

CHAPTER ACCEPTED FOR PUBLICATION IN *HARMONISATION OF SHARI'AH AND LAWS: ISSUES AND CHALLENGES*

(FINAL DRAFT)

WHETHER WAQF AND ENDOWMENT CAN RIDE THE SAME LEGAL VEHICLE IN MALAYSIA?

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ABSTRACT

The concepts of waqf and endowment are used for fund-raising by charitable organisations in Malaysia. This chapter explores the concepts of waqf and endowment and their legal framework to ascertain whether both can co-exist in one legal vehicle. To this end, the chapter examines the various legal vehicles available under Malaysian law that can support the two concepts. It then looks into the legal possibility of implementing both waqf and endowment within one legal vehicle and the challenges arising. The problem relates to the role of the State Islamic Religious Council (SIRC) as sole trustee of waqf, in circumstances where the vehicle chosen is outside of the legal framework provided under the state enactment relating to waqf. The method used is legal doctrinal and comparative legal methodology. This study has found that there are several feasible legal vehicles suitable to undertake waqf and endowment endeavours nonetheless due to the automatic vesting of all waqf properties situated in a state on the SIRC, such vehicles would still require the authorisation of the respective SIRC before it may operate and manage waqf. Recommendations will include reform of the law relating to incorporated trustees as well as suggestions for recognition of a legal vehicle that is able to incorporate both, waqf and endowments.

Keywords: waqf, endowment, legal framework, legal vehicle

INTRODUCTION

Waqf and endowment are concepts used for charity and fund-raising. In Malaysia, both operate under separate legal frameworks. Etymologically, the two phrases do not carry the same meaning. Waqf originates from and operates under Islamic law while Endowment is from civil law, hence the opportunity arises to explore harmonisation of these two concepts through a legal vehicle.

There is a general lack of clarity for the terms ‘waqf’ and ‘endowment.’ For example, is endowment a type of Waqf or Waqf a type of endowment? Gaudiosi¹ and Makdisi refer to waqf as a charitable trust.² While it is found that Western scholars refer to Waqf as a waqf endowment,³ Islamic endowment, Islamic trust, Muslim endowment, religious endowment, or Mohammedan endowment, to mention a few, further scrutiny of both terms under Malaysian law may be inconsistent with these and indicate that waqf and endowment are not the same. In some cases, the old laws governing their day-to-day management clearly states that their organisations can collect or manage endowment. For example, a three-decade law governing the local authority provides for grants under an endowment as forming part of the revenue to the local authority.⁴ This has prompted a question whether such endowment is inclusive of Waqf or otherwise? It is generally acknowledged that there are many old laws which are the legacy of the secular and liberal stand of the colonials. As such, a mere literal interpretation excluding the culture, religion or values of the locals is a missed opportunity.

This then leads to another point of discussion in regards to the legal framework. What law is applicable to one and the other? Given that Malaysia is a country where several ethnicities with a variety of religious backgrounds live in harmony, our discussion in this chapter explores the unique Malaysian legal framework. It is with these considerations that the chapter explores the

¹ Monica M. Gaudiosi *Influence of the Islamic Law of WAQF on the Development of the Trust in England: The Case of Merton College*, 136 U. Pa. L. Rev. 1231 (1988).

Available at: https://scholarship.law.upenn.edu/penn_law_review/vol136/iss4/6

² Makdisi, G, *The rise of colleges: Institution of Learning in Islam and the West*, Edinburgh University Press, 1988, https://www.academia.edu/35349502/George_Makdisi_The_Rise_Of_Colleges

³ See Anderson, JN (1951); “The Religious Element in Waqf Endowment” *Journal of the Royal Central Asian Society* Vol. 38 No. 4, pp. 292-299.

⁴ See section 39 of the Local Government Act 1976 (Act 171).

various legal vehicles available under Malaysian law that can support the two concepts. By ‘legal vehicle’ is meant the body tasked with the responsibility to carry out the intentions of the donor under an endowment and the donor (*waqif*) under a waqf, be it a statutory corporation, a company, an incorporated trustee, a financial institution, a cooperative and other forms of legal entities recognised by Malaysian law. It will conclude by identifying some of the legal vehicles that enable waqf and endowment to operate and challenges, if any.

RESEARCH METHODOLOGY

The method used is legal doctrinal and comparative legal methodology. Relevant literature are analysed to gauge understanding on the concept of Waqf and Endowment by referring to various documents such as statutes and other secondary sources explaining the similarities and differences of both concepts as well as the law applicable. A comparative study was employed to understand how the two concepts work and to propose a standardised method in which both concepts can be implemented within a harmonised legal structure.

LITERATURE REVIEW

Salehudin and Nor Asiah report that there are approximately 75 Malaysian books written on *waqf*.⁵ Waqf is effective when a valuable property, movable or immovable, is endowed for a charitable purpose in perpetuity and the revenue, or the benefit generated is spent for the original purpose based on the intention of the endower. Various findings about waqf governance point to an administrative set up that may hamper individuals and private entities from doing waqf⁶ or the conflict of jurisdiction of Waqf in which waqf matters have been allowed to be decided by the civil courts hence, to a certain extent, eroding the prosperity of Waqf.⁷

⁵ Md Dahlan, Salehudin and Mohamad, Nor Asiah (2019) Waqf literatures from Malaysia: 60 years after independence. In: *Waqf in Selected Asian countries*. International Islamic University Malaysia, Kuala Lumpur, pp. 55-130.

⁶ See for example Hassan, R., Abu Bakar, N.M. and Akmal Abu Bakar, N.H. (2022), “A Review on Governance and Best Practices in Waqf Management for Sustainable Development in Selected Malaysian States and Other Countries”, Hassan M.K., Muneza, A. and Sarea, A.M. (Eds) *Towards a Post-Covid Global Financial System*, Emerald Publishing Ltd., Bingley, pp.161-184.

⁷ Syed Abdul Kader, Sharifah Zubaidah and Md. Dahlan, Nuarrual Hilal (2017) “Current legal issues concerning awqaf in Malaysia”. In: (Syed Khalid Rashid, ed.) *Waqf Laws and Management*. IIUM Press, Kuala Lumpur, pp. 162-193. ISBN 978-967-418-444-5

There are seven (7) issues revolving around waqf management in Malaysia namely; the administration, management and development of waqf, specifically, ownership and registration of waqf land, financial management, illegal occupation and encroachment, physical barriers, incomplete database and shortage of competent manpower.⁸ In regard to the issue of shortage of competent manpower, it is suggested that the SIRC's should hire qualified administrative personnel such as architects, property valuers, engineers and accountants without elaborating the process and regulations behind it. Many have learnt from the management of Waqf by Warees Investment, a company established by Majlis Ugama Islam Singapura (MUIS, Singapore) to manage Waqf.⁹ The seven issues relate to development of waqf land including the low awareness among the members of the society about Waqf; non-uniformity of laws; non-strategic locations, trespass on Waqf land, unrecorded waqf land, non-optimisation of commercial banks funding and non-existent of central banks administration for all State waqf operations. Analysis of this information would lead to a finding that most of the problems involve the main Waqf stakeholder that is the State Islamic Religious Council ('SIRC'). Thus, it is not a surprise that many donors opt to find another platform or option to do charitable deeds or create a charitable trust. Among the elements of weak management is inefficiency of SIRC's in Malaysia which may be caused by managerial inefficiency.¹⁰ Ali Pitchay and Abdul Jalil observe that waqf institutions face management problems where the major issues are lack of expertise and waqf land management is still not effectively and efficiently managed.¹¹

AbdelKader Laallam, et. al. (2018) highlights the importance of intellectual capital in the operations of waqf institutions and non-profit organisations, emphasising the importance of having highly qualified and competent employees with diverse specialities and skills.¹² The study recommends building and establishing an environment that is able to attract and retain talent, invest

⁸ Ismail C.Z, S., & Ahmad Hanafiah, N.J. "Challenges and prospects of cash waqf development in Malaysia," *Journal of Basic and Applied Scientific Research*, 4(2) (2014) 340-348.

⁹ Zaini Osman, (2019), "Waqf Innovation: Unlocking and Multiplying the Value of Waqf Properties in Singapore" in *Waqf in Selected Asian countries*, Nor Asiah et al (eds), International Islamic University, 148-155.

¹⁰ Dalia Ibrahim and Haslidar Ibrahim (2017); "Efficiency and Governance of waqf Institutions in Malaysia" in Muhammad Rahimi Osman, Ghafarullah Din and Najaudin Lateh (eds.), *Contemporary Issues on Zakat, Waqf and Islamic Philanthropy*, ACIS, UITM, 2017, pp. 198-208.

¹¹ Anwar Allah Pitchay, Mohamad Isa Abd Jalil (2016). "The constraints of Malaysian Mutawalli in Developing Idle Waqf Lands" in Fuadah & Asma (Eds.) *Proceedings of the Muktamar Waqf Iqlimi III*, 13-14 October, Thailand.

