

Waqf Land Administration and Registration: Legal Analysis

Roshidah Binti Osman*

Advocate & Solicitor of High Court of Malaya, Messrs Roshidah Osman & Patners No 73-2, Sunway Perdana, Jalan Todak 6, 13700, Seberang Jaya, Pulau Pinang

Noor Asyimah Binti Ramli

Advocate & Solicitor of High Court of Malaya, Syarie Lawyer of Penang State, Messrs Noor Asyimah & Associate No.88. Tingkat 2, Jalan Todak 3 Pusat Bandar Seberang Jaya, 13700 Perai, Pulau Pinang

Mohd Zakhiri Bin Mohd Nor

Senior Lecturer / Research Fellow, Legal and Justice Research Centre, School of Law, Universiti Utara Malaysia, 06010 Sintok, Kedah, Malaysia

Abstract

The conflict in registration of waqf land in Malaysia has been prolonged for such a long time particularly in Penang. This conflict has contributed to the major setback in development of *waqf*¹ land. This paper aims to examine the procedure in registration of *waqf* land from legal perspective with reference to provisions in National Land Code 1965 and the state law under Administration of The Religious of Islam (State of Penang) Enactment 2004. The methodology used in this paper was qualitative and content legal analysis method. This paper found there were inadequacy and insufficiency in administration and registration of *waqf* enactment in Malaysia. There were also lacuna in National Land Code 1965 and obscure and uncertain in creation and registration of *waqf* land. This paper concludes that Penang State Islamic Religious Council (SIRC) is in dire need to enact a specific law relating to administration and registration of *waqf* land in Penang together with a major plan to reform and strengthen the power of Syariah Court in addressing the issue of registration of *waqf* land in Penang.

Keywords: Waqf land; Registration; Administration; National land code 1965; Administration of the religious of islam (state of penang) enactment 2004.



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1. Introduction

Islamic Banking and Finance in Malaysia is developing progressively due to the effort made by regulators and industry player (Mohd Zakhiri *et al.*, 2017). The executive governmental functionaries in Malaysia play their greater roles to enhance the economic system in their jurisdiction (Mohd Zakhiri, 2017). Islamic Banking has played an important role in development of waqf land even though the management of waqf is under the administration of the state functionaries.

According to Prof Ismail (2017) difficulties in developing *waqf* land can be seen in three categories namely, legal and administrative, economic and financial and social-political elements. However, for the purpose of this article the discussion will only be on the administration and registration of *waqf* land in Penang from legal perspective.

Ishak (2013), by using a qualitative analysis has concluded that more than 11,000 hectares of *waqf* land in Malaysia have a potential to be developed. However, only 8 projects so far have successfully been completed due to problems concerning the development of Waqf land and the major obstacle is the issue of ownership and the law relating to it. The author has provided several resolutions to overcome the issue of ownership and has also suggested for the law relating to *waqf* land to be reformed or a new law be enacted to achieve the development goals.

Mahamood (2005), It seems that since each state in Malaysia have their own regulations in registration and administration of *waqf* and hence there is no uniformity and standardize procedure to govern the administration and management of waqf land in Malaysia and this has been a major obstacle in developing and commercializing *waqf* land in Penang. There also seems to be a lacuna in National Land Code 1965 governing the registration procedure of waqf land in Malaysia that need to be clarified in order to enhance the development of *waqf* land especially in the state of Penang.

2. Methodology

The methodology used in this paper was qualitative and content legal analysis method. This paper described, analysed and examined the law with regard to administration and management of *waqf* land in Malaysia and the legal and procedural aspect in procuring the registration of *waqf* land to enhance the development of *waqf* land. This article

¹ A literal meaning of Waqf is to preserve or to stop; but a technical meaning of Waqf is dedication of any property for charitable purposes and for the benefit of the community as recognised by Shariah.

also apply legal doctrinal research approach by referring to the statutes, state enactments and case decided in Penang court regarding the administration and registration of *waqf*land. In order to gain information on the law and regulation pertaining to *waqf* land in Malaysia, this research also examine the State Enactment and provide thorough description on the law involved. In addition, this research provides an analytical and critical comments on the overview of these Enactment and Law that caused a major problem in the administration and registration of *waqf* land in Malaysia generally and Penang particularly.

3. Literature Review

Waqf generally is inalienable trust in which the founder of the *waqf* (*waqif*) makes the guidelines or principles for the property's revenue and allocates the profit or usufruct or yields of the property to specific person or institutions. Such property is then given in the possession of fiduciary (*wali* or *mutawali*) who oversees the trust for the benefit if a third party.

