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INFLUENCE OF THE BRITISH COLONIALISTS ON WAQF PRACTICE IN PENANG, MALAYSIA: REFLECTIONS ON ITS LEGAL HISTORY

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ABSTRACT

Previous researchers' general impression inferred that western colonialists contributed to the decline of waqf practice in the Muslim world. However, whether this statement is accurate in the case of the British colonial rule in Penang is uncertain. This research paper reviewed waqf practice in Penang under the British colonial rule. This paper also discussed how the colonial rule influenced and impacted waqf development in the state. Due to the nature of the study, doctrinal

legal research methodology was employed, which involved examining law cases, legal provisions, policy documents, books, journal articles, and working papers. This study found that the British colonialists did not abolish waqf but improved its practice according to English trust and charitable laws. Unlike other colonialists, waqf practice under British rule in Penang had flourished, albeit with some flaws. The authors are convinced that this writing will provide a balanced perception of the colonialists and their hidden purpose in occupying the Malay states.

Keywords: British colonialists, endowment, legal history, waqf.

INTRODUCTION

The general impression among researchers was that foreign colonialists contributed to the decline of waqf practice in the Muslim world (Abdur-Rashid, 2019; Brett, 1988; Leeuwen, 1999; Raissouni, 2001). Cizakca (2000) supported this notion by stating:

“From the eighteenth century onwards, European imperialist powers **played a great role in undermining waqf systems throughout the Islamic world** and therefore destroyed any potential for democracy”.
(Emphasis added).

This impression might be accurate based on French colonialists’ actions in many countries such as Algeria, Morocco, Tunisia, Syria, and Lebanon during their occupation of those countries (Othman, 2013). In Lebanon, the French imposed waqf to be registered similar to real estate registry, which excluded God as the owner of waqf property, banned family waqf (being a special waqf), forced waqf to be converted from public property into private property and ensured free circulation of waqf property which was against the inalienability principle of waqf (Moumtaz, 2021). Whereas in Algeria, the French tried to control waqf through legislation with assistance from the orientlists to discredit the practice of waqf (Powers, 1989).

In India, the British imposed their understanding of waqf through several actions, namely by (1) replacing Muslim *qadis* with colonial judges; (2) abandoning the role of Muslim experts in helping the

colonial judges; (3) training the judiciary with British law; (4) integrating British legal notions with indigenous traditions, rather than applying Islamic law and (5) applying British civil law in legal dispute cases on waqf. Nevertheless, legislation was used to legalise family waqf practice (Powers, 1989). The British colonialists tried the same legislation method to impose English law in India compared to the French colonialists. However, the method saved waqf practice instead (Powers, 1989).

As for the British colonialists in Malaysia, Othman (2013) believed that the objective of British intervention was to abolish waqf institution in Muslim society through the law, looting, and nationalisation. On the other hand, Nasution (2002) posited that British rule in Penang contradicted Islamic law.

Nevertheless, Othman (2013) admitted that there has been no detailed research on the actual factor(s) contributing to waqf decline among Muslims. He added that among the contributory factors were greed, untrustworthiness, and misuse of power among rulers, waqf administrators, and judges. Despite this, his claim that the British colonialisation policy was the fundamental factor leading to waqf decline among Muslims is questionable.

Further reading suggests that there are multiple factors leading to the decline of waqf. Before Western colonisation, Cizakca (2000) stated that Muslim rulers' actions had affected waqf practice. For example, the method of Fatimid Caliph Al-Mu'izz in 396 AH who decreed that all waqf assets must be handed to the Public Treasury or Bayt al-Mal. Consequently, it led to farming out substantial revenue from the waqf system worth 1.5 million dirhams. Magda Ismail Abdel Mohsin (2016) stated that the waqf system in the Ottoman Empire deteriorated towards the end of Sultan Mahmud II's government when he centralised waqf supervision in Istanbul through a bureau. Subsequently, Muslim jurists lost control of waqfs, leading to the appointment of administrators who were unfamiliar with waqf institutional legalities. At the same time, it created unemployment including mismanagement by appointed trustees who depended on monthly salaries without proper administration of the waqf. This situation resulted in waqf properties being left idle without revenue.

Layish (2002) provided five factors that have contributed to the decline of waqf in modern times, namely (1) extension of freedom of

testation in current legislation has diminished the incentive of using family waqf for circumventing Islamic law of inheritance; (2) social welfare, economic and development enterprises and investments in infrastructure have become the responsibility of the state and other agencies; (3) religious motive to endow pious institutions and charity seems to diminish where other legal devices could (4) desire to secure property from expropriation and for tax exemption or loss of property; and (5) the reforms introduced in waqf has resulted in diminishing incentive and complete abolition to endow.