¹² Abdelkader Laallam, et. al. (2018) "Intellectual Capital in Non-Profit Organisations: Lessons Learnt for Waqf Institutions" *ISRA International Journal of Islamic Finance* Vol. 12, No.1, 2020, pp.27-48.

in technology infrastructure, databases and manuals and establishing networks and new associations through implementing joint investments and projects that would result in overall waqf performance enhancement.

The recognition given to cash waqf in Malaysia has enabled the growth of many waqf products. Cash Waqf will enable a bigger scale of waqf development with the possibility of channelling waqf capital for the economic development of the community.¹³ The need for cash waqf products is increasing due to its convenient nature as well as the lack of ownership of immovable properties. This has triggered a number of cash waqf initiatives, individually or collectively, handled by public entities.¹⁴ Cash Waqf can help in providing capital to develop idle and abandoned waqf land or other assets, particularly in developing and enhancing the utilities by employing the *mudarabah* and *musharakah* schemes (types of profit-sharing schemes).¹⁵

Siti Mashitoh Mahamood & Asmak Ab Rahman (2015) refer to waqf as a pious endowment when examining the role of waqf in financing higher education in Malaysia and Turkey. They noted that many notable universities in the West were established under the concept of endowment such as Oxford and Cambridge in the UK and Harvard and Yale in the USA. Similarly, waqf has played a prominent role in establishing and maintaining universities in the Muslim world such as Al Azhar University in Egypt, University Al Qurawiyin in Fez, Morocco, University of Cordova in Spain and many more. The authors conclude that waqf can be an alternative source of funding for universities.¹⁶ Rohayati Hussin, et. al. (2021) emphasises the importance of good governance for waqf in higher education institutions in order to reduce moral hazards either on the part of the founder or trustee/ mutawalli as well as the government.¹⁷ Such good governance practices elaborated include accountability and transparency of waqf institutions, monitoring by a special

¹³ Soliha Sanusi, Muhammad Hakimi Mohd Shafiai (2015); "The Management of Cash Waqf: Towards Socio-Economic Development of Muslims in Malaysia" *Jurnal Pengurusan* 43(2015) 3-12.

¹⁴ For a good discussion of the various cash waqf initiatives, see Magda Ismail A. Mohsin, Aishath Muneeza; "Cash-WAQF Models and Their Socio-Economic Roles" Chapter 5 in Magda Ismail A. Mohsin, Aishath Muneeza ((2020) *The Institution of Waqf: An Innovative Financial Tool for Socio-Economic Development* (Pearson Malaysia Sdn Bhd, Kuala Lumpur) at pp.105-143.

¹⁵ A good discussion on this is in Magda Ismail Abdel Mohsin, et. al. (2016) "Current Development of Waqf Properties in Selected Countries and Their Socio-Economic Roles" in Magda Ismail, et. a.; (eds) (2016) *Financing the Development of Old Waqf Properties* (Palgrave Macmillan, 2016) pp. 37-220.

¹⁶ Siti Mashitoh Mahamood, Asmak Ab Rahman [2015] "Financing universities through waqf, pious endowment: is it possible?" *Humanomics*, Vol. 31, No.4, 2015, pp. 430-453.

¹⁷ Rohayati Hussin, et. al. (2021); "Good Governance Practices for Waqf in Malaysian Higher Education Institutions (HEIs), *Academy of Strategic Management Journal* Vol. 20, Special Issue 2, 2021, pp. 1-6.

committee or secretariat and internal control mechanisms which incorporates risk management and internal audit.¹⁸

The first use of the term ‘corporate waqf’ was by Johor Corporation in Malaysia when it established Waqf An-Nur in 2006 but it is observed by Aisha I. Saad (2019) that the organisational structure itself appeared as early as 1948 in India through the establishment of Hamdard Wakf Laboratories and in Turkey in 1967 through the setting up of Vehbi Koc Wakfi.¹⁹ The author compares the structure of corporate waqf with industrial foundations in Europe and concludes that existing corporate waqf is able to benefit from transferable lessons and best practices from foundation-owned firms that would in turn facilitate the achievement of charitable ends along with strong financial performance.

According to Sharifah Zubaidah Syed Abdul Kader and Nor Asiah Mohamad (2014) the word ‘*waqf*’ under Malaysian law refers to the dedication of any property from which its usufruct or benefit maybe used for any charitable purpose according to Islamic law but does not include a trust which is defined under the Trustee Act 1949. Hence, the word ‘*waqf*’ in Malaysia is strictly confined to *waqf* created according to Islamic law and such *waqf* must come within the jurisdiction of the SIRC as ‘sole trustee.’ Nonetheless, Sharifah Zubaidah Syed Abdul Kader in her study examining the law applicable in Penang to the creation of waqf during the British period concludes, inter-alia, that in the Straits Settlements, the word Muslim endowment was used to refer to waqf and English law of trusts was applicable to disputes relating to validity of waqf.²⁰

As rightfully observed by Mohammad Abdullah (2019), not many have conducted comparative studies on waqf and trust with a socio-economic approach. The author attempts to identify whether the jurisprudential paradigm of waqf is disadvantaged in terms of its flexibility compared to trust. In his findings he notes that ‘the dilemma for waqf is that in the process of its adaptation to the framework of trust, it cannot compromise on its distinctive religious identity.’ He concludes that the jurisprudential paradigm of waqf is flexible enough to incorporate future

¹⁸ Ibid.

¹⁹ Aishah I. Saad, [2019], “The Corporate Waqf in Law and Practice” *Berkeley Journal of Middle Eastern and Islamic Law* Vol. 10:1 [2019] pp. 1-22.

²⁰ Sharifah Zubaidah Syed Abdul Kader (2021), “Analysis of the Law Applicable to the Creation of Waqfs During the British Era in Penang” in Nor Asiah Mohamad, et.al. (eds.) *Waqf: Past, Present and Future* (International Islamic University Malaysia, Global Waqf Conference (GWC), Ahmad Ibrahim Kulliyah of Laws, 2022).

evolution where circumstances demand for it. He identifies some scope for waqf to learn from trust, namely in terms of incorporating innovative approaches, professional management paradigm and infusion of greater transparency and accountability in its framework.²¹

Given that both, waqf and endowments are considered charities and part of the non-profit sector, it is worthy to note Mary George's (2001) accurate observation that Malaysian law of charities consists of a variety of legislation and that the term 'charity' has eluded a standard definition.²² After examining the various federal and state laws under which charities may exist, the author concludes that in order to encourage charities more broadly and make these laws consistent with modern developments elsewhere, charity law in Malaysia requires better rationalisation. Towards this end, the author proposes the setting up of a Charity Commission and a national register of charities.²³

The gap found from the above review of existing literature is that none have examined the types of legal vehicles that can be used by both waqf and endowment. Looking into charity, endowment and Waqf, all are set to serve the public through the distribution of benefits to the people. However, an in-depth analysis is required to determine the nature and functions of these institutions so that the trust of the people may be maintained at the highest level. This chapter thus contributes to existing literature by examining, through a comparative approach, the legal possibility of utilising the same legal vehicles to actualise both, waqf and endowment.

ETYMOLOGY OF WAQF AND ENDOWMENT

Waqf²⁴ is created by a donor (*waqif*) who declares his property as waqf, thus divesting it from himself, and returning the ownership back to Allah, the creator. Unlike zakat which is obligatory,

²¹ Mohammad Abdullah (2019); "Waqf and Trust: The Nature, Structures and Socio-Economic Impacts" *Journal of Islamic Accounting and Business Research* Vol.10 No.4 (2019) pp. 512-527.

²² Mary George, "An Overview of Issues in Charity Litigation in Malaysia" [2001] *The International Journal of Not-for-Profit Law*, Vol.4, Issue 1, September 2000 accessed at <https://www.icnl.org/resources/research/ijnl/an-overview-of-issues-in-charity-litigation-in-malaysia-2001-2> on March 12, 2022 at 3pm.

²³ *ibid.*

²⁴ Waqf literally means stop. Murat Cizakca, "Towards A Comparative Economic History of the *Waqf* System" *Al-Shajarah: Journal of the International Institute of Islamic Thought and Civilization*, Vol. 2, Issue 1 (1997), 63.

waqf is voluntary and so the motivation behind the desire to create waqf over one's property is largely to seek continuous rewards from Allah in an effort to get closer to Him.

