BOOK REVIEW

Siti Mashitoh Mahamood, (2006), *Waqf in Malaysia: Legal and Administrative Perspective*, (University of Malaya Press, Kuala Lumpur), pp. 191, ISBN No. 983-100-287-3

Dr. Siti Mashitoh's book of 191 pages may be brief if one goes by the number of pages, but its coverage is quite comprehensive and very rich in its contents. Largely based on her PhD thesis submitted in 2000 to the University of Birmingham, it effectively fills a wide gap in the field of investigative research on the legal and supervisory aspects of *waqf* administration in Malaysia. An earlier book written in 1982 by Mohd. Zain bin Haji Othman, titled *Islamic Law with Special Reference to the Institution of Waqf* (Prime Minister Department, Religious Affairs Division, Kuala Lumpur, 1982, pp. 254) was purely theoretical in nature, and gave only the classical law of *waqf* in accordance with the four Sunni schools of Islamic Jurisprudence. The book made no reference to the realities on the ground, that is, the statutory and administrative set-up of *awqaf* in Malaysia.

The book under review carries a very lovely and thought-provoking Foreword written by Dato' Abdul Hamid bin Haji Mohamad, Judge, Federal Court, Malaysia, who praises the author for the painstaking research and for putting a lot of "thinking" into the book. The Judge further adds: "From my experience in hearing and deciding a number of *waqf* cases in Penang, I am of the opinion that the main problem is not law ("Secular law," as it is now often said) or court ("civil court" as it is now conveniently called) but rather the number and the type of officers who are entrusted with the management of *waqf* properties, or the lack of it" (p. ix) He substantiates this statement with the help of facts in *Tan Kim Luan Lwu Sabariah bt. Mohd. Nor* (1995) 1 CLJ 323 and *G. Rethinasamy v. Majlis Ulama Islam, Pulau Pinang & Amor* (1993) 2 MLJ 166.

Similar were the findings of a Seminar held in Jeddah in 1984 under the auspices of the Islamic Development Bank.¹ There it was observed that in Malaysia “although all of the thirteen States are empowered to develop all the *waqf* lands and assets according to their own plan, till today not even one state has tried to amend or codify more complete and perfect laws regarding administration of *awqaf*. *Waqf* lands are yielding very little income; most of the *waqf* lands, houses and shops were let out on nominal rents and that too on 99 years. The state government has so far done nothing to redeem this situation.”² The situation did not change much even in 1998 as could be gathered from the remarks made by Othman Alhabshi in his paper presented in an international seminar³ held in Kuala Lumpur in 1998.

The book under review consists of five chapters, a brief conclusion and an appendix containing the text of the *Wakaf* (State of Selangor) Enactment No. 7 of 1999. It also contains a List of Statutes, List of Cases, Glossary, Bibliography and a detailed Index. But, according to the author, “the prime contents of the book focuses on the statutory provisions of *waqf* in Malaysian legislation, as well as the role of the State Islamic Religious Councils (SIRC) as the sole Trustees for the (*waqf*) assets” (p. xiii).

Chapter I deals with the ‘Institution of *waqf* in Islam.’ It is introductory and informative in nature, describing the Quranic exhortations behind the disposition of properties as *waqf* and Islamic educational institutions. There is also a very brief discussion on the perpetual nature of *waqf*. The author supports perpetuity as an integral feature of *waqf*, notwithstanding “other views which insist that a *waqf* for limited period is lawful, for instance, those of (Imam) Malik and Abu Hanifah” (p.16). No reference is made to the rationale behind the abolition of *waqf al aulad* in several Middle Eastern countries or restricting the life span of such *awqaf* to two generations or 60 years, whichever comes first.

¹ *Management and Development of Awqaf Properties: Proceeding of the Seminar held on 7 to 19 Dhul Qada, 1404 H (4-16 August, 1948)*, (Islamic Research and Training Institute, Islamic Development Bank, Jeddah, Saudi Arabia, 1407H-1987), 161.

² *Id.* at 129.

³ Syed Othman Alhabshi, “Case Study: Malaysia,” International Seminar on *Awqaf* and Economic Development jointly organized by IRTI, IKIM and BIRT, Kuala Lumpur, 2-4 March 1998.