Be that as it may, the authors believe that the British colonialists still retained and allowed waqf practices in Penang and elsewhere in their settlements and other Malay states. This opinion is based on the grounds that this charitable public wealth pooling method was beneficial to help the British colonialists to maintain the well-being and welfare of the inhabitants and was able to reduce the need to use their funds as well as the British settlements and British states' council monetary provision to maintain their settlement colonies and the Malay states. Further, the Islamic concept of a charitable trust (waqf), as the British colonialists observed, did not affect and threaten, altogether, their economic, business, military and political interests and hegemony in their settlements and the Malay states. Instead, this method had proved to assist their administration in preserving their interests. So, there was no reasonable grounds to abolish this favourable and suitable fund pooling method.

Penang Waqf Legal History

Before Francis Light came in 1786, Penang was governed by Kedah (1650–1784) through laws, namely Part laws, *Dato Seri Paduka Tuan* laws, *Dato Star* Code laws, *Bunga Emas* laws, and Kedah laws (Ibrahim, 1986). However, there is no direct mention of waqf rules and procedures in these texts. There were no written British laws in Penang between 1786 and 1807. British laws only commenced in 1807 after the first Charter of Justice was issued. Moreover, there were no laws relating to the religion of Islam until the establishment of the Mohammedan Marriage Ordinance in 1880. Due to numerous disputes on waqf issues, W.T. Taylor, the Colonial Secretary of the Straits Settlements, ordered a Commission of Enquiry on Moslem trusts and foundations in Penang in 1903 (Sennett, 1932). Based on the report, the Mohammedan and Hindu Endowments Ordinance of

1905 (Ordinance No. 92) was promulgated to govern waqf in Penang. This Ordinance was in force until the Administration of Muslim Law Enactment 1959 (No. 3 of 1959).

Definitions

British Colonialism

According to Hornby (1998), colonial means relating to or possessing a colony or colonies. This paper refers to the British colony in Penang, which runs from 1786 to 1957 for 171 years. During this period, the East India Company was the lead organisation controlling Penang. Established as a joint-stock company with 125 shareholders and a capital of £72,000, Queen Elizabeth I granted a charter on December 31, 1600. Penang was initially under the administration of the East India Company based in India. Later, it merged with Malacca and Singapore in 1826 under the name of the Straits Settlements. The Straits Settlements was later handed over to the Colonial Office's control in Britain and became a crown colony governed directly under the Bengal Presidency, a subdivision of the British Empire based in India in 1827 (Alias, 2013).

Waqf

According to Section 2 of Islamic Religious Administration (State of Penang) Enactment 2004, waqf is defined as any property which may enjoy its benefits for any charitable purpose either as a general waqf or special waqf according to Hukum Syarak but does not include a trust as defined under the Trustees Act 1949 [Act 208]. There are two kinds of waqf: *waqf am* (general waqf) and *waqf khas* (special waqf) governed under the same law. According to Islamic law, *waqf khas* or specific endowment is a waqf realised for a specific charitable purpose. It may include the endowment of land for a mosque or cemetery. According to Islamic law, the second type of waqf is *waqf am* or general endowment, i.e., a waqf created for public charity. This type of waqf is much more liberal as it can consist of many types of objects, such as waqf products or services.

RESEARCH OBJECTIVE

The research objective of this paper is to determine whether the British colonialists wanted to abolish waqf practice in the Malay states.

To answer this question, one needs to do some fact finding, and one of the essential documents to refer to is the rare Hand Book of the Mohammedan and Hindu Endowments Board, Penang 1932. This book is probably the earliest comprehensive documentation of waqf practice in Malaysia. It contains numerous waqf details, descriptions, laws, and information on waqf practice during the British occupation of Penang.

But why, Penang? As the first state occupied by the British in the Malay states, it makes sense to discuss them first. Historically, documented waqf practice in Penang goes back as early as 1801 with Capitan Cling Waqf. Compared to other states in Malaysia, there is hardly any comprehensive documentation of waqf practice before or during colonisation. Most of them are in the form of buildings and lands presumed as waqf property. It is believed that the oldest undocumented waqf practice started in Penang in 1705 in the form of a burial ground at Datok Keramat (Musa, 2013).

RESEARCH METHODOLOGY

In this writing, doctrinal legal analysis is used as the study touched mostly on legal history. Generally, legal research doctrine examines the traditional concept and principle of all types of cases, statutes, and rules (Gawas, 2017). Kharel (2018) defined legal doctrine as a body of regulations associated with the traditional concept or principle with a long historical development. While Gawas (2017) posited that doctrinal legal analysis involves analysing legal propositions or concepts as the primary basis of the studies. He mentioned further that “the doctrinal legal research is an important element to identify various societal problems. It is beneficial to improve social relations and society while reforming law towards social development.”

