Chapter VIII

Waqf and Social Patronage among the Tamil Muslim Diaspora in the Straits Settlement of Penang

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Introduction

George Town, Penang, has the most valuable concentration of pre-war urban Muslim waqf in Malaysia, a legacy that can still be seen today. Through fortunes made in trade, Tamil Muslim traders built up their wealth and prestige both here and in India. In light of the Islamic prohibition against usury, and the absence of banks in the modern-day sense of the word, capital was mainly amassed in the form of landed estates including houses, shops, orchards, and plantations.

During the period of the East India Company administration of Penang (1786–1857) and subsequently during the period when Penang was part of the Straits Settlements, administered as a Crown Colony (from 1867), a number of public and family endowments in nineteenth-century Penang were created, many of them by the diaspora Muslim community from Tamilnadu in South India, dedicated to a range of objects, and constructed in different ways.

The Historical Survey of the Mosques and Kramats on Penang Island [Abdul Kahar Yusoff et al. 1974] identified almost 70 mosques from the nineteenth and early twentieth centuries, on an island of less than 300 square kilometres.[1] Men of Tamil Muslim origin played a founding or co-founding role in about 20 of the mosques studied. In addition to mosques, Tamil Muslim benefactors also sponsored a number of Sufi saint-shrines (*dargah*); these tended to be important places of resort for marginal and non-mainstream groups, and also served as integrative

[1] The above survey qualified that the term "founder" is, of course, capable of several meanings: 'it could be applied to a religious leader or to some other person who, by his word or example, inspired the building of a Mosque; to a Penghulu or other secular leader who supervised the construction of a building by "gotong royong"; to the donor of the Wakaf land upon which a Mosque is built; or to the donor of the money which rendered the building of a Mosque possible. For the purpose of this survey… the "founders" of Mosques have been taken to be those persons who, in the opinion of our respective informants, were the prime movers in the institution of the new Mosques, whatever their precise role may be' [Abdul Kahar Yusoff et al. 1974].

transcultural space accommodating both Muslims and Hindus.

In 1903 the Commission enquiring into "Moslem Trusts and Foundations" in Penang found 49 Muslim religious or charitable foundations in George Town and its vicinity, and made a detailed investigation into 14 of those foundations, some of them comprising a cluster of endowments by the same testators.[2] Given the lack of a system for the registration of Islamic endowments, only a portion of the Islamic endowments ever bequeathed are known from surviving historical records. Testators generally made their wills in Tamil (and in a few cases, in Malay or English), according to their understanding of Islamic law. The court sometimes could not establish legal certainties as "the language used more often than not bristles with ambiguities" [Sennet 1932: 4]. When contested in the courts of the Straits Settlements, some wills were deemed to be badly constructed and the waqfs consequently declared void.

Islamic law allows for two different categories of waqf. The first is *waqf khayri*, in which the founder designates an institution, or the general Muslim community, as the beneficiary of the endowment and its usufruct. The second type is *waqf ahli* or *waqf dhurri* or "familial trust," in which the income from the property is to be distributed to family members. The family and public aspects of the trust were often combined. In both cases, the dedicated property or land can never change hands by inheritance, sale, or seizure.

Waqf can be established for pious purposes (e.g. mosques, *dargah*, burial grounds, *ashurkhanah* for the Muharram observances, *kenduri* or feasts), as philanthropic endowments (e.g. hospitals, orphanages, schools), for the benefit of family (e.g. regular income to kith and kin) or specified non-family beneficiaries (e.g. assistance to pilgrims and wayfarers, scholarships), or as charity for the poor and needy (e.g. alms, gifts of clothes). Historically, many of these objectives were often intertwined and overlapping. The endowments can be in the form of cash, land, or properties that are themselves part of the good works (e.g. mosque buildings, wells, land for cemeteries, school buildings), or assets that yield usufruct or income to support and maintain the objects of waqf (farm land, orchards, built-up rental properties). Family members and the rich and the poor of society may benefit from religious and philanthropic endowments, whereas primarily the poor would benefit from the charitable dispensations of food, money, and clothing. Should prior objects fail categorically, the ultimate beneficiaries of the waqf should be the poor. It has been argued that Islamic law tends to facilitate the redistribution of wealth over capital accumulation, and therefore the distribution of the wealth of failed endowments toward the poor would be in line with this "ecological" ideal [Singer

[2] "General Report upon the Moslem Trusts and Foundations in Penang (No. 13 of 1904 Straits Settlements Paper to be laid before the Legislative Council by Command of His Excellency the Officer Administering the Government)" [Sennet 1932].

2002; Kozlowski 1985].

The founding of waqf was a strong tradition among the wealthy Tamil Muslims in early Penang. By endowing waqf, both public and private, they expressed their cultural-religious aspirations and played their roles as patrons of family and community, providing for all those "near and dear" to them and furthering their cherished causes while bolstering their standing in this world and the hereafter. The initial gift of property was often enhanced by subsequent gifts towards building, maintenance, improvements, or the addition of amenities. Through a complex of accumulated waqf, executors, families, and community leaders operated and controlled essential institutions such as mosques, schools, shrines, and graveyards, thus providing the diaspora community with a high degree of local autonomy [Kozlowski 1985].

As *mutawalli* (trustees, custodians, agents, managers, caretakers) of waqf, the sons and grandsons of the testators continued to play the role of social patrons, dispensing charity and favour from the testator's waqf and in the testator's name. With the extended family provided for, the *mutawalli* and beneficiaries were able to take up positions of social leadership and patronage of the diasporic community. Many of them were even enabled to pursue entrepreneurial careers, literary occupations, and cultural innovations, although a description of achievements in these fields is beyond the scope of the present paper. The accumulation of waqf within a community, undertaking the delivery of social services within their respective but at times overlapping spheres of social patronage, led to a proliferation of descendants and beneficiaries playing civic roles. Decentralised and localised, these waqfs nevertheless had a major impact in building socio-cultural capital, expanding the community's public sphere, and growing its capacity for resilience and autonomy.

