

MEDIATION AS AN ALTERNATIVE DISPUTE RESOLUTION FOR MALAYSIAN WAQAF (ENDOWMENT) CASES¹

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Introduction

This paper discuss mediation as a viable alternative dispute resolution for *waqaf* (Islamic endowment) disputes in Malaysia. Notwithstanding the existing courts, parties to these issues can opt for mediation for legal remedy. Mediation is deemed complementary to courts adjudication, and a viable alternative for resolution of *waqaf* cases. Mediation have proven its effectiveness and amicability in resolving several *waqaf* issues.

Mediation is viewed as a viable alternative, given some shortcomings in courts *wakaf* adjudications. First, it is due to occurrence of jurisdictional conflicts. A legal uncertainty whether *waqaf* cases fall under Civil or Shari`ah courts. Second, is judges` competency. Whether Civil courts judges have the competency to hear Shari`ah oriented *waqaf* cases; or whether Shari`ah courts can decide on cases involving non-Muslim *waqaf* disputants.

Mediation as an alternative ADR and existing courts adjudication on *waqaf* cases need to be reviewed. Cases of jurisdictional conflicts are casting doubts on the efficacy of both civil and shari`ah courts. The consequences will adversely affect the welfare of the disputants, leading to prevailing disputes among their heirs and, in case of public interest, the larger community.

This paper shall briefly highlight mediation as an alternative ADR; cases of jurisdictional conflicts between Civil or Shari`ah courts; competency issues of Civil courts judges in hearing Shari`ah oriented *waqaf* cases; and an Islamic Code of Conduct for Mediation deemed applicable for *waqaf* cases. All collectively to illustrate efficacy of mediation as an alternative ADR for *waqaf* disputes.

Keywords: mediation, *waqaf* , alternative dispute resolution, code of conduct

Definition of Mediation

The spirit of mediation is originally from the concept of *sulh* in Islamic perspective. Allah said in the Qur`an:

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“If a wife fears cruelty or desertion on her husband's part, there is no blame on them if they arrange an amicable settlement between themselves; and such settlement is best; even though human inner-selves are swayed by greed. But if ye do good and practise self restraint, Allah is well-acquainted with all that ye do” (An-Nisaa:128)”

Ibn Mundhir in Lisan Al ‘Arab defined *sulh* as “السلام”⁶ which means “peace”. This is similar to Hans Wehr dictionary definition of *sulh* as “peace, reconciliation, settlement”⁷. The literal meaning is also reflected in a definition by Ibn Mundhir as “تصالح القوم بينهم” which means “reciprocally made peace in a group of people among themselves.”⁸

Mediation is a method of alternative dispute resolution that involve a mediator as the middle person to resolve the disputes between conflicting parties. Cambridge Dictionary defined mediation as ‘the process by which someone tries to end a disagreement by helping the two sides to talk about and agree on a solution.’⁹ Mediation as medium of settlement of dispute could play a role in addressing the issue of disputes related to wakaf.

Definition of Wakaf

AAOIFI Shariah Standard in Standard 2/1 defined Waqaf as:

In Shari’ah terminology, Waqf refers to making a property invulnerable to any disposition that leads to transfer of ownership, and donating the usufruct of that property to beneficiaries.”¹⁰

Majelle Al- Ahkam Al-‘Adliyyah defined waqaf as:

“A thing dedicated. A dedicating. It further defined as ‘Land truly made waqf in accordance with the Sher’I law being from Arazi Memluke.¹¹ Of Arazi Mevqufe of this category the thing itself and the ownership of it (raqabe), and the rights of disposition (tasarruf) belong wholly to the waqf.¹²”

Muhammad Abu Zahrah further explained wakaf as:

“To preserve the essence of property and utilise the usufruct for the sake of Allah, or preserving the essence of the good to distribute the usufruct of the good.”¹³

Therefore, the essence of *waqaf* according to the definition is the preservation to the essence of the subject matter. Therefore, the corpus itself cannot be utilised by selling, leasing or gift

⁶ Lisanul ‘Arab li-Ibn Mundhir, (Darul Ma’arif)

⁷ Cowan, J.M (ed.)(1976) Arabic-English Dictionary:The Hans Wehr Dictionary of Modern Arabic, 3rd Edition (New York:Spoken Language Services, Inc)p.523

⁸ Lisanul ‘Arab li-Ibn Mundhir, (Darul Ma’arif)

⁹ Mediation in <https://dictionary.cambridge.org/dictionary/english/mediation> (accessed 7th of August 2019)

¹⁰ AAOIFI Shari’ah Standard No. (33): *Waqf:815*

¹¹ C.R. Tyser. B.A.L.; D.G. Demetriades; Ismai; Haqqi Effendi (2001) The Mejelle being an English translation of Majallah el-Ahkam-I-Adliya and A Complete Code of Islamic Civil Law (Kuala Lumpur: The Other Press) p. xxxiv-xxxv, xlvi.

¹² Ibid.