The strength of this method is that it provides solid legal evidence of waqf practice backed by legal tools, namely statutory materials, reports of relevant committees, legal, administrative and political historical records, legal judgements, case reports, and cases. However, the method has a few limitations: the lack of interdisciplinary perspectives, such as education, politics, and economy. Secondly, doctrinal legal research is often constrained by the availability of reliable data and is open to bias interpretation (Kharel, 2018).

This writing used chiefly primary sources, namely the Hand Book of Mohammedan and Hindu Endowments Board (1903), Mohammedan

and Hindu Endowments Ordinance No. 92 (1905), and reported law cases. Besides, secondary sources were also used such as books, encyclopedias, journal articles, and academic papers. All the facts were analysed and synthesised using content analysis method to construct a relevant argument and to answer the research questions. A triangulation method or reference to various texts and authoritative sources was used to ensure the validity and reliability of the research conducted.

FINDINGS

(1) The Hand Book

The Hand Book of Mohammedan and Hindu Endowment Boards, Penang, written in English was published by the Penang Land Office in July 1932 through a now-defunct printer, The Criterion Press Co. Ltd., Penang. The copy referred is a reprint as the original is no longer in circulation. It contains information on Penang's waqf situation before 1932 (in 185 pages). The book has been one of the primary references to researchers such as Musa (2013), Nagata (2016), Nasution (2002), and Mahamood (2006). The book contains nine documents, namely:

General Report upon Moslem Trusts and Foundations in Penang 1904
In forty-two pages, this report showed the investigation methodology, waqf framework, waqf practice in Penang before 1904, waqf issues, and other Muslim countries' comparative solutions to overcome related problems and challenges. A summary of inquiry on fourteen foundations is attached as Appendix A, while evidence of old papers in the Registry of the Supreme Court and Land Office records is attached in Appendix B.

List of Title Deeds of Property Vested in the Mohammedan and Hindu Endowments Board, Penang

Written in six pages, this list of title deeds showed 16 waqf properties such as grant numbers, grantees' names, place of grant kept, deeds numbers, and dates of grants. The list contains waqf properties, namely the Capitan Kling Mosque, Capitan Kling's Private Wakoff, Hadjee Abdul Cader Alim's Mosque (Chulia Street), the Dulbadalsah Yahyah Mosque (Dato Kramat), the Old Mosque (Burmah Road),

Syed Mohuddeen Mosque (Chulia Street), Burmah Road Mosque, the Nagore Mosque, Perak Road Ground, Capitan Kling, Malay Mosque (Acheen Street), Shaik Ismail's Mosque (Chulia Street), Perak Road Burial Ground, Jelutong Mosque, Mahomed Noordin's Wakoff (Beach Street), Masjid Langor and Shaik Eusoff's Mosque. From the list, most of the waqf properties are in the form of mosques.

List of Board Properties

It lists 44 waqf properties in Penang (in tabular form in three pages) with details of: lot number, locality, name of endowment, and occupation of endowment.

Mohammedan and Hindu Endowments Ordinance No. 92 (1905)

In five pages with 21 sections, this Ordinance empowered the British colonial government to centralise waqf administration under a Board. This Board had the power to appoint managing committees, the power to hire and fire officers, the power to acquire accounts, the power to call upon trustees to be examined, the power to impose a penalty for non-compliance, and many other administrative issues.

Scheme for the Establishment of a Malay Home in Penang (1883)

This is a copy of the Supreme Court order dated December 12, 1883, to establish a Malay Home in Penang (in six pages). This Malay Home is an educational scheme for poor Muslim students which provided scholarships, hostel, food, and clothing from Syed Sheriff Tunku Syed Hoosein's endowment fund.

Ordinance No. 135 (Municipal Ordinance 1913)

This is an appendix attached to the Hand Book regarding selected and relevant municipal laws which served as guidelines for any property establishment. Waqf property in the Straits Settlements, which comprised Penang, Malacca, and Singapore, must adhere to these municipal laws. The relevant sections under the municipal law relating to waqf are in sections: 93 to 105, 139 to 164, 226 to 231, and 239 to 242. These laws explain the rules and regulations in enacting any building, which include waqf buildings. Meanwhile, sections 93 to 105 explain the laws relating to streets, sewers, and buildings.

On the other hand, sections 139 to 164 explain the rules on buildings, open spaces, and back lanes. Sections 226 to 231 concern laws on sanitary premises. Sections 239 to 242 deal with nuisance notice regulations, while sections 243 to 251 explain obstructive buildings' law.

By-laws to New Streets and Buildings 1931

Written in 65 pages, it contains 123 sections, which explain by-laws concerning new streets and buildings. It repealed previous by-laws made in 1920, 1924, and three 1928 by-laws.

