



COMPARATIVE ANALYSIS OF THE STATUTORY DUTIES OF WAQF MANAGERS UNDER THE STATE WAQF ENACTMENT AND THE DUTIES OF TRUSTEES UNDER THE TRUSTEE ACT 1949

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INTRODUCTION

The paper seeks to propose improvements in terms of the statutory duties of the Waqf Managers in Malaysia (SIRC and appointed third parties) under the Waqf Enactments through a comparative review of the Trustee Act 1949. Specific duties such as the duty to invest, duty to report and duty to monitor as provided under the Trustee Act 1949 were critically analysed to determine whether it could be replicated or integrated in the current Waqf laws. It was found that the Waqf enactments can indeed be improved and insights from Trustee Act 1949 would serve as valuable comprehensions on how the provisions can be enhanced as part of the effort in perfecting the Waqf laws in Malaysia.

METHODOLOGY

Comparative analysis of the statutory duties of Waqf managers under the **State Waqf Enactment*** and the duties of trustees under the **Trustee Act 1949**

*Wakaf (State of **Selangor**) Enactment 2015 and the Wakaf (State of **Terengganu**) Enactment 2016

Comparative legal analysis:

- 1) **Appointment and removal**
- 2) **Beneficiaries & Distribution**
- 3) **Waqf property management**
- 4) **Investment management**
- 5) **Account & Audit**

Patrick Glenn states that one of the aims of comparative law is to contribute to one's own legal system (understanding it better, including the resistance of its traditions, improving it, using it as a means for interpreting the constitution)

LITERATURE REVIEW

LITERATURE	REVIEW
<p>Kader, Sharifah Zubaidah Syed, Nor Asiah Mohamad, and Zuraidah Ali. "Examining the Fiduciary Duties of the Waqf Trustee Benchmarking with the Law of Trusts and Islam." <i>Shariah Law Report Articles 1</i> (2018).</p>	<p>Authors argue that the relationship between the donor, waqf trustee (nazir and mutawalli) and the beneficiaries creates duties that are fiduciary in nature and that Waqf and trust may learn from each other to enhance the role of both trustees and mutawallis. Article examines the fiduciary element in the role of Waqf trustees and those delegated with power to manage Waqf properties.</p>
<p>Sabit, Mohammad Tahir. "A Proposal for a New Comprehensive Waqf Law in Malaysia." In <i>Waqf Laws and Management</i>, edited by Syed Khalid Rashid. Gombak: IIUM Press, 2017.</p>	<p>The author proposed for a new comprehensive waqf law in Malaysia and amongst the proposals are on; the appointment, removal and disqualification of managers and individual trustees, duties and liabilities of Nazhirs, Waqf property management, investment management, distribution of income on beneficiaries and accounts and audits.</p>
<p>Hassan, Siti Asishah, and Rusnadewi Abdul Rashid. "Towards the Improvement of the Rights and Duties of Mutawalli and Nazir in the Management and Administration of Waqf Assets." In <i>9th ISDEV International Islamic Development Management Conference</i>, 2015.</p>	<p>Authors outlined factors that contributed to waqf mismanagement such as legislative lacunae, misapplication or misuse of waqf assets, lack of honesty and integrity, lack of skills and lack of awareness of waqf among the Muslims society. Paper attempts to focus on the roles and responsibilities of mutawalli and nazir in the administration and management of waqf assets in Malaysia.</p>

State Waqf Enactments

- 6 states which has its own Waqf enactments
- The Waqf enactments are more comprehensive in terms of the power and duties of the SIRC as the sole trustee of Waqf in the state
- Provisions on:
 - Power of SIRC
 - Appointment of Registrar of Wakaf
 - Formation of Waqf
 - Mawquf
 - Mawquf 'Alaih
 - Wakaf Fund
 - General provisions

Trustee Act 1949

- Principal statute which relates to trustees in Malaysia
- “The powers conferred by this Act on trustees are in addition to the powers conferred by the instrument, if any, creating the trust, but those powers, unless otherwise stated apply if and so far only as a contrary intention is not expressed in the trust instrument, if any, creating the trust, and have effect subject to the terms of that instrument.”
- Provisions on:
 - Management of investments
 - General powers of trustees
 - Appointment and discharge of trustees
 - Powers of the Court