Chapter II describes the origin and development of *waqf* in Malaysia. The author rightly complains that not much is known about the way *awqaf* were administered during the pre-colonial period. Similarly, not much information is available regarding any specific law dealing with *awqaf* during this period, except a reference found in *Pahang Laws* (1596 CE) of the times of Sultan Abdul Ghaffur (1592-1614 CE).⁴ However, no mention of *waqf* is found in other compilations of laws like *Hukum Qanun* Melaka (1523 CE), the *Ninety-Nine Laws* of Perak (1765 CE), the *Johore Legal Digest* (1789 CE) and *Kedah Legal Digest* (1605 CE). According to the author, “the British Government (*sic*) of the East India Company, at the beginning of the 19th century, endowed lands for Muslim mosques and burial grounds in Penang” (p. 30). Yet, ironically, the Board of Endowments constituted by the British diverted *waqf* income to other objects. It was nothing very surprising, as all the members of the Board were Englishmen (p. 33).

An important development during post-independence Malaya was the establishment of State Islamic Religious Councils (SIRCs). These were entrusted, *inter alia*, with the supervision and administration of *awqaf* by virtue of the Administration of Muslim Law Enactments of the various States. In the words of the author, “the justification of this change has resulted (*sic*) from the existence of the complex and subjective attitude of man, i.e the trustees of *awqaf* in this context of discussion, which deals with the question of honesty and trustworthiness. It is hard to find these two characteristics these days. To maintain the supervision of *awqaf* assets to (*sic*) private trustees means to expose it to corruption, maladministration and malversation” (p. 44).

An important point made in this chapter relates to the lack of knowledge about the exact number of *awqaf* that exists in the country. No systematic survey of *awqaf* was ever undertaken. The National *Wakaf* Properties Development and Administrative Steering Committee established in 1988 under the Prime Minister’s Department Land the two sub-committees established under it that is, sub-committee for the Administration of *Wakaf* Properties and sub-committee for the Legal Administration of *Wakaf* Properties, made in vain, efforts to collect

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See, John E Kempe & R.O. Winstedt (eds.), “A Malay Legal Digest Compiled for ‘Abd Al-Ghaffur Muhaideuddin Shah Sultan of Pahang (1592-1614 CE),” *Journal, Malaya Branch of Royal Asiatic Society*, vol. xxi, pt. 1 (1948), 14.

information of the existing *awqaf* in the country, as the SIRC's could not provide them relevant information (p. 46).

The book highlights the fact that except the State of Selangor, no other State has a separate enactment dealing with *awqaf*. Their administration is governed by the Administration of Islamic Laws Enactment of the respective States or Federal Territories. As is well known, these State enactments, except Selangor, make it a rule that not more than one-third of the property belonging to a Muslim may be made *waqf*. Islamic law places this restriction of one-third only in cases of *awqaf* created through *wassiyah* or during *mard al maut*. The author rightly criticizes the statutory restriction and recommends the amendment of relevant provisions so as to bring them in conformity with the classical Islamic Law (pp. 61-63). She also criticizes the Land Acquisition Act 1960 for allowing the acquisition of *Waqf* lands by the State Authority for public purposes and also national economic development (p. 67).

The book also touches upon the legal position of the family *awqaf* in Malaysia, the problem of conflict of jurisdiction between the Shariah Court and Civil Courts in matters of issuance of injunctions, estoppel, resjudicata, difference of religion between plaintiff and defendant, etc. After referring to the Federal Court's Judgment in *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaikh Zalkaffily bin Shik Natar* [2003] MLJ 705, the author concludes that "if the subject-matter of a case has already been enumerated under State enactments, like *wakaf*, then it should be adjudicated by the *Shariah* Court Judges, and not the civil court ..., notwithstanding that the relief sought for deals with civil (matters)" (p.71).

Chapter IV discusses the legal status of State Islamic Religious Councils (SIRC) of each State. She disagrees with the present legal position whereby all *waqf* properties vest in SIRC's and their income goes to *baitulmal*. According to her the capital of the *mawquf* shall be utilized for the objects stipulated by the *waqif* (founder) and income shall not form part of the *baitulmal* (p. 87).

Legal provisions of certain States⁵ which allow the SIRC, with the approval of the Ruler of the State concerned, to close or demolish

⁵ S. 84, Kelantan Enactment No. 4 of 1994; S. 92, Pahang Enactment No. 3 of 1991; S. 71, Perak Enactment No. 2 of 1992; S. 77(1)(2)(3), Perlis Enactment No. 3 of 1964; and S. 172 (2), Terengganu Enactment No.12 of 1986.

any mosque, have been criticized by the author. According to her, “no demolition should affect any *waqf* building, particularly a mosque, unless an exchange or transfer of the building is made (under *istibdal*). Indeed, the four Sunni Schools of Law prohibit the exchange of mosques (even though the *waqif* may have provided so in the *waqf* deed), (pp. 89, 101).