¹³ The exact word translated in Malay in the book:” Menahan zat harta dan menjadikan hasilnya di jalan Allah atau menahan zat barang untuk disedekahkan manfaatnya.”-Muhammad Abu Zahrah (2007) Wakaf Menurut Agama dan Undang-undang, H. Muhammad Yusuf Sinaga (Pent.) (Puchong: Jasmin Enterprise) m.s. 55

or acquisition as inheritance. The proceed will be utilised only to the people assigned to the beneficiaries.¹⁴

Therefore, essentially waqaf is defined as the perpetual dedication of any property from which its benefit may be used for any charitable purpose, whether as general waqf (-any waqf that is created for a general charitable purpose according to Syarak-Islamic Law) or special waqaf (- a waqf that is created for a specified charitable purpose according to ruling of Islamic law.

Waqaf: Jurisdictions under Malaysian Plural Legal System

Malaysian Legal System is originated in the Federal Constitution as legal heritage of British Common Law and Islamic law practised since pre-independence Malaysia. The jurisdiction of executive, legislative and judiciary is properly stated in this Constitution. The Constitution has set the jurisdiction on matters related to Federal and States under Federal list and State list. Islamic Law mostly apply under State List and certain areas of jurisdictions under Federal list. As for waqaf; the matters come under state jurisdiction and religious authorities, the dispute related to *waqaf* are tried in Syariah court.

According to Nor Asiah Mohamad et al noted that ‘Waqaf’ is listed under the State List of the Federal Constitution 1957 and thus comes under the jurisdiction of the state governments. Given the multifarious backgrounds of the states and religions in Malaysia, and the lack of understanding of legal practitioners and the legal draftsmen from the times of British influence resulted in the lack of specific legal provisions for the administration of waqf lands in Malaysia. Today, the same legal challenge permeates amongst waqf administrators as well as land administrators who also have minimal appreciation concerning the spirit and rationale of waqf in Islam.

Therefore, Malaysian dual legal system Federal and State laws have respective jurisdictions on certain aspects of Islamic matters.

Factors Contributing to Civil and Shari`ah Courts Waqaf Adjudication Issues

Problems in the Administration of Waqf Lands as highlighted by Nor Asiah Mohamad et al underscored possible factors contributing to adjudication issues are as follows:

a. Lack of statutory provisions in the present legislation

Some states in Malaysia have introduced law to specifically deal with waqf. Nevertheless, the provisions are inadequate. Provisions dealing with the registration of waqf land by the SIRC are subject to the NLC where the powers lie with the Land Administrator while NLC has provisions which exempt waqf from the NLC (section 4(2)). One suggestion for improvement is the SIRC should exercise their powers to regulate and introduce rules on waqf without having to enact new law as that will take a longer process.

b. No Standardisation in the Procedures for Vesting Order of Waqaf lands

Waqf land falls under the jurisdiction of each state (List II, Ninth Schedule of the Federal Constitution) that caused lack of standardized practices and inconsistency of laws and policies adopted in every state. The proposal to use the vesting order as one sole processes of registration of waqf is timely although a short-term solution to waqf land. There is a need to

¹⁴ Ibid.

gain the people's trust on the administration of waqf land to spur economic activities based on principles of Islamic law.

c. Issues involving Ownership and Registration of Waqf land

Studies (Muhammad, M.T.S, n.d; Sharifah Zubaidah and Nuarrul Hilal, 2011) show that one of the problems in dealing with waqf land involves the registration of the waqf land in line with the requirement of land administration in Malaysia. The problems are due to failure to register in cases of death of the land owner, and in cases where the waqf land was entrusted and registered in the name of village head or the Qadhi. The matter becomes worse if the trustee also dies. There are also cases where the next of kin refuses to acknowledge the waqf and opt to distribute the property according to estate distribution.

d. Lease of Waqf land

The Federal Government has a policy that they will only provide finance for projects carrying its name. As such, the SIRC is to lease the waqf lands to the Federal Government to comply with this policy and the SIRC must be the registered owner of the land to qualify to create a registered lease over the land. Thus, problems arise when some of the lands are still registered under the owner's name and are yet to be transferred to the SIRC. Therefore, the need to transfer the ownership through proper registration of waqf land is deemed to be essential.

e. Occupiers in Waqf land

The presence of waqf land has existed in Malaysia since the early settlement of the Muslims in the states. As a result, in Penang for example, there are many areas that are known to be waqf land. The land has been occupied by peoples from various background with various activities have been conducted on the land. They have peacefully occupied the land and some of the lands are mistakenly believed to be vacant state land. Lately, there are calls for reviving the waqf land to bring better benefit for the Muslims and among the main obstacles is to ask the occupiers to vacate the land.

The accompanying issues are compensation, reluctance as well as issues relating to equitable interests of the people as well as welfare. To make matters worse, there are many waqf lands that have now changed hands and ownership especially in Penang. Studies show that a large tract of waqf land in Penang has changed hands, some being transferred to non Muslims. It is a matter of concern for the Muslims that activities on waqf land should not be contrary to Islamic teachings.

g. Ignorance about the role of waqf and its institutions

Generally, it has been shown that public awareness about waqf and waqf land exists. Nevertheless, the level of awareness is very low as compared to the general expectation on the development of waqf properties and investment (Aidid, 2012). The general public generally believes that waqf is normally created for certain types of properties to serve those in need or for religious and educational purposes. They lack knowledge on the dynamic nature of waqf. The people's ignorance is obvious in cases involving protests about the use of istibdal for development of waqf land that diverts the original intention of the mauqif (creator). Some have

also protested the development of waqf land into a hotel worrying that some activities in the hotel are unIslamic.