Muslim and Hindu Endowments Ordinance No. 175, Ord. XVII of 1905

This is a similar copy of the Mohammedan and Hindu Endowments Ordinance No. 92 (Ordinance XVII of 1905 dated January 1, 1906), albeit with a change in term from “Mohammedan” to “Muslim”.

Copies of Letters Regarding Syed Hussein Idid's Waqfs

It contains two copies of letters complaining to the management of Syed Hussein Idid waqf properties from his descendant to the Resident Commissioner, a reply from the Secretary of the Muslim and Hindu Endowments Board Penang to him, a letter to the Straits Settlements Secretary, and a letter addressed to the Yang di-Pertuan Agong.

This Hand Book showed that the British had carefully documented waqf practice in Penang to improve its practice and as future reference. Now let us analyse the positive and negative aspects of British action towards waqf practice in Penang.

(2) Positive Notes

The British colonialists made several efforts to defeat the general perception that they intended to abolish waqf in the Malay states. Although we could not ascertain the real motives of these actions, the facts prove that waqf practice did not disappear in Muslim society during or even after the British occupation. Probably the fact that the majority of the existing waqf are in the form of pure private religious activities, namely mosques, *musolla* (small mosque), and cemeteries, which do not relate with economic or political concerns. Be that as it may, some of the positive actions include:

Continuing Waqf Practice

Waqf continued to be practised in Penang with the coming of the British in 1786. The British endowed a large plot of land on November 2, 1801, under Grant no. 367 to be held as “Mohammedan Church” situated on the Southside of Malabar Street with an estimated 5,468 square *jumbas* or, 18 acres but without a named trustee. A brick

mosque named Capitan Kling Mosque was built on this land by Cauder Mohuddeen, which previously housed an *attap* mosque and a burial ground. There were 49 reported religious foundations in Penang before 1932, including private and government waqf (Sennet, 1932).

Setting up Investigation Commission and Report on Waqf

Due to notorious dissatisfaction with many court cases, the British prompted an investigation commission in 1903 and prepared a report on waqf practice in Penang, which began its meeting on June 9, 1903. The Commission met 16 times with a total of 42 witnesses. With this first of its kind report, the government tracked waqf properties in Penang and passed the second waqf enactment in the Malay states after the Pahang Digest in 1596 (Sennet, 1932).

Setting up a Special Board Supervising Waqf Properties

Another essential administrative effort was establishing a body called Mohammedan and the Hindu Endowments Board in 1905. This action was an effort made after the submission of the General Report upon the Moslem Trusts and Foundation's presentation in Penang before the Legislative Council in 1904. The Board resulted from the Muslim and Hindu Endowments Ordinance 1905, which governed waqf properties. The Mohammedan and Hindu Endowments Board controlled the business activities of waqfs with the aid of local committees chosen from respective congregations. There were approximately eighteen endowments under the control of the Mohammedan and Hindu Endowments Board, Penang worth two million Straits dollars with an annual income of \$75,000 Straits dollars. These revenues were used to pay the properties' maintenance cost, salary to religious officials, gifts for charitable and educational purposes, and to carry out the objects of various trusts. Members of the Board consisted of government officers, professionals, and business people with two government officers (as secretary and assistant secretary) and four staff (two clerks, a rent collector, and a building inspector) (Sennet, 1932).

Enacting Specific Waqf Law

By the Enactment of a specific waqf law named Mohammedan and Hindu Endowments Ordinance No. 92 in 1905 ("the Ordinance"), it catered for several pertinent waqf management issues, such as human resource management, fund management, record management, claims by founder's kin, property management, and misappropriation of property. As mentioned in the Hand Book, issues that arose from waqf

property were more towards the desire of some person(s) to obtain a share from waqf funds and not because of religious differences (Sennet, 1932). Each section from the Ordinance provides solutions to pertinent issues, namely:

- a. Dispute as to the proper persons to take charge of endowment funds.
- b. Disagreement among trustees on waqf management, appointment of officers, possession of title deeds, custody and disposal of surplus revenue.
- c. Charges of malpractice of trust funds and misappropriation of endowment land and endowment belongings by trustees or other persons or owing to the trustees' criminal breach of trust (CBT).

Dispute as to the Proper Persons to take Charge of Endowment Funds

Section 4 of the Ordinance gives the Board the power to administer the endowment in case of mismanagement of endowment or no trustees appointed to manage or provide an advantage to the endowment. One classic example of a non-appointed trustee was the saga of the Capitan Kling Waqf case. A piece of waqf land was first endowed by Sir George Leith, Lieutenant-Governor, on November 2, 1801, on behalf of the East India Company (Sennet, 1932). Initially, there was no dispute during the lifetime of Cauder Mohuddeen until he died in 1834. Subsequently, the situation changed in 1852, where different parties filed suits on the mosque's supreme administrator, namely Cauder Mohuddeen or the *Khatib* of the mosque.