1. The Kapitan Kling Mosque

In 1801, the East India Company endowed two important sites—an 18 acre site (approximately 7.3 hectares) for the "Mohammedan Church" and a small corner site of about 2,000 square feet for the Nagore Dargah. Cauder Mohuddeen who had been appointed the Kapitan Kling, headman of the Chulia community, was also considered the founder of the present mosque.[3]

[3] The Kapitan system can be traced back to the Malacca Sultanate of the fifteenth century, whereby a ruler would appoint a "Capitan" or chief for each ethnic group, and give instructions or conduct negotiations through this leader on matters relating to that particular community. These leaders had a primary responsibility to act as intermediaries between the rulers and the ruled, to keep the peace within their own communities, and to bring the population "within the pale of the law" [Tregonning 1965: 45–46].

> The grant of land occupied by the mosque was confirmed with a land title as follows: On the November 2, 1801 Sir George Leith, the Lieutenant-Governor, executed Grant No. 367 of 1801, whereby he, on behalf of the East India Company, granted to the "Mohameddan Church" (sic) a piece of ground situated on the South side of Malabar Street [Chulia Street] estimated to contain 5,468 square jumbas, or about 18 acres. In this Grant the land is described as being bounded towards the West and South by grounds belonging to Kaider Madeen (Cauder Mohuddeen)… The Grant concludes with the sentence following:—"which having been originally given for religious purposes is not to be sold or transferred but to revert to the Honourable Company should it cease to be used for the purposes intended." [Sennet 1932: 9–10]

The application of waqf law in nineteenth-century Penang should be understood in the light of the settlement's historical development under the rule of the Bengal Presidency. In the early days of Penang, the East India Company government, with its emphasis on promoting trade and profits, brought an Indian experience and outlook to governing the population. In India, colonial bureaucrats saw themselves as having simply "stepped into the shoes" of the old Mughal government and this perception was often shared by its Muslim subjects. The East India Company's grant to the "Mohammedan Church" could have been construed as a public waqf—even an imperial waqf—for, after all, any gift of land for a mosque or burial ground is considered a religious endowment even if the word waqf is not used in the dedication of the property. Certainly, the Kapitan Kling Mosque land was understood to be waqf.

> Through the East India Company's gift of land for the Kapitan Kling Mosque and the Nagore Dargah, the Chulia community gained a central and permanent place in the British settlement of Penang. The ruler's benefaction would have encouraged individual testators to add value to the Kapitan Kling Mosque waqf and also to endow other sites. The founding of mosques and accumulation of a large number of waqfs over a relatively short time took place for many reasons, including the relative ease of acquisition of landed assets, the wealth of the diasporic elite, and the culture of Islamic piety which granted enormous prestige to benefactors. [Khoo 2014: 206–210]

Cauder Mohuddeen, a ship captain or *Marakkayar*,[4] is remembered as the founder and first superintendent of the Kapitan Kling Mosque as well as the leader

[4] A sobriquet assumed by old lineages of Muslim seafaring elites in coastal Tamil Nadu and Sri Lanka. It is also written "Merican."

of the South Indian community. According to his descendants, the Muslims of the settlement, including sepoys and Arabs, approached Cauder Mohuddeen to build the mosque and supplied him with a letter of request from the community. After obtaining a letter of authorisation from the lieutenant-governor, Cauder Mohuddeen brought builders and stones (or bricks) from India to erect the mosque. The resulting rectangular mosque and water well can be discerned in a town map of 1803. This indicated Cauder Mohuddeen's standing among the Muslim population and also that the Chulias were the majority then [M. I. Merican 1981].

Penang was elevated to a Presidency of India in 1805, and the settlement was granted a Charter of Justice in 1807 [Langdon 2013]. The settlement made an abrupt transition from a situation of legal pluralism to a state-established dominant legal order based on English law [Maxwell 1859]. The Kapitan system was abolished and Cauder Mohuddeen himself got into trouble with the law [Skinner 1976, 1978, 1982]. In 1830, the Presidency status was abolished and Penang was in a state of crisis due to the sudden downsizing of government and support services. In such an uncertain situation, the Tamil Muslim community relied more than ever on housing, amenities, and other services provided by existing waqf.

2. Cauder Mohuddeen's Endowment

Cauder Mohuddeen's fortunes waxed and waned but when he died in 1834, he declared a personal fortune of Sp$50,000. His properties had clearly appreciated with Penang's increased population and prosperity. Cauder Mohuddeen signed off his will with an elegant statement of humility, perhaps a standard expression of the time:

> I do not leave this as a sufficient estate to my wives and children but I have for them unperishable goods in the hands of God. [Will of Kapitan Kling 1834]

By this he meant that his deed as the founder-builder of the mosque, his endowment of burial land as waqf and his other charitable acts would stand him in good stead in the hereafter.

The testator wished to pass on his entire estate without *faraʾid* (Islamic inheritance laws) distribution. He stated that if any dispute were to arise from any of his wives or children demanding their respective shares, then he desired that the estate should be appraised and divided according to *faraʾid* but in no case should the matter be taken to court. If the estate were to be distributed, then the executors should settle two-thirds of his estate according to *faraʾid*, after reserving one-third of the estate as an endowment for the purposes specified and dispensing small sums

for pilgrims, priests, *khatib*, *imam*, *pir*, and *alim*.

By creating a familial endowment, Cauder Mohuddeen prevented the division of his estate and effectively handed over control of the estate to his first-born son, of whose filial loyalty he felt assured. He appointed his two sons as executors and laid down the rules of succession of executors. To ensure that this legacy would be upheld, he called eight friends and relatives as witnesses to exert moral pressure upon his sons to carry out his will faithfully.

As leader of his clan, the extended family, the kinship group, and their dependents, Cauder Mohuddeen helped to provide housing and social services during times of economic recession as well as funds for performance of rituals, *kenduri*, and processions. During his lifetime, the testator was already underwriting part or whole of the salaries of the religious functionaries, and these charitable functions were to be continued after his death with income from the waqf. It is obvious that verbal instructions were passed on to the sons and executors which were not written down in the will. The two sons seem to have had full-time careers as *mutawalli* over the endowments consisting mainly of urban real estate.

