Wakaf Khas means a Wakaf which benefits a specific person or groups of persons. The concept of Wakaf is in accordance with the principle of cooperation and mutual aid amongst the Muslims in a Muslim community, in order to foster good relationship as specified by God. Wakaf has been practiced since the thirteenth century and now in the Middle East countries, Wakaf plays an important role in the economy of Muslim community.

According to Imam Abu Yusuf, wakaf is an appropriation of a particular article in a way that it becomes divine property and the appropriator's right in it is extinguished. It becomes the property of God where the advantage of the property is enjoyed by His creatures.

In order that a wakaf can be valid the founder (wakif) must be able to dispose of his property according to his own will and wishes. The subject of the wakaf must be such as can be made used of perpetually like land for example. Foodstuffs therefore cannot be a subject of wakaf; but with that exception the wakaf may be of either movable or immovable property. The Muslim law also requires that the beneficiaries to a wakaf must have the capacity legally to become proprietors of the wakaf property which therefore excludes slaves or infants as beneficiaries. A wakaf is valid equally in favour the poor as of the rich. The intention of making a wakaf must be formulated in explicit terms as for example, "I make

a wakaf of such a thing." A wakaf in favour of a certain and particular person is not complete without his acceptance.¹

In Johore the law regarding wakaf was first provided by the Wakaf Enactment No.5 of 1935. This was replaced by the Wakaf Enactment No. 11 of 1973. According to the Enactment the Nazir Am means an officer appointed by the government to supervise the administration of the wakaf property. The Nazir Am shall be a Corporation for all purposes under the name of Nazir Am Johore and shall have a perpetual succession.² The Nazir Am shall be the trustee of all maukufs (property which has been made a wakaf) declared in the state. The Corporation may sue and be sued in its corporation name and shall have a corporate seal. All deeds, documents and other instruments requiring the seal of the Corporation shall be sealed with the corporate seal and signed by the Nazir Am. The Ruler in Council may give directions to the Corporation not inconsistent with the provisions of this Enactment, and the Corporation shall give effect to such directions.³

The appointment of officers is made by the Ruler in Council. They include the following:-

1. Nazir Am - an officer to supervise the administration of Wakaf property,
2. An assistant Nazir Am,
3. Assistant Nazir Am of the Districts,
4. Inspectors of Wakaf,
5. Other Officers.⁴

The Enactment also requires the registration of the Wakaf (hujjah, wasiat and maukuf). Every wakaf am, except those not permitted by the Islamic law, shall be registered in the name of the Nazir Am Johore and where it comprises

1. Professor Ahmad Ibrahim, Islamic Law in Malaya, P.277-280
 2. Wakaf Enactment 11 of 1973, s.5
 3. Wakaf Enactment 11 of 1973, s.5(5).
 4. Wakaf Enactment 11 of 1973, s.3.

land it shall be registered in the name of Nazir Am Johore as proprietor in accordance with the National Land Code. And every Maukuf shall be exempted from payment of land rent under the National Land Code and assessment rates under the Town Board Enactment.

Every wakaf has to be certified by a Kathi or witnessed by two persons qualified under Muslim law to be such witnesses. A Kathi shall have power to determine whether a property is a maukuf. And a person who is not satisfied with a Kathi's determination may lodge an appeal in accordance with the provision of section 67 of the Courts Enactment.

The Corporation maintains a fund called Wakaf Trust Fund and all monies received by the Corporation in respect of the Fund shall be lodged for safe custody in such manner as approved by the State Treasurer, Johore. The Fund shall be under the direction and control of the Corporation and shall be used for any purpose permitted under Muslim law.⁵ The Corporation shall also prepare annual estimates of its revenue and expenditure in advance and may from time to time prepare supplementary estimates of its revenue and expenditure. All estimates of revenue and expenditure shall be submitted for the approval to the Ruler in Council.⁶

Whoever commits trespass or illegally occupies any maukuf or takes away any income therefrom is guilty of an offence and on conviction is punished with a fine not exceeding \$1,000 or with imprisonment for a term not exceeding 6 months or to both.⁷