COMPARATIVE ANALYSIS



APPOINTMENT AND REMOVAL OF TRUSTEES

Waqf Enactments	Trustee Act 1949	Analysis
<p><u>Appointment</u></p> <ul style="list-style-type: none"> • SIRC sole trustee • Given the capacity to appoint/declare any person to be the <i>Nazhirs</i> in managing Waqf on their behalf • exercise such duties subject to the control and direction of the Majlis and shall inform the Majlis as to all actions and matters done • The <i>Waqifs</i> themselves are given limited autonomy to appoint their own administrator/manager to manage Waqf created by them <p><u>Removal</u></p> <ul style="list-style-type: none"> • SIRC cannot be removed as trustee • Appointed managers can be removed by the SIRCs. • “They may also withdraw the appointment of Waqf administrators or managers if the <u>Majlis is of the opinion that such action is appropriate</u>” 	<p><u>Appointment</u></p> <p>Two ways a trustee can be appointed: Through trust deed and through court’s appointment</p> <p>Number of trustee limited to four (to avoid potential mismanagement)</p> <p><u>Removal/Substitution</u></p> <p>Act outlines circumstances trustee can be replaced.</p> <p>Removal may occur in 3 different ways:</p> <ol style="list-style-type: none"> 1) Through express clause in deed 2) Upon completion of task/expiry of period 3) Court may remove if; trustee remains out of country more than 12 months, trustee refuses/unfit to act/appointed trustee is a minor. 	<p>Total emulation not appropriate due to different administrative framework.</p> <ul style="list-style-type: none"> • SIRC is sole trustee • However, SIRC is allowed to appoint 3rd parties to manage Waqf • Court does not have the power to appoint and remove trustee • For trusts, absolute power is given to testator to appoint trustee through the trust deed. TA to supplement the trust deed. • Possible adoption: provisions on removal of appointed managers. Circumstances where managers can be removed by SIRC: <ul style="list-style-type: none"> - Insolvency - Involved in criminal activities - Waqf manager leaves country - Waqf manager refuses to act

BENEFICIARIES/ DUTY TO DISTRIBUTE

Waqf Enactments

Both the Selangor and Terengganu Waqf Enactment **regulates on matters regarding “mawquf ‘alaih,”** meaning a person who is eligible to receive any benefit, interest or profit from a “mawquf,” or property given by way of Waqf.

Enactment also authorises their SIRC to be the recipient of benefits, interests or profits from Waqf properties within or outside their respective states

In situations where the “mawquf ‘alaih,” cannot be located or is non-existent, enactment requires the SIRC to **obtain decision of the state Fatwa Committee** before any benefit, interest or profit of the mawquf may be distributed to the nominated mawquf ‘alaih.

Trustee Act 1949

Duty to distribute is one of the fiduciary duties of the trustee and failure to do so amounts to a breach. Another fiduciary duty is to maintain equality among the beneficiaries.

The Trustee Act 1949 provides for the making of an advertisement in order to protect a trustee from being liable for breach of trust for their failure to distribute.

- Trustee may advertise in the Gazette and other notices including their claim and he should be given 2 months to send their particulars.

Analysis

Adoption of the provision under Trustee Act 1949 in relation to advertisement for purposes of distribution is not relevant to Waqf as Waqf created in Malaysia after the promulgation of the AILE and Waqf enactments are limited to Waqf Am (waqf made for purposes of public benefit) (Waqf Khas is allowed however subject to approval from sultan), therefore SIRC can distribute the benefit of the Waqf to any section of the public or public as a whole and not specific individuals/class or persons.