Cauder Mohuddeen's wife who predeceased him, Fatimah Nachiar, was regarded as a holy person. Although the family tomb was marked the "Founder's Tomb" on the map, it became popularly known as Makam Ma'amah, in honour of the founder's wife. The potential significance of such a Sufi shrine is described by religious scholar Elizabeth Schomburg:

> In Tamil Nadu, women are excluded from the mosques, and offer their prayers at home. They visit the *dargah* for supererogatory devotion, however, in large numbers. Men, women and children visit the shrine, although women's presence is especially noticeable. In general, *dargahs* are the one public venue where Muslim women in the Tamil region can congregate freely, and for all—men, women and children—shrine outings clearly have a certain recreational and social function, in addition to being sites of devotion and healing. [Schomburg 2003]

It is suggested here that the Makam Ma'amah, the mausoleum of Cauder Mohuddeen's wife Fatimah Nachiar, might have served as a kin centre for the women of the early *Marakkayar* diaspora; Schomburg notes that it is common for *dargah* in Tamil Nadu to have separate entrances and seating areas for women. This could have been an additional motivation for Cauder Mohuddeen to endow the land where the tomb was located as private waqf. It is known that Cauder Mohuddeen's son and executor "maintained a tank for the use of the poor," similar to the communal tanks found in the villages of South India. Located next to the founder's tomb in which Cauder Mohuddeen and his family were interred, the tank was an instrinsic part of the ritual space of the saint-shrine, and stories of miracle-workings

have been related in connection with this place of ablution. The settlement around the founder's tomb was called Kampung Kolam, meaning "tank village" [Sennet 1932: 12, 23].

The economic historian Raj Brown points out that family trusts were usually created as a strategy to prevent fragmentation of a patriarch's estate. She offers a working definition of how the notion of waqf operated in practice:

> A waqf is an unincorporated trust, an endowment that is established under Islamic law and holds land or real estate in perpetuity for the benefit of the family and their descendants, while maintaining social provisions for the poor. Although there are both public and private waqf… there was no distinction between the two, and a fundamental motive for the creation of a waqf by a wealthy patriarch was to avoid fragmentation of his assets through taxation or family feuds. The public aims included religion and education as well as political and economic motives. [Brown 2008: 346–347]

Brown points out that the importance of customary law in addition to that of shari'a law is in the fundamental difference between Hadhramis and their preference for agnatic descent, and South Indian Muslims preferring cognatic over agnatic relatives and indifference to gender distinctions; this is reflected in their wills.

In many parts of the Muslim world, the familial waqf was a preferred means of inter-generational wealth transmission because it conferred several advantages. As Peter Hennigan writes in *The Birth of a Legal Institution*, the creation of Muslim bequests in India was often influenced by many factors—religious, political, economic, and legal, as well as personal.

> Some founders established waqfs believing that the endowment might make their property immune—in theory, at least—from unscrupulous rulers. Others used the waqf as a legal fiction to prevent the revocation of a sale or to secure property to whose ownership was contested. More commonly, founders created familial endowments in order to retain a measure of control over their estates that was denied to them under the default rules for inheritance set forth in the Qur'ān… With the waqf, founders could keep their property intact as well as define a descent strategy denied to them under the *ʿilm al-farāʾid*. [Hennigan 2004: xiv–xvi]

The dedication to establish a waqf required founders to relinquish possession and control of the endowed properties during their mortal lives, as was done by Cauder Mohuddeen through his will. In return, the founders 'acquired de facto "dead hand" control over the distribution of the waqf's yields.' Hennigan points out that the family waqf was generally well-regarded by Muslim society:

> Although it is tempting to view the waqf as a cynical means for evading the *ʿilm al-farāʾid*, it is clear that the Muslim community considered these endowments to be acts of piety, or at the very least, believed that the pious motives of the founders' actions justified circumventing the Qur'anic inheritance verses. [Hennigan 2004: xvi]

To put Cauder Mohuddeen's bequest in a historical perspective, it is necessary to look at the social transformation of Muslim property and inheritance laws in India under British rule, where wealthy Muslim patriarchs often created family waqf. As Gregory Kozlowski has noted in *Muslim Endowments and Society in British India*:

> In part, the character of the system of law which the British enforced in India was responsible for their concern to maintain an estate intact. With the British came the notion that land or houses were owned, that they were "private property." They could be bought, inherited, sold, mortgaged and seized for debt. In addition, the Anglo-Indian courts took literally the Quran's demand that property be divided by inheritance. The courts, with few exceptions, enforced those rules strictly, perhaps more rigidly than Muslims themselves ever had. [Kozlowski 1985: 3]

In Cauder Mohuddeen's hometown of Porto Novo in South Arcot, local pre-British systems of land tenure might have been more compatible with *Marakkayar* family values of matrilineal inheritance, perpetuated by a society thickly knitted by endogamous family ties. In Penang, on the other hand, Cauder Mohuddeen could easily anticipate that the efficient expedition of Muslim inheritance laws coupled with the liquidity of private property in a free market could readily bring about the total fragmentation of his estate almost immediately after his death. Although practised for hundreds of years, the institution of the familial endowment was severely tested in Muslim societies that came under colonial rule.

3. Mahomed Noordin and the *Kenduri*

Mahomed Noordin was a rich Muslim merchant who traded as far as China and Europe. In the 1840s, when Penang was going through bad times, he sponsored the laying of pipes for water supply to the town and mosque area. He died in 1870 and left behind a large family endowment which included hundreds of shophouses, mansions, and several country estates. He was buried in the mausoleum at Chulia Street, to the north of the Kapitan Kling Mosque compound.

A year before he died, Mahomed Noordin made his last will, settling his

vast property upon two trusts. The first was a family endowment made up of the residue of his real estate, "to be held upon trust" by his executors and trustees, namely the Scottish lawyer Daniel Logan, his sons Nina and Habib, and his son-in-law Nacodah Merican, "for the benefit of his children and grandchildren, whom he named, and their issues" [Sennet 1932: 19–21].

The second trust was a charitable or philanthropic endowment or waqf which was for, *inter alia*, a school, a *kenduri* in his own memory, a *kenduri* for all the saints, and the lighting up of the tomb. The executors and trustees for the second trust were the same as the first, with the addition of Colonel Anson, the lieutenant governor of Penang, in view of the charitable dimensions of this trust. He also bequeathed his large tracts of lands in Akyab and Tenasserim in Burma as endowments.

Again, it is most likely that the school and feasts for saints were already being supported by Mahomed Noordin during his lifetime. Through the waqf instrument, the testator's largesse and patronage would be continued by his family after his death, thus perpetuating his memory and the family's leadership role within the community.