5. Wakaf Enactment 1973, s.11.

6. Wakaf Enactment 1973, s.11 (5)

7. Wakaf Enactment 1973, s.12.

G. Wakaf Property in Johore.⁸

i) Wakaf Khas

- a. A shophouse at No.45 Jalan Ibrahim, Johor Baru.
 - b. A shophouse at No.37 Jalan Tan Hick Nee, Johor Baru.
 - c. A brickhouse at No. 9F Jalan Yusof Taha, Johor Baru.
 - d. Two shophouses at No.2 and No.3 Jalan Maharani, Muar.
- ii) Proceeds from Wakaf Khas - \$34,583.60.

Wakaf Am - In Johore there are Wakaf lands given by Muslim persons who intended them to be used for building of mosques, surau, madrasah, Arab Schools, Religious Schools and Muslim cemetery, under the supervision of the Johore Religious Department which amounts to 2,000 acres and almost 75% of them are not being utilised yet.

The capital collected from Baitulmal property could perhaps be utilised for economic purposes of the Muslim community as a whole, for the potential of these properties are clear.

2. Baitulmal

The term Baitulmal is an abbreviation of Baitulmal ul Muslimin which means literally "The Treasury of the Muslims". The revenues of the Baitulmal are derived from the proceeds of wakaf and the properties left by persons dying without heirs.

In Johore the Baitulmal Enactment (Enactment No.136) provides for the establishment and administration of the Baitulmal. The Enactment applies to the estates of Muslims dying domiciled in the state and to any immovable property within the state forming part of the estate of a deceased Muslim

8. Statistics obtained from the Johore State Religious Department

Muslim. The Baitulmal acquires the status of a corporate body and the Treasurer (Amin) is a body corporate under the name of Treasurer Baitulmal, Johore.¹⁰ Therefore the Corporation has the authority to buy and sell, execute contracts, deal or mortgage the property under its own name. The Enactment provides for the appointment of a Controller (Nazir) of the Baitulmal and a Treasurer (Amin) of the Baitulmal. All the appointed persons must be Muslim and the officers exercise their power subject to the direction of the Controller.¹¹

Baitulmal Property

The Baitulmal property can be classified as the following:-

1. The estate of a deceased Muslim leaving no beneficiaries whatsoever shall after the settlement of all debts due from the estate, be paid to the Treasurer by the deceased's representative.
2. Every estate of a deceased Muslim having only the beneficiaries not legally entitled to the whole share in accordance with the rules of distribution, such part of the estate remaining after the division to which the Baitulmal is entitled, shall be paid to the Treasurer by the deceased's representative.
3. Any property derived from Zakat or other charities or trusts credited to the Fund of the Baitulmal, shall be the property of the Baitulmal.¹²

H. In the state of Johore Baitulmal Property include:¹³

i) Land Property	\$186,932.48
ii) Money in fixed deposit.....	\$350,000.00
iii) Money in Current account.....	\$150,000.00
TOTAL	<u>\$686,932.48</u>

10. Baitulmal Enactment No 136(No.18 of 1934) s.3A(i)

11. Baitulmal Enactment No 136(No 18 of 1934) s.3(i) & 3(ii)

12. Baitulmal (Rules under section 14)

13. Statistics obtained from Johore State Religious Department

Administration.

Every executor of the will of a deceased Muslim and every administrator of the estate of a deceased Muslim shall, if there is any share of the deceased estate due to the Baitulmal, report the fact to the Treasurer and furnish him with a true and full account of the value and nature of the estate within one month of obtaining probate or letters of administration or within such further time as the Treasurer may allow in writing. Any person who fails to comply with this is liable to a fine not exceeding \$100, and in the case of continuing failure, to a fine not exceeding \$50 for each month. The fact that the executor or administrator was unaware that any share of the estate was due to the Baitulmal is no defence to a charge.¹⁴ Every executor is required to pay the equivalent cash value of the share of the estate due to the Baitulmal within one month of the demand of the share by the Treasurer of the Baitulmal or within such further time as the Treasurer may allow in writing. The treasurer may allow further time on such terms as he may think fit and may in his direction accept in lieu or in part payment of the equivalent cash value of the share of the estate due to the Baitulmal such property movable or immovable.¹⁵ Any person who fails to comply with the this provision is liable to a fine not exceeding \$100 and another \$50 for continuing failure. The Treasurer of the Baitulmal is given power to summon persons and to call for documents.¹⁶