The donor may specify in his declaration, the purpose of the waqf, which can either be for the benefit of his family members (*waqf al-ahli*) or for philanthropic purposes (*waqf al-khayri*) or a combination of both (*waqf musytarak*). Waqf for philanthropic purposes can either be general (*am*) or specific (*khas*). An example of *waqf am* is a declaration which reads: "The building is to be used for any purpose that brings benefit to Muslims in Penang." An example of *waqf khas* is the following declaration: "The land is to be used for the benefit of orphans residing in Kampung Cempaka, the elderly, madrasah and school for Islamic studies, for worship and fruit orchard for the public."²⁵

From the fiqh perspective, there are four (4) pillars to fulfill in order to create a legally binding waqf in Islam, namely (1) the *waqif* or *muhabbis* (founder), (2) the beneficiaries; (3) the *mawquf* 'or *al-muhabbas* (the object or subject matter of waqf); and (4) *sighah* (declaration).²⁶ Waqf is managed by a *mutawalli* who is a trustee-manager of waqf assets.²⁷ This makes Waqf different from an endowment from the Western or civil perspective. An Islamic or 'Mohammedan' Waqf is created based on a very special motive that is to get the blessings from Allah SWT as the Creator and the Sustainer known as *qurbah ila Allah*. The creation of endowment requires conformity to the rules and fulfilment of the agreement agreed between the donor and the trustee.

Waqf and endowments may differ in various senses. It may differ in terms of the intention or objective of establishment though in practice it may appear similar on most aspects. It may differ in the sense of worship. Waqf is an act to get blessing from Allah SWT. A Waqif who chooses to detach his ownership over a property forever, for others is a sacrifice based on faith, love, and spirit of helping others, not for his self-interest. Certainly, waqf is a thoroughly religious and pious concept and a material institution that is a charitable act of the first order.²⁸ While

²⁵ Sharifah Zubaidah Syed Abdul Kader (2021) at pp. 16-17.

²⁶ R. Peters, Wakf in *The Encyclopaedia of Islam*, edited by P.J. Bearman, TH. Bianquis, C.E. Bosworth, E. Van Donzel and W.P. Heinrichs (Leiden: Brill, 2002), 60 – 61.

²⁷ Siti Aishah Hassan and Rusnadewi Abdul Rashid, "Towards Improvement of the Rights and Duties of Mutawalli and Nazir in the Management and Administration of Waqf Assets". Paper presented at 9th ISDEV International Islamic Development Management Conference 2015, 346.

²⁸ F.B. Tyabji, *Muhammadan Law: The Personal Law of Muslims*, 3rd Edition (Bombay: N.M. Thirpati and Co., 1940) at p. 541.

endowment may appear in a similar format, the intention must not necessarily be for the sake of Allah SWT, which has religious value behind the sacrifice.

The Oxford dictionary defines an endowment as money that is given to a school, a college, or another institution to provide it with an income; the act of giving this money or a permanent income that is given to a person or institution but is basically meant for general use. The term endowment in some earlier research, was used to indicate the creation of waqf. Waqf was defined as specific endowed properties, the revenue of which were designated in perpetuity to sustain defined beneficiaries; the properties or capital of the endowment were managed by a specified succession of managers. Once constituted, the endowment is irrevocable and unalterable except according to conditions laid down in the original deed or otherwise approved by a judge.²⁹

‘Endowment’ is defined as a gift of land or money but in some contexts, the word is used as the equivalent to ‘foundation,’ a sense inconsistent with the definition.³⁰ Endowment in the form of endowed trust or foundation is a civil matter whether the parties are Muslims or non-Muslims.³¹ The foundation or trust is the creation of the founder. The person who provided the first gift or endowment is regarded as the founder and has power to make directions for its use and provide for the control of it.³²

The word ‘endowment’ first appeared in legislative form in Malaya in the Mohammedan and Hindu Endowments Ordinance (Straits Settlements) 1905³³ and was defined as “any endowment in land or money given or to be given for the support of any Mohammedan Mosque or Hindu Temple, or Mohammedan or Hindu pious, religious, charitable or beneficial purpose.” Prior to the passing of this Ordinance, a Commission was set up in 1903 in Penang to enquire into

²⁹ Amy Singer, (2008) *Charities in Islamic Societies* (2008) Cambridge University Press, at 93. The author quoted one of the earlier waqf inscriptions as quoted in M. Sharon, “A Waqf Inscription from Ramlah,” *Arabica* 14 (1966): 77-84.

³⁰ Taylor, J. In *Re Shrine of Habib Noh* [1957] 1 MLJ 139.

³¹ *TM Feroze Khan & Ors. v. Meera Hussain TM Mohamed Mydin* [2006] 3 CLJ

³² Kerry O Halloran, (2007) *Charity Law and Social Inclusion: An International Study*, Routledge Taylor & Francis Group at 47

³³ Which provided for the establishment of the Mohammedan and Hindu Endowments Board, a statutory corporation (section 3(3)) charged with the administration, management and superintendence of Mohammedan and Hindu endowments that has been ordered by the Governor in Council to be administered by the Board in the Straits Settlements (section 3(1) read with section 4).

and report upon the Moslem Trusts and Foundations in Penang and in their report,³⁴ the Commission makes reference to Muslim endowments as follows:

All Muslim trusts and foundations which have been the subject of enquiry in Penang were vaguely designated 'Wakaf', a term which according to recognised authorities of Mohammedan Law denoted in its original sense "Property in which the proprietary right is wholly relinquished and which is consecrated in such a manner to the service of God that it may be to the benefit of men."

It is also interesting to note that during the British colonial period in Malaysia, English common law and rules of equity became the applicable law in relation to resolving disputes relating to wills and settlements made by Muslims and although the colonial courts seemed to have acknowledged waqf as similar to a charitable trust,³⁵ the validity of *wakaf khas* (specific waqf) was questioned due to the applicability of the *Cy-Pres* doctrine and the rule against perpetuities.³⁶

There is no exact term in the English language to convey the idea of waqf. The closest English terms commonly employed are 'endowment' and 'charity' or 'charitable trust'. It is well appreciated that the term 'trust' does not, either closely or remotely, convey the idea of waqf.³⁷ More so, it is equally well appreciated that in their legal compositions and consequences, trust and waqf are totally different so much that it is believed that interpolation of the trust idea with waqf has contributed to decline of the waqf institution.³⁸

Although the institutions of waqf and trust emerged in two different legal and socio-economic environments, similar to the institution of waqf under the Islamic civilisation, the role of trust has been crucial in institutionalising charity in the English society.³⁹ The word 'charity'

³⁴ 'General Report Upon the Moslem Trusts and Foundations in Penang' which appears in the *Hand Book of the Mohammedan and Hindu Endowments Board* (The Criterion Press, Penang, 1932), p. 1.

³⁵ See *Re Estate of Hadjee Haroun bin Tamby Kechik* (1949) 15 MLJ 143, *Re Sheikh Salman bin Abdul Shaik bin Mohamed Shamee* (1953) 19 MLJ 200, *Re The Settlement of Shaik Salleh bin Obeid Abdat* (1954) 20 MLJ 8.

³⁶ Zuraidah Ali, Nor Asiah Mohamad, Sharifah Zubaidah Syed Abdul Kader (2016); "Failure of Charity: Theoretical and Practical Comparison between the *Cy-Pres* Doctrine under Charitable Trust and the Concept of *Istibdal* under Waqf", paper presented at the 4th Global Waqf Conference 2016, University of Wales Swansea, United Kingdom.

³⁷ Sharifah Zubaidah Syed Abdul Kader, Abdullahi Ishola, Nor Asiah Mohamad (2018) "The Meaning and Legal Consequences of 'Sole-Trustee' of Waqf under the Shariah and Malaysian Waqf Laws" [2018] 4 Sh LR pp. 1-15 at 4-5.

³⁸ Jeffrey A Schoenblum (1999), 'The Role of Legal Doctrine in the Decline of the Islamic Waqf: A Comparison with the Trust' (1999) *Vandabilt Journal of Transnational Law* at 1191.

³⁹ Mohammad Abdullah (2019), *ibid.* at 524.

in Malaysia may reflect quite a number of meanings and perceptions as it needs to be examined from both, civil and shariah laws. Charity under the civil law originates from a Latin word ‘caritas’ which means ‘love’. There are many ways for charity to be performed and the concept is wider as compared to that legally recognised under the civil law. As the law relating to charity in Malaysia follows the English law, the spirit and intent of the Charitable Uses Act 1601 together with 4 main charitable purposes as introduced by Lord Macnaghten in *Pemsel’s* case are applicable, namely, relief of poverty, advancement of education, advancement of religion and other beneficial purposes. Under the English Charities Act 2011, charity means any institution which is established for charitable purposes and falls under the control of the High Court in the exercise of its jurisdiction relating to charity. There are 13 charitable purposes laid down by this English Act, which can be considered as a huge extension as compared to the earlier four principal purposes of charity introduced in 1839.⁴⁰

ENDOWMENT AND WAQF UNDER THE FEDERAL CONSTITUTION

It is interesting to observe and analyse the words ‘wakaf’, ‘trust’, ‘endowment’ and charity which are mentioned in the Federal Constitution in both, the Federal and the State Lists in the 9th Schedule of the Federal Constitution. Item 4(e)(i) of the Federal List provides that the federal legislature has power to makes laws relating to: ‘civil and criminal law and procedure and the administration of justice including...equity and trusts...’. Item 15(c) of the same list states: “matters on labour and social security, including charities and charitable institutions; charitable trusts and trustees excluding Wakafs, Hindu endowments;” Hence, trusts and endowments created under the law of trusts clearly fall under the Federal list. ‘Wakaf’ and Hindu endowments are expressly excluded under the Federal List and the word endowment in this list would clearly indicate charitable trusts and charities created under the law of trusts. Where an endowment is created in the form of a trust or foundation, any disputes relating to this would fall under the jurisdiction of the civil court.⁴¹ The provisions for endowment under the Federal Constitution, and some Federal laws, for example, section 39 of the Local Government Act 1976 (Act 171) clearly envisage endowment as a civil law connotation.