Penang SIRC have yet to enact a specific *Waqf* Enactment and in the absence of such, all *waqf* land be it special *waqf* or general *waqf* are govern under Administration of The Religious of Islam (State of Penang) Enactment 2004 and section 89 of empowered the State SIRC to be a sole trustee of all *Waqf* and to the extent of any property affected by *waqf*, *nazr am*² or trust and situated in the State of Penang. However, in practice because of no specific guideline on the registration of *waqf* land, all *Waqf* land has been registered under Penang SIRC as the registered owner and this has open a floodgate of argument from scholars and public at large that the requirement under the Enactment is for State SIRC to be a sole trustee and a guardian of *waqf* land, not a registered owner as this would create confusion as well as intermix *waqf* land with the land under Baitul Mal which is also under Penang SIRC jurisdiction as a registered owner.

On the other hand, National Land Code 1965 (NLC 1965) has clearly exclude *Waqf* land by virtue of section 4(2) (e) where it provides that "...4. **Savings.** (1) *Nothing in this Act shall affect the past operation of, or anything done under, any previous land law or, so far as they relate to land, the provisions of any other law passed before the commencement of this Act: Provided that any right, liberty, privilege, obligation or liability existing at the commencement of this Act by virtue of any such law shall, except as hereinafter expressly provided, be subject to the provisions of this Act.* (2) *Except in so far as it is expressly provided to the contrary, nothing in this Act shall affect the provisions of-*

- (a) *any law for the time being in force relating to customary tenure;*
- (b) *any law for the time being in force relating to Malay reservations or Malay holdings;*
- (c) *any law for the time being in force relating to mining;*
- (d) *any law for the time being in force relating to sultanate lands;*
- (e) *any law for the time being in force relating to wakaf or bait-ul-mal; "....*

and, in the absence of express provision to the contrary, if any provision of this Act is inconsistent with any provision of any such law, the latter provision shall prevail, and the former provision shall, to the extent of the inconsistency, be void.

These sections in State Enactment and NLC has created a study gap in the area of registration and administration of *waqf* land and remain as a major obstacle in developing *waqf* land in Penang.

Thus it seems there is an urgent need that this research be carried out because it looks at factors associated to *waqf* property development and commercialisation from legal perspectives

4. Result and Findings

4.1. Inadequacy and Insufficiency in Administration and Registration of *Waqf* Enactment in Malaysia

Weakness in law in current jurisdiction of *Waqf* Enactment can be seen through the following *Waqf* State Enactment, namely:

4.1.1. Administration of Islamic Law (Federal Territories) Act 1993 Act 505

Section 62. Vesting

- (1) All properties subject to the provisions of section 61 and situated in the Federal Territories shall without any conveyance, assignment or transfer whatsoever, and, in the case of immovable property, upon registration under the relevant written laws relating to land, vest in the Majlis, for the purposes of the trust, *wakaf* or *nazr 'am* affecting the same.
- (2) The Majlis shall take all necessary steps to vest in itself for the like purposes any such property situated elsewhere than in the Federal Territories.

4.1.2. Enactment No. 5 of 2005

Wakaf (State Of Malacca) Enactment 2005

Section 50. Vesting of *Mawquf*

- (1) The Majlis shall take all necessary steps as soon as practicable to vest in itself wakaf which are created under this Act.

² Nazr literally means a bequeath

- (2) Any usufruct or benefit from a *mawquf*³ shall be vested to the Majlis from the date of the commencement of the *wakaf*, and the Majlis may claim any usufruct or benefit of a *mawquf* from any person before the registration of the *wakaf*.
- (3) All *mawquf* situated in the State of Malacca, before the commencement of this Enactment, shall, without any conveyance, assignment or transfer whatsoever and in respect of all immovable property upon registration under the provisions of the National Land Code [Act 56 of 1965], is hereby vested to the Majlis to the extent of any property affected thereby.
- (4) Subject to the provision of section 32, the Majlis shall take all necessary steps to vest in itself for the like purposes any such property situated elsewhere than the State of Malacca.

