

Examining the Feasibility of Waqf (Islamic Endowment)-based Takāful Model from the Malaysian Legal Perspective

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Abstract

In 2004, the State Islamic Religious Council (SIRC) in Malaysia stated their concern on jurisdiction pertaining to control of state waqf assets, which were different among the states in Malaysia. Based on discussions with the legal experts, they have proposed the adoption of the agency principle in order to cater to the issue of control over the waqf fund. This study discusses the feasibility of waqf (Islamic endowment)-based takāful products to be practiced in Malaysia by considering the opinions of SIRC and legal experts in the industry. In order to achieve the research objective, this research adopts a qualitative methodology and focus group discussions with the SIRC representatives and legal experts. Overall, it is found that all respondents have agreed with the proposed waqf-based takāful model as it has special values that may inculcate the culture of brotherhood in society as this concept encourages people to give something to others without receiving any financial return. This study contributes to the discussion of the feasibility of waqf (endowment) principle to be introduced in the takāful products from the legal perspective.

Keywords: Islamic Endowment, Waqf, Takāful, Legal Perspective.

اختبار جدوى نموذج التكافل المستند إلى الوقف في ضوء القانون الماليزي

ملخص البحث

في عام ٢٠٠٤، أعلن مجلس الدولة الإسلامي الديني (SIRC) عن قلقه بشأن الولاية القضائية المتعلقة بالسيطرة على أصول الوقف الحكومية التي كانت مختلفة بين الولايات في ماليزيا، واستنادا إلى المناقشة مع الخبراء القانونيين، فقد اقترحوا اعتماد مبدأ الوكالة من أجل تلبية مسألة السيطرة على صندوق الوقف. تناقش هذه الدراسة جدوى منتج التكافل المستند إلى الوقف الإسلامي في ماليزيا وذلك بمراعاة آراء (SIRC) والخبراء القانونيين في هذا المجال. ولتحقيق هذا الهدف، هذه الدراسة تستخدم المنهجية النوعية وتجرى مناقشات جماعية مركزة مع ممثلي (SIRC) والخبراء القانونيين. بشكل عام، وُجد أن جميع المشاركين قد وافقوا على نموذج التكافل المقترح القائم على الأوقاف لأنه يحتوي على قيم خاصة قد تغرس ثقافة الأخوة في المجتمع لأن هذا المفهوم يشجع الناس على إعطاء شيء للآخرين دون تلقي أي عائد مالي. تساهم هذه الدراسة في مناقشة جدوى مبدأ الوقف الذي سيتم طرحه في منتجات التكافل من الناحية القانونية.

كلمات مفتاحية: الوقف الإسلامي، الوقف، التكافل، المنظور القانوني.

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1. Introduction

Islamic endowment is also known as waqf and, under the Islamic law, it is considered to be one of the voluntary charitable acts which has been recommended by the Prophet Muhammad (pbuh) in the early age of Islam. It is also considered to be the property that is donated by the Muslims for the benefit and welfare of the Muslims in general, through which the trustee will gain merit till the hereafter. According to Mahamood (2006), and Abu Zahrah (2007), there are four conditions for a donation to qualify as Islamic endowment, which are the intention or declaration, the donor, the property or any tangible or intangible asset given as endowment and lastly, the beneficiary.

Cizakra (2000) added that the establishment of Islamic endowment went through a significant growth,

stagnation and even downturn. In Malaysia, the practice of endowment started in the 15th century during the ascendancy of Malacca Sultanate. During this period, endowment became one of the popular practises among the Malaysian Muslims. Many proofs of the existence of endowment properties have been found in villages such as mosques and Islamic schools (called Pondok) (Aun, 1975). In addition, cash endowment was also being practiced in Malaysia in order to help and benefit the society.

One of the examples of cash endowment proposed by this research is endowment-based Islamic insurance (*takāful*) for the flood victims in Malaysia. Compared to other countries, the power of control over the Islamic endowment fund (*waqf*) in Malaysia is basically put under one statutory body for each state called the State Islamic Religious Council (SIRC). This has resulted in the significant challenge that there is no standard shared among these councils in terms of managing the waqf fund (asset) as each state council has carried out their own enactments for governing the management of the fund. Therefore, this research aims to discuss the feasibility of Islamic Endowment-based Islamic insurance products to be practiced in Malaysia through considering the opinions of the State Islamic Religious Council and legal experts in the industry.

