

WAQF MANAGEMENT AND ADMINISTRATION IN MALAYSIA: ITS IMPLEMENTATION FROM THE PERSPECTIVE OF ISLAMIC LAW

Mohd Afendi Mat Rani

*Accounting Research Institute &
Centre of Islamic Thoughts and Understanding
Universiti Teknologi MARA, Malaysia*

Asmah Abdul Aziz

*Accounting Research Institute & Faculty of Accountancy
Universiti Teknologi MARA, Malaysia*

Abstract

Endowment is one of the Islamic institutions that has existed since the time of Prophet Muhammad SAW. It serves as a catalyst for economic growth and development of the Muslims. Endowment is not only a ritual matter to Allah SWT but is also considered as an economic institution which benefits the Muslims. The management and administration of the waqf property is an important issue to be resolved in Malaysia. This article includes the discussion of the powers of a trustee of an endowment property in Malaysia. A number of legal obstacles and constraints that impeded efforts to develop waqf property in Malaysia are identified. Thus, the implementation of a waqf management must be aligned with the waqf legislation so that there is a continuity of the reward to the waqf donor through good governance and systematic procedures. The trustee who manages the waqf property is responsible to look after, preserve and develop the land that is donated in order to collect income which can be distributed to the recipient. Although the Religious Council is appointed as the sole trustee on the management of waqf in Malaysia, nevertheless, from the practical aspect, these assets are still subjected to various acts made by Parliament.

Keywords: *waqf, property, management, religious council, Malaysia*

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Introduction

The Federal Constitution of Malaysia clearly states that the King is the ultimate authority in Islam for every state that is headed by the King or Sultan. In states within the Federation that do not have a King or Sultan such as Sabah, Sarawak, Malacca and Penang, the Chief authority in Islamic matters is the *Yang di Pertuan* of the State (Wu, 1991, p.90). The administration of Islamic legal matters in Malaysia is upheld by the Federal Constitution. The Civil Law that is enacted at the state level should not contradict the Federal Constitution (Federal Constitution, Article 75).

However, matters relating to the Administrative Affairs of Islam or Islamic law are placed under the jurisdiction of the State Government. Only the Federal Territory is exempted from this ruling. The legislation list or scope of the power to legislate and administer is stated in Schedule 9, List 2 of the State List. In this case, the state government has the jurisdiction to establish an Islamic council and religious department in the respective states. The implication from this is that the administration of affairs related to Islamic religion is governed separately in every state and is not standardised whether in legislation, management and implementation among the states in Malaysia.

The State list of the Constitution mentions among others Islam and the definition of *waqf* and the rule on Charitable Trust and Religious Charity, Trustee appointment and corporation for persons related to religious grant and Charity, Trust Foundation, Charity and Charity Foundation. Yet matters on *waqf* will usually be brought to the Civil Court, particularly if the said land is not registered in the name of the State Religious Council or involves non-Muslims (Ahmad, 1999, p.29).

Waqf Wealth Management from the Perspective of Islamic Law

Islamic law prescribes that the property that is donated must be managed and administered by the appropriate parties responsible to supervise *waqf* property benefits so that the benefits can be channeled to parties that are the rightful recipients (Badran, Badran Abu al-'Aynayn, 1986, p.687). In Islam someone who is appointed to manage a *waqf* property as a trustee is known as an "*al-Mutawalli*" (Al-Baghdadi, Abu Muhammad Ghanim b. Muhammad, 1999, p.687). *Al-Mutawalli* can be a person or organisation which possesses the capacity, trust and ability to implement what is intended by a *wakaf* donor (*pewakaf*) ('Ala' al-Din Muhammad, p.584).

The major tasks of a trustee are to look after, preserve and develop the land that is donated, and collect *waqf* income and distribute the income to the beneficiary that deserves it as well as preserve the land from any loss and damage, as intended by the donor (Al Nawawi, Abu Zakariyya, 2000, p.411).

Theologians state that the *wakaf* donor has a wide jurisdiction to appoint anyone to administer and manage the *waqf* property. A *waqf* donor could appoint himself as trustee or hand over this trust to people who receive *waqf*, or to other than both of them (Mohd Zain, 1998, p.190). If the *waqf* donor sets certain conditions on those appointed, the trustee should implement the conditions and observe all the decisions taken by the *waqf* donor. On the other hand, if the *waqf* donor does not specify any party to deal with the *waqf* property, the judge of the *Syariah* court (a Muslim court) will have to determine the said party as mentioned from *Maliki* and *Syafi'i* sects Islamic scholars' view. Most *fatwa* mention that the authority to manage the *waqf* property is in the hands of the judge of the *Syariah* Court.