4.1.3. Enactment No. 7 of 1999

Wakaf (State of Selangor) Enactment 1999

Section 48 Vesting of *Mawquf*

- (1) The Majlis shall take all necessary steps as soon as practicable to vest in itself *wakaf* which are created under this Act.
- (2) Any usufruct or benefit from a *mawquf* shall be vested in the Majlis from the date of the commencement of the *wakaf*, and the Majlis may claim any usufruct or benefit of a *mawquf* from any person before the registration of the *wakaf*.
- (3) All *mawquf* situated in the State of Selangor, before the commencement of this Enactment shall, without any conveyance, assignment or transfer whatsoever and in respect of all immovable property upon registration under the provisions of National Land Code [Act 56/65], is hereby vested in the Majlis to the extent of any property affected thereby.
- (4) The Majlis shall take all necessary steps to vest in itself for the like purposes any such property situated elsewhere than the State of Selangor.

4.1.4. Enactment 2 Wakaf (Negeri Sembilan) Enactment 2005

Incorporating latest amendment - N.S. P.U.27/2008

Section 5. Majlis as Sole Trustee

- (1) Notwithstanding any provision to the contrary contained in any instrument or declaration creating, governing or affecting any *wakaf*—
 - (a) the Majlis shall be the sole trustee of any *mawquf*, situated in the State of Negeri Sembilan
 - (b) the Majlis, as sole trustee of any *mawquf* situated in the State of Negeri Sembilan, may be made a *mawquf-alaih*⁴ for any such *mawquf*; and
 - (c) the Majlis may be made a *mawquf-alaih* for any *mawquf* situated elsewhere than in the State of Negeri Sembilan.
- (2) In the case of a *mawquf* situated elsewhere than in the State of Negeri Sembilan for which the Majlis is a *mawquf-alaih*, the Majlis may make any arrangement with the trustee of such *mawquf* for the purposes of this Enactment.

Section 6. Registration of *Mawquf*

Any person who desires to endow his property as a *wakaf* shall register such property with the Majlis in such manner as may be prescribed by the Majlis.

Section 7. Court may order *mawquf* to be Registered

Subject to section 50, where the Majlis has any reasonable ground to believe that a property has been endowed as a *wakaf* but such *mawquf* is not registered under this Enactment, the Majlis shall apply to the Court for an order to register such *mawquf*.

Section 9. Vesting in Majlis

- (1) The Majlis shall take all necessary steps as soon as may be practicable to vest in the Majlis any *mawquf* registered under sections 6 and 7.
- (2) Any *mawquf* vested in the Majlis shall be vested in the Majlis without any conveyance, surrender, assignment, or transfer whatsoever and shall be so vested for the like title, estate or interest on the like tenure as the property was vested before the registration of such *mawquf* under sections 6 and 7.
- (3) Any *mawquf* which has been vested in the Majlis shall not be conveyed, surrendered, assigned, charged, mortgaged, loaned or transferred except for the purposes of subsection 12(1) or in accordance with a *fatwa* made by the *Fatwa* Committee.

³“*mawquf*” means a property endowed as *wakaf*, whether as *wakaf am* or *wakaf khas*; Section 2 of the Enactment

⁴“*mawquf-alaih*” means a person or an association or institution entitled to receive any benefit, interest or profit from a *mawquf*; section 2 of the Enactment

(4) The vesting of any immovable property shall be in accordance with the National Land Code.

4.1.5. Administration of The Religion of Islam (State of Penang) Enactment 2004

Incorporating latest amendment - Pg.P.U. 11/2008

Section 89. Majlis to be Sole Trustee of *Wakaf, Nazr* and Trusts

Notwithstanding any provision to the contrary contained in any instrument or declaration creating, governing or affecting it, the Majlis shall be the sole trustee of—

- (a) all *wakaf*, whether *wakaf am* or *wakaf khas*;
- (b) all *nazr am*; an
- (c) all trusts of every description creating any charitable trust for the support and promotion of the religion of Islam or for the benefit of Muslims in accordance with *Hukum Syarak*⁵, to the extent of any property affected by the *wakaf, nazr am* or trust and situated in the State of Penang.

Section 90. Vesting of *wakaf, Nazr* and Trust Property in Majlis

All property subject to section 89 shall without any conveyance, assignment or transfer, and, in the case of immovable property, upon registration under the written law relating to land, vest in the Majlis, for the purpose of the *wakaf, nazr am* or trust affecting the property.

Base on the provisions stated above it is clear that all registration of *waqf* land shall be vested under the State SIRC as sole trustee and therefore the administration and management of *waqf* shall be a sole responsibility of state SIRC. For the state of Selangor, Negeri Sembilan and Malacca that have the specific *Waqf* Enactment however such administration, management and registration of *waqf* land have been defined under *Waqf* Enactment of the state and for a state that do not have a specific *Waqf* Enactment, like Penang State, the law regarding *Waqf* is govern under a general law of Administration of The Religious of Islam (State of Penang) Enactment 2004.