Jurisdiction Conflicts

Legal confusion does arise regarding jurisdictions of wakaf disputes. There were also situations when the parties in the *wakaf* dispute might involve non-Muslim actor. Therefore, in this situation, disputes are brought to civil court.

Mashitah () observed that the *wakaf* cases highlighted the attitude of judges in dealing with *wakaf* issues. She highlighted that, for the court to identify whether they have jurisdictions over the matter or not, the courts should identify the subject matter of the case and not the remedy prayed for.

If the subject matter is *wakaf*, then the jurisdiction should be in Syariah Court, eventhough the civil remedy prayed for by the litigants. This approach highlighted in the case of *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors.* ([2003] 3 MLJ 705). In this case, The Federal Court and Appeal Court decided that Syariah Court has no jurisdiction to issue injunction to the respondents. This decision however was criticised because the court apply the approach of ‘remedy prayed for’ and not looking into the subject matter of the disputes.

The issue related to jurisdiction raised due to the non-exclusivity of the Syariah court to deal with *wakaf* issues. The reason being, the process involves civil remedy as practiced in the dealing related to land. The issues such as caveat, estoppel and injunction, in fact has nothing to do with Syariah.

Therefore, the hearing in Syariah court is of no relation with the Syariah knowledge that the judges have related to advance commercial practice, specifically on Islamic instrument which has evolved along with commercial practice, but still preserving the compliant aspect with the verification by Shariah Advisory Council assigned by the bank. In some situation, the judges are not competent to deal with *wakaf* issues due to their limited knowledge. The situations admitted by the judge themselves as stated by YA Datuk Saari b. Yusoff, Hakim Mahkamah Tinggi Kuala Lumpur in an interview session by Dr Mashitoh on 10 April, 1999. YA Dato’ Abdul Hamid Mohamed, who was a High Court Judge mentioned the same when he decided a case of *Isa Abdul Rahman and Anor v. Majlis Agama Islam Pulau Pinang* [1995] 10 JH 222; (Mac 1996) 8(1) Kanun 123).

Nor Asiah Mohamad et al also cited a case that lack of statutory provision. For example, in *G Rethinasamy v Majlis Ugama Islam, Pulau Pinang* [1993] 2 MLJ 166, the Land Administrator

was held as having no power to transfer waqf land to the Plaintiff who is a non-Muslim. Any amendment of the law is welcome and the amendment to article 121 the Federal Constitution helped to resolve the issue of redundancy of jurisdictions on waqf. Nevertheless, the understanding of the judges on this matter will ensure that matters relating to waqf must be upheld as it is a part of Islamic principles. The present weaknesses of the NLC in dealing with waqf can be improved with amendments of some of the provisions.

When *wakaf* case involved non-Muslim actors, Civil court will have jurisdiction to hear the case. This is due to a limitation of jurisdiction in Shariah Court, according to State list, that it only have jurisdiction to hear cases involving person professing the religion of Islam.¹⁵

In the cases where the case was decided by the non-Muslim judge, for example in the case of Barkath Ali bin Abu Backer v Anwar Kabir Bin Abu Backer & Ors [1997] 4 MLJ 389 and Shaik Zolkaffily Bin Shaik Natar & Ors V Majlis Agama Islam Pulau Pinang dan Seberang Perai [1997] 3 MLJ 28, these two cases decided by Hakim Jeffrey Tan. The Judge held that Syariah Court has no jurisdiction to issue the declaration as claimed by the parties.

Non Muslim judges also have difficulties in understanding the ruling related to Islamic law, and most of the time, prefer to defer the trial. This is evidenced in the case related to administration of Muslim estate, In The Estate of Tunku Abdul Rahman Putra Ibni Almarhum Sultan Abdul Hamid [1998] 4 MLJ 623. Even Judge YA Hakim Low Hop Bing decided that Syariah Court has no jurisdiction in matters of probate and administration, YA Hakim did not deny the jurisdiction of Shariah court in the matter of validity of marriage and the status of children as valid child in the cases of marriage related to the persons who revert to Islam.

The courts are also free either to accept or reject the fatwa issued by State of Religious council. However, the court refer to the two cases held by the Privy Council, Abul Fata Mohamed Ishak lwn. Rusomoy Dhur Chowdry [1894] 22 Indian Appeals 76; Indian Law Reports 22 Cal. 619: see also Privy Councils Judgements from India [23 November, 1894] 572) and case Fatuma bt. Mohamed b. Salim Bakhshuwen & Anor lwn. Mohamed b. Salim Bakhshuwen([1952] Appeal Cases 1). These two cases are binding upon High Court.

Inheritance (Waqaf Inheritors/Heirs)

There were cases when the case decided not in accordance with the Islamic rules on *wakaf*. For example in the case of Tengku Nik Maimunah & Anor V Majlis Ugama Dan Adat Melayu Negeri Trengganu & Ors[1979] 1 MLJ 257, the decision by the judge Hakim Harun was based on Section 61 of the Enactment of Administration of Islamic Law 1955 (Terengganu) which allowed on 1/3 of the property to be distributed for religious purposes and charity.