According to the *Hanbali's* sect's view (*waqf* for general purpose or specific purpose), if a *waqf* donor has determined specifically the parties to receive the *waqf* and everyone is assigned the portion, then each *waqf* recipient is the trustee to the land that is donated to him. In contrast, if a general *waqf* land does not determine the *waqf* recipient, such as the *waqf* for a mosque, or the poor, then the Judge or his assistant could be the inspector or trustee of the property (Al Nawawi, Abu Zakariyya Yahya, 2000, p.410). There is also *Fuqaha Hanbali's* view that the property control authority is subjected to the one who accepts the *waqf*, even if it is not conditioned (Ibn Qudamah, 1992, p.32). However, according to the *Hanafi's* sect, the *waqf* donor is the party that is answerable to any matters related to the donated property, even when there are existing conditions. The accountability is transferred to the recipient of the property. Otherwise, the judge of the *Syariah* Court will take over that task (Al-Sarakhsi, Sham al-Din, 1978, p.44). Referring to the *waqf* concept, the asset ownership of donated asset remains with the *waqf* donor. While another view says that parties which receive *waqf* will become the administrator and be fully responsible of the property, because something that is donated no longer belongs to the *waqf* donor. So the power to administer the property will depend on the recipient or the administrator (*qadi*).

Waqf Wealth Management in Malaysia

In Malaysia, a pertinent point relating to the *waqf* property is one of the trust property's aspects that are listed under Schedule Nine, List II, under the State List. This pertinent point is appropriated in the respective state enactment. All *waqf* land, whether movable property or not, is governed and run by the State Religious Council or *Majlis Agama Islam Negeri* (MAIN) (Baharuddin, 1998, pp.94-98). Registered *waqf* lands are under the authority of MAIN as the sole trustee of the *waqf* property.

Although the task of estate administration of the *waqf* property is given to MAIN as the Sole Trustee, nonetheless, its administration is managed by a special committee that will manage the *waqf* property (Mohd Daud, 1999, p.7). The *waqf* allocation in the state enactment is not all encompassing. It focuses more on the administration aspect and simple procedures of *waqf* donation. The substantive aspects are not emphasised except for a number of states that are allocated a specific enactment on the *waqf* property, such as the states of Selangor, Negeri Sembilan and Malacca (Siti Mashitoh, 2006, p.3).

To improve the administration machinery of the *waqf* property, the Federal Government has constituted a *Waqf, Zakat* and Pilgrimage Department (JWZH) as proclaimed by the former Prime Minister YAB Dato' Seri Hj Abdullah Ahmad Badawi on the 27th of March 2004. The objectives of establishing the JWZH are to monitor and coordinate the management of the *Waqf, Zakat* and Pilgrimage in Malaysia. It is also to increase the effectiveness and efficiency in its service delivery. JWZH is not meant to take over the role and task of MAIN, the State Islamic Religious Department or other departments (Mohd Afandi, 2008, p.3).

Before JWZH was established, the government through JAKIM in the Prime Minister's Department, had appointed one Property Development Coordinating Committee of *Waqf (Jawatankuasa Penyelaras Pembangunan Harta Wakaf)* at the National Level to aid MAIN to develop the *waqf* property. It involves officials from private agencies and the government who have expertise and experience in the respective field.

Most state enactments do not allocate specifically how to administer the *waqf* property. Usually the power of officials that run the *waqf* property is limited because it is placed under *Baitulmal*, except for several states such as Johor, Selangor, Malacca and Negeri Sembilan. Other states have not created the *waqf* allocation specifically. In Selangor, after the existence of the *Waqf* enactment, all *waqf* business is governed and managed by the *waqf* management committee which was established by the religious council. In Negeri Sembilan such a committee is known as the *Waqf* Management Consultant panel. The *Waqf* Management committee not only manages and administers the *waqf* property, but it also administers the *Waqf* fund so that it fulfils the requirements of the Islamic law (Siti Zalikhah, 2008, pp.62-63).

Islamic Religious Council as the Sole Trustee

Islamic religious councils constitute through the administration enactment of Islamic law that is approved by the State Legislative Assembly in every state. Referring to the enactment of MAIN, it is the Sole Trustee to all the *waqf* properties, whether General or Special *Waqf*, and to all General Vow and types of trust which became a Charitable Trust in order to help the Muslims' interests according to the Islamic law. This allocation has been clearly mentioned, for example in the Administration Enactment of Terengganu Islamic Religious Affairs, Section 143. as follows:

“Whatever the allocation oppositional in any instrument or declaration which was created, controlled or related to the matter, the Council should become the only “guard” to all waqf, whether General waqf or Special Waqf, and all general vow and all trust from all types that were created for charitable trust to help , progress or for Islamic benefit of people according to Syara' Law and that located in this state or if people who made the settlement of property or person other than that created trust, waqf or general vow and domiciled in this state, till all related property by him where ever the property is located”

While Section 144(1) of the Administration Enactment of Terengganu states the following:

“ ... all property that, in that is fixed, subject to section 143 should, if lies within this state, are vested in the council”.