Salleh *et al.* (2015), In the State of Penang however, although the law regarding *waqf* land is crystal clear that Penang SIRC which is known as Majlis Agama Islam Negeri Pulau Pinang (“MAINPP”) shall be a sole trustee of all *waqf* land but in-reality and by practice such *waqf* land has been registered to state SIRC without the word “sole trustee” in the land title. This has created an uproar of confusion for such registration would make Penang SIRC as a registered owner instead of a mere trustee. The status as trustee however will be kept in the Registrar of Land Office’s record book but only by practise and there is no rule or guideline pertaining to this practise has ever been enacted by the law maker. The fear in this area does not goes without reason because if *waqf* land does not states the word “sole trustee”, the land might be confused with the land belongs to Baitul Mal as in Baitul Mal all property shall be vested under Penang SIRC as registered owner. It seems that the function of these two is different even though the management is by one body namely Penang SIRC.

Sulong (2013), Penang SIRC is estopped from being registered as “trustee” on the *waqf* land by virtue of section 5 of NLC 1965 provides that definition of “trust” excludes *waqf* which has been created in accordance of Islamic Law. In order to differentiate between *waqf* land and land belongs to Baitul Mal, section 95 of The Administration of The Religion of Islam (State of Penang) Enactment 2004 requires Penang SIRC to maintain a list of all properties, investments and assets which are vested in Penang SIRC and subject to trust, *waqf* or *nazr*. The said properties, investment and asset shall not form part of the Baitul Mal. The said list must be published in the Gazette after the thirty first day of December in every year.

Mahamood (2005), Another area of inadequacy governing administration and registration of *waqf* land in the State of Penang lies in section 90 of Administration of The Religious of Islam (State of Penang) Enactment 2004 when the law stated that “All property subject to section 89 shall without any conveyance, assignment or transfer, and, in the case of immoveable property, upon registration under the written law relating to land, vest in the Majlis, for the purpose of *wakaf* or *nazr am* or trust affecting the property”. This section requires that even if without any conveyance, assignment or transfer any *waqf* land shall be vested under Penang SIRC upon registration under the written law relating to land.

The inadequacy and insufficiency of *Waqf* Enactment in Malaysia remain as in all *Waqf* Enactment and State Enactment as the word “the written law regarding land” as NLC 1965 and this wording was enacted as if the state SIRC was unaware and oblivious to the fact that section 4(2) of NLC has declared *waqf* as to be out of NLC 1965 jurisdiction. These sections of law however, failed to highlight the fact that written law relating to land in this country is NLC 1965. Since NLC 1965 has ousted *waqf* land from its jurisdiction then there would be no other written law governing to land in this country. Being ousted means that any rules under NLC 1965 shall not binds *waqf* land and as such the power to register *waqf* land is now rest under the jurisdiction of Syariah Court of the State. However, the state enactment silent on the registration of *waqf* land and this has created a major conflict in determining an appropriate procedure to be followed by Penang SIRC in registration of *waqf* land in Penang.

Waqf Enactment of Malacca has stated that *waqf* land shall be vested under SIRC according to NLC 1965 and in Negeri Sembilan Enactment stated that *mawquf* shall be vested by the order of court and the court here is referring to Syariah Court. However be it in Malacca or Negeri Sembilan Enactment the registration of *waqf* land has been clearly stated to be in accordance to NLC instead of just a word “.the written law regarding land” as compared to The Administration of the Religion of Islam (State of Penang) Enactment 2004 that are trying to connect the registration of *waqf* land with NLC. This section of law regarding *waqf* in Negeri Sembilan and Malacca has created

⁵ Hukum Syarak is Syariah Law

more inadequacy in the administration and management of *waqf* land that still clouding the judgement regarding the registration of *waqf* and how *Waqf* land should be administered and managed by many states SIRC in Malaysia.

If state like Malacca and Negeri Sembilan that have their own special *Waqf* Enactment can be confused in enacting the rule regarding registration of *waqf* land than more so to the states like Penang that have no special *Waqf* Enactment of their own. The law regarding *waqf* in the state of Penang need a major reform as the current law is not enough to cover the registration of *waqf* in Penang. The worst scenario is when Penang SIRC is very much depending on the law in NLC 1965 even though it is a clear fact that NLC 1965 has exclude *Waqf* land in Malaysia. As a result, this has caused confusion in legal perspective on the law governing the registration of *waqf* land.