The provisions relating to the executors and

14. Baitulmal Enactment, 136 s. 5.

15. Baitulmal Enactment, 136 s. 6 .

16. Baitulmal Enactment 136, s. 7.

and administrators do not apply to official administrators or assistant official administrator but such administrators is bound to pay to the Baitulmal the equivalent money value of any share of the estate in their hands which may be due to the state. No executor of the will of the deceased Muslim or the administrator of the estate of a deceased Muslim shall apply to the court for his discharge until he produced a certificate from the Treasurer of the Baitulmal that no share of the estate is due to the Baitulmal or that the share so due has been paid. It is provided that a before Collector of Land Revenue may make an order to register a person as the owner of any land which form part of the estate of a deceased, he must be satisfied that the share of the estate which may be due to the Baitulmal has allowed the payment of such share to be postponed.

In Johore, the Sultan in Council has power to make rules;-

- a) providing for the proper management of the Baitulmal and getting in of monéys due,
- b) prescribing the objects on which the moneys may be disbursed,
- d) prescribing the duties of the officers.

A certificate signed by the Treasurer is admissible in any court as prima facie evidence that a share of an estate is due to the Baitulmal. Section 4 of the Baitulmal Rules provide that the Baitulmal property can be made used of only upon application to the Controller who brings the matter for consideration to the Religious Board; the decision of the Board whether the disbursement is necessary or otherwise is submitted for the approval of the Ruler in Council.

Every application on behalf of any Muslim for the disbursement of any money of the Baitulmal for the benefit

of all Muslims in general is made through a headman of a Kampong or a member of the Religious Board or by Muslim leaders in the district of Johore Bahru and to the Kathi or district Kathi for the other districts. Each application shall contain full particulars specifying the purposes for which the money of the Baitulmal is lawfully required and permissible under the Islamic law. On receipt of the application the Chief Kathi or the district Kathi shall examine and verify the statement which will then be forwarded to the Treasurer of the district to be dealt with. The Baitulmal authorities shall only make payments in conformity with the decision of the Board as approved by the Ruler in Executive Council.¹⁷

The representative of the deceased shall make a report which contain true and full informations of all the surviving beneficiaries of the deceased residing within or outside the state either alive or dead. He shall also specify their names, ages and sexes. He shall also disclose the deceased religious obligation under the Islamic law which the deceased has or has not performed during his life time with respect to Zakat, pilgrimage to Mecca and the payment of any indemnity for non-fulfilment of the fast or Kefarat and the contents of the deceased's will, if any.¹⁸

Whenever the Baitulmal is entitled to any part of an estate which has been distributed, action can be taken under section 9 of the Enactment. This applies to cases where the person presumed to be dead is still alive and his property has actually been distributed amongst the beneficiaries.

17. Baitulmal (Rules under s.14 of Baitulmal Enactment), s. 4.
 18. Baitulmal (Rules under s.14 of Baitulmal Enactment), s. 6.

Any moneys due to the Baitulmal may be sued for as a debt to the state against:-

- a. any executor or administrator of the estate in respect of which such moneys are due or any of the sureties,
- b. any person who has taken possession of (other than as a bona fide purchaser for value) or administered any part of the estate, but only to the extent of such part,
- c. any person indebted to the deceased,
- d. any person who has obtained possession of any part of the estate as beneficiary, even though the distribution was made by order of court.