When Mahomed Noordin made his will in 1869, he might have been aware of the state of the waqf lands attached to the Kapitan Kling Mosque and the Cauder Mohuddeen private waqf, upon which a poor standard of houses had been built and were being let and sublet with diminishing income to the trust. In order to ensure that his own waqf would be properly maintained, Mahomed Noordin set it up on modern principles. He pronounced his intention: 'I direct that the said lands and premises shall be called "The Wakoff of Mahomed Noordin."' He endowed 11 pieces of land, inclusive of 31 shophouses on Chulia Street, Prangin Road, Beach Street, and China Street, all built up and expected to fetch decent rents. Noordin also anticipated the maintenance required and directed that rents and profits for the land premises should be devoted to the objects,

> after deducting the necessary expenses for collections, in the first place repair and keep in repair all buildings, erections, roads, drains and other works which are and shall from time to time be, built, erected, or made on the said lands… [Sennet 1932: 19–21]

This was in accordance to the provision of waqf law which gives priority to the maintenance of the source of perpetual income. Mahomed Noordin dedicated, as the first object of his waqf, an educational foundation:

> To the Managing body of the School built by me in Chulia Street, adjoining the compound of the Capitan Cauder Mohuddeen's Mosque, for the learning of English, Hindoostanee, Malay, Tamil, Malabar, and the Alkoran. Twenty

dollars per month. [Sennet 1932: 19–21]

Religious, philanthropic, and familial objects were all mixed up in the dedication. In comparison to the modest Sp$240 per annum set aside for the school (philanthropic), Noordin had stipulated Sp$1,200 per annum for the lives of two beneficiaries (familial), Sp$700 per annum for *kenduri* (religious and philanthropic), and the balance for clothes to the poor (philanthropic). As shown below, the waqf for *kenduri* was a substantial object of Mahomed Noordin's endowment:

> And the residue of the rents and profits of the said devised premises upon trust to expend for the yearly performance of Kenduri and entertainments for me and in my name, to commence on the anniversary of my decease according to the Mohammedan religion or custom, such Kenduri and entertainments to continue for ten successive days in every year, and also in the performance of an annual Kenduri in the names of all the prophets and to expend the same in giving a Kenduri or feast according to the Mahommedan religion or custom, to the poor, for ten successive days, in every year, from the anniversary of my decease, to the extent of three hundred dollars including the costs of lighting up the Mosque or burial-place of my deceased mother and the school rooms thereto adjoining, and also to give Kenduri or feasts to the poor, as aforesaid, once in every three months, to the extent of one hundred dollars and, provided there should remain any surplus moneys, then the same is to be expended in purchasing clothes for distribution to the poor. [Sennet 1932: 19–21]

This waqf was contested soon after his death. In a landmark case known as *Fatimah & Ors v. Logan & Ors* (1871), it was ruled that the trust for the school was a "good charitable bequest and therefore valid" but that the gifts for *kenduri* were not charitable gifts, being "void as tending to a perpetuity," and that the Sp$700 per annum should be distributed to the next of kin. In 1902, upon a petition by another beneficiary named Tengachee Nachiar, the residuary gift for the poor was also declared void. This meant that the whole income of Noordin's waqf, with the exception of the small allocation for the school, would go to the next of kin [Norton-Kyshe 1885: 255–272; Sennet 1932: 38–39].

Pious gifts to support the cultural-religious practices of the Tamil Muslim diaspora were essential to the social cohesiveness and cultural survival of a diasporic population in a foreign land. It was an opportunity for the testator's family and kinship group to come together, renew their ties, bring themselves up to date on the *mutawalli*'s performance of his responsibilities, and distribute alms in the form of food and clothing to relatives and the poor. A *kenduri* in honour of the testator would be first observed on certain dates after the testator's death and sub-

sequently on the anniversary of his passing, during which it was usual to have reciters read the entire Qur'an. Such ceremonies were considered to benefit the testator's soul and raise his spiritual merit in the hereafter. Ritual feasts for saints might last for many days, attracting both Muslim and non-Muslim participants and onlookers from all social classes. Such occasions not only replicated the cultural calendar observed in one's own hometown, but also reproduced the complex social relations between patrons and beneficiaries of different classes and age groups [Khoo 2014: 221].

As mentioned earlier, Noordin stipulated that as much as Sp$700 per annum would be spent on feasts in his own name and in the names of various saints, and on feasts for the poor. Justice William Hackett, who presided over the case *Fatimah & Ors v. Logan & Ors* (1871), was unfamiliar with the custom of "kandoories." He likened them to "ceremonial entertainments" and thus declared them "not charitable":

> The purpose of this trust seems to be of a ceremonial, religious, and also of a festive nature… As the gift is to last for ever, the question arises whether it is charitable or not, as if it is not, it is void as tending to a perpetuity. No evidence was given to shew the nature and object of these feasts and kandoories, and whether they are enjoined by the Mahomedan religion… I do not see how it can be of any public utility to give feasts even when those feasts are to be enjoyed by the poor. For although it would be good charity to give alms to the poor, a feast can scarcely be regarded in the same light. On the whole I am of opinion that the gifts are not charitable, and that they are therefore void. [Norton-Kyshe 1885: 255–272]

Justice Hackett's judgement set a precedent for other petitioners in the Straits Settlements to claim distribution by getting the court to annul the gift of *kenduri*. The *kenduri arwah* (feast conducted on the fortieth day after death) and *kenduri* for saints (*urs*) were not recognised as being either religious or charitable, that is, of "benefit to man" and family endowments were also seen as contravening the rule against perpetuity. When these trusts were declared void due to bad construction or allegedly invalid objectives, the courts would distribute the inheritance to the next of kin instead of to the poor.

As the scholar Torsten Tschacher pointed out, "Many of these cases were decided in Penang." Indeed, the commissioner's report of 1904 took the cue from India: it has been held in India that provision made for the reading of the Qur'an at, and the lighting of, the tomb of a testator cannot of itself be looked upon as necessarily constituting the property, upon which it was charged, "Wakaf," presumably on the ground that the object of the dedication was not proved to be for "the benefit of man" [Tschacher 2006: 50–51].