The Council's appointment as a sole trustee to this *waqf* property is to ensure that the *waqf* property is well administered, efficient and is able to generate good results for the beneficiary or for welfare purposes; whether predestined or unspecified by the *waqf* donor. This is important as to prevent various problems which might arise through the appointment of private trustees made by the *waqf* donor. These problems include the attitude of the private trustee who does not trust, or the interference of the heir resulting in the loss of the *waqf* property and also the deviation from the original purpose of *waqf* and the contradiction with the principles of law (Siti Mashitoh, 2005, p.3).

From the legal aspect, MAIN deserves to make an agreement, buy, take, hold and own property whether movable property or not transferable to transferable; shift and develop all properties that belong to MAIN; and follow any available rules according to the Islamic law. This rule empowers MAIN to implement and develop the *waqf* property.

Referring to the powers that are allocated to MAIN, it is entitled to carry out all development activities towards economic progress that are necessary and to which all the benefits from that *waqf* property can be distributed. MAIN can also be involved in developing any activity, whether undertaken by other bodies, or people, or either under the management or half management or by a private organisation by giving help to those spotted by MAIN eligible to carry out all the activities. To increase income, MAIN is entitled to carry out activities by collaborating with the different bodies whether from the government, corporation or private sectors.

Legislation Obstacle and Constraint

Although the Council is appointed as the sole trustee of the management of *waqf* in Malaysia, however, from the practical aspect, these assets are still subjected to the act which is made by the Parliament (Suwaid, 1994, p.83). Constitutional Amendment, Section 121 (1A), and the provisions relating to *waqf* have been codified in the Administrative Law State Islamic Religion; however, there are a few different statutes which are related and can be referred to, especially the National Land Code Act 1965 (Act 56) and a few other acts. Among them are the Local Government Act 1976 (Act 171), Trustee Act 1949 and Land Acquisition Act 1960 (Act 486). Any dispute on the *waqf* property is still handled in the Civil High Court and Court of Appeal, although the *Syariah* Court has the power in hearing related cases that involve Muslims.

The National Land Code Act 1965 did not set aside the *waqf* property specifically as compared to the allocation made for the trust as stated in Sections 344 and 345

of the Trustee Act 1949. As such, all the titles of the *waqf* land do not get any endorsement with the title of “*waqf*”. (Mashitoh, 2006, p 112). The implication is the land status of *waqf* is still vague and the land may be converted for other purposes. Likewise, some *waqf* land is still under lease (Leasehold) due to the shortage of land in this country. Apart from that, there are some other provisions which are constraints to the Council such as Section 196 (1), Section 136 (1) for Terengganu and others. The same problem also exists in the Local Government Act 1976, where the *waqf* properties are still taxable like private land.

In Malaysia many *waqf* land are involved with land acquisition by the government for public interest and economic progress of the country. This phenomenon allegedly occurs almost in every state in Malaysia. Because of the civil land law (Land Acquisition Act 1960, Section.3) that allows land acquisition based on public interest and economic development of the country, MAIN as the Sole Trustee of *waqf* property is forced to fulfill the government’s requirement. The National land law that is under the National land code 1965 and Land Acquisition Act 1960 do not distinguish the classification of *waqf* land and land owned by the individual. Hence, APT 1960 provides different meanings of public purpose and economic development of the country; it brings about long term effect on the *waqf* property development in Malaysia. Land acquisition may be made by anyone who is qualified to apply and who can justify economic development. Apart from that, the objective of land acquisition or for ‘public interest’ is for the government to decide. In addition, whatever decision made by the State Authority shall not be questioned by any party, the land owner, or any court. (Mohd Afandi, 2008, p.334).

Conclusion

Waqf practices are included in the aspect of ‘*Ubudiyyah*’ that is, targeted for linking humans with Allah and humans with other humans. Therefore, in order to achieve this objective, every aspect of implementation should fulfill all the conditions and principles that are clearly delineated in the Islamic law. Furthermore, *fiqh* scholars provide the same attention as other religious requirements in Islam. The *waqf* property can act as a catalyst to strengthen the Muslim society in developing the economy and wealth of the nation especially if the *waqf* property is properly and systematically administered.

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