This decision however was reviewed in Federal court in the case of Haji Embong bin Ibrahim and Ors v. Tengku Nik Maimunah bt. Al-Marhum Sultan Zainal Abidin & Anor [1980] 1 MLJ

¹⁵ Article 121 (1A) Federal Constitution of Malaysia.

286. The Judge, YAA Salleh Abbas (as he then was) held that waqaf can be distributed in the whole asset.

The decision on waqaf previously also was decided wrongly in the case of Commissioner for Religious Affairs Terengganu lwn. Tengku Mariam [1970] 1 MLJ 222) whereby YAA Hakim Suffian in the Federal Court, agreed with the decision of YA Hakim Wan Suleiman in High Court [1969] 1 MLJ 110) stating that waqaf for the benefit of family in perpetuity and the last gift for charity is illusionary, therefore, void ab initio. Though, the State religious council has issued fatwa on the permissibility of that *wakaf*, but the judge claimed that he was not bind by the fatwa.

The matter is excacerbated when the judges who listen to the *wakaf* cases also has no background on Islamic law, specifically *wakaf* contract. This can be seen in the case of Re Dato Bentara Luar Decd. Haji Yahya and Anor v. Hassan and Anor, [1982] 2 MLJ 264 dan Isa Abdul Rahman and Anor v. Majlis Agama Islam Pulau Pinang Isa Abdul Rahman and Anor[1995] 10 JH 222; (Mac 1996) 8(1) Kanun 123).

The cases of *wakaf* in fact are the example, where the decision made not in line with the Islamic rules on *wakaf*. The reluctant by the judges to abide by the fatwa, in fact has given the impression that the civil court is not recognised the Islamic law of contract.

This impression lead to the issue of, whether the civil court is a proper forum to decide on dispute related to *wakaf*? Further, if the Syariah court also address this issue, whether the element of harmony as well as the maintaining the relation among families could be resolved.

Based on the observation, as well as various decided cases shows that, the adversary process created more conflict especially among families, heirs and the society. To ensure peace co-existence between the parties involve, therefore, mediation is considered as one of the best methods in dispute resolution process.

Mediation as an Alternative Dispute Resolution under Islamic Law

According to Said Bourheaa, Muslim jurists have stated that all means of peaceful conflict settlement including mediation are recommended in Islamic law. The fundamentals derived from the general principles of Islamic Law as ably stated by Bourhea are as follow:

1- Peaceful conflict settlement is encouraged regardless of the ideology or sects or religion of the parties involved in the conflict. The Quran lauds all type of peaceful conflict settlement as long as they do not contravene Islamic teachings.

2- Mediation is not available in cases where the law is clear and explicit

3- Mediation as a process of peaceful conflict settlement falls under the scope of Siyasaah Shar'iah which "includes all measures which bring the people closer to beneficence, and furthest away from corruption, even if it has not been introduced by the Prophet (SAAS) nor regulated by divine revelation"⁸, therefore whatever procedure applied in the process of mediation is valid as long as it brings the people closer to beneficence, and furthest away from corruption, and as long as it does not contravene the principles of Islamic teaching.

4- Islam permits the mediation of a non-Muslim in internal and international conflicts occurring between Muslims and non Muslims.. As for mediation in conflicts occurring between Muslims or between Muslim countries many scholars are not in favor of accepting the mediation by non-Muslims based on the prohibition of the arbitration by non- Muslims in a conflict between Muslims and non- Muslims. However, many other scholars permit mediation by a non Muslim, as long as the matter it is not in a purely religious, and it is within Islamic Values (public interest; ending hardship; reaching a fair settlement etc).

5- Sincerity, fairness and qualification are the core conditions of a mediator.

6- The mediator should be of good reputation and acceptable to both parties. The Holy Quran emphasizes, for instance in the issue of witnesses to contract formation, on reputation and acceptability. Allah says:

7- Although mediation is a benevolent act, authorities should encourage and assist financially mediators either they are individuals or organizations.

Waqf Cases at Malaysian Courts

According to Syarak, ruling of Islam Waqf is defined as the perpetual dedication of any property from which its benefit may be used for any charitable purpose, whether as general waqf (-any waqf that is created for a general charitable purpose according to Syarak-Islamic Law) or special waqf (-a waqf that is created for a specified charitable purpose. The definition is also accepted by the state law. , and is referred to as Waqf Enactment of Selangor State (Enactmen Waqf state of Selangor, No. 7, 1999).

According to Nur Khalidah Dahlan et al there is no provision either in the Federal Constitution or in the Court of Judicature Act 1964 which confers the civil courts the jurisdiction to decide Waqf related cases. However, if waqaf is regarded as a trust, then it is subject to the Trustee Act 1949 whereby only the High Courts of Malaya and Borneo hence, have the jurisdiction to try and decide on trust cases. The jurisdiction of the Syariah Court is thus excluded.

Nevertheless, certain federal statutes embodied the fact that civil law or the principles of English law shall not be applicable to waqf. Thus, the civil laws are negated from having any impact on waqf in terms of application. These statues thus pointed to the facts that Waqf matters are largely under the scope of Islamic law under the State List.