Muslim endowments were judged not by Islamic law, but by English concepts of what rightfully constituted a public trust or charity. In a case which came to court in 1936, the will of a Tamil Muslim from Penang contained detailed instructions for the staging of three annual feasts in honour of the Prophet, ʿAbd al-Qādir al-Jīlānī (Sufi saint, d. 1166), and the sixteenth-century Saint of Nagore, Shahul Hamid, without calling them "kanturis" (feasts). Tschacher shows that, ironically, this endowment for feasts was upheld by court because it was argued differently:

> By that time, the British had already grown accustomed to consider only feasts commemorating the dead to be kanturis, and the judge thus permitted the trust as a charity of the advancement of religion, explicitly denying that the ceremonies constituted kanturis. [Tschacher 2006: 50–51]

Fatimah & Ors v. Logan & Ors (1871), the landmark case in which it was held that a gift for *kenduri* was not a charitable gift, was itself overturned in 1947 by the Court of Appeal in the case of the Estate of Hajah Daeng Tahira; the latter endowment has been preserved until today as an important waqf estate in Singapore. The courts in India and the Straits Settlements at the time would not admit certain aspects of Islamic law, let alone acknowledge the different cultural practices of a heterogeneous Muslim community. As the law professor Ahmad Ibrahim has remarked, "The adoption of English rules has led to some strange results" [Ahmad Ibrahim 1992: 59–60].

4. Mixed Private and Public Endowments

The small *Marakkayar* elite endowed the bulk of waqf properties in the town. Strong circumstantial evidence shows that the Tamil Muslims in India had already realigned Islamic law pertaining to waqf to the concerns of their own customary law. Even in Penang, *Marakkayar* families observed practices which favoured the women owning property, as two court cases showed that the patriarch provided a "house gift" to each of his two daughters jointly with the sons-in-laws as part of the daughters' wedding dowry [Norton-Kyshe 1885: 463, 583].[5] In the case of matrilineal *Marakkayar* families, the need to overcome the rigidity of Islamic laws of inheritance was particularly compelling. In the case of waqf created by Shaik Eusoff, he explicitly specified control of the endowment by appointing his wife the executrix and specified that his female offspring would be equal beneficiaries.

[5] Demonstrating this strong custom of women's property entitlements, a late twentieth-century survey revealed that in one *Marakkayar* town in Tamil Nadu, 80 percent of house properties were in women's names [J. Raja Mohamad 2004: 269, 275–276].

Through his will of 1892, Shaik Eusoff settled two endowments and resettled a third one. The first was a familial endowment in which he bequeathed the bulk of his properties (except for the Shaik Eusoff Mosque property) in trust for his wife during her lifetime, to have the sole and exclusive right of collecting rents and enjoying its rents and profits. He appointed his wife Mawan Bee "executrix" and their two sons as joint executors, with his wife being the acting executor until the latter reached the age of 21. The estate would be tied up in a family trust for a period of 99 years, after which it should be broken up and sold, and the proceeds distributed equally among "all my children by my wife the said Mawan Bee" as well as their descendants, with the condition that the proceeds to the female children and grandchildren shall be "for their sole and separate use free from the control debts liabilities or engagements of their respective husbands." However, if the 99-year term should fail, then the proceeds should be divided equally among his beneficiaries [Sennet 1932: 22–23].

The second endowment included certain public objects, but was constructed along the lines of a familial endowment. The land, located between Ayer Itam Road and Sungai Pinang near Dhoby Ghaut, in the "District of Campong Pulow Penang," had been acquired in 1874 for the purpose of family burial land and a mosque, and on it the "Shaik Eusoff Mosque" had been built. This property was now bequeathed in the names of his wife, two sons, and six daughters. He stipulated that the trustees should manage, cultivate, or lease the land and apply the rents towards the rebuilding and maintenance of the mosque, tombs, and assets, and payment of mosque officials and lighting. Indigent relatives should be allowed to live on the land rent-free provided they did not sublet and were willing to remove their houses when requested. The residue of income would be paid to Shaik Eusoff during his lifetime and after his death to poor descendants. After the expiration of 21 years of the last survivor of those named, the trustee should settle the property upon similar trusts, failing which, the land should be waqf forever, with Sp$20 a year reserved for the teaching of the Qur'an to "boys and girls of Mohammedan parentage" and any surplus to go towards the purchase of clothes for the Muslim poor. The Commission which enquired into Muslim trusts and foundations in 1903 remarked that

> This trust is a good illustration of the modern method in which the rule against perpetuities is attempted to be evaded by limiting the trusts to lives in being and twenty one years afterwards with directions to settle. [Sennet 1932: 22–23]

The third endowment mentioned in Shaik Eusoff's will was his grandfather Shaik Nathersah's waqf. This was a cemetery and an *ashurkhanah* or *imambarah* for the celebration of Awal Muharram. Shaik Eusoff resettled the trust for the "Hasharah Khana" property on Chulia Street by appointing his two sons as trustees;

in the event of their death, the trusteeship would pass to his daughters, "exclusive of the interference and control of any husbands with whom they may intermarry…" The fate of this endowment is not clear, but the *imambarah* appear to have remained in the family for generations later, devoid of any supporting properties to sustain it [Khoo 2014: 184–189].

The brothers Dalbadalsah and Yahyah Merican founded a burial ground and the "Dulbadalsah [sic] Yahyah Mosque" which first opened for prayers in 1865, but this was only the most visible manifestation of several complex and interrelated endowments. Between 1862 and 1877, the brothers created individually or jointly at least six waqfs. The first was intended as a burial ground for Yahyah, his heirs, and descendants; the rents and profits would go towards building and maintaining a house for the use of people attending burials, towards repairing tombs, and in "charitable relief" of his descendants. The second, third, and fourth dedications for "the benefit of the Mohameddan Community in Penang" stipulated that the rents and profits of the waqfs would go towards maintaining a mosque, while the surplus would be divided among the descendants of the three brothers, the third being their younger brother Zekariah Merican. They specified "future trustees to be members of the family, and the original number of three to be always maintained." Descendants would be permitted to live on the land provided they did not sublet and agreed to remove their houses when asked to do so. The Dalbadalsah Yahyah Mosque stood on waqf created by the fourth dedication, made out to "Hashim Nina Merican bin Yahaya Merican and Mohamed Nina Merican bin Bapasah all of Penang inhabitants." The fifth and sixth waqfs contained properties which were to be leased as the trustees might think fit [Sennet 1932: 15].