2. Literature Review

2.1 Legal Issues on Islamic Endowment in Malaysia

In Malaysia, every decision or ruling relating to Islam is seen to be under the absolute authority of the States. Thus, the issue of endowment is placed under a body known as the National Council for Fatwa Committee of Islamic Religious Affairs Malaysia. As mentioned by Nooh (2003), at the state level, institutional law is enacted by a legal entity other than the State Islamic Religious Council, which is State Islamic Religious Department; or the state's Islamic laws are granted recognition through the Shariah Court. Mahmood Zuhdi (2004) added that the problems and disputes arising with respect to endowed property involving Islamic law will be referred to the Fatwa Committee Meeting and the committee itself will address these problems. Laws enacted in the states have delegated authority to the respective state governments to set up

a committee to help the department issue a *fatwā* from a *Muftī* Council (Nur Khalidah, 2014).

Even though the power of control over this endowment is basically put under one statutory body for each state and there is no standard shared among these councils in terms of managing the fund, this study will further investigate the standardization of rulings when it comes to the implementation for flood victims.

2.2 Concept of *Takāful* (Islamic Insurance)

The concept of *tabarru'* (donation) is the core of the *takāful* system and this should be free from elements of uncertainty and gambling. In addition, *tabarru'* means donation, gift or contribution (Nasser, 2011). The contract must possess not only an element of mutual cooperation (shared responsibilities) among participants but also an element of sharing investment income between the *takāful* operator and its participants according to a predetermined ratio (Kwon, 2007). This shared responsibility can be viewed as a practice of *tabarru'*.

Nasser (2011) also adds that each participant who needs protection must have an intention to donate to other participants, when they face difficulties. Besides, according to Shariah principles, an Islamic insurance system should be based on the concept of a pooling of risks, where a professional service manager charges for his services and does not gain benefit from the insurance activities (Abdul Rahim, 2007).

In the context of *takāful*, a voluntary specific amount of donation is made by the participants and is managed by the *takāful* operator. The pooled fund is then utilized to help the members who have been unfortunate. Through the concept of *tabarru'* (donation), the participants do not think only of their own protection, but also of helping other participants (Abdul Rahim, 2007). Furthermore, without this concept of donation, the transaction would be considered as buying and selling and would be the same as the conventional insurance contract. Before going deeper into the explanation of the proposed model of Islamic insurance for flood victims, this research will explore further the existing model of Islamic insurance.

providing services. Moreover, if there is a deficiency in the *takāful* risk fund, a provision for an interest-free loan or *qard ḥasan* is applied (Zuriah, 2009). The following figure illustrates the *muḍārabah* model in *takāful*.

2.3.2 *Wakālah* Model

Under the *wakālah* model, the *takāful* operator acts as the agent who invests and administers the fund(s) on behalf of the participants, and ensures appropriate treatment, equity and fairness among all participants. In return, the *takāful* operator receives the *wakālah* fee, which comprises of both the administration and investment fees, to cover the operating expenses. Besides, the *takāful* operator can be considered to be a third-party administrator (Younes, 2010).

Based on the flowchart in Figure 2, all contributions paid by the participants are allocated to the PIF and PRF at a ratio based on the various products offered. The company charges a *wakālah* fee for managing the family fund. Part of the contributions in the PIF and PRF is put into the *Ta'āwunī* Account Pool (TAP) that has front and back-end charges for allocations to be made to the Expense Fund, Risk Fund

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graph TD
    PARTICIPANT --> TC[Takaful contribution]
    TC --> G1[General Or Group Family Takaful Fund]
    G1 --> G2[General Or Group Family Takaful Fund]
    G2 --> OCF1[Operational Cost of takaful]
    OCF1 --> OCF2[Operational Cost of takaful]
    OCF2 --> OCF3[Operational Cost of takaful]
    OCF3 --> SP[Surplus profits]
    SP --> SSC1[Share of Surplus to the company Eg. 60%]
    SP --> SSC2[Share of Surplus to the company Eg. 60%]
    G2 --> IB[Investment by company]
    IB --> PFI[Profits from investment]
    PFI --> PSH[Profits to shareholders]
    PFI --> CAM[Company's Administration & Management expenses]
    CAM --> PSH
    TC --> TCB[Takaful contract Based on principle of Mudarabah]
    TCB --> PSH
    
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In *muḍārabah*, the participants contribute capital while the operator contributes services. If there is profit in the operation, all partners in the contract will share the profit according to a pre-agreed ratio. In the event of loss, the operator only loses its labour in

and Special Fund for benefits, reserves, claims, management expenses and commissions. Any surplus in the TAP is put back into the PIF and PRF.