In the case of "In the goods of Cauder Mohuddeen, deceased (1870) SLR 231", a question on the rightful trustee of Capitan Kling Waqf emerged after an amendment to the Indian Act 20 of 1837. In the Act, it was stated that the devolution of real property in the Straits from the heir to the executor or administrator occurred only in cases where the deceased had both beneficial and legal rights. When Cauder Mohuddeen died, leaving the property to a charitable purpose and appointing his son as trustee, Sir P. B. Maxwell J. held that the heir of this trustee in the event of his death became the trustee of the charity, and not the executor or administrator.

In 1880, in *Kader Mydin and Ors. v. Hadjee Abdul Kader* (1880), I Ky 489, the plaintiff claimed to represent the charity as the late trustee's

heir. However, the defendant objected to this proposition. Instead, he wanted the Attorney-General to be a party to the case because of the charity's permanent nature. The Judge accepted this objection.

On November 16, 1880, Wood J. held that no nominees in the grant were appointed, and the fee simple in the land was vested in the Crown. The waqf was subject to British colonial government discretion without any appointed trustee by the Crown and any appointed trustee (Sennet, 1932). The judgment was subsequently mentioned again by Wood J. during the case of Hajee Abdullah & Ors. v. Khoo Tean Tek & Anor (1881) I Ky 506.

Nevertheless, another issue cropped up in Jamaludin v. Hajee Abdullah (1881) I Ky 503. The plaintiff, in this case, sued the present priest and claimed to be restored as a priest because priesthood was hereditary under Mohammedan law. The Court upheld that the defendant could not be sued because it affected a voluntary religious association related to the internal management of religious affairs. Secondly, there was no proper representation of the Mohammedan church (mosque) on whom should be sued or could sue based on the original grant.

In 1883, the issue of who has the right to be the Trustee of Capitan Kling Waqf came up again in Attorney-General v. Hajee Abdul Cader (1883) I Ky 616. Although Capitan Kling had made a will stating the rightful trustee, the interpretation was left to parties. It was stated in the will, *"My son, Oodman Nina, will act as my executor; and on his death, my second son Oodman Salt – in the absence of my sons, their sons will succeed as executors...they will succeed one to the other; the eldest son first, and the next afterwards, and so forth"* (emphasis added). Wood J. held that the eldest grandson in point of age – and without reference to his being the son of the first or second son – is entitled to be the executor. As for the testator, Capitan Kling had intended that his executors would also be the trustees. Consequently, on his two sons' death, the eldest grandson, as aforesaid, was the charity's trustee.

Nevertheless, it seemed the parties concerned did not accept this decision, and in 1899, the Court asked each party to propose a capable trustee. Each party counter objected to each suggested person between them. In the end, the witness agreed that the only way out was to appoint a European government official as trustee. As a result, Walter

Egerton was appointed as its Receiver of Charity Estate from 1883 to 1888. Subsequently, after Walter Egerton left office, Hafiz Ghulam Sarwar, a Muslim British government officer, was appointed as the Receiver in Suit No. 172 of 1899 by the Court dated September 22, 1902 (Sennet, 1932).

Disagreement among Trustees on Waqf Management, Appointment of Officers, Possession of Title Deeds, Custody and Disposal of Surplus Revenue

Section 4 of the Ordinance allows the endowment properties to be vested and registered upon trust on the Board's hand. This provision safeguards the waqf property documentation such as trust deed, lease, grant, and title deeds to provide sufficient notice in the registry book for persons searching for waqf property details.

Section 6 meanwhile gives the power of hire and fire against each waqf managing committee to the Board. However, any aggrieved person may appeal to his removal using section 8 of the same Enactment. This provision is probably to overcome malpractice or inexistent or ambiguity of the person in charge of waqf property.

Section 7 gives significant power to the Board as the general trustee of waqf property. It could appoint and remove any officer, receive and collect endowment income and spend the revenue according to the endowment purpose and management cost. This provision directly deals with collecting rent from private houses built on waqf land where previously, the rents were collected by the person in charge of the waqf. Unfortunately, these rents at the time were mainly pocketed while only a small token was given to the Waqf Board.

Regarding management and administration of endowment, the Board shall be consulted for advice to avoid bringing any dispute matters to court (Section 12). Any notice of legal proceedings needs to be transmitted to the Board (Section 13). This was due to numerous legal cases being brought up to court consuming years of litigation, draining parties' energy, and consuming waqf funds.