This waqf community illustrates the spiritual and organic relationship between waqf land, mosque, burial ground, *kampung* (village or settlement), and parish (*mukim*). The land dedicated for the maintenance of a mosque might house part of the mosque community, with the founder's descendants (especially the poor among them) being given special housing rights. Land not yet built upon would be leased as fruit orchards. The founder would usually be buried next to the mosque, and his memory would be perpetuated as part of the social memory of the community that lived there. Family endowments with a public dimension could also enhance religious reputations.

Founders tended to appoint their descendants or near kin as executors and *mutawalli* for both private and public waqf. After studying a large number of wills and waqf cases in India, Kozlowski surmises that, more often than not, the testators made no clear distinction between private and public beneficiaries:

> As with temporal arrangements of endowments, donations for spiritual activities began with the family group and moved outward to embrace more individuals who were less intimately connected to the donors…[Kozlowski 1985: 61]

Although the concepts of public and familial endowments are distinct, it was common in practice for testators to combine public and private objectives in one bequest, as "religious and temporal concerns blended together in the minds of its founders." Though common in the past, this intertwining of family and society, and of private and public, was quite incompatible with British notions of public charity, and did not survive the scrutiny of English law.

5. Judiciary and Executive

In judgements pertaining to waqf, the Straits Settlements courts were closely influenced by developments in India. Overseen by British and Indian judges who were trained in English legal traditions, the courts in British India had begun to discuss endowments seriously "in terms of a legal system rooted in the European experience." These changes are summarised by Kozlowski in *Muslim Endowments and Society in British India*:

> Beginning in 1879, the High Courts of India handed down a series of decisions which overturned any endowment considered to benefit primarily the settlor's own "family." The Privy Council in London confirmed those judgements and in 1894 issued a definitive ruling on Muslim endowments: they must be "religious" and "charitable." public not private. Courts throughout the empire could no longer sustain an endowment in the interest of the donor's own family. [Kozlowski 1985: 5]

Thus, for a long time, the British courts in India—based on precedents of court cases which had been decided based on a very limited knowledge of the shari'a or history of endowments—denied the validity of family endowments. While upholding public endowments for mosques, burial grounds, and so forth, the courts saw familial endowments as devious means to evade the Islamic laws of inheritance (*fara'id*) and the British laws of perpetuity. What is more, British judges could use their own discretion to decide if a Muslim trust was "good" or "bad" [Kozlowski 1985: 157–162].

In India, eminent Indian lawyers lobbied to convince British courts that it was a venerable tradition among noble families to create familial endowments to keep their estates intact. It was only with the belated passing of the "Mussalman Wakf Validating Act" in 1913 that the family trust "for the maintenance and support wholly or partially of [the testator's] family, children, or descendants" was recognised. It was also acknowledged that a Hanafi Muslim could add a provision for "his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated." The act stipulated that

the family trust was valid so long as the ultimate beneficiary of the trust—after the extinction of the family, children, or descendants of the testator—was the poor, or an object of a "religious, pious or charitable purpose of a permanent nature."

As Vanaja Dharmalingam points out in her thesis "The British and the Muslim Religious Endowments in Colonial Malaya," the push for a waqf reform through the passing of new legislation came at a time of pronounced increase and consolidation in executive powers in England as well as in British India, on a wide variety of matters which were previously under the fold of the British legislature or judiciary.

The nineteenth century had seen the ascendancy of colonial administrators influenced by the post-enlightenment moral philosophy of thinkers such as Jeremy Bentham and John Stuart Mill, the utilitarian ethics of achieving the "greatest good for the greatest number." Concerned that the cases involving religious endowments were wasting the court's time, these colonial administrators sought to find a solution to the persistent "waqf menace."

> After the Indian Mutiny, the colonial European population was especially wary of potential problems to their rule stemming from religion… While freedom of worship was guaranteed, still, the British had to control or manipulate to their advantage the huge political, economic, spiritual and other resources at the disposal of the temples and mosques. This meant that though they could no longer officially meddle in or take actions against native religious customs which were offensive to their tastes, they still had to bring their institutions under their control, reduce their independence, and alter their privileged positions vis a vis the rest of the population and the state… while they could not "interfere" with native religions and customs, they could still alter drastically the context in which these waqfs functioned in the colonial state. [Dharmalingam 1995: 24–25, 39]

They were clearly intolerant of alleged financial mismanagement of Muslim trusts which they perceived as having an ultimately public objective. As custodians of the public sphere, they were appalled at the number of waqf cases that wasted the courts' time, exposed embarrassing family squabbles, and ate up the surplus of the endowments. The colonial officers believed themselves to be reformers of what they saw as decayed Islamic institutions and thought that Muslim subjects would benefit far more from being led by an enlightened colonial administration than by the traditional (and, to them, discredited) Islamic clergy.

In Malaya's "Protected Malay States," British residents had been appointed, or rather imposed, to advise sultans on matters of governance and administration, with the proviso that they were not to interfere with matters of religion and custom. However, in order to establish a more rational administration, British officers

frequently meddled in the interpretation of the Islamic religion, leading to a standardisation of Islamic legal systems and the elevation of Islamic law above local irregularities of *adat* [Peletz 2002: 48–49].[6] In some instances the interventions were made at the prompting of the sultan or the community who saw the British officer as a neutral arbiter. In the Straits Settlements, unlike the Malay States, there was no traditional Muslim ruler to contend with; this made it relatively straightforward for the government to impose its own will through a sustained process of legal and administrative reforms.

For much of the nineteenth century the colonial government had been content to allow the settlement's constituent communities considerable leeway in managing their own internal affairs. But Penang's status as a Crown Colony, the impact of the Penang Riots of 1867 that threatened public order and property, the fallout from damaging legal cases over competing claims to waqf legacies, the more general late-Victorian social reformist impulse within the colonies, and the municipal imperative for urban renewal, all created an unstoppable momentum for "improvement" and more direct forms of governance.

In the absence of any single religious authority ensuring the due appointment of waqf trustees or the proper management of waqfs, Muslims were increasingly turning to the civil courts which alone had jurisdiction over land matters. Court cases tended to drag on and were often dropped without any final decision being reached, "the permanent result having been to embitter the existing discussions and waste the funds of the endowment." It was observed that, in fact, few of the disputes pertaining to waqf properties arose from religious differences; most were related to self-interest of various "enterprising and unscrupulous" descendants, relatives, or other stakeholders [Sennet 1932: 4–5].