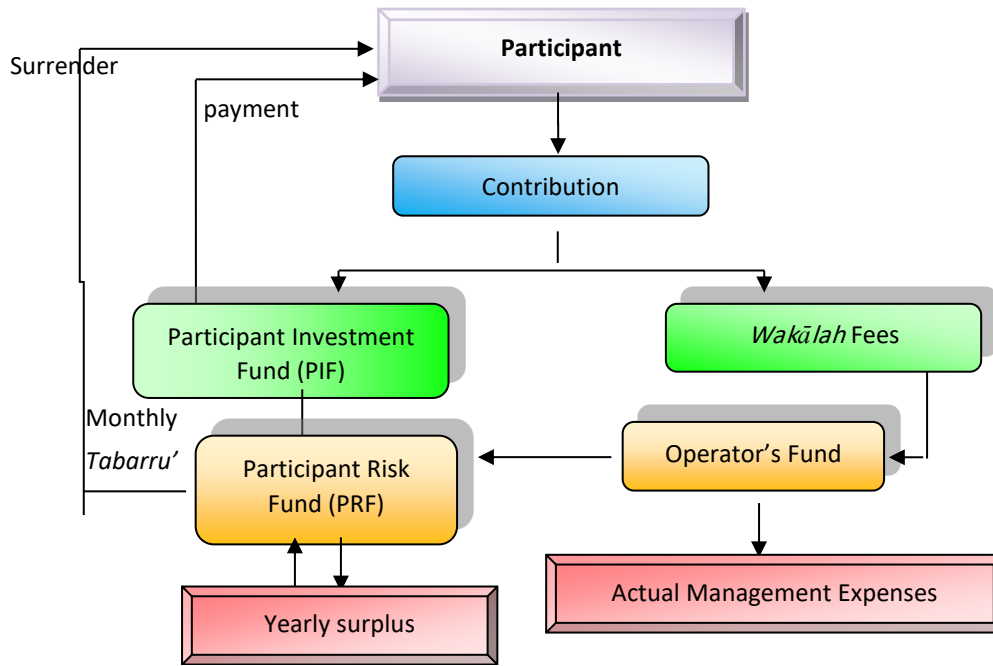


Figure 2: *Wakalah* Model for *Takaful* - Source: INCEIF (2012)

3. Proposed Waqf-based Takaful Model

The proposed model for *waqf* (Islamic Endowment)-based *takaful* for flood victims is shown in Figure 3 below. The *waqf* fund would be collected via one option attached with a normal *takaful* scheme where the customer (termed as participant in *takaful*) have an option to donate a portion of their monthly contribution (termed as premium in conventional insurance) into this fund. As the main concern of the model is flood coverage, the *takaful* operator will act as an agent to collect and manage the fund on behalf of the participants. Hence, the respective future flood victims

(people who live in flood prone areas) would also need to contribute a small amount of *takaful* contribution to show that they made efforts to contribute to this scheme. It basically parallels the spirit of the *takaful*, which is mutual protection, and in this case, the normal participants will make a special donation (*waqf khās*) for the flood coverage to assist the future flood victims. Hence, when the flood happens, the *takaful* operator is responsible for utilising the *waqf* fund to pay for all losses caused by the flood as determined upfront in the agreement.