Furthermore, In Malaysia, the establishment and jurisdiction of the Syariah Court are the concerns of the respective states. The respective states are responsible to make laws relating to

matters related to Islamic law, including waqf and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State.

Therefore, waqf is considered as one of the State matters. The jurisdiction of the respective State Syariah Courts is to be found in each state administration of Islamic affairs enactments.

Adjudication of Waqf Issues at Shari`ah Courts

Umar Oseni observed that many of waqf cases in Shari`ah courts are related to management issues, demolition of property erected on a waqf land, declaration of waqf land, and payment of returns to the beneficiaries. Waqf properties, particularly land, have been the subject of litigated cases in issues involving title to the land itself. Ordinarily, the survey of waqf properties triggers numerous disputes involving title to the endowed land. Some of the lands, which have become the subject of litigation, were endowed so many decades or even centuries ago.

Some of the cases involving management issues, demolition of waqf property, waqf land, , payment or litigated cases involving title to the waqf land are as follows:

Bakhtiar Adnan v. Mohd Fawzi Nahrawi & 6 Ors [2006] XXI(I) JH 19 Interim Application on Waqf Land [Land] Mahkamah Tinggi Syariah W.P.Kuala Lumpur The Ex-parte Application is Rejected and MAIWP is supposed to be present as respondent.

Ismail Bin Wahab v. Majlis Agama Islam Melaka & 3 Ors [2008] 25 (1) JH 123 Claim of Waqf Property [Property] Mahkamah Tinggi Syariah Melaka Court accepts and allows the Application to alter Waqf Order.

Majlis Agama Islam Dan Adat Melayu Terengganu v. Tis'ata 'Ashar Sdn. Bhd. [2008] 27 (1) JH 137 Claim for Declaration of Waqf Land [Land] Mahkamah Tinggi Syariah Negeri Terengganu Court gives Judgment as agreed by the Parties – Consent Judgment.

Tengku Abdul Kadir Bin Tengku Chik Dan Seorang Lagi v. Majlis Agama Islam, Kelantan [1995] X (I) JH 34 Claim of Special Waqf/Conflict of Jurisdiction [Land] Mahkamah Rayuan Negeri Kelantan. In 1956, an Originating Motion failed before Kelantan Civil High Court, in which the High Court judge made his Decision concerning waqaf. In 1987, the Appellants brought the matter to Syariah Court. Court held the Syariah Court does not have jurisdiction to reverse court judgement made in 1956.

Isa Abdul Rahman Dan Lain-Lain v. Majlis Agama Islam Pulau Pinang [1995] X (I) JH 222 Waqf/Objection on action to demolish a Mosque that was erected on a piece of Waqf Land (Since 1889). Mahkamah Tinggi Pulau Pinang. Plaintiffs have a valid Locus Standi; Defendant ordered to reconsider the action to demolish the Mosque. Latest Fatwa From Majlis Fatwa Kebangsaan should be sought.

G. Rethinsamy v. Majlis Ugama Islam, Pulau Pinang & Ors [1994] IX (I) JH 75 Waqf/Land Law-National Land Code Mahkamah Tinggi Pulau Pinang. Plaintiff is not a bona fide Purchaser without notice. He is a bare Trustee for Defendant.

Tegas Sepakat Sdn. Bhd. v. Mohamed Faizal Tan [1994] IX (I) JH 225 Waqf Mahkamah Tinggi Johor Bharu. High Court must follow the decision of Federal Court based on Stare Decisis.

Shari`ah Court-annexed ADR

Umar Oseni highlighted the need for a court-annexed ADR for cases with impact on the larger society, when families in dispute often end up washing their dirty laundry in public. To avoid such circumstances, the ADR measures are to ensure the sustainability of any decision through amicable settlement or an enforceable court judgment. Parties should be encouraged to adopt amicable settlement procedures through sulh. Being the representative of the state in charge of settling disputes, judges should go the extra mile to encourage litigants to settle out of court. This is part of the original value proposition of the administration of justice system in Islamic law and it replicates the practice of *maslahah*. To this end, one may rightly conclude that the duties of Shari'ah court judges is more of dispute management than dispute resolution since they are required to actively engage in dispute avoidance as well.

Waqf Dispute Tribunals

Umar Oseni also highlight the Imperativeness of Waqf Dispute Tribunals With the growing interest in waqf, the emerging incidences of waqf cases going before the Shari'ah Court, and the likelihood of the proposed waqf survey triggering a plethora of cases involving title to waqf lands and other properties, one may propose the establishment of Waqf Dispute Tribunals. This body should be empowered to hear and determine waqf-related cases exclusively. The tribunal should be composed of judicial officers from the Shari'ah judiciary and some learned members of the academia who should sit on ad hoc basis. The tribunal should be required to utilize all available dispute settlement processes such as sulh and tahkim and its decisions or awards should be enforceable by the Shari'ah Court. Moreover, it is more practicable to resolve waqf cases involving so many parties through mediation or arbitration, particularly when the parties concerned prefer to maintain their privacy to avoid unnecessary publicity

Mediation of Wakaf Issues at Mediation Bodies

The mediation in *wakaf* issues is yet to be mainstream, in practice albeit in isolated cases. However, the success is evidenced when the relation of the parties could be preserved especially in family matters and also to mitigate racial tension in multi-cultural society in Malaysia. The case studies on mediation in waqaf issues narrated as evidence that even it is not popular, but it is practiced and successfully reach an amicable settlement.