Other states in Malaysia also need to amend their Enactment as regards to the registration of *waqf* land and to give sole power to Syariah Court to determine the management, administration and registration of *waqf* land in their states and a clear emphasis should be made in all the state Enactment that registration of *waqf* land should be made with disregard to NLC 1965. Malacca Enactment has make a clear mistake by putting a registration of *waqf* land in accordance to NLC 1965 and this in fact has contradict the requirement in NLC 1965 itself and states SIRC should in whatever way must overcome this problem but that is not the purpose of this research as this research will concentrate on the legal and procedural aspect on registration of *waqf* land in the state of Penang only.

4.1.6. Lacuna in National Land Code 1965 Regarding Registration of Waqf Land

NLC 1965 by its own section 4(2) (e) clearly excludes *waqf* land from its regulation and therefore, it can be submitted that the intention of Parliament is to let the procedure in management, administration and registration of *waqf* land in the hand of state SIRC. In fact, the state enactment shall overrule NLC 1965 if there is inconsistency between the state enactment and NLC 1965. Thus, being the sole trustee of *waqf* land, SIRC should develop their own *waqf* law with disregard to rules and regulations in NLC 1965.

Great emphasize should be made by state SIRC to give a wide power to Syariah Court to deal with the procedure of registration of *Waqf* land in all states in Malaysia. The lacuna in procedure to register *waqf* land in NLC 1965 should be seen as a blessing to give Syariah Court exclusive power to determine the registration of *waqf* in Malaysia and this in fact can resolved all issue as to legal and procedural aspect of registration of *waqf* in Penang and in Malaysia as a whole.

It has been a long practise by states SIRC to use section 415(1)(a) and form 30A to register *waqf* land in Malaysia and MAINPP is also influenced by this practise. Such practise was in fact provided by JAWHAR via the circular of Ketua Pengarah Tanah dan Galian Persekutuan (JKPTG) Bilangan 8/1999. However, after some time the practice has been changed to the current practise of using section 416C of NLC 1965 (Sharifah and Nor, 2014). This current practised of using 416C is in fact not the accurate procedure and still open to be challenged in Court. This may open a flood gate to litigate the previous and current practices of *waqf* registration in Malaysia and Penang in particular. This current practise is seems like violating and contradicting the intention of section 4(2) (e) of NLC 1965 (Disa, 2012) and all registration made under section 415(1)(a) and 416C can be nullified by any claims and challenged in the future.

Currently JKPTG has introduce a new guideline for a *waqf* land to be transferred by way of Statutory Vesting by using form 416C of NLC. It has been a long practise by states Penang SIRC to use section 415 and form 30A to register *waqf* land in Malaysia and Penang SIRC is also influenced by this practise.

As such practise was in fact provided by JAWHAR in their guidelines and in the case of Dalam Perkara Permohonan Ahmad Yahya; MAJLIS AGAMA ISLAM NEGERI PULAU PINANG (Pencelah)⁶, the civil high court has recognised the vesting order made under s. 415 of NLC by using form 30A as a valid procedure for Penang SIRC to procure the *waqf* land.

However, after some time the practice has been changed to the current practise by virtue of a guideline provided by Jabatan Ketua Pengarah Tanah Dan Galian (JKPTG) by using section 416C of NLC. This current practised of using 416C even though provide a better alternative in registering *waqf* land but it can also open a flood gate of litigation to litigate the previous and current practices of *waqf* registration in Malaysia and in Penang in particular. The lacuna in NLC by JKPTG's circular gives rise to a more misunderstanding to legal practitioners Malaysian-wide as the circular gives a guideline to register *waqf* land by using 416C of NLC 1965 which clearly contravened with the word in the section itself. Sec 416C is not a solution to the lacuna in the procedure in the registration of *waqf* land.