One of the instances was the legal case of Kader Saiboo's will, where it began with the inaccurate translation of a will written in the Tamil language, as reported in *Kader Bee & Anor. v. Kader Mustan* (1878), 1 Ky 432. In this case, Kader Saiboo appointed Kader Mustan and

Saboor Mydeen (defendants) as executors of a will with the instruction of distributing income from an estate of lands to his four children with a condition prohibiting any alienation for 60 years. However, the will's translation used the wording "As I have entailed..." which was erroneously translated where it should be "As I have authorized..." Wood J. held that this was a void will and that the children had equitable estates free from all restrictions.

Charges of Malpractice of Trust Funds and Misappropriation of Endowment Land and Endowment Belongings by Trustees or other Persons or Owing to Trustees' Criminal Breach of Trust (CBT)

Section 9 of the Ordinance gives the Board the power to require accounts from any trustee and other related persons such as agents or trustees, the person in possession, custody, or control of an endowment fund, and beneficiaries of the endowment fund. This provision enhances transparency and accountability. Besides that, it probably avoids issues such as a non-existent account book for waqf property in Perak Road burial ground, Hadjee Abdul Cader Alim's Mosque, Acheen Mosque, and Jelutong Mosque. Other issues included for instance, failure of payment to mosque servants in full at Jelutong Mosque, loss of income to waqf beneficiaries from waqf properties at Dato Kramat Bridge and Chulia Street. Similarly, in section 16 where the Board has the power to impose that financial transactions be recorded in accounting books and to do audit checking of accounting books (Section 17).

Meanwhile, section 10 of the Ordinance gives the power to query trustees and other relevant persons to attend before the Board and be examined. Any non-compliance with the Ordinance or destroying or withholding required information could be penalised with a fine under Section 11. However, the Board is given the power of consent on any work that improves waqf properties (Section 15 of the Ordinance).

Diversifying Waqf

Most waqf properties during the pre-colonial era were in the form of traditional, religious, and less productive waqf such as mosque, *musolla*, and burial grounds. However, under the British colonialists, waqf types were diversified into productive waqf, including water

tanks, schools, scholarship schemes, lodgings, shop houses, and houses (Sennet, 1932). Nevertheless, these diversifications required approval from the Board (Section 19) and certification by the Court (Section 21). This law avoided the previous practice of erecting houses on waqf land without consent from the trustee or imam, as in the case of the Capitan Keling Mosque.

Improving Waqf Revenue

After the necessary steps had been taken on waqf properties management and governance, waqf revenue had climbed, especially for the Capitan Keling Mosque Waqf. In 1899 it recorded a rental income of \$2,800 Straits dollars a year, while in 1932, it recorded a significant increase of \$10,000 Straits dollars a year. Before 1899, there was no written record of waqf revenue (Sennet, 1932). The following Table 1 shows waqf revenue from 1910 to 1912:

Table 1

Summary of Endowments 1910–1912

Endowment	Brought forward from 1910	Revenue 1911	Total	Expenditure 1911	Balance carried forward to 1912
Capitan Kling Mosque	17,773.88	22,725.73	40,499.61	18,634.59	21,865.02
Waterfall Temple	6,540.50	2,802.17	9,342.67	1,196.85	8,145.82
Nagore Mosque	1,433.13	1,259.80	2,692.93	1,135.10	1,557.83
Acheen StreetvMosque	2,875.31	2,923.50	5,798.81	2,588.40	3,210.41
Jelutong Mosque	68.09	120.37	188.46	207.56	-
Alimsah Mosque	1,019.10	1,035.57	2,054.67	890.18	1,164.49
Musjid Langgar	318.76	1,557.19	1,875.95	1,514.16	361.79
Butterworth Temple	211.50	448.72	660.22	341.84	318.38
Sri Kunji Bahari Temple	326.13	2,186.21	2,512.34	2,088.60	434.74
Captain Kling's Private Wakoff	-	227.47	227.47	137.38	90.09
Total	30,566.40	35,289.73	65853.13	28,723.66	37,148.57

Source: Reports of the Mohammedan and Hindu Endowments Board, Singapore, Penang, and Malacca 1911

(3) Negative Note

Despite the positive aspects of previous British colonial measures, there were several negative instances by the British colonialists which affected waqf practice in Penang. They namely included:

Prohibition of Family Waqf

In *Shaikh Lebby v. Fateemah* (1872) 1 Ky 324, the case started when the plaintiff wanted to eject the defendant from a piece of land. The defendant opposed the suit, relying on a deed claiming that the land was set aside as waqf for the donor's family and relatives' burial ground. Hackett J. upheld that the land set in the deed was waqf for the donor's family and relatives, and it was not considered a charity under English Law. This decision was due to a lack of public benefit, and that no trustee was appointed. However, the Court remarked that if the plaintiff were a good Mohammedan, he would give up the land, but he did not act as a conscientious man. This decision was clearly against Islamic law, where family waqf is permitted under all Islamic jurisprudence schools.