WAQF PROPERTY MANAGEMENT

Waqf Enactments	Trustee Act 1949	Analysis
<p>Both the Selangor and Terengganu Enactment regulates on the management of Waqf properties. Duties include, the registration, monitoring of the properties, investment and duty to publish a gazette of the list of Waqf properties are also contained in the enactments.</p> <p>As the sole trustee of all Waqf properties in the state, the SIRC possesses dominative power over the Waqf property (subject to order of the Sultan).</p> <p>Duty of the appointed Waqf manager is not prescribed in the Enactments.</p>	<p>In terms of management of property, the trustee has a fiduciary duty to preserve the trust property in accordance with the terms of the express trust imposed on it which the trustee had accepted. They also have the fiduciary duty to not sell the trust property and make secret profits out of the trust property.</p> <p>In exercising their power of sale, section 16 of the Trustee Act deals with the power of trustees to sell by auction while section 17 deals with power of trustee to sell subject to depreciatory conditions.</p>	<p>The Trustee Act does not expressly mention on the fiduciary duty of the trustee when it comes to management of trust property. These fiduciary duties however are well established under case law and remedies in cases of breach of fiduciary duty is established. The fiduciary duties (of SIRCs) however has yet to be established through case laws which warrants the mawquf alayh to claim for equitable remedies. Even so, as Waqf falls under the jurisdiction of the Shariah Court, equitable remedies and its principles may not be applicable and granted to the parties.</p> <p>Therefore, there is a need to include provisions on the liabilities of the SIRC officers as well as appointed Waqf managers.</p>

INVESTMENT MANAGEMENT

Waqf Enactments	Trustee Act 1949	Analysis
<p>As opposed to the Selangor Waqf Enactment, the Terengganu Waqf enactment expressly allows for the utilization of monies in the Wakaf Fund to be used for investment in Waqf schemes.</p> <p>It is also outlines one of the duty of the Waqf Management Committee which is to advice MAIDAM on the investment of Waqf funds.</p> <p>The types of investment permitted however is not stipulated.</p>	<p>One of the fiduciary duty of the trustee is duty to invest. It is considered a breach of trust to leave trust funds lying idle without it being invested. Trustee is required to act honestly and must take into account all precautions which an ordinary businessman would take in managing similar affairs in business in performing his duties.</p> <p>A whole part in the Trustee dedicated to regulating trustees' duty to invest trust funds. (Sections 4 to 15 and 68 of the Trustee Act 1949)</p> <p>Example:</p> <p>Section 4 outlines what are 'authorized investments'</p> <p>Section 6: Duty of trustee in choosing investment</p> <p>Section 13: Liability of loss by reason of improper investment</p>	<p>One of the duties of the Nazir is to enhance the value and maximise the income generation of the Waqf property</p> <p>In regard to Waqf funds, special care must be placed to ensure the principal sum does not deteriorate and such investments are permissible in Islam. Therefore, the nature of investments of Waqf funds and conventional trust funds differ and therefore 100% replication cannot be adopted.</p> <p>At present, waqf schemes have been introduced by many financial institutions such as banks and cooperative societies and are governed by various other laws with clear provisions on fiduciary duties and penalties (Financial Services Act 2013). If the SIRC however was introduce any Waqf schemes without appointing waqf manager or trustee, there is no existing regulatory framework that would apply to them.</p>

ACCOUNT & AUDIT

Waqf Enactments

Both Selangor and Terengganu require the SIRC's to prepare, issue and publish in the Gazette a list as to all property, investment and asset vested in the Majlis in respect of any waqf created under their authorities from time to time.

The Nazhirs (Waqf Corporation & Management Committee) are also required to keep proper accounts and records of every transaction made in regard to the Waqf Fund and prepare a statement of account for each financial year. These statements of accounts need to be audited by qualified auditors at the end of each financial year and submitted to the Majlis for scrutiny.

Trustee Act 1949

One of the fiduciary duty of the trustee is to keep accounts and be constantly ready to produce them for the beneficiaries.

Section 27(3) and (4) of the Trustee Act 1949 empowers the trustee to call for valuation of assets and auditing of the trust account. The trustee needs to constantly keep the account in check and ready to produce them when being requested by the beneficiaries.

Analysis

Although the Waqf enactments requires for the SIRC's and the appointed Waqf managers to keep proper accounts and records of every transaction made in regard to the Waqf Fund and prepare a statement of account for each financial year and that these statements of accounts need to be audited by qualified auditors at the end of each financial year and submitted to the Majlis, it does not require the accounts to be made available to the beneficiaries.

To increase transparency and accountability to the mawquf alayh, it is recommended that a provision similar to Section 27 is introduced.

CONCLUSION

Based on the comparative analysis between the Waqf enactments and Trustee Act 1949, it is observed that the statutory provisions on the duties of trustees under the TA cannot be completely emulated due to the differences of administrative structure as well as nature of Waqf and trust. However, it is found that certain provisions on the duties of Waqf managers in the Waqf enactment can indeed be improved to ensure the interest of the Waqf and Mawquf alayh can be preserved.