In addition, another medium to collect the *waqf* fund for reducing the burden suffered by the flood

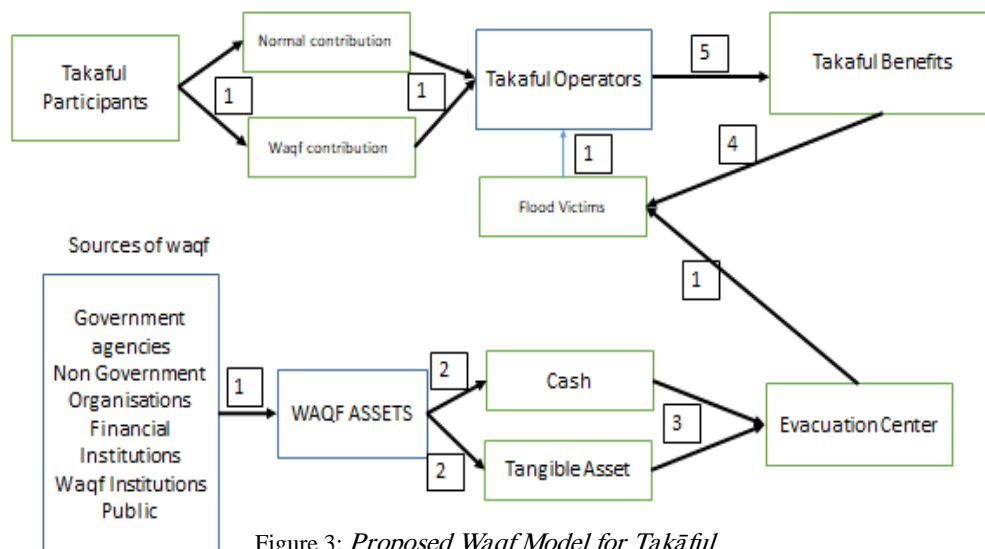


Figure 3: *Proposed Waqf Model for Takaful*

victims is via *waqf* contribution (both in terms of monetary and tangible assets) by other external parties including government agencies, private companies, financial institutions, *waqf* institutions (Islamic religious councils), and also the public. In this context, following the spirit of the *waqf* principle, all contributions given by any party for *waqf* should provide perpetual benefits to the recipients (flood victims). Therefore, both *waqf* in the form of cash as well as any intangible *waqf* donation will be utilised to prepare flood evacuation centres near the flood prone areas. The centres will be used as temporary living places for the flood victims and would be useful as community centres during the non-flood season. Overall, only the first part of the proposed *waqf*-based *takāful* model shown in Figure 3 is discussed in detail in this research which involves the *takāful* operator as a manager of the *waqf* fund. In Malaysia, there is an issue regarding the power to manage the *waqf* fund as once the fund is given based on the *waqf* principle, the only body that has full power over this fund is the Islamic religious council of a particular state. The next few sections will discuss the findings from the focus group discussion with council representatives and legal experts on how to solve this issue.

4. Research Methodology

This research adopts the qualitative approach to find the legal opinions on the issue of control over a *waqf* fund in the context of the *takāful* model as well as views on the proposed model. Focus group discussions (FGD) with four (4) representatives from the Islamic Religious Council and three (3) legal experts have been conducted in which the main topics were discussed. These topics include legal issues, the power to manage *waqf* assets, profit sharing, the sharing of underwriting surplus, and others. Overall, a one-day session (8.30am-5.30pm) was utilised for the FGD. Detailed results of the FGD are presented in the next section.

5. Findings from Focus Group Discussion (FGD)

5.1 Details of Respondents

Details of the respondents are provided in Table 1. Overall, all discussants were divided into two groups,

takāful/bank operators and Islamic Religious Council/lawyers.

There were three sessions conducted during the one-day FGD in which the first session was a briefing on the two existing models discussed in this research and a third model proposed in it by the head researcher; the second session was conducted as parallel discussions in groups; and the third session was a presentation of the outputs or decisions made by all groups.

In this context, each group was asked to comment on three models, discuss the possible issues, and, finally, to come up with the best model that can be offered in the market. The FGD was concluded with an agreed-upon alternative model of the *waqf*-based *takāful* product as presented by the head researcher.