The share of a child en ventre sa mere shall be treated in accordance with the rules in distribution in Islamic law.¹⁹ Where a beneficiary is known to have existed and no proof of his being either alive or dead is forthcoming, his share shall be delivered to the Official Administrator for the time being until it has been definitely ascertained upon proof that the beneficiary is either alive or dead.²⁰

Application of Funds of Baitulmal.

According to section 12 of the Enactment, the funds of the Baitulmal shall be devoted to such objects consonant with the Islamic law as the Ruler in Council shall approve. At this moment the funds allotted to the Baitulmal are spent in building mosques in various parts of the state like the Kampong Melayu Majidee Mosque in Johore Bahru, the Masjid Kampong Pasir, Tempoi and many other places. The funds are also being used to print and publish Religious books and some

19. Baitulmal (Rule under s.14), s. 12.

20. Baitulmal (Rule under s. 14), s. 13.

are accorded for scholarships for Muslim students studying in Egypt.

Perhaps the funds of the Baitulmal should be added to the other funds allocated for Zakat, Wakaf and Trust funds and in one big total to be used as capital for economic ventures for the Muslim community. From the profits which in due course could double or triple the amount, other religious undertakings could be made like the building of more mosques Muslim centre for religious education, and help Muslim farmers in capital and education.

CONCLUSION.

The Religious Department in Johore is generally well-organized to cope with the administration of Muslim law in the state. The Religious Department is run by officers exercising various functions in different sub-departments at both district and state levels.

However, I would suggest that the sub-department of the Mufti should be expanded to include more assistants to deal with the recording of fatwa or rulings given by a Mufti. A Mufti gives fatwa on questions of Muslim law sought by individuals, groups of persons, the Shariah Court and the Magistrate Court. There is an average of 600 to 900 fatwa given in a year, regarding general property, Baitulmal and small estates. However, these rulings are not recorded or compiled in an organized manner. Perhaps it would be more beneficial to both the citizens and the state if these fatwa could be selected, recorded and published for all the Muslim community in the state. A fatwa given by a Mufti is binding on all Muslim persons in the state. If the fatwa is duly published, then the Mufti need not answer two Muslim persons who sought the same fatwa. Furthermore, it would benefit the Muslim community to have ready access to the rulings on important issues of Muslim law and a comparison with other states could then be made since fatwa of different states sometimes differ. There is the Information Department which handles the publication of religious magazine. On the whole there is a lack of information given to the general public on the running of Islamic law by the Religious Department.

The Courts Enactment no.54 and the Kathis Court Rules 1973 do not expressly define the spheres of the Shariah jurisdiction of the Shariah Court as provided by other states like Perak. The jurisdiction of a Kathi as the judge of the Shariah Court is provided in the Tauliah but this is again not specific. Perhaps the enactments could be amended to provide for specific jurisdiction of a Kathi like for example:-

Section 1. The Shariah Court shall:

a. In its criminal jurisdiction, try any offence committed by a Muslim, and may impose any punishment therefor provided;

b. In its civil jurisdiction, hear and determine all actions and proceedings in which all the parties profess the Muslim religion and which relate to -

i) betrothal, marriage, divorce, nullity of marriage or judicial separation;

ii) any disposition of, or claim to property;

iii) maintenance of dependants, legitimacy, guardianship or custody of infant;

iv) wills or death-bed gifts of Muslim persons;

v) Wakaf or Nazar;

vi) other matters in respect of which jurisdiction is conferred by any written law.

As it is the Johore Shariah Court can only try cases like marriage, divorces, maintenance, non-payment of Zakat and eating in public places during the fasting month.

According to the Muslim Offences Enactment, the offences of adultery, incest, unlawful marriage and unlawful religious teachings triable by the Magistrate Court, do not come within the jurisdiction of the Shariah court. There is also a defect in the provisions of the Muslim Offences Enactment which provide for conviction and punishment of only Muslim persons in section 3 of the Enactment. This

would exclude the conviction of a non-Muslim person who are involved in an offence with a Muslim person. A non-Muslim person who commits adultery with a Muslim woman could not be tried by the court while the Muslim woman could be convicted

In Johore, the Majlis is directed to take notice of and act upon all enactments in the state, the provisions of the Shariah law and the Malay customary law. The Shariah law in Malaysia is not codified. The Mufti, Kathi or the Majlis have to refer to the standard references regarding Muslim law like Nawawi's Minhaj al Talibin or other recognised authority on the Shafii school of law.