Case 1:

The experience by Malaysian Mediation Association can benefit the finding in dealing with this issue. The mediation process was made by mediator community in case of dispute between the siblings related to *wakaf* issues. There was a brother, who, without the consent of other siblings, has distributed the land inherited from their mother, to be disposed as *wakaf* land. The act of the brother was known by other siblings and they argued against the decision. The matter was brought before a community mediator in their locality. In the process of resolving the disputes, the mediator community gathered all the authorities involve in the process of acquisition of the land such as the land council, as well as the State Religious Council. The explanation given to the siblings about the status of the land and the siblings also voiced their

disagreement over the decision of the brother, who did not even consult them when he did the action. Luckily, the process of disposition was not yet completed, and the asset later was returned to the family as agreed by all siblings. This mediation process in fact was successful because the brother realised his mistake of not consulting other siblings. The involvement from various parties in the process actually indicate the flexibility in mediation process in order to reach an amicable settlement.

Case 2:

A man has waqf his land to build masjid (Muslim place for prayer), however, the waqaf was not registered. Later, the man who wakaf the land passed away, left his heirs; sons, daughters and grandchildren. The committee of the masjid set up specific task force to collect the fund to build the masjid on the land, however, the successors of the man objected and claimed that the land is theirs. The case was mediated, and all witnesses called as well as heirs in the session. They resolved to proceed with the intention of the wakif, for the land to build masjid on the land. This matter finally resolved amicably and the heirs clear with the intention of their father. The land later registered as *wakaf* land and the State Religious Authority become the sole trustee of this land.

Islamic Code of Conduct for Mediation

Muhammad Amanullah in a Proceeding of the 2nd International Conference on Management and Muamalah 2015 provided a draft of an Islamic Code for Mediation which deemed to be applicable for waqaf mediation purposes. The author noted that he based his draft of the guidelines based on some verses of the Qur'an and ahadith of the Prophet (p. b. u. h.) and his analysis of various mediation resources. Key take-aways from Muhammad Amanullah commendable formulation of the Code are as follows:

Article 1: Introduction (Definitions)

That, important means of alternative dispute resolution in Islam are: tahkim (arbitration), sulh (conciliation), and wasatah (mediation). To understand them clearly, it is necessary to know their definitions and similarities and differences. **Conciliation** is: "A contract between two parties or more to resolve a specific dispute by ending its causes." . **Arbitration** is: "The appointment of a judge or judges by the disputed parties to adjudicate a certain dispute or issue." And **Mediation** is: "A benevolent and non-binding procedure to end a dispute. It is characterized by one or more persons intervening in a dispute either of their own initiative or at the request of one of the parties. The independent mediator must then seek to achieve an amicable settlement by proposing solutions to the parties."

There are similarities among these means as forms of alternative dispute resolution; that they depend on the choice of the disputants; they can lead to have possible settlement of the dispute. The differences between arbitration and conciliation are that arbitration results in a binding judicial decision, whereas conciliation results in a non-binding proposal for settlement; and in conciliation one or both parties renounce some rights, whereas in arbitration no one renounces his rights. A difference between arbitration and mediation is that the former results in a binding decision, while the latter facilitates negotiation.

Article 2: Dependence on Allah As Muslims,

That mediation is not an exception from dependence on Allah and His help. That we are obliged to depend on Allah (SWT) in every aspect of our life because without His help and support, we cannot be successful in our life. To receive help of Allah (SWT), and become successful in his/her mediation, from the beginning, a mediator should depend on Allah (SWT). Whereby it is recommended that he/she should start his/her work with the recitation of tasmiyyah, praise of Allah and salah on the Prophet (p. b. u. h.). Recitation of Surat al-Fatihah at the beginning also is recommended. Likewise, it is recommended to adjourn the session with the recitation of Surat al-`Asr.

Article 3: Intention

That, intention (niyyah) is very important for actions of a Muslim in acts of worship, work and in all of life undertakings. The intention of a mediator is an undertaking for the sake of Allah SWT and his fellow men. This way **Mediator** work will become worship of Allah, for which he/she will receive reward from Him. The profession of a mediator is one of the collective duties, for which intention can play an important role, i.e. it can make mediation as a worship. The Prophet (p. b. u. h.) says: “Verily, deeds are considered based on intentions.”

Therefore, a Muslim mediator is recommended that he/she does an intention that he/she performs the work of mediation for the sake of Allah. That he/she also should try to make his/her mediation as perfect as possible because struggle for perfection is the key condition to receive love and reward of Allah (SWT). The Prophet (p. b. u. h.) says: “Surely Allah loves a person who, when he does a work, tries to make it perfect.”

Article 4: Qualifications of a Mediator

That all jurists unanimously agree that a mediator should attain the age of puberty or be an adult. A minor cannot be a mediator. All jurists also agree that a mediator should be a sane because without sanity he/she cannot understand the different aspects of mediation, and also cannot conduct it. **Mediator** should have knowledge of how and what to do for mediation. Islam encourages to acquire knowledge of all different fields or aspects of human life including the mediation. **Mediator** should have experience and capability of doing mediation because without experience the work of mediation may not be done properly.