⁴⁰ Zuraidah Ali, Nor Asiah Mohamad, Sharifah Zubaidah Syed Abdul Kader (2020) “Regulating Charitable Organizations in Malaysia.” Paper presented in the Global Waqf Conference 2020

⁴¹ List II, Ninth Schedule, Federal Constitution.

List II outlines the legislative jurisdiction of the states and Item 1 of this list includes the following:

Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; **Wakafs** and the definition and regulation of charitable and religious **trusts**, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable **endowments**, institutions, trusts, charities and charitable institutions operating wholly within the State;

Given that Islamic law and personal law of Muslims are placed within the State List (List II), it follows that the term ‘charitable and religious trust’ would *sui generis* refer to a charitable gift or religious trust created by a Muslim (person professing the religion of Islam). The words that come after that are: ‘the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State.’ The word ‘Islamic’ at the beginning of this phrase would cover all the bodies mentioned thereafter, hence, these necessarily refer to endowments, institutions, trusts and charities that are ‘Islamic’ in characteristic.⁴² Additionally, the fact that these bodies are to operate wholly within the State would further strengthen this proposition. In other words, the creation of a structured waqf is viewed under the Federal Constitution as a charitable Muslim endowment.

The Supplement to the Concurrent List (List IIIA) applies to charities in Sabah and Sarawak in Item 15 as follows: “charities and charitable trusts and institutions in the state (that is to say operating wholly within or created and operating in the state) and their trustees, including the incorporation thereof and the regulation and winding up of incorporated charities and charitable institutions in the state.”

DIFFERENCES BETWEEN WAQF AND ENDOWMENT

⁴² The concept of an Islamic trust is recognised in Islam by virtue of verses in the Holy Quran, namely, 4:58, 8:27, 2:83. Appointment of trustee is done by way of *wakalah* (agency) where the representative is to exercise a civil right on behalf of the person who appoints him or *wisayah* (executor/ administrator) in respect of administration of the appointer’s estate. See: Akmal Hidayah Halim (2011), “The Legality of a Living Trust as an Instrument for Islamic Wealth Management: A Malaysian Perspective” (2011) 19 *IJUM Law Journal* 35 at 42-43.

The law of trust under which an endowment or foundation is created originated from the common law and civil law jurisdictions, and has its roots in the rules of equity that has existed for at least 400 years. This institution, whether endowment or foundation, is self-governing, non-profit distributing, dedicated to public purposes and to some varying degree, has its own resources. It should not depend on the goodwill of the government and it should be free to lend its support to other causes.

Although endowment has a characteristic of perpetuity, given that the formation and establishment of endowment is legally founded, a change in accordance with the law is possible which could have the effect of adjusting or amending the structure of the endowment provided that the change is allowed in the deed based on the agreement by the creator of the endowment. As far as a normal structured charitable endowment is concerned, once the property has been transferred to the trustee or board of trustees, the former will need to abide by the instruction given by the owner or founder of the foundation in the trust deed.

Changing the terms and structure of a Waqf is generally not possible as the Shariah prescribes that Waqf is perpetual, inalienable and irrevocable. Once created, Waqf cannot be withdrawn and the donor (*Waqif*) cannot withdraw it. Although there are differences of opinions on the issue of ownership of the waqf property (*mawquf*), the majority of the Muslim jurists are of the view that Waqf cannot be revoked⁴³ but if there is a need for change of needs of the Mawquf, the property must follow a very strict process of ‘*Istibdal*’ (the migration of a waqf asset) after which it will be replaced with another property.⁴⁴ Thus, the issue of revocation of Waqf property is almost irrelevant especially in Malaysia or other countries following the Shafii school of thought.⁴⁵

⁴³ An Nawawi, *Minhaj At Talibin: A Manual of Muhammadan Law according to the School of Shafii*, Translated into English from French Edition of L.W.C. Van Den Berg by E.C. Howard (W Thacker & Co, 1914),232; Ibn Abidin, *Radd al Mukhtar ala Al Durr al Mukhtar Sharh Tanwir Al Absar* (‘Adil Ahmad Abd Al Mawjud and Ali Muhammad Mu’awwad (eds)14 Vols, Dar al Kutubal –‘Ilmiyya,2003, vol.6,517. See Abbasi, M. Z. (2012). The Classical Islamic Law of Waqf: A Concise Introduction. *Arab Law Quarterly*, 26(2), 121–153. <https://doi.org/10.1163/157302512X629124>, M Zain Othman, The Theory, Practice and Admistration of Waqf with Special Reference to the Malayan State of Kedah, (unpublished thesis submitted to University of St Andrews, 1971) 59.

⁴⁴ Section 15 of the Selangor Waqf Enactment 2015

⁴⁵ Section 17 of the Selangor Waqf Enactment 2015.

The underlying principles and objectives for waqf and endowment as one of the vehicles for charity under English law are generally similar. The purpose is to help the needy. Similarly, while Waqf has some religious value in its creation, charity under civil law may not be associated with religion. One of the important differences between the concept of charity in common law and waqf is that no perpetual dedication for family is allowed for charitable acts under common law as such may be prevented by the rule against perpetuity and the rule against remoteness of vesting.⁴⁶ In Islam, protection and security for family is of the highest priority and hence the creation of waqf for the family termed as *waqf al dhurri* or *waqf al-ahli* is highly encouraged and such may be perpetual in nature.⁴⁷

Table 1 below summarises significant differences between the concepts of waqf and endowment.

TABLE 1: Differences between the Concepts of Waqf and Endowment

	WAQF	ENDOWMENT
Intention/purpose	Ibadah, blessing from Allah	Charitable purposes and public benefit
Duration	Forever/Perpetual	Perpetual except for non-charitable endowments
Nature	Cannot be changed	Can be changed in accordance with the law
Source and Legal Framework	Allah, Shariah	Nature, Natural law
Ownership	Mawquf belongs to Allah or SIRC/ Mutawalli as Trustee	Legal title in name of trustee as fiduciary

⁴⁶ A discussion of this in the context of the evolution of the law of trust in Singapore can be found in Tang Han Wu, From Waqf, Ancestor Worship to the Rise of the Global Trust: A History of the Use of the Trust as a Vehicle for wealth transfer in Singapore, 103 *Iowa L. Review*, 2263 (2018).

⁴⁷ See Nor Asiah Mohamad (2018), “A Study on the Socio-Economic Roles of Waqf Ahli (Family Waqf) in Promoting Family Security and a Sustainable Family Economy” *IIUM Law Journal* 26(1), 141.

Terms of Commitment	Waqf Deed and Rules of Islamic Law (<i>Hukm Syarak</i>)	Trust Deed and Law
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Although there are clear distinctions between waqf and endowment as indicated from Table 1 above, the term ‘endowment’ in Malaysia has been used in a variety of modes. Some may refer to waqf as an endowment whilst in another aspect endowment refers to trust and foundation. If the creator has indicated that such endowment is waqf or an Islamic religious endowment, then the law regulating it will be within the waqf legal framework or to be more precise, according to the laws touching on waqf in each state in Malaysia.

As the law on Waqf and law of trusts differs, it raises a question, which law governs ‘endowment’? Obviously, the **law on endowment** falls outside of the legal framework provided under the state enactments relating to waqf. The following sections of this chapter will discuss the respective legal frameworks for waqf and endowment.