Malay custom can also be considered as a source of law in the state. Malay customs which do not conflict with Islamic law are recognised as valid law. Cases of conflict between customary practices and a doctrine of Shariah law shall be resolved in favour of the former in the absence of a definite Shariah rule. Cases of conflict between customary practices and a Shariah rule shall be resolved in favour of the latter in the presence of a definite Shariah rule.

The law regarding marriage and divorce are based on Hukum Shara' and the state enactments do not touch on the substantive law. Registration of marriages is provided for in the enactment but non-registration of marriage do not render the marriage invalid. A penalty of \$50 is inflicted on the person who fails to register the marriage. Registration of marriage and divorce can be effected anywhere, in the Kathi's office or at home. There is no provision in the enactments relating to the various forms of divorces as provided by the Muslim law such as Taalik, Fasakh and Khula.

A Kathi has the jurisdiction in his tauliah to register the divorce of Taalik but there are no specific provisions in the enactments.

Zakat is not only compulsory on the commercial income of Muslim persons but also income and interests of money in the banks, shares, bonds, debentures, money kept in cooperative societies are taxable by Zakat. As it is, the annual Zakat collection amounts to only \$16,982.53. This shows that the bulk of the Muslim community do not pay Zakat. Possible reasons for non-payment of Zakat are lack of knowledge or neglect on the part of the Muslim persons towards this specific provision of the Muslim religion, and lack of efficiency of the authorities concerned.

The Zakat department in the Johore Religious Department is a small department which could not possibly handle the collection of Zakat throughout the state, especially the commercial incomes of Muslim persons which are constantly growing in number and amount. In order to facilitate the efficient running of Zakat collection, perhaps the Zakat department should be reorganised to accomodate the functions of collection of Zakat Revenue, Evaluation, Enforcement, and Legal Services.

Each sub-department should be headed by skilled and qualified officers who could administer the collection of Zakat according to the system administered by the Income Tax Department, especially on taxable matters like property and commercial undertakings. Each officer should have legal authority to administer the collection of Zakat. There should be an Enforcement Unit which would have the authority to make inspections and to give advice to Muslim businessmen concerning the payment of Zakat. They should make reports

and conduct general inspection to detect persons who try to evade the payment of Zakat and have them charged in either the Magistrate court or Shariah court.

It is very important that in order to ensure the efficient collection of Zakat the law concerning Zakat and Fitrah itself be amended. The authority for penalties concerning Zakat are given in section 6 (5) and section 9 of the Zakat and Fitrah Enactment and section 10 (3) of the Zakat and Fitrah Rules 1957. (See Appendix III)

The suggestion is that the fine or penalty which is imposed on section 6 (5) and section 9 of the Enactment should be fixed to \$1000 or an imprisonment of 6 months or both and the penalty for section 10 (3) should be fixed as a fine of \$50. The penalty provided by the existing enactment is conviction by the Shariah court to a fine not exceeding \$10 for non-payment of Zakat. Section 12 of the Wakaf Enactment gives the penalty of a fine of \$1000 and 6 months jail. It would be appropriate for the Zakat Enactment to have a similar provision in order to ensure a more efficient collection of Zakat. The Zakat

The Zakat Enactment provides for the Zakat collection to be distributed to six asnaf. In my chapter on Zakat, I suggested that the asnaf of Fisabilillah should be included to the existing 6 asnaf of the Poor, the Needy, the Debtors, Wayfarers, Converts and the Aml. As it is the allocation to the debtors asnaf are being distributed as donations to Village Imam, Religious Teachers and Arab Schools (Table E). These items would hardly fit into the definition of a debtor and therefore should not be given the allocation for the asnaf of debtor. The asnaf of Fisabilillah should be added to the 6 present asnaf and the