Article 5: Virtues That a Mediator is Expected to Possess

Mediator should be trustworthy. Allah says: “Verily Allah commands that you should render back the trusts to those to whom they are due” (Al-Nisa’: 4: 58). According to this verse, maintaining trustworthiness in all different aspects of our life including mediation is obligatory. The Prophet (p. b. u. h.) says: “The one who does not possess trustworthiness (amānah) does not have perfect religion (dīn).” (Ibn Hanbal, v. 3, p. 135, hadith no. 12406). According to this hadith, trustworthiness is a part of our religion. Therefore, all Muslims including mediators should possess this quality.

Mediator should control his/her anger during mediation. The Prophet (pbuh) says: “A person is not considered strong through wrestling; rather a strong person is the one who can control himself at the time of anger” (Bukhari, Muslim, see Riyad, p. 63). He/she should possess the quality of being patient. Allah says: “O you who believe, seek help [of Allah] through patience and salah” (Al-Baqarah, 2: 153). In order to be successful in mediation, a mediator requires Allah’s help. A key condition for receiving His help is patience during the

conflicting arguments of parties. He should not insult any of the disputing parties. Allah says: “O you who believe, let not a group insult another group, it may be that the latter are better than the former” (AlHujurat, 49: 11). Although the verse states about a group, it is also applicable for individuals including mediators. 3.5.5. He is recommended not to disclose personal shortcomings or faults of any of the disputing parties unless they are disclosed by the parties. The Prophet (pbuh) says: “One who covers [the fault of a] Muslim, Allah (SWT) will cover [his fault] on the Day of Resurrection” (Bukhari, Muslim, Riyad, 145, 148-149). 3.5.6. He is also recommended not to hate any of the disputing parties. The Prophet (pbuh) says: “Do not hate each other” (Bukhari, Muslim, Riyad, 594).

Mediator should not give bad names or titles to any of the parties. Allah says: “Do not insult each other by nicknames” (Al-Hujurat, 49: 11). Mediator should not provoke the conflicting parties against each other. Normally he should be truthful in his dealing with the parties and conducting mediation for them. Allah says: “O you who believe, be afraid of Allah, and be with those who are true [in words and deeds].” (Al-Tawbah, 9: 119).

However, if the situation becomes so complicated and there is no way to solve the problem except through telling a lie, the mediator is allowed to tell a lie provided that it should not be related to alternating the facts, denying the rights of any conflicting party, and it should be considered an exception of the normal rule of telling the truth and should not be a regular practice. Imam al-Nawawi says that in order to reconcile among people, telling a lie is permissible. (Riyad, 586-587). He should try his best to get the right of a conflicting party such as right of a piece of land back to this party from the other party, if he considers it as an appropriate and right action to do.

Article 6: Neutrality and Impartiality

Mediator should be neutral and just in his/her mediation. On the tongue of His Messenger, Allah says: “And I am commanded to do justice among you” (Al-Shura, 42: 15). This command is not confined to the His Messenger; rather it is applicable to all Muslims including a mediator. 3.6.2. He should not harm any of the disputing parties. The Prophet (pbuh) says: “No harm should be inflicted to anyone” (Tirmidhi). He should not try to achieve personal gain through his mediation except his fees that has been decided by him or his organization beforehand. For instance, he is not allowed to receive bribe from any party to take a decision in their favor unjustly.

Mediator should not take a decision after listening complain and arguments of one party only. Rather, his decision should be made after listening complain and arguments of all conflicting parties. In other words, Mediator should give equal chance to all disputing parties to talk and complain. The Prophet (pbuh) says: “When two persons come to you to carry on a lawsuit, do not judge for the first person unless you listen to the statement of the other; then you will know how to judge” (Ahmad, Abu Dawud, Tirmidhi).

Article 7: Confidentiality

That confidentiality is related to trustworthiness. That a mediator should be a trustworthy person. Additionally, keeping confidential matters, information and documents as confidential is the right of the party to whom they belong. Therefore, Points discussed during mediation should not be disclosed publicly. Any shortcoming of any party known to a mediator should be kept as secret. Data belong to any party should be kept confidential and

should not be used for any other purpose. However, if it is required by the law of a country to disclose these confidential matters for a certain purpose, a mediator is allowed to do so with the permission of their owners.

Article 8: Conflict of Interest

That a mediator is recommended to avoid conflict of interest in his mediation because it can cause harm to any of the parties. The Prophet (p. b. u. h.) says: “Harm should neither be inflicted nor should be reciprocated.” (Ibn Mājah, vol. 2, p. 784, hadith no. 2340). Therefore, a mediator should not have any financial or other personal interests in the mediation other than his mediation fees because this interest may cause him/her to be unjust to a party. This injustice can cause different types of harm to this party.

If a mediator has a personal interest, he/she should refrain from mediation, otherwise his/her mediation may cause injustice and harm to any of the disputing parties. He is not supposed to be one of the conflicting parties. If any of the conflicting parties is his relative, he should try to hand over the case to another mediator. However, if there is no choice except to conduct the mediation between his relative and other party who is not his relative, he must be just to each party.