LEGAL FRAMEWORK FOR WAQF IN MALAYSIA

The Federal Constitution of Malaysia clearly states that the Sultan or the Yang di Pertuan Agong is the supreme authority in Islam. In Sabah, Sarawak, Malacca and Penang, the supreme authority in Islamic issues is the Yang di Pertuan Agong or the Yang di Pertua Negri of the states. Matters falling under ‘Islam’ matters are *zakat*, *baitulmal*, waqf, Syariah courts, Muslim personal laws and many others. The Sultans have supreme authority, and he is also the highest authority for the State Islamic Religious Council (‘SIRC’) which exists in all states in Malaysia. The administration of Islamic legal matters in Malaysia is upheld by the Federal Constitution. Therefore, the civil law that is enacted at the state level should not contradict the Federal Constitution.⁴⁸

Malaysia is a federation with 13 states and 3 Federal Territories. The Federal Constitution divides legislative (law-making) powers between the federal government and the states. Matters relating

⁴⁸ Article 75 Federal Constitution.

to Islam, including waqf, rests within the jurisdiction of the states. Waqf in Malaysia today operates under three separate laws, namely:

- 1) Islamic Law
- 2) Federal Territory Act or State Enactments relating to administration of the religion of Islam/ Islamic Law⁴⁹
- 3) State Waqf Enactments

Islamic Law

The substantive law on waqf is contained under Islamic Law (*Hukum Syarak*) which is defined under section 2 of the Administration of Islamic Law (Federal Territories) Act 1993 as “Islamic law according to any recognized *Mazhab*”. Islamic law on waqf encompasses matters such as the definition of waqf, the pillars of waqf comprising of the waqf declaration (*sighah*), the donor (*waqif*), the waqf property (*mawquf*) and the waqf beneficiaries (*mawquf alaih*), as well as powers and duties of the waqf manager (*muttawali*). A clear example of the priority given to Islamic law in relation to the enforcement of waqf can be seen in the following provision found in the waqf enactments of Terengganu and Sabah:

“A *wakaf* shall come into effect once all the requirements and conditions for the creation of a *wakaf* pursuant to *Hukum Syarak* have been fulfilled, unless it is specifically provided that the *wakaf* shall come into effect only after the death of the *waqif*.”⁵⁰

A waqf will become void if it is contrary to Islamic law. The determination of Islamic law in matters relating to waqf is undertaken by the State Fatwa Committee established under the Federal Territory Act or state enactments relating to administration of the religion of Islam/ Islamic Law.

Federal Territory Act or State Enactments relating to administration of the Religion of Islam/ Islamic Law

⁴⁹ Laws that are within the jurisdiction of the federal government are passed by Parliament in the form of ‘Acts’ of Parliament. Laws within the jurisdiction of the states are passed by the respective State Legislative Assemblies and are in the form of ‘Enactments’. Some of these state enactments on Islam are named as ‘Administration of the Religion of Islam Enactment’ while some are named ‘Administration of Islamic Law Enactment’. The contents of these enactments are basically the same, making provision for the establishment of an institution called the *Majlis Agama Islam Negeri* (State Islamic Religious Council, hereafter referred to as SIRC) with powers to administer the religion of Islam / Islamic Law in the state.

⁵⁰ See Section 15(1), Wakaf (Terengganu) Enactment 2016; section 10(1) Wakaf (State of Sabah) Enactment 2018.

As a result of the clear division of legislative and administrative powers in the Federal Constitution, the laws relating to waqf are placed under the jurisdiction of the respective states. The federal government only has jurisdiction over the federal territories. The federal government (in respect of the federal territories) and the states have passed laws to regulate how the religion of Islam or Islamic law is to be administered. We can find some provisions relating to waqf in such laws as identified in Table 2 below:

Table 2: Provisions relating to waqf in the Federal Territory Act or State Enactments

State	Enactment	Sections relating to waqf
Perlis	Administration of the Religion of Islam (Perlis) Enactment 2006	ss. 89-95
Kedah	Administration of Islamic Law (Kedah Darul Aman) Enactment 2008	ss. 52-58
Penang	Administration of the Religion of Islam (Penang) Enactment 2004	ss. 89-95
Perak	Administration of the Religion of Islam (Perak) Enactment 2004	ss. 78-84
Selangor	Administration of the Religion of Islam (Selangor) Enactment 2003	ss. 89-95
Federal Territories	Administration of Islamic Law (Federal Territories) Act 1993 (Act 505)	ss. 61-68
Negeri Sembilan	Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003	ss.89-95
Malacca	Administration of the Religion of Islam (Malacca) Enactment 2002	ss.77-83
Kelantan	Islamic Religious Council and Malay Customs (Kelantan) Enactment 1994	ss. 61-66
Terengganu	Administration of Islamic Religious Affairs (Terengganu) 2001	ss. 63-69
Pahang	Administration of Islamic Law (Pahang) Enactment 1991	ss. 70-78
Johor	Administration of the Religion of Islam (Johor) Enactment 1993	ss. 89-95

Sabah	Administration of Islamic Law (Sabah) Enactment 1992	ss. 45-52
Sarawak	Majlis Islam Sarawak Ordinance 2001	ss. 43, 51-54

The provisions relating to waqf in the above laws cover matters such as the following:

- definition of general waqf (*wakaf am*) and specific waqf (*wakaf khas*),
- the function of the Majlis as the sole trustee of all waqf properties in the state,
- about the vesting of waqf properties in the Majlis,
- the restriction against making waqf over more than 1/3 of a person's property, restriction on making specific waqf,
- about income from waqf,
- about waqf capital,
- about the waqf deed
- about the requirement to gazette the list of waqf properties every year.

These provisions are general and not very comprehensive. For example, there is no specific provision on the appointment of a waqf manager or agent (*mutawalli, nazar or qayyim*) to manage the waqf property on behalf of the SIRC. There are no provisions made for offences relating to waqf implementation and enforcement. The absence of specific provisions and the non-comprehensive nature of these laws could result in the powers of the SIRC over waqf administration to be challenged. Therefore, for the purpose providing more comprehensive provisions on the administration and management of waqf in the states, there arises the need for the states to enact specific laws relating to waqf. This brings us to the discussion on the specific enactments passed by several states on waqf.

State Waqf Enactments

States that have enacted specific laws on waqf are Johor, Selangor, Malacca, Negri Sembilan, Perak, Terengganu and Sabah as follows:

Table 3: List of State Waqf Enactments (as of 20th March 2022)

1.	Johor Waqf Rules 1983
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2.	Selangor Waqf Enactment 2015
3.	Malacca Waqf Enactment 2005
4.	Negri Sembilan Waqf Enactment 2005
5.	Perak Waqf Enactment 2015
6.	Terengganu Waqf Enactment 2016
7.	Sabah Waqf Enactment 2018

The state waqf enactments make more specific provisions on waqf. To have a general idea of the contents of the specific waqf enactment we may look at the parts contained in the Sabah Waqf Enactment⁵¹ as follows:

Part 1: Introduction

Part 2: Power and Duties of the Majlis

Part 3: Appointment of Chief Registrar and Registrar of Waqf

Part 4: Creation of Waqf

Part 5: *Mawquf*

Part 6: *Mawquf 'Alaih*

Part 7: Testamentary Waqf

Part 8: Waqf Fund

Part 9: Offences and Penalties

Part 10: Enforcement and Investigations

Part 11: General

At Federal level, there are two other bodies that have specific functions in relation to waqf. The first is the Department of Awqaf and Hajj (JAWHAR) established administratively in the Prime Minister's Department. This department is given the task as a coordinating body to guide the respective Majlis on waqf administration. Where there is a federal budget given for waqf development in the country's annual budget, it is channeled through JAWHAR to the respective Majlis. JAWHAR additionally organises training programmes and publishes manuals and a journal on waqf management. The second body is Yayasan Wakaf Malaysia (YWM) (Malaysian Waqf Foundation) established under the Trustees (Incorporation) Act 1952. YWM organises programs to collect funds for the WYM Trust Fund for the purpose of forming the economic capital for Muslims. It cooperates with the respective SIRC's and higher education institutions to develop waqf properties as well as to conduct research on new waqf products. Additionally, YWM engages in investment of waqf funds in shariah compliant investments until the process of distribution of the income to the lawful beneficiaries.

⁵¹ The latest waqf enactment to date is the Sabah Waqf Enactment 2018.

Where there are any disputes relating to waqf, such dispute is either brought to the civil court (in a situation where either of the parties are non-Muslim or the remedies sought are remedies that can only be obtained in the civil court) or to the Syariah court (where both parties are Muslims). It is the legal system that provides for the court system and jurisdiction of the courts in such matters without which such disputes would continue to be unresolved. Although alternative dispute resolution methods are used in certain cases by the SIRC, these are not yet sanctioned by law and thus there is a need for express legal provisions to be enacted for this purpose.⁵²

LEGAL IDENTITY, FUNCTIONS OF THE SIRC AND ABILITY TO APPOINT OTHER BODIES TO MANAGE WAQF

The SIRC is declared by the Act or state enactment relating to the administration of Islamic law as ‘a body corporate having perpetual succession with a common seal. It may sue and be sued by its corporate name.’⁵³ It may enter into contracts and may acquire, purchase, take, hold, and enjoy movable and immovable property of every description, and subject to any written law affecting the property, may convey, assign, surrender and yield up, charge, mortgage, demise, reassign, transfer or otherwise dispose of, or deal with, any movable or immovable property vested in the SIRC upon such terms as the SIRC deems fit in accordance with *Hukum Syarak*. The SIRC additionally has power to act as an executor of a will or as an administrator of the estate of a deceased person or as a trustee of any trust.