Similarly, in *Ashabee & Ors. v. Mahomed Hashim Anors* (1887) IV Ky 212 Sheriff J. held that waqf for children and descendants was void for its perpetuity in nature. A bequest of \$400 Straits dollars for wife maintenance and *kenduris* without explicitly mentioning the exact portion for the care and *kenduris* was considered void due to its uncertainty and infinite nature. In this case, the plaintiff wanted to sell the land on the grounds of void bequest and that the testator of waqf died intestate. This decision also contravened the majority of Islamic jurisprudence schools where waqf creation is considered for perpetuity. A similar judgement on the same issue was discussed in *Ong Cheng Neo v. Yeap Cheah Neo* (1872) 1 Ky 326.

Prohibition of Conditional Gift

In *Kader Bee & Anor v. Kader Mustan* (1878) 1 Ky 432, Wood J. held that a gift with a restraining clause was void due to its uncertainty status and the rule's application against perpetuity. In this case, the deceased, Kader Saibo, died with a will leaving the land to a trustee for 60 years that prohibited selling it beyond 60 years from the date of the will. As such, his children and next-of-kin bought a suit to challenge the will against Kader Mustan being the will's executor and trustee. The gift consisted of three parcels of land with income derived from the

lands was claimed by the plaintiff except for the prohibition clause. The will would give the plaintiffs the full power to transact the lands and gain income from the gift of lands. Nonetheless, under Islamic law, particularly under the Maliki school, temporary and perpetual waqf is permitted (Ab Rahman, 2017).

In another case of *Mahomed Ghouse v. Hajee Mohamad Saibo & Anor* (1885) IV Ky 101, Wood J. held that gift of lands to children was valid, but the restriction on alienating the lands was a void restriction clause. This situation was because the said restrictive clause condition affronted the rule against perpetuity under English law. The case showed that the plaintiff, one of the testator's children, wanted to declare the gift's whole clause to be void. The defendant, who was the executor of the will, disagreed with such a proposition. Again, this judgement was against the majority of Islamic schools where perpetual waqf is allowed.

Illegality of Kenduris

In the case of *Mustan Bee & Ors. v. Shina Tomby & Anor* (1882), 1 Ky 580, the plaintiff, who is the next-of-kin of the testator, wanted the waqf property and prayed for the court to declare the will void property to be disposed of. The defendants who were the will's executors were against the suit. They contended that it was done after the limitation period, i.e., 12 years after creating the will. *Sindgreaves J.* held that *kenduris* (feast) for the testator's benefit was void due to the conditions restraining alienation and contrary to the rules against perpetuity. As such, the trust deed executed by the defendant was cancelled, and the property was conveyed to the plaintiff. This case followed the judgement of *Fatimah v. Logan* (1871) I Ky 255, where the parties contended that holding of *kenduris* for testator was not in line with the rules against perpetuity, and thus the court voided the will. However, this decision was overturned later in the appeal case of the estate of *Hadji Daeing Tahira binte Daeing Tedelleh* (deceased), *Haji Samsudin v. Badruddin bin Hadji Papang and Others* [1948] 1 MLJ 62.

House on Waqf Land Regarded as Personal Chattel

In *Mootyah Chetty v. Yacob in Re Nyai Hamzah* (1890) IV Ky 568, *Pellereau J.* held that houses built on waqf land were personal chattel and thus claimed to be removable similar to growing crops on the ground. In this case, the plaintiff took action to recover a judgement from *Nyai Hamzah*, who previously had borrowed some money from

the plaintiff. One of Nyai Hamzah's properties was in the form of waqf land, where the defendant built one of the houses on the waqf land. The house was unregistered under the Bills of Sales Ordinance, and there was no conveyance of freehold or leasehold of the land. The gist of this case was similar to *Letchman Chetty v. Hassan Kudus & Anors*. In *re Khoo Thean Poh & Anor* (1890) IV Ky 675, where the court held that a brick house built on waqf land with granite buried ground, was considered personal chattel.

Confiscation of Waqf Land

The British government took some parts of waqf land to construct public buildings such as public streets, police stations, and vernacular schools without compensation to the Capitan Keling Mosque waqf management. However, this action might be caused by the judgement of *Hajee Abdullah & Ors. v. Khoo Tean Tek & Anor* (1881) 1 Ky 506, where it was held that Capitan Keling Waqf was a gift from the Crown without a named trustee, and was considered as under the Crown's unfettered prerogative.