Article 9: Etiquettes

That conflicting Parties are Expected to Maintain Many of the etiquettes mentioned below have already been discussed earlier for a mediator. The same etiquettes are also applicable to the conflicting parties. Therefore, a mediator should advise his clients at the beginning of his mediation to follow the following etiquettes: that all the parties without any exception should have sincere intention to have a solution for their disputes. If they are Muslims, they should depend on Allah (SWT). They should not tell a lie in their discussion and complain against each other. They should control their anger. They should not cheat in providing their supporting documents and data. They should not abandon their brotherly relationship following the possible settlement of their disputes, if they are Muslims.

They should not neglect their blood relationship following the settlement of their disputes, if they have this type of relationship. They should forgive each other unless it is related to a worldly interest such as right of a piece of land. However, this type of right also can be forgiven, if the right owner wants to do so. They should not harm each other. They should not insult each other. They should not disclose shortcomings or faults of each other during mediation which have nothing to do with issue under mediation.

They should not hate each other. They should not give bad names or titles to each other. If the conflict is related to the right of the conflicting parties such as the right of a piece of land, the mediator is advised to warn them about the consequences of wrong ownership in the Day of Judgment. They should respect each other during the time of mediation. Once the settlement is completed, they should forget the past and make a new start for maintaining good brotherly relationship among them. None of the parties should consider himself/herself free from committing mistakes and shortcomings because this quality belongs to Allah (SWT) and His prophets only.

Article 10: Fees

A mediator is expected to fix reasonable charges for his/her mediation. A mediator should inform all disputing parties about his/her charges beforehand. There should be flexibility in charging the clients. If a poor person needs mediation but he/she is unable to pay fees, he/she should not be deprived from mediation services. Rather, this service should be offered to him/her free or with reduced charges.

Article 11: Utilization of Modern Technology

It is recommended that a mediator uses modern technology for keeping records. He/she should use email, phones, etc. For updating any change about appointment or other deadlines.

Article 12: Procedures/ Agreement and Commencement/ Recording of Decisions

Following all required procedures for mediation is part of its perfection, which is encouraged by the Prophet (p. b. u. h.) in a hadith mentioned above.

Therefore, after the contact of disputing parties with a mediator, and consent of all them, he/she should make a preliminary appointment for them to discuss all requirements for evaluating their case through his mediation. All disputing parties without exception should be willing to participate in mediation among them. An agreement should be made between the mediator and disputing parties for mediation. A particular day, date, time and place should be fixed for mediation.

All supporting documents of all parties should be submitted to the mediator enough time before the date of mediation, so that he/she will be able to read them and be ready for proper mediation. He/she should be satisfied before the commencement of mediation that he/she will be able to do evaluation of the submitted case through his/her mediation. At the beginning of mediation the mediator should explain again what he /she is going to do.

He/she also should explain to the parties what are expected from them during the mediation session. Before completion of mediation, if the mediator feels that anyone of the parties does not want to reconcile or to have a solution, or feels that the evaluation will not be possible, or any party requests him/her not to do mediation, or any party requests him/her to do an unjust favor to them, or if any party breaches the agreement, or if there is no hope of reaching a settlement, he/she should immediately refrain from mediation. The decision or award of mediation should be recorded. The session should be adjourned by declaring that it has ended.

Article 13: Binding/non-Binding Nature of Possible Settlement

Since the mediation is not considered an official task, its possible settlement is not binding to any of the parties. However, if all the parties agree in the session to abide themselves with this settlement and give their consent by signing it, then it will be binding. Or, if the settlement is submitted to a court and a judge adopts it, it will be binding for all the parties.

Article 14: Enforcement Mechanism of the Code

Before starting the profession of mediation, a mediator should take a written oath that he/she will try to implement the code of conduct for mediation. This code could be posted in the website of all mediating centres or organizations for public awareness. Its hard copy could be posted on the main noticeboard of all mediating centres or organizations for a reminder for mediators and also for disputing parties.

CONCLUSION

Benefits of mediation for waqaf dispute resolutions may be deduced from the preceding discussion that mediation as an ADR for waqaf disputes can be an alternative for disputants.

Given cases of jurisdictional conflicts between Civil or Shari`ah courts; competency of Civil courts judges in hearing Shari`ah oriented waqaf cases, mediation may seem to be a viable alternative. Mediation is more conciliatory, is less adversarial, win-win deliberation, not a zero-sum game.

Mediation therefore, can be a means for disputants to either circumvent issues faced in courts adjudication. It can be a prelude to resolve their disputes, before resorting to a potentially more adversarial or acrimonious courts adjudication if mediation failed.

Mediation is based on integrity and professionalism. It can be deduced from the Muhammad. Amanullah draft of the code of mediators (an outcome of a critical analysis of Malaysian Mediation Centre Code of Conduct); that mediation is informed by positive values derived from both Islamic and conventional ethics and norms for its procedural elements. All evidently reflect integrity and professionalism of mediation process, to be adhered to, and abided by mediators and disputants.

Provided, that all parties exercise good faith, abide and comply with the agreement reached; the aim of mediation to resolve disputes, preserve goodwill and relationship among disputants will successfully reach an amicable settlement. Thus, ultimately fulfilling the original intent, purpose and higher objectives of waqaf for benefits of families, community and the larger society.

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