S.416C deals only with gifts, bequest, or donation when it explicitly stated, 416C. Provisions as rights in whole or part of alienated land vested in the transferee. (1) *Where the whole or a part of any alienated land held by the transferor is occupied, used, controlled or managed by the transferee under any right or entitlement derived by way of a donation, gift, bequest, permission, consent, or otherwise howsoever, from the transferor or any predecessor in title of the transferor for any of the statutory purposes of the transferee immediately before the statutory vesting takes effect, the transferee's right to such occupation, use, control or management shall, upon application in writing by him to the Registrar, be endorsed on the register document of title to the land, where the Registrar is satisfied that the statutory vesting of such right or entitlement in the transferee has taken effect.* (2) *The right endorsed on the register document of title under subsection (1) shall have effect from the date on which the statutory vesting took effect and shall subsist throughout the duration of that title and be binding on every subsequent proprietor of the land.*

⁶(2016) 1 CLJ 1018

Nothing in this section that can be referred to *waqf* and in fact by the silence shows that this section is not an exception to sec 4(2) (e) to exclude *waqf* from NLC scope of law. JKPTG's circular even though is not a law but it stands as internal guideline to all Land Administrators in Malaysia. JKPTG circular should not override the clear provisions of law and the guideline ought to be replaced to suit the written law relating to land.

Another issue and lacuna with section 416C is that it can be analysed that the law in this section only applicable to the person who is still alive when the *waqf* is made and as regards to *waqf* made by the deceased when he is still alive the study gap emerged as currently there is no clear rules or procedure to govern this situation except to revert to the normal procedure that need the beneficiaries to obtain a Small Estate Order or Grant of Letter of Administration to vest or transfer the *waqf* land to SIRC.

The law in NLC should be read as intended by the lawmaker and Parliament, our regulator has explicitly exclude *waqf* from its regulation in s.416C but the procedure for statutory vesting of *waqf* land can be cured by virtue of s. 420 of NLC that provides the power of Court to give Order for vesting of land and by virtue of interpretation in section 421A Syariah Court Order is recognised and by virtue of s.421A any order made by Syariah Court under s. 417 & 420 must be registered by the Land Registrar . This power must be grasp by state SIRC to enact a special Enactment or improvised current enactment to give power to Syariah Court to regulate the procedure to register *waqf* land in Malaysia.

Another application section in NLC 1965 that it worthy to explore is in **section 420** that provides for a **Registration of vesting orders**. (1) *Notwithstanding anything in any other written law, no order of the Court vesting any alienated land, or any share or interest therein, in any person or body shall affect the land, share or interest in question until it has been registered pursuant to this section.* (2) *The Court shall, accordingly, cause a copy of any such order to be served on the Registrar or, as the case may be, Land Administrator forthwith after the making thereof; and the Registrar or Land Administrator, upon receiving any such copy, shall give effect to the order by making a memorial of the vesting on the register document of title to the land to which, or a share or interest in which, the order relates.* (3) *The Registrar or Land Administrator shall sign and seal every memorial made by him pursuant to this section, and, if able to secure the production of the instrument in question, shall make a copy of the memorial on the issue document of title to the said land or, where the order relates to a lease or a charge, on the duplicate thereof.* (4) *Where the Registrar or Land Administrator takes action under this section in respect of any land or any share or interest therein, he shall cause notice of his action to be served upon any person or body having a claim protected by caveat affecting the land, share or interest.*

Court in this section also means Syariah Court as provided in the interpretation section in NLC 1965, whereby it is stated in section **421A. Interpretation**. *For the purposes of section 417 and 420, "Court" includes a Syariah Court.*

The law in NLC 1965 should be read as intended by the lawmaker and Parliament , our regulator has explicitly exclude *waqf* from its regulation but by virtue of interpretation in section 421A that includes Syariah Court as a meaning of Court under section 417 and 420, this power must be grasp by state SIRC to enact a special Enactment or improvised current enactment to give power to Syariah Court to regulate the procedure to register *waqf* land in Malaysia and the Land Registrar by virtue of section 420 of NLC 1965 must register any Order or Vesting Order made by Syariah Court.

These lack of legal and procedural transparency and accountability will hinder the development of *waqf* land in Penang. Throughout the history of *waqf* land in Penang, most of it has been developed only after a long and hard struggle of legal battle between Penang SIRC and the beneficiaries.

In fact, some of potential *waqf* land until now still pending to be developed as the case is still litigated in Civil Court. Most of *waqf* land was disputed by the beneficiaries who claimed the *waqf* land as the estate property of the deceased as the said land has yet to be registered or vested on MAINPP due to unclear provisions in law relating to *waqf* land.

4.1.7. Obscure and Uncertain in Creation and Registration of Waqf Land

The consent of landlord to create *waqf* of his own land is the most important element in creation of *waqf* land. Once *waqf* has been created, the landlord or any part may not revoke the *waqf*. The *waqf* land in Penang has been created long time ago.