It is found that the more recent waqf enactments such as the one in Terengganu and Sabah provide far wider powers for the SIRC to appoint other parties as agents or waqf managers. In Sabah for example, a statutory board is established to manage waqf on behalf of the SIRC.⁵⁴ The SIRC is also empowered to establish a corporation or a company to carry out any activity by the Majlis under the Enactment.⁵⁵ Additionally, the SIRC may appoint or give written permission to any party to manage, administer and hold any *mawquf* on its behalf; may declare the appointment

⁵² For more on this see: Zati Ilham Abdul Manaf, Sharifah Zubaidah Syed Abdul Kader, Nor Asiah Mohamad (2018), “ADR as An Alternative Access to Justice in Resolving Waqf Land Disputes” *Current Law Journal* 1 Legal Network Series (A) ii, pp. 1-30.

⁵³ See for example section 5 of the Administration of Islamic Law (Federal Territories) Act 1993.

⁵⁴ See section 7(1) of the Wakaf (State of Sabah) Enactment 2018.

⁵⁵ This has been done by the Negri Sembilan SIRC through incorporation of Perbadanan Wakaf Negri Sembilan Sdn. Bhd., a subsidiary of MAINS Holdings Sdn Bhd. and in Penang by SIRC Penang, through Wakaf Pulau Pinang Sdn Bhd.

of any administrator or manager in a situation where donor (*waqif*) has appointed his own administrator or manager subject to the terms and conditions prescribed by the SIRC and the SIR may establish any waqf scheme or approve any institution to establish any scheme related to waqf.⁵⁶ All of these provisions allow the SIRC to authorise various legal vehicles to undertake and manage waqf projects and schemes.

It is plain to see from the above discussion that the main legal vehicle to carry out waqf under the present legal framework for waqf is the SIRC, a statutory corporation expressly declared as the ‘sole trustee’ of waqf. It is up to the SIRC to decide to allow other parties operating under a variety of legal vehicles to undertake waqf management either by appointing them as an agent or as a waqf manager.

CHALLENGES IN WAQF MANAGEMENT UNDER THE PRESENT LEGAL FRAMEWORK

The law provides that the sole trustee of the Waqf properties in Malaysia is the SIRC.⁵⁷ The SIRC is a body corporate consisting of several respected members appointed and led by the Sultan. The problem relates to the role of SIRC being the sole trustee of waqf as it is perceived that the procedures relating to Waqf becomes restrictive as the SIRC is seen as generally reluctant to hand over the duties to manage waqf properties to other bodies either as agents or appointed waqf managers.

It has been found that Waqf management in the SIRC's suffer from scarcity of staff in terms of quality and quantity when it comes to waqf management. There is a general paucity of quality standards for recruitment, training and staff development programmes in the awqaf sector in Malaysia. Additionally, most employees of the waqf sector are not linked to the waqf except through government jobs.⁵⁸ Lack of qualified and trained personnel for the management of awqaf results in low productivity of the awqaf, which in turn affects the continuity and sustainability of

⁵⁶ See sections 3(1)(d) – (g) of the Wakaf (State of Sabah) Enactment 2018.

⁵⁷ See for example, section 4 of the Selangor Waqf Enactment, 2015.

⁵⁸ See: World Bank Group, INCEIF, ISRA (2019), *Report on Maximising Social Impact through Waqf Solutions*, The World Bank Group, INCEIF and ISRA, Kuala Lumpur; Abas and Raji (2018); “Factors Contributing to Inefficient Management and Maintenance of Waqf Properties: A Literature Review” *UMRAN-International Journal of Islamic and Civilisational Studies*, Vol. 5, No. 3, pp.53-67.

the investments in the sector. It was also discovered that the inadequacy of skills and required competence in waqf employees is a direct result of poor academic or functional specialties for the positions required, as well as weak training programmes provided to waqf staff.⁵⁹

The above stigma is more pressing when there are research findings revealing the number of increasing under-developed or abandoned Waqf lands. This state of affairs is ongoing despite the careful or selective policies of some of the States in accepting properties for Waqf. For a better management of Waqf, some States use their discretion in selecting the type of properties that can be registered as Mawquf. Any property with issues such as properties with many owners that have not been sub-divided and obtained separate titles, properties subject to a caveat or properties without any profits may not be accepted to be registered as Waqf.

Moreover, a few provisions in the Waqf (State of Selangor) Enactment 2015 **are taken** as providing for full control of Waqf by the Majlis **for example**, Section 4 on the declaration that all Waqf properties are put under the control of Majlis, section 8 provides for the authority of Majlis pertaining to Waqf, section 13 specifically provides that all Waqf Khas are subject to the consent of the Majlis, section 44 on the power of Majlis on Mawquf and **section 45 relates to managing Waqf properties without the consent of Majlis as a body with authority on Waqf.**

These challenges in waqf management have prompted the donors, the Waqf trustee appointed by donors or even the family members of the donors to find other ways to do charity. In fact, certain organisations or institutions with authority to collect and manage properties will be more selective and careful in choosing the most suitable mode of charity. Although many parties are interested in introducing, managing, and distributing *manfaah* from Waqf assets, their intentions have often been postponed or they have opted for modes that would preclude the jurisdiction of the SIRC. As such, endowment, foundation, a company limited by guarantee or a cooperative may be some options. Even so, these existing options may only become viable for waqf where the relevant SIRC has given authorisation to these legal vehicles to undertake the proposed waqf project. This is due to the fact that under the waqf legal framework existing in

⁵⁹ AbdelKader Laallam, et. al (2018) at 36.

Malaysia, all waqf properties situated in the state automatically vests in the SIRC whether or not such property has been registered in the name of the SIRC.⁶⁰

LEGAL FRAMEWORK FOR ENDOWMENTS

The substantive law on endowments is the law of trusts which in Malaysia is governed by the Trustee Act 1949 as well as common law. There is not a single Act of Parliament that regulates charities and endowments in Malaysia. Charities law in Malaysia can instead be found under several Acts of Parliament⁶¹ and hence there are no specific procedures for the establishment of an endowment. The law differs depending on the legal vehicle envisaged and the manner of how the endowment is managed whether as a foundation, a company limited by guarantees, a cooperative or a trust. If it is a foundation and it is in the form of a non-profit organisation, the Trustee Incorporation Act 1952 is applicable and those who are involved in the creation of this foundation will need to submit the request to the Legal Department at the Prime Minister's Department. If the endowment is in the form of a company or incorporated association, the governing law is the Companies Act 2016 under the purview of the Companies Commission whilst if it is in the form of society, then the Societies Act 1966 will apply. The choice depends on several factors such as the amount of funds, expertise and human resources, taxes as well as the terms of the donors.

Trust is a structured institution and it comes within the purview of civil law. As mentioned earlier on in this chapter, the Federal Constitution clearly states that matters relating to 'equity and trust' are within the purview of List 1, namely the Federal List. The definition and important elements of trust are based on English law as trust is an obligation enforceable in equity, which rests on a person as owner of some property, for the benefit of another or for the advancement of certain purposes.⁶² Trust endowment is usually charitable in nature and it may come in many structures depending on the intention of the creator.

(i) Endowment or Foundation under the Trustees Incorporation Act 1959

⁶⁰ See for example section 5 (2) of the Waqf (State of Selangor) Enactment 2015.

⁶¹ Trustee Act 1949, Trust Companies Act 1949, Trustee (Incorporation) Act 1952, Public Trustees Act 1950, Housing Trust Act 1950, National Trust Fund Act 1950, Labuan Trust Companies Act 1990, etc.

⁶² *Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd* [2014] 4 MLJ 64

Where an endowment forms part of a charitable trust in which the property manager is entrusted to manage the property according to the intention or the agreement made by the donors, the law relating to trust is applicable. In Malaysia, there are a few laws governing trust such as the Trustee Act 1949, Trustee Incorporation Act 1952 (Act 258), the Companies Act 2016 and the Societies Act 1966.

Charitable or non-profit organisations in the form of a foundation is governed by the Trustees (Incorporation) Act 1952. The Act provides for the incorporation of trustees of certain bodies and association of persons and this covers a few purposes and activities namely, religion, education, art, scientific research, social or charitable. The application to incorporate certain bodies as incorporated trustees is made to the Legal Department at the Prime Minister's Department and more importantly, the approval of such application will entail a non-profit organisation as a foundation with certain exemptions and privileges, namely the ability to collect donations from the public and certain tax exemptions.