There is a good discussion in this chapter (pp. 91-96) on the problems which the SIRC face in the way of developing the *waqf* properties. The *first* and foremost problem is financial. Governments have shown reluctance to finance the development of *waqf* properties. Other financial agencies are hesitant due to their belief that they will not “receive an adequate profit margin compared to the market value rate....” (p. 91). Then there are legal problems indirectly created by the National Land Code (NLC) 1965, the Control of Rent Act 1966, Local Government Act (LGA) 1976, the Land Acquisition Act (LAA) 1960 (as amended in 1997), and the Specific Relief Act (SRA) 1950. It is pointed out by the author that “none of the SIRC in Malaysia, except Johore, Malacca and Selangor, appoint specific officers to supervise *awqaf* assets.... It is to be regretted that almost none of the personnel appointed for the administration of *awqaf* assets has any training or competency in investment analysis, project management, property management, property evaluation etc....” (p. 93).

Chapter V is broadly a repetition of the above mentioned problem in the specific context of the Federal Territory of Kuala Lumpur. Lastly, Chapter VI carries a brief conclusion and largely consists of an appraisal of the role played by SIRC in the administration and development of *waqf* properties. The author concludes by saying that SIRC “have not fulfilled their role as the sole trustees of *awqaf* assets... In spite of this, however, one may acknowledge a few positive contributions on their part” (p. 143).

On the whole the book is a very good attempt in evaluating the position of *awqaf* in Malaysia, the problems they are facing now and some possible solutions. The value of the author’s contribution lies in the fact that she has boldly embarked on a journey of discovery, knowing fully well the possible hazards and has succeeded to a credible extent, in achieving the goal of collecting the relevant material, analyzing it to the best of her ability and throwing a challenge to future researchers to pick the baton from where she has left it.

The book is neatly printed and nicely bound, but unfortunately not much care is given to the quality of the language used, grammar,

construction, etc. It was the duty of the publisher (the University of Malaya Press) to have provided effective editing assistance to minimize these defects which have brought down the value of this book. The saving grace is that there are no printing mistakes and page setting is done very professionally.

It would have added more credibility to the book if instead of merely mentioning the *waqf* Development Corporation Sdn Bhd and various company holdings established by the SIRC in various states (pp. 87-88) that is, Maim Properties Sdn Bhd (in Malacca), Edi Fajar Development Sdn Bhd (in Negeri Sembilan), Assahabah Holding (in Penang), Bakti Suci Properties Sdn Bhd (in Selangor), and Pusat Rawatan Islam Sdn Bhd (in Federal Territory, Kuala Lumpur), the achievements of these companies were described and their working was evaluated with the help of statistical data. This would have provided valuable information to *waqf* institutions world wide which are presently engaged in finding effective means for developing *waqf* properties. Similarly, there is only a mention of the establishment of the Department of Wakaf, Zakat and Haji in 2004 under the Prime Minister Department without furnishing any information about its working achievements (p. 90). The discussion about *awqaf* in Kuala Lumpur given in Chapter V is narrative in style without any in-depth analysis and critical comments. The criticism that the author has leveled against the SIRC are indeed valid, but no viable alternative has been suggested by her to rectify the problem. Probably each State may have a *Waqf* Board consisting of ten members, to be nominated by the Sultan on the recommendation of the SIRC. Members should be nominated out of experts in *Shariah*, administration, law, finance and economics. No one should be nominated on the basis of political affinity. *Waqf* Boards and not *Waqf* Development Corporations shall be entrusted the job of looking after *awqaf* and their development. As a corporation has necessarily to be established under the Companies Act, its actions would come under the jurisdiction of civil courts. Once *Waqf* Boards are formed, there should also be some sort of central authority to supervise their working and provide advice and guidelines to them. For this, a Federal *Waqf* Advisory Council, a non-statutory body, needs to be established under the Prime Minister Department consisting of twenty members, and nominated from different States and Federal Territories, and chaired by the Deputy Prime Minister. It may meet bi-annually to advise the *Waqf* Boards, State Governments and other institutions connected with *waqf* matters, to prepare guidelines for

undertaking the development of *waqf* properties on a country-wide scale, to negotiate loans or financing for this purpose from banks within and without Malaysia, and to make serious efforts with the State Governments to undertake a systematic survey of *waqf* properties. These measures probably may bring improvement in the existing stale attitude of SIRC's toward *awqafs*. The author may wish to take into account these suggestions while preparing the second edition of this book.

Dr. Siti Mashitoh deserves to be congratulated for her pioneering effort in undertaking research on *waqf* administration in Malaysia. May Allah reward her for her hard work and perseverance.

*Syed Khalid Rashid**

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Professor, Department of Private Law, Ahmad Ibrahim Kulliyah of Laws, International Islamic University, Malaysia.