As cases involving the Kapitan Kling Mosque waqf was brought to court time and again, the colonial government began to take an interest and insert itself as a stakeholder. Due to a family dispute among the descendants of the Kapitan Kling which went to court in the 1870s, the court decided in *Kader Mydin & Ors v. Hadjee Abdul Kader* (1880) that "the Attorney-General is a necessary party to a suit relating to a charity, although there may be trustees of the charity, capable of enforcing or protecting its rights" [Norton-Kyshe 1885: 489].

In another dispute in the 1880s between one faction of the mosque leadership trying to restrain another faction from allowing a third party to build on mosque land, it was brought to the court's attention that although the East India Company had given the land to the "Mohammedan Church," no trustees had ever been appointed, and that the "fee simple in the land was vested in the Crown." As such, the colonial government had a real interest in the waqf endowment and only the attorney general could act as plaintiff in *Hajee Abdullah & Ors v. Khoo Tean*

[6] Adat refers to regional customs and traditions not derived from Islam.

Tek & Anor (1881) [Norton-Kyshe 1885: 500–502].

The various factions then presented petitions to the attorney general for trustees to be appointed to the mosque. The attorney general referred the matter to Solicitor General Daniel Logan, instructing him "to look for a direct descendant of Capitan Kling, a man of property and with no interest." But the more capable nominees refused the position due to the lack of consensus and undivided support [Sennet 1932: 23].

When the acting inspector of schools, A. M. Skinner, proposed the establishment of a "Home for Malay Boys," the solicitor general Daniel Logan saw the opportunity to use waqf funds for an educational charity. It is useful to remember that Logan, as trustee of both the Noordin Estate and private waqf, would have been very familiar with the affairs of the Muslim community. First, he drew up the "Scheme for the Establishment of a Malay Home in Penang" in 1883 [Sennet 1932] for establishing a scholarship and boarding school which would provide the "best and most advanced" Muslim boys with an allowance, food, board, and clothing to study at Penang Free School. Logan then applied to the court to make use of the accumulated interest from another waqf, the Tengku Syed Hussain funds, in which the beneficiary, the Anti-Mendacity Society appointed under a previous court order, had ceased to exist in 1878, and the funds had since accrued in the hands of the accountant general.

In the 1880s, the idea of establishing a central authority over Muslim religious endowments in Penang had begun to be mooted by the colonial government. By the late-nineteenth century both the Kapitan Kling Mosque endowment and Cauder Mohuddeen's private waqf had come to the attention of the colonial authorities, due to a series of court cases which exposed the weaknesses in the management of Muslim endowments, the internal dissension among the third generation of Cauder Mohuddeen's family, and numerous fault lines within the Penang Muslim society.

6. Municipal Reform

The "sanitary revolution"—the systematic installation of clean piped water and sewerage systems—arrived in Penang in the wake of the Municipal Ordinance of 1887 which, along with subsequent conservancy regulations, gave the Municipal Commission new powers to regulate and reshape George Town in the interest of public health. In terms of urban improvements, George Town had advanced by leaps and bounds in the previous 20 years, so much so that the contrast with the deplorable conditions of the Kapitan Kling Mosque estate had become glaringly obvious. The official perception was that 'the meanest class of buildings within Municipal limits is to be found generally upon so-called "wakaf" property' [Sennet

1932: 5]. The municipal president reasoned that if titles were granted for the land, in view of the strategic location of much of the waqf in the centre of town, "a much better class of house would be built, which, of course, would mean greater municipal revenue." The key to his strategy would be an assertion of new modes of control, using waqf reform as the engine of urban renewal [Khoo 2002].

Observing the judicial dilemmas and backlog in dealing effectively with the issue, the emerging powers of the executive arm of colonial government put itself to solving the waqf question, initiating a commission of inquiry into Muslim trusts.

Determined to reorder urban space and improve the town, these resourceful public servants went to great lengths to justify the colonial state's intervention into religious matters and legitimise their appropriation of waqf resources to carry out all sorts of "good works." In the process, they reinterpreted Islamic law and radically redefined the role of the colonial state in the affairs of its Muslim subjects.

In a rapidly changing society, the spheres of traditional patronage had shrunk. The enquirers found a divided community and a lack of consensus over religious-social leadership, confirming the vacuum in traditional authority. The commissioners saw the opportunity to reclaim parts of the East India Company endowment which were no longer used for "religious purposes." Perceiving the potential of waqf to be used for public interest and preempting further failures of waqf which would end in a judgement for the distribution to the next of kin, they recommended an ordinance to constitute a secular board with powers to administer religious trusts. This central board would take control of all distressed waqfs. The "General Report upon the Moslem Trusts and Foundations in Penang" was completed on November 29, 1903 and laid before the Legislative Council in 1904. W. T. Taylor, a senior government administrator, recommended that the formation of the Board should be based on the "Delegates of Ewkaf," formed in Cyprus, which consisted of a board of two persons: one senior officer of the civil service and one representative of the Muslims. Comparing the situation in Penang with a similar case in British Ceylon, where he had also served, Taylor was of the opinion that

> The case for interference is stronger than in the Buddhist temporalities in Ceylon because the Capitan Kling Mosque property at any rate is the result of a grant by the British government. [CO 273/299]

The final draft of Ordinance No. XVII of 1905 (an Ordinance "For the Better Administration of Mohammedan and Hindu Religious and Charitable Endowments") was passed at a sitting of the Legislative Council chaired by the Governor Sir John Anderson on September 8, 1905. Under its provisions (effective from January 1, 1906) the Mohammedan and Hindu Endowments Board was constituted. As already noted, many of the endowments taken over by the Board had originally been established by various segments of the Indian community. In the

ordinance, the word "endowment" was defined as

> any endowment in land or money heretofore given or hereafter to be given for the support of any Mohammedan Mosque or Hindu Temple or Mohammedan or Hindu Shrine or School or other Mohammedan or Hindu pious religious charitable or beneficial purpose. [Ordinance No. XVII of 1905]

Here it was further clarified that "Hindu" included Sikhs and any variety of religion professed by the "natives" of India except for Christians, Buddhists, and Muslims. Again, the "Indian" nature of the endowment was emphasised, pertaining only to the "British" and "Indian" subjects of the Straits Settlements so as to avoid any suggestion that Malay religion and custom might be interfered with.