Industry	Positions	Agencies/Institutions
Takāful and Banks	Assistant Manager, Shariah Division	Syarikat Takāful Malaysia Berhad
	Secretariat	Malaysian Takāful Association
	Assistant Manager, Shariah and Governance	CIMB Islamic Bank Berhad
	Shariah Advisory and Shariah Management	Maybank Islamic Berhad
	Head of Shariah	Prudential BSN Takāful Berhad
Islamic Religious Council and Lawyers	Senior Assistant Director, Waqf Division	Wakaf, Zakat, and Haji Department (JAWHAR)
	Head of Assistant Director, International Cooperation Unit	Wakaf, Zakat, and Haji Department (JAWHAR)
	Assistant Officer of Islamic Affairs (Waqf)	Majlis Agama Islam dan Adat Melayu Terengganu (MAIDAM)
	Finance Assistant	Majlis Agama Islam dan Adat Melayu Terengganu (MAIDAM)
	Principal Assistant Secretary (Property Management)	Majlis Agama Islam dan Adat Melayu Terengganu (MAIDAM)
	Managing Partner	J. Lee & Associates
	Managing Partner	Mu'az Aiman Halem Auzan & Associates

Table 1: Background of Respondents

5.2 Views on the Proposed Model

With regards to the decision of the Focus Group Discussion, the main focus was on the legal matters, especially when dealing with *waqf*. Basically, it is not easy for a person to go against the requirement for the law, where the receiver of the donation must be an executor under the Islamic Religious Council for the state. Even if there is an early establishment of *waqf*, it takes ages to make legal matters clear when dealing with *waqf* issues because this jurisdiction is under the King of the State.

The FGD with Islamic Religious Council and legal experts concluded with the structure to help the flood victims in the future. The group suggested to continue with the existing *takāful* operation with the following example:

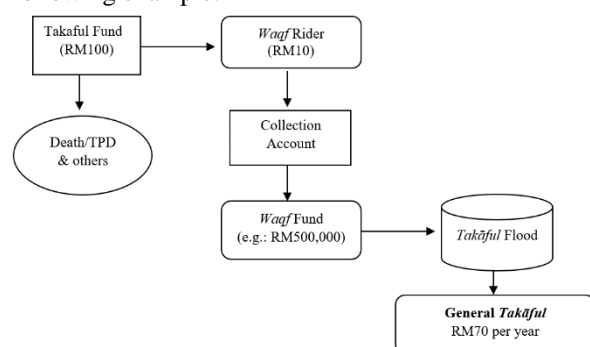


Figure 4: Proposed Model of *Takāful* Fund Based on *Waqf* for Flood Victims

Figure 4 explains how the proposed model for flood victims can be implemented in general. However, in order to ensure this fund is relevant to be operated or administered by the *takāful* operator, an alternative model is shown in detail in Figure 5. The proposed model involves two situations-the first situation involves Mr. Ahmad and the second situation involves Mr. Ali. To reduce the burden of contribution for flood victims, they contribute a small contribution. Figure 6 develops further the application described in Figure 5.

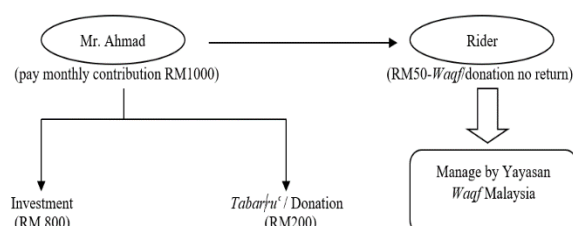


Figure 5: Illustrates the situation of Mr. Ahmad

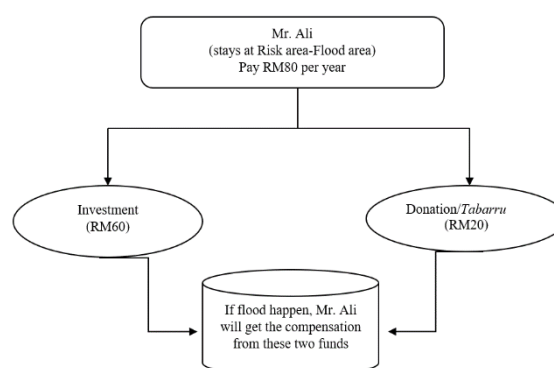


Figure 6: Illustrates the situation of Mr. Ali

Based on the first situation (Figure 5), Mr. Ahmad can be considered as a normal contributor to the *takāful* family product who does not live in an area with a high risk of flooding. Basically, Mr. Ahmad pays a monthly contribution RM1,000. Then, this contribution is allocated into two funds, which are the investment fund (RM 800) and the risk fund (RM200). Once we have the *takāful* operator's initiative to start, we add in something called the waqf rider/charity rider or extra funds for flood victims. This starts with Mr. Ahmad's situation and later is further explained with Mr. Ali's situation.