The Trustees (Incorporation) Act 1952 has no definition of 'foundation' and there is no clear demarcation on whether such foundation should be a private or public foundation. The procedures begin with the application for the incorporation by the trustees who has been appointed by anybody or association of persons established for the mentioned purpose. Such trustees may apply to the Minister for a certificate of registration of the trustees of such body or association of persons as a body corporate.⁶³ The discretion to grant such certificate lies solely with the Minister in charge. Section 2(2) of this Act states that the Minister needs to look at the extent, nature and objects and other circumstances of such body or association of persons before granting such certificate and such application must be expedient. More consideration will be given to certain conditions, namely, the qualifications and number of the trustees, their tenure and avoidance of office, the mode of appointing new trustees, the custody and use of the common seal, the amount of the land which such trustees may hold, and the purposes for which such land may be applied.⁶⁴

The concept of charities is not clearly defined under any of the provisions of the Trustees (Incorporation) Act 1952. However, the six purposes which are provided under which the

⁶³Section 2(1) of the Trustees(Incorporation) Act 1952

⁶⁴Section 2(2) of the Trustees (Incorporation) Act 1952.

certificate for incorporation may be granted are within the purview of charity. Section 2(1) of this Act provides that trustees may be appointed by anybody or association of persons established for any religious, educational, literary, scientific, social or charitable purpose, and such trustees may apply, in the manner hereinafter provided, to the Minister for a certificate of registration of the trustees of such body or association of persons as a body corporate.⁶⁵

(ii) Endowment (or Waqf) under a Trust Corporation

Trust corporation means a Public Trustee or a corporation appointed by the court in any particular case to be a trustee or registered as a trust company under the Trust Companies Act 1949 (Act 100).⁶⁶ An example of a trust corporation that may be appointed by the court to be a trustee is As-Saliheen Trustee ('AST') that offers the services of Islamic estate planning and wealth management. This raises the possibility of instruments for transmission of Muslim estates including waqf to be operated and managed by a trustee company through operation of law. Nonetheless, in such a situation, it is opined that the relevant authorisation of the SIRC would still be required due to the automatic vesting provision in the state enactments on waqf.

Meanwhile, a trust company is a company registered as a trust company under the Trust Companies Act 1949 by the Registrar of Companies.⁶⁷ Such company must be a public company incorporated in Malaysia⁶⁸ provided that the said company complies with the following pre-requisites, namely, that the objects of the company complies with one or more of the objects specified in section 8 of the Act; secondly, the authorised capital of the company is not less than RM500,000 divided into shares of not less than RM10 each; thirdly, at least one-half of the amount of every share issued by the company remains unpaid and is not liable to be called up except if the company is wound up or dissolved; fourthly, the board of directors has been duly appointed in accordance with the Articles of Association; fifthly, at least RM150,000 of the authorised capital has been bona-fide paid up; sixthly, the company has deposited with the Accountant General securities to be approved by the Finance Minister to the value of RM100,000 and lastly, the

⁶⁵ Zuraidah Ali, Sharifah Zubaidah Syed Abdul Kader & Nor Asiah Mohamed; "Analysing the Need to Regulate Non-Profit Foundations under the Trustees (Incorporation) Act 1952: Towards Transparency and Good Governance," *International Journal of Business and Society*, 21(S1) pp 165 -176

⁶⁶ Section 3, Trustees Act 1949.

⁶⁷ Section 2, Trust Companies Act 1949.

⁶⁸ Section 3, Trust Companies Act 1949.

company is able to meet its obligations, apart from its liability to its shareholders, without taking into account the securities so deposited with the Accountant General.⁶⁹

Among the objects of the company under section 8 that are related to trusts and endowment are:

“(c) to act as agent for the management and control of movable and immovable property for and on behalf of the owners, or for or on behalf of executors, administrators or trustees;

(d) to act as investing and financial agent for and on behalf of executors, administrators and trustees or any other persons whatsoever, and to receive money in trust for investment and to allow interest thereon until invested; and to undertake for and on behalf of executors, administrators and trustees or any other persons whatsoever the negotiation of loans of all descriptions and the procuring and lending of money on the security of any description of property, immovable or movable, or without taking any security on such terms as may be arranged, and to advance and lend moneys to protect any estate, trust or property entrusted to the company as aforesaid and to charge interest upon any such advances:

Provided that nothing herein contained shall be held either to restrict or extend the powers of the company as trustee or agent under the terms of any trust or agency that may be conferred upon it;

(m) to support and subscribe to any charitable or public object and to any institution, society or club which may be for the benefit of the company or its employees or may be connected with any town or place where the company carries on business; to give pensions, gratuities or charitable aid to any person who may serve or have served the company or to the wives, children or other relatives of those persons; to make payments towards insurance and to form and contribute to provident and benefit funds for the benefit of any person employed by the company:

Provided that no such subscription, gift, payment or contribution shall be given or made, except out of profits of the company available for distribution as dividend;”

A trust company may not engage in the banking or insurance business nor the business of a deposit, provident or benefit society,⁷⁰ Other than that, any trust funds, property or securities held by the company in a fiduciary capacity are to be kept separate from that belonging to the company and in separate accounts and marked clearly in the books of the company.⁷¹ There is a strict requirement to forward annually to the Registrar the list of members and the statement of liabilities of the company to the public in its trustee capacity.⁷²

Company Limited by Guarantee as a Legal Vehicle to Run ‘Corporate Waqf’

⁶⁹ Ibid.

⁷⁰ Section 8(2), Trust Companies Act 1949.

⁷¹ Section 16, Trust Companies Act 1949.

⁷² Section 21, Trust Companies Act 1949.

Generally, there are two types of companies incorporated under the Companies Act 2016, namely, a company limited by guarantee ('CLBG') and a company limited by shares (or a company having a share capital). For CLBG, no share is issued and there is no shareholder involved. The members of this type of company are known as 'members' and not 'shareholders'.⁷³ A CLBG is 'a public company incorporated with the principal liability of its members limited by the constitution to such amount that the members undertake to contribute to the assets of the company.'⁷⁴ The objective of a CLBG includes, inter-alia, 'education' as well as 'promoting charity.'⁷⁵ A CLBG may either have the word 'Berhad' or 'Bhd' or not depending on the objects of the company. Where the object of the company is for purposes of charity, the word 'Berhad' or 'Bhd' should be omitted and this may only be done on application to the Minister of Domestic Trade and Consumer Affairs. For such application to be approved, such company must obtain an initial fund of RM 1 million in order to sustain its operations for the first two years of incorporation.⁷⁶ Such fund is expected to be obtained through cash contributions within six (6) months after its incorporation. Such company may use the word 'Yayasan' or 'Foundation' in its name however in such a case the word 'Berhad' or 'Bhd' should be omitted.

A CLBG is chosen by some groups to run a corporate waqf in Malaysia. A corporate waqf is as a type of waqf where the *mawquf* are in the form of shares issued and managed by a corporate entity.⁷⁷ In other words, the concept utilises the application of waqf principles in a corporate setting. The concept was initially introduced by Johor Corporation (Johor state economic development corporation (SEDC)) in 2000 through the incorporation of Waqaf-Annur Corporation ('WanCorp'). Two other CLBGs have been since incorporated resembling the corporate waqf model pioneered by WanCorp is Awqaf Holdings Berhad, namely Awqaf Holdings Berhad, established by the Malaysian Islamic Chamber of Commerce in 2010 and FELDA Waqf recently

⁷³ Observed by the court in *Soh Jiun Jen v Advance Colour Laboratory Sdn Bhd & Ors* [2010] 5 MLJ 342.

⁷⁴ Suruhanjaya Syarikat Malaysia (2021), 'Guidelines on Company Limited By Guarantee' accessed at: https://www.ssm.com.my/Pages/Legal_Framework/Document/GUIDELINES-ON-COMPANY-LIMITED-BY-GUARANTEE-270921-Final.pdf on 24th March 2022.

⁷⁵ See para 5(f), *ibid.*

⁷⁶ See para. 26, *ibid.*

⁷⁷ See Norma Md Saad, et.al. (2017); "Managing Corporate Waqf in Malaysia: Perspectives of Selected SEDCs and SIRC's" *Shariah Journal* Vol. 25, No.1 (2017), 91-116.

established by FELDA in 2021. Eight (8) features have been identified by Awqaf Holdings Bhd. for a corporation to qualify as a corporate waqf using the model as follows:⁷⁸

- (1) The corporation must be incorporated under the Companies Act as a company limited by guarantee;
- (2) The corporation must be appointed a *Nazir* or *Mutawalli* by any SIRC and is allowed to receive waqf am contributions according to the manner prescribed in the company's constitution which are in line with the terms and conditions of the waqf.⁷⁹
- (3) The waqf corporation is empowered to receive endowments in the form of cash, shares, business, physical or tangible assets including land, buildings or intellectual property from institutions, corporations or members of the public, and such physical assets are not necessarily to be registered as waqf assets by the said corporation.
- (4) The corporation must at all times uphold and comply with business principles and best corporate practices undertaking business ventures through sustainable entrepreneurial efforts.
- (5) To achieve the long-term goal of empowering the Ummah, corporate waqf gives higher priority to the accumulation and conservation of its resources by stipulating in its trust deed that 70% of annual profits/ surplus be allocated for reinvestment and not more than 30% to be distributed to charity.
- (6) The waqf corporation has full autonomy in entering business transactions lead by its CEO with the supervision of the Board of Directors.
- (7) The waqf corporation opens its membership to the public by collecting a waqf fee based on category of membership as stipulated in the Company's constitution.
- (8) The waqf corporation must at all times act in full compliance with the Shari'ah and strive to realise the *Maqasid al-Shari'ah*, particularly in relation to material wealth.⁸⁰

⁷⁸ These characteristics of corporate waqf are adapted from the website of Awqaf Holdings Berhad, visited on 10th April 2022. see: <https://awqaf.com.my/info-awqaf/ciri-ciri-waqaf-korporat/>

⁷⁹ Awqaf Holdings Berhad was appointed mutawalli by the SIRC of Negri Sembilan while FELDA Waqf received its appointment as mutawalli in March 2022 by the SIRC of the Federal Territories.