The ordinance set out in clear terms the powers to be vested in the Board. It consisted of three or more commissioners, "one of whom at least shall be an officer of the Government." The Board in turn appointed and controlled a management committee for each endowment, made up of Muslim members as well as at least one government officer who would also be a commissioner of the Board.

The extension of the secular colonial state's jurisdiction to include the "mosque lands" was of paramount importance. This delicate issue was tackled by colonial officers who understood how to put in practice an administrative "separation of church and state"—always in a manner which was respectful of the Islamic religion, but incrementally limiting the autonomy of Muslim self-governance until it became circumscribed to the private family sphere.

With the passing of the "Mohammedan and Hindu Religious Endowments" ordinance, a secular authority was established to administer Muslim charitable land and property in Penang. Similar reforms were carried out in the other two Straits Settlements, Malacca and Singapore, but the Penang Endowments Board remained by far the most successful, running 10 endowments, both mosques and temples, in 1912 [*The Singapore Free Press*, May 18, 1912: 6]. The Kapitan Kling Mosque waqf was by far the single most important resource available to the local authorities for jumpstarting the broader process of urban renewal. The Board rented, rebuilt, and repaired the various properties under its control. From 1905 to 1916, within little more than 10 years, the estate's monthly rental income had increased fivefold [*The Straits Times*, October 13, 1916].

As an instrument of the colonial government, the role of the Board in managing the public estates of the Muslim community can hardly be overstated. The Board considered itself a model of financial integrity, operating with a large measure of efficiency and accountability. The government provided the part-time services of one Malayan civil service officer as secretary of the Board and one member of the general clerical services as assistant secretary. The Board itself employed two clerks, a rent collector, and a part-time building inspector. It also

paid all running expenses. Apart from this, its income was devoted directly "to the maintenance of the property, to the payment of religious clerics, to charitable and educational purposes and generally to carry out the objects of the various trusts" [Sennet 1932: 1]. The efficient running of the Board, the improved fiscal and property management, and the higher salaries it paid out to religious clerics helped to legitimise its position.

The colonial government came to be seen as the patron of its Muslim subjects, providing Arabic schools, roads, water supply, social housing, and scholarships, superseding the original testators' reputations as benefactors of the Muslim community. The preference under Islamic law for descendants to be appointed *mutawalli* of waqf lands and for the rights of indigent family members to be among the first beneficiaries of waqf charity was often ignored. While Muslim benefaction was usually expressed in the distribution of alms, the Board preferred to accumulate its funds to be spent on longer-term goals such as new construction projects and certain approved charities. In place of *kenduri* to private testators and saints, public feasts were now carried out "under the auspices of the Board" during major "religious" festivals and on extraordinary occasions such as British imperial celebrations [Khoo 2014: 268–269].

The Board wielded enormous powers and, in its management of waqf properties, was able to rise above the local and familial entanglements of the Tamil Muslim community. The Board was in a position to provide both honorary and salaried positions to Muslims, favouring those who were English-speaking or Malay-speaking and pro-British, while side-lining the *mutawalli* who could not fit into the new scheme. The traditional leadership of the Muslim community was gradually weakened, compromised or simply superseded.

7. From Social Patronage to Political Patronage and Public Delivery of Goods

The rise of the Tamil and Malay press in Penang was a reflection of the community's general long-term prosperity and expansion of the public sphere, achieved in part through the accumulation of waqf over the decades. The print revolution ushered in a new kind of religious, cultural, and political awareness among the wider community of believers (*ummah*) across the Indian Ocean and throughout the Muslim world. Journalists trained in the Middle East, India, and the Dutch East Indies had been exposed to pan-Islamic ideas that advocated the unity of the Muslim *ummah*, under the symbolic leadership of the Ottoman Caliphate. Through an active Tamil press, the Straits Settlements Muslims were also exposed to anti-colonial propaganda from nationalist movements in India [Khoo 2014: 319–336].

The majority of the diaspora population, who were here primarily for economic motives, remained conservative. Among the Muslim communities in India

and also in the Straits Settlements, anxieties arose about the British position in the Balkans and finally loyalties were tested when Turkey entered the war against the Allied forces during the First World War. The international Ghadar Party successfully instigated the 5th Light Infantry regiment, largely comprising Rajput Muslims and Pathans, to open rebellion against the British, resulting in the Singapore Mutiny of 1915 [Mohammad Redzuan Othman 1995; Kuwajima 1988; Miller and Harper 1984]. But in Penang, the Endowments Board which had been actively engaging with the local Muslim community in a process of urban renewal, managed to contain or diffuse any anti-British feelings.

With increased revenues from rental properties, the Endowments Board had invested in the expansion of the mosque. The Kapitan Kling Mosque went through several stages of renovation and enlargement and was refashioned into a Moghul revival monument from around 1910 to 1916. This phase of transformation was completed with the erection of the minaret, which was the tallest structure in George Town during its time. The new architecture of the mosque and minaret befitted the image of Britain as a protector of Muslim subjects in the empire. During this period, full opportunity was taken for British imperial propaganda for the hearts and minds of its Muslim subjects [Khoo 2014: 341–343].

In conclusion, just as the Tamil Muslim community in the past realigned the institution of waqf with its own traditional leadership and customs, the colonial government also realigned the objectives of waqf with its own imperial patronage and the project of modernisation.

The takeover of the Kapitan Kling Mosque lands and other waqf by the colonial state could be compared with the more overt waqf "nationalisation" in other countries at different periods. By divorcing religious from non-religious purposes, charitable and non-charitable objectives, public benefit and private family benefit, the role of the testator's family or traditional *mutawalli* was largely or completely undermined. On the other hand, by circumscribing Islamic law and taking over mosques, public amenities, the regulation of public holidays, the funding of Islamic schools, feasts, welfare, and alms-giving, the colonial government and its appointees would effectively control a large part of the Muslim public sphere.

Though presented as a legal, supervisory, and administrative exercise to create "order," the establishment of the Endowments Board had deep political implications. Colonial intervention changed the terms of Muslim governance and patronage, and directly influenced the transition between the old and new leadership of the local communities—and between tradition and modernity.

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