5. Through Trust Conveyance

Trust conveyance is a part of land conveyance that was introduced by British to Malaysian soil since the establishment of Straits Settlement state in 1872 which consists of state of Penang, Malacca and later on Singapore. Trust conveyance was then being incorporated into Penang and Malacca Title Act 1960 and was adopted and accepted by the National Land Code 1965. The trust conveyance might be in the form of indenture, deed and others. Therefore, through the trust conveyance, the landlord may appoint any person as a trustee to hold the land on trust for the purpose of *waqf* either general *waqf* or specific *waqf*.

For instance in the case of *Seberang Baru Sdn Bhd v. Majlis Ugama Islam Pulau Pinang dan Seberang Perai*⁷ , by a trust deed dated September 30, 1901, Seetee Aishah bte Haji Mahmood conveyed the land to her daughter and her descendants to hold on trust as a perpetual Mohamadan Wakaf Endowment and for religious purposes. The Court of Appeal held that the said lands were clearly *waqf* properties by reason of the express dedication of Seetee Aishah

⁷ (2012) 5 AMR 293

in the trust deed. Thus, by virtue of section 89(2) of the Administration of Muslim Law Enactment 1959 of Penang, Majlis Ugama Islam Pulau Pinang dan Seberang Perai as the Respondent shall be the sole trustee of the said lands.

Meanwhile in the case of *Dalam Perkara Permohonan Ahmad Yahaya; Majlis Agama Islam Negeri Pulau Pinang (Pencelah)*⁸, there was deed pool dated 30 April 1900 which stated as follows; “*To hold the same premises unto and to the use of the said Meenah binti Bahar, Lah bin Mat, Sahid bin Saman, and Haji Fatimah binti Bahar, in trust to apply the rents and profits from the said land in the performance of Kanduries for Bahar deceased and for the lighting the Mosque at Lahar Keper*”. The High Court of Pulau Pinang held that the said land was a *waqf* land based on the said deed pool and the long usage of land for the religious purpose.

In the circumstances when the meaning or effect of any instrument or declaration creating or effecting any *waqf* is obscure or uncertain and for the propose Penang SIRC to determine the establishment of *waqf* based on the trust conveyance, section 94 of The Administration Enactment provides that Penang SIRC may refer to the Fatwa Committee for its opinion as to the meaning or effect of the instrument or declaration. The opinion and decision of the Fatwa Committee shall bind Penang SIRC and Penang SIRC shall act accordingly.

The decision of the Fatwa Committee shall not be gazetted in order to bind Penang SIRC, unlike section 49 (1) The Administration Enactment which requires the fatwa must be gazetted in order to bind on every Muslim in the state of Penang. By studying closely, the requirement of Section 94 of The Administration Enactment, Penang SIRC is not under obligation to apply for declaration from any court to establish *waqf* on the related land. In fact, there is no any written law which requires Penang SIRC to get declaration from any court on validity of any instrument or declaration including trust conveyance for creation of *waqf* on the related land.

Upon the decision of the Fatwa Committee that confirming the creation of *waqf* on the related land, Penang SRIC shall act in accordance as provided in sections 89 and 90 of The Administration Enactment which require that related land to be registered under written law.

Since NLC 1965 governs on land law in Malaysia, Penang SIRC has no option unless to resort to NLC 1965. Thus, Penang SIRC opt to apply section 415 (1) (a) by presenting form 30A to the relevant land office. Form 30A is used for the application to the Registrar for registration of a statutory vesting of a registered interest in land. With effect of the presenting form 30A, the name of Penang SIRC shall be appeared on the document title of land without any remark. It seems that Penang SIRC was registered as a registered owner on the *waqf* land even though in the actual fact Penang SIRC is only the registered interest in the said land.

In the case of *Dalam Perkara Permohonan Ahmad Yahaya; Majlis Agama Islam Negeri Pulau Pinang (Pencelah)*⁹, the High Court of Pulau Pinang held that the registration of MAIPP on the *waqf* land as sole trustee by presenting form 30A under section 415 (1) (a) is a valid procedure and in accordance to law. The Court has further opined that *waqf* land belongs to Allah and parties registered on the *waqf* land was only as administrator of the land.

6. Waqf Created by Usage

Waqf land may be created and recognised through long usage of religious purpose. It can be assumed that the former landlord has consented his land to be used for religious purpose such as for the purpose of the mosque.