⁸⁰ See also Zuhairah Abdul Ghadas, Hartinie Abd Aziz (2017); "Legal Framework for Shari'ah Corporations in Malaysia: Special Reference to Waqf Corporation" *Journal of Modern Accounting and Auditing*, March 2017, Vol. 13, No. 3, 121-127.

The abovesaid criteria indicate the ability to use a CLBG for both, waqf and endowment endeavours. Nonetheless, although the above features for corporate waqf are formulated by Awqaf Holdings Sdn. Bhd. itself and are not compliance benchmarks recognised by the Companies Commission under any specific guidelines for corporate waqf, the regulatory reach of the Companies Commission is as far as corporate governance is concerned while the SIRC regulates the CLBG's function as mutawalli within the parameters of the instrument of appointment.

Another interesting case study of a CLBG is the International Islamic University Malaysia (IIUM) incorporated in 1983. Among the objectives stipulated in Clause 6 the IIUM Constitution are as follows:

- (p) to institute and award fellowships, scholarships, bursaries, medals, prizes and other titles, distinctions, awards and other forms of assistance towards the advancement of education;
- (q) to invest in land or securities including trustee investment such funds as may be vested in it for the purpose of endowment, whether for general or special purposes, or such other funds as may not be immediately required for current expenditure, with power from time to time to vary any such investments and to deposit any monies for the time being uninvested with any bank or any financial institution established in or outside Malaysia, in any manner that is consistent with Shari'ah;

The above objects clearly indicate the ability of IIUM to operate endowment endeavours and towards this end the IIUM Endowment Fund (IEF) was established on 15th March 1999 as a charity and fund-raising division of IIUM. It has an Executive Committee to oversee its activities and performance and a Shari'ah Advisory Committee for **advice** on shari'ah compliance. In 2016, IEF received authorisation from the Selangor SIRC to manage cash waqf schemes and among its waqf projects are two (2) cash waqf schemes, namely, the IIUM Waqf Al-Ilm and the IIUM Waqf Al-Quran. IEF launched the IIUM Waqf Al-Ilm (Knowledge Waqf) to increase the size of its fund for needy students. In 2017, it launched another scheme called IIUM Waqf Al-Quran to collect money for the purchase of the Holy Quran to be placed at designated charitable institutions. Although IEF is not a legal entity and only a division of IIUM, it shows that IIUM as a CLBG is able to operate and manage both, endowments and waqf.

v) Statutory Corporation

A good example of a statutory corporation specifically incorporated to manage waqf is Perbadanan Wakaf Selangor (PWS) established by the SIRC of Selangor in 2011 under section 8(1) of the

Administration of Islamic Law (Selangor) Enactment 2003 through the Establishment of Perbadanan Wakaf Selangor Order 1911⁸¹ to optimise the development of waqf projects in Selangor. It has a CEO, a Board of Directors with 10 members and 4 departments: i) Administration, ii) Finance, iii) Marketing and Dakwah; and iv) Investment. An Internal Audit Unit reports directly to the CEO. Among its waqf projects are housing and property development through strategic ventures and incorporation of its own developer company, Urus Maju Ehsan Sdn. Bhd. as well as cash waqf schemes.⁸²

vi) Cooperative Body

An example of a product with the spirit of Waqf or promoting Waqf is the instrument introduced by ANGKASA (National Cooperative Society) under the scheme *Infaq-lil-Waqf*. It is a crowd funding scheme for their staff and members. Although by name it has the ‘word’ infaq, nonetheless, it is a collection of money for charitable purposes with no specific motive except for the benefit of the people. A donor is made to understand that their money will later become a waqf once it reaches a certain targeted purpose. Once a Waqf is determined, ANGKASA will hand over the property to the respective SIRC as provided by the law. On many occasions, the SIRC will appoint ANGKASA as the agent or *nazir* to manage the properties since they may not have the expertise to handle the project.

In the above situation, the trustee has a choice whether to carry on with endowment project or convert the property as Waqf and seek the permission from the Majlis or once the fund has increased and requires for a bigger investment prospect, the trustee may consider to establish a foundation if the tax issue is the concern or establish a company limited by guarantee to further enhance the investment of the fund.

It is important for the manager or the trustee to understand the basic law principles that any dispute on endowment or trust shall be under the purview of the civil court where the judges may

⁸¹ Gazetted on 3rd February 2011.

⁸² Bakar, N.A.A., Hussain, M.N.A. & Hamed, A.B. (2017); “Scrutinizing the Effects of Restructuring in Perbadanan Wakaf Selangor” *International Journal of Accounting, Finance and Business* 2(4), 13-21.

consist of Muslim and non-Muslim judges while if it is clearly ‘waqf’ then the court with jurisdiction to hear the disputes is the Shariah court.⁸³

Recommendations

Reform of the law relating to endowment in the form of a non-profit organisation and incorporated trustees as well as suggestions for recognition of a legal vehicle that is able to incorporate both, waqf and endowments are feasible. Hence, as some laws have a clear provision providing for the management of endowment, adding the word “waqf” may create a door for such legal entity to operate a specific crowdfunding account based on Waqf. Some organisations such as the local authority, universities or cooperative societies have sufficient and qualified persons managing properties. Hence, with proper qualifications, expertise and human resource, the SIRC will not hesitate to appointing them as waqf agent or private Mutawalli or nazir.

Below are some models that could be explored.

A. Endowment Model

Like the above, any organisation with no authority or even with a restriction in place curtailing its management of Waqf, may opt to devise a policy which is Shariah compliant or Shariah friendly. This can be done with the setting up of a specific Board or Advisor who are Shariah experts. The terms of the appointment of the Board must spell out that all policies, management, and distribution of the benefits must not involve any principles of Islam such as ‘riba’, ‘gharar’ and etc. For a company providing or supporting non-Muslims’ clients, the hybrid Model is a better option. Accounting of this model also requires shariah compliant flow of fund, source of income, investment portfolio etc.

B. Waqf Model

Similar to an endowment, firstly, any party who is interested to introduce or establish a waqf project must take note of the legal structure of the vehicle or organisation. If an organisation has no provision providing for waqf establishment, effort can be made to formulate a proposal to be

⁸³ *Kamarol-Zaman bin Hajar v Majlis Agama Islam Selangor* [2016] 4SHLR 44; *G Rethinasamy v Majlis Ugama Islam Pulau Pinang and Anor.* [1993]2 MLJ 166.

submitted to the top management to seek approval for the establishment of a Waqf product or Waqf project. It is important to ensure that the structure and management are in place to support waqf products. Following that, there should be a proposal seeking approval for the implementation of Waqf project or products from the State Islamic Religious Council.

A common issue raised by a large number of Waqf initiators or practitioners is the difficulty of obtaining the requisite approval from the SIRC. The Majlis is either very strict or meticulous in appointing the Waqf agent or Nazir or Mutawalli. Sometimes, the fee or the requirement for the sharing of the percentage of the collection (cash waqf) that is imposed is too high for the perspective of the initiator. This policy, in many cases, shuns away the waqf initiator who may alternatively opt for either endowment or crowd funding.

C. Hybrid Model of Endowment and Waqf Model

Putting in place a hybrid model is proposed to facilitate the working of the Waqf within the existing Malaysian land system. Any party, whether an institution or individual can initiate a waqf project and endowment depending on the viability of both to work within the legal set up of the organisation. The set up can be of two separate units for Waqf on the one hand, and Endowment on the other, to ensure that all the processes for Waqf are Shariah compliant. Like the Waqf model, the hybrid model must also establish a Shariah Advisory Board or Council to monitor and approve all processes and products of Waqf to facilitate audit and report to the Majlis.

A hybrid model is very suitable for Malaysia with a background of multi-racial and multi religious societies. Although Waqf is workable for both Muslims and non-Muslims as waqif (donor) and Mawquf Alaih (beneficiaries) nonetheless, a separate product will be of advantage to promote to the non-Muslims and less hassle for the management. A hybrid model is not alien and the practice of Employee Provident Fund (EPF) and financial institutions can be a benchmark in management as well as investment of Waqf funds.

All the three models suggested above are approaches that can accommodate both, endowment and waqf projects. The existing legal vehicles discussed in this chapter have so far been used by respective waqf and endowment proponents to undertake their projects depending on the

objectives of the charitable venture and the mode of implementation as well as the role of the SIRC in approving such project, if any and regulator of such legal vehicle.