Besides RM1,000, Mr. Ahmad declares to the *takāful* operator to add RM50 to the waqf rider. At the time of his contribution, he mentions to the *takāful* operator that his intention is that he does not want the returns and it must be considered as a donation for the flood victims. It is the responsibility of the *takāful* operator to use the fund for investment purposes and to put it into an especial fund that will be managed by Waqf Council Malaysia.

In the second situation, which involves Mr. Ali, the *takāful* operator needs to open the product for flood funds. For the *takāful* operator to operate, Mr. Ali must be a participant in *takāful*. Mr. Ali also stays in an area with a high risk of flood. The example shown in Figure 6 explains that Mr. Ali needs to pay RM80 for his contribution to the *takāful* operator per year. Out of this amount RM 60 will be channeled to the investment fund and RM 20 to the Tabarru' fund. If a flood occurs, Mr. Ali will receive compensation from both funds. The scenarios of Mr. Ahmad's and Mr. Ali's situations are combined as follows.

Here the problem is that the contribution from Mr. Ali is a very small amount. Therefore, to solve this

issue, Mr. Ahmad's group contribution is combined with Mr. Ali's fund (as the rider). The new *tabarru'* donation pool is segregated into two different groups of people which are, firstly, those who want to donate; and secondly, the participants who need the assistance. The *takāful* operator already operates the existing fund and needs to expand it in order to get the approval of Bank Negara to have that rider. Therefore, all *takāful* participants may contribute to the rider, which is transferred into a flood fund to help other people such as Mr. Ali.

Among the potential issues that might appear when implementing this model are:

- i. Are there any insurable interest issues?
- ii. How to maintain the sustainable issues (aligned with waqf principles)?
- iii. If the Islamic Religious Council of each state gives the authority, is it possible for the *takāful* operator to manage the fund?
- iv. Will the money from the Waqf Council of Malaysia be given to the *takāful* operator or Mr. Ali?
- v. Will the Waqf Council of Malaysia invest the money first before channeling it to the *takāful* operator?

6. Conclusion

Overall, it is found that all respondents have agreed with the proposed *waqf*-based Islamic insurance product because it has special values that may inculcate the culture of brotherhood in society, as this concept encourages people to give something to others without receiving any return, especially in financial matters. Hence, as part of their agreement, the respondents have stated their concern on the *waqf* enactments which differ among the states in Malaysia and, based on discussions with the legal experts, they have proposed to adopt the agency principle in order to address the issue of control over the *waqf* fund.

The term *waqf* referred to for this model explains the contract of *takāful* as underlining the agreement or consent of the participant that the *takāful* contribution paid in return for participating in the *takāful* product is to be credited by the operator into the

takāful fund in accordance with the principle of *waqf* endowment.

A *waqf* account has to be established by the operator within the *takāful* fund. To this effect, the operator is required to relinquish some kind of 'seed' money as *waqf* to generate the *waqf* account. This *waqf* account of the *takāful* fund will be invested in a method similar to *muḍārabah* and *wakālah*. The *waqf* fund shall work to achieve the following objectives:

- i. To extend financial assistance to its members in the event of losses.
- ii. To extend benefits to its members strictly in accordance with the *waqf* deed.

All the expenses related to the underwriting and operational costs of *takāful* shall be charged to the *waqf* fund. As manager, the *takāful* operator will perform all functions necessary for the operations of the *waqf* for a *wakālah* fee to be deducted from the contribution by the participants.

As *muḍārib*, the operator will manage the investment of the *takāful* fund, including its *waqf* account, in Shariah compliant investment avenues and will share its returns on the investment at an agreed ratio similar to the profit-sharing structure under the *muḍārabah* contract.

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The authors would like to express heartfelt thanks to the Ministry of Higher Education, Malaysia and the International Islamic University Malaysia for financial support under Fundamental Research Grant Scheme (FRGS19-016-0624).