Ambiguity of the Law of the Land

In the *Goods of Abdullah* (1835), II Ky 8, Malkin J. stated that it would be difficult to prove the existence of any definite system of law applying to the Prince of Wales' Island or Province Wellesley. If there was any, it should be Dutch law as in Malacca. However, he admitted that perhaps Mohammedan laws might be proven to be present, but that it would be a matter of evidence. This contention had its fallacy, it was submitted, as Penang was formerly under Kedah's administration. As such, it should be following Kedah's laws.

DISCUSSION

From the points presented, there are positive and negative impacts of the British colonialists in Penang, particularly on waqf administration. It has shown that there was no clear proof that the British colonialists wanted to abolish waqf in Penang. Claiming otherwise is also incorrect. In practice, one might argue that it could have been easy for the British to cancel waqf as they were in power and thus could replicate other colonialists' steps in other Muslim countries. For example, attempts could have been made by outlawing waqf practice, selling waqf properties, or diverting all waqf revenues into the state's account.

However, the actions taken by the British were contrary to other colonialists. They granted lands as waqf to build mosques, set up a commission to investigate waqf, introduced endowment law, centralised waqf administration, and set up a platform to hear disputes. Meanwhile, daily management was given to appointed waqf management committees. As a result, waqf revenue could be tracked, and its performance monitored. This practice was later adopted in other Malay states through the establishment of state religious councils. Besides, British presence has led to increasing numbers of waqf establishments in Zanzibar, Hadhramaut, Mauritius, India, and Singapore (Alias, 2013).

Secondly, from the cases mentioned, the British applied their understanding of waqf based on British trust law, where beneficial deeds to the founder or his family were not considered charity. Thus, family and relatives' *kenduris* were deemed contrary to perpetuity rules. This proposition was similar to the findings by Md Dahlan and Kamaruddin (2006) and Nasution (2002). Contrary to Islamic law, charity for the British means benefit to the public and not to family or relatives. There is a cultural difference between British and Malay society, where for the latter, the benefit of family and relatives' *kenduris*, is both for the testator and the public. However, the British stand is contrary to Islam which emphasises the principle that charity begins at home. Nevertheless, in 1948 the British appreciated the cultural differences by recognizing *kenduris* as a charity evidenced in the estate of Hadji Daeing Tahira binte Daeing Tedelleh (deceased) *Haji Samsudin v. Badruddin bin Hadji Papang and Others* [1948] 1 MLJ 62.

Thirdly, the cession of Penang to the British could also be considered a blessing in disguise. The general perception was British occupation in Penang brought harm to the locals, such as affecting the sanctity of Islam and Muslims as a whole due to the importation of British laws and administration. This perception was argued by Md Dahlan and Kamaruddin (2006) stating that, "The British colonialists, as a matter of course, brushed aside the aforesaid Islamic laws by replacing them with British laws and legal principles. Accordingly, Islamic law was no longer important save on personal and family matters, and their ancillary matters relating to these aspects of the law such as inheritance and wills."

Nevertheless, we also cannot deny that the British introduced a systematic administration into the country. For example, they showed

the importance of records in case laws, land titles, and written reports in office administration. All these were rare practices during the pre-colonial period. These documents have become the basis of current research and administration.

Fourthly, it is understood that the registration of waqf properties and proper waqf management had to a certain extent, made the British control over Penang more systematic. They had a valid registration on land in general, and waqf lands directly contributed to land tax collection and assessment rates, thus adding to the government's income list. Therefore, the British benefitted from the system.

Finally, the authors contended that there was no necessity for the British colonialists to abolish waqf as it had helped in their acclimatisation to their settlements and a method to pool wealth and to use it for the benefit of beneficiaries, the public and maintenance of their welfare and well-being. Furthermore, the existence of waqf had not adversely affected their political, economic and military hegemony in their settlements and protectorates.

CONCLUSION

In conclusion, although the British colonialists did not abolish the waqf system in Penang, they were exceptional compared to other colonialists. This finding parallels Oberauer's (2008) research, which concluded that the British colonialists allowed waqf practice to flourish in Zanzibar (currently, Tanzania). They even enhanced and systemised the method, albeit with a British flavour which to a certain extent, challenged Islamic law. Although British law is imperfect and open to endless discussion, the British colonialists' meticulous work in law and administration resulted in waqf modernisation in Malaysia. As such, waqf practice in Malaysia should move forward as the country had already gained complete independence from the British in 1957 and that lawmakers should reverse the detrimental effects of British laws. In short, Malaysia should seize the opportunity to make Islam the law of the land again. Furthermore, legal loopholes in implementing Islamic law are already known and discussed thoroughly by previous researchers such as Md Dahlan and Megat Latif (2003). Presently, all it needs is willpower, strategic planning, committed workers and the political will to change the situation and the strategy(s) to make it happen.

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