In the case of *G. Rethinasamy v. Majlis Ugama Islam Pulau Pinang & Anor*¹⁰, the High Court of Pulau Pinang held that *waqf* land can be created through long usage of mosque and grave, even though in the absence of direct evidence or conveyance about its existence. This decision has been followed in the case of *Dalam Perkara Permohonan Ahmad Yahaya; Majlis Agama Islam Negeri Pulau Pinang (Pencelah)*¹¹ which the court held that based on the deed pool dated 13 April 1900, the said land has been used for the benefit of mosque of Lahar Keper for a long time ago. Thus the decision of Fatwa Committee of Pulau Pinang conforming that it was a *waqf* land was in accordance to the law.

Besides, section 96 (2) of the Enactment provides that ; “*Every mosque, together with the land on which it stands and any land which is appurtenant to and used for the purposes of the mosque, other than State land or land reserved for a public purpose, shall, upon registration under the written law relating to land, and without any conveyance, assignment or transfer, vest in the Majlis for the purpose of this Enactment.*”

This section offers assistance in registration of vesting in Penang SIRC for land used for the purpose of the mosque. Thus, Penang SIRC may apply section 420 of NLC 1965 for the purpose of registration of vesting order granted by court, either civil court or Syariah Court as provided under section 421A of NLC 1965.

7. During the Lifetime of Landlord

On initiative of Ketua Pengarah Tanah dan Galian Persekutuan, circular of Ketua Pengarah Tanah dan Galian Persekutuan bilangan 8/1999 has been issued regarding statutory vesting of *waqf* land under NLC 1965. There are 3 methods of registration have been recognised in the said circular namely;

- i) Application of form 14A executed by the landlord and submitted to SIRC for the purpose of transferring the land to SIRC. The landlord should enclose issue document of title and quit rent receipt together with form 14A to effect the transfer at the relevant land office.

⁸ (2016) 1 CLJ 1018

⁹ Ibid

¹⁰ (1993) 2 CLJ 605

¹¹ Ibid 4

- ii) The landlord may surrender the whole of the land to the Land Administrator under section 197 or a part only of the land to the Land Administrator under section 200. The SIRC shall made an application to the Land Administrator for alienated land for the purpose of waqf.
- iii) The SIRC may apply for statutory vesting under section 416C. Section 416C deals with gifts, bequest, donation, permission, consent or otherwise howsoever.

The application of statutory vesting under section 416C which takes effect from 1st January 2010 has been regarded as the easiest and the most efficient method in the said circular for the purpose of registration of *waqf* land in the name of SIRC. There is no standard of form to be presented by parties at the relevant land office.

However, the methods stated in the said circular only applicable to the landlord to transfer or to *waqf* the land to the SIRC during his lifetime. These methods still could not resolve the problem which the *waqf* land has yet to be transferred on Penang SIRC even though the said landlord has passed away. Furthermore, circular of Ketua Pengarah Tanah dan Galian Persekutuan only stands as internal guideline to all land administrators in Malaysia, not as a binding law.

It has been a long practise by Penang SIRC to adopt section 415 by presenting form 30A at the relevant land office in order to register *waqf* land in Penang. This procedure can be noticed in the case of *Dalam Perkara Permohonan Ahmad Yahaya; Majlis Agama Islam Negeri Pulau Pinang (Pencelah)*¹². However, since the year of 2010 Ketua Pengarah Tanah dan Galian Persekutuan has introduced a new guideline for registration of *waqf* land under section 416C of NLC 1965, Penang SIRC may resort to alternative method available in this section. Besides, Penang SIRC may adopt the procedure of vesting the *waqf* land through application to Syariah Court which is available in section 420 and 421A of NLC 1965.

Both sections provide that the jurisdiction of the Syariah Court equivalents to the jurisdiction of the High Court of Malaya. The Syariah Court order relating to vesting or cancellation of the vesting of the *waqf* land shall be enforced by the Registrar of Titles or the Land Administrator (Ismail, 2017).

8. Conclusion

At the time of this article is prepared, Penang SIRC with the assistance of State Legal Advisor is drafting enactment to govern the *waqf* land in Penang. Since the application of NLC 1965 does not extend to *waqf* land, Penang SIRC should take the opportunity to enact the law to govern the registration of *waqf* land in Penang. Thus, the law deals with the registration of *waqf* land shall lay exclusively in the state enactment without conflicting to any written law relating to land matter.

As a result of clear provision governing on registration of *waqf* land in Penang, the *waqf* land shall be developed without being disputed by any parties on validity of registration of *waqf* land. Indirectly, it may strengthen the administration of *waqf* land in Penang and contribute to the development of *waqf* land.

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¹² Ibid