

## **A STUDY ON THE SOCIO-ECONOMIC ROLES OF *Waqf Ahli* (FAMILY *Waqf*) IN PROMOTING FAMILY SECURITY AND A SUSTAINABLE FAMILY ECONOMY\***

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### **ABSTRACT**

The challenges associated with financial stability and sustainability of family economy in the future are increasing. The most worrying is the problems facing the survivors after the death of their breadwinners. The majority of Muslims are rarely ready for this possibility and many lacks the knowledge on how to face such a situation. Some wrongly hold to the view that such preparation is not encouraged in Islam, against the principle of *faraidh* (estate planning) and an act of avoiding taxation and etc. In this article, it is shown that although *waqf* (Islamic endowment) appears in the form of charity but the outcomes are tremendous, encompassing family future investment and income generating. Employing a doctrinal analysis by looking into the available literatures on *waqf*, this article discusses how *waqf ahli* can contribute to family security and ensure a sustainable family economy. It is shown that Islamic endowment (*waqf*) aims to preserve and protect property for the use of the public; including spending on family. In addition, family *waqf* saves the heirs' property or business from fragmentation. Most importantly, it ensures sustainable family financial planning within the Shari'ah framework while adding value to the existing family property or business.

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**Keywords:** family *waqf*, *waqf dhurri*, *faraidh*, tax evasion, Islamic financial planning, sustainability of family economics, family security

## **KAJIAN MENGENAI PERANAN SOSIO-EKONOMI WAQF AHLI (WAQF KELUARGA) DALAM MENINGKATKAN JAMINAN KELUARGA DAN KEMAMPUAN EKONOMI KELUARGA**

### **ABSTRAK**

Cabaran yang berkaitan dengan kestabilan kewangan dan kemampuan ekonomi keluarga pada masa akan datang semakin meningkat. Yang paling membimbangkan adalah masalah yang dihadapi oleh waris-warisan selepas kematian si mati. Majoriti umat Islam tidak bersedia dan kurang pengetahuan untuk menghadapi keadaan sedemikian. Sesetengah orang berpegang kepada pandangan yang tidak benar yang mengatakan bahawa perancangan sedemikian adalah tidak digalakkan dalam Islam, bertentangan dengan prinsip *faraidh* (perancangan harta pusaka) dan merupakan satu bentuk tindakan bagi mengelakkan percukaian dan sebagainya. Makalah ini menunjukkan bahawa walaupun *waqf* (endowmen Islam) terhasil dalam bentuk *infaq* tetapi hasilnya luar biasa merangkumi pelaburan masa depan sesuatu keluarga dan menjana pendapatan. Berdasarkan penggunaan analisis doktrin dengan melihat literatur yang ada berkenaan dengan *waqf*, makalah ini membincangkan bagaimana *waqf* ahli boleh menyumbang kepada jaminan keluarga dan kemampuan ekonomi sesuatu keluarga. Perbincangan makalah menunjukkan bahawa sesuatu *waqf* dalam Islam adalah bertujuan untuk memelihara dan melindungi harta benda bagi kegunaan orang awam; termasuklah perbelanjaan keluarga. Di samping itu, *waqf* keluarga dapat melindungi harta atau perniagaan waris dari pemecahan. Yang paling penting, ia memastikan kemampuan kewangan keluarga dalam kerangka Syari'ah dan memberi tambah nilai kepada harta atau perniagaan keluarga yang sedia ada.

**Kata kunci:** *waqf* keluarga, *waqf dhurri*, *faraidh*, percukaian, perancangan kewangan Islam, kemampuan ekonomi keluarga, jaminan keluarga

## INTRODUCTION

Family wealth management is crucial nowadays where economic instability issues are increasing; family unity is uncertain and reliance on an individual family member to manage family assets is sometimes hopeless due to personal incapacity or intellectual disorder. There are various means of wealth management in Islam including Islamic trust, Islamic foundation and Islamic endowment, charitable trust, private trust and etc.<sup>1</sup> According to Cizakca,<sup>2</sup> the economists who studied *waqf* would be perplexed by the fact that countless of essential services such as health, education, municipal, etc., were provided in Islamic history at no cost whatsoever to the government. Therefore, the *waqf* system can significantly contribute towards that ultimate goal of every modern economist. It can help reduce government expenditure, adjust or realign budget deficit and lowers the need for government borrowing. In the long run, *waqf* may help curbing the ‘crowding-out effect’ and leads to a reduction in the rate of interest which consequently is a basic impediment for private investment and growth. Fyzee claims that *waqf* has a strong relationship of religious and social economy for the Muslim.<sup>3</sup> In this article, *waqf* is proposed as an alternative mechanism to protect as well as to enhance family economy by promoting *waqf ahli* or family *waqf*.

## WHAT IS WAQF

Literally, “*waqf*” means to stop, contain, or to preserve. In Shari‘ah, *waqf* is a voluntary, permanent and irrevocable dedication of a portion of one’s wealth either moveable or immovable, in cash or in kind, any profit arising from the property to be used for the benefit of others for the sake

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<sup>1</sup> The word *waqf*, Islamic foundation and Islamic endowment is employed interchangeably in this article though there are fine differences in the concept as well as the philosophy of those words.

<sup>2</sup> Cizakca, Murat, “Awqaf In History And Its Implications For Modern Islamic Economies”, *Islamic Economic Studies* (1998): Vol. 6, No. 1, November 1998, 44.

<sup>3</sup> Fyzee Asaf, *Outlines of Muhammedan Law*, (New Delhi, 1974), 274.

of Allah (s.w.t).<sup>4</sup> Once a *waqf*, it can never be alienated, given away as a gift, inherited, or sold. It belongs to Allah (swt) and the corpus of the *waqf* always remains intact. The *manfa'ah* or usufruct of the *waqf* may be utilized for any Shari'ah-compliant purposes.

A proper understanding of the concept of *waqf* is necessary in developing and managing *waqf* assets. The concept of *waqf* must go beyond the religious purpose seeking the reward from Allah (swt) in order to protect the property and ownership of the *ummah* for future enjoyment. Although *waqf* is only a voluntary act, the synergy of practices of *waqf* with other economic instruments such as *zakat* (alms-giving) and Islamic finance would gear towards a bigger planning which could benefit more people thus providing a better security economically.

## COMPONENTS OF WAQF

The components of *waqf* could be easily understood by examining the table below.

Table 1:  
Components of *Waqf*

<i>Waqif</i> (donor, endower)	A person who endows his property; tangible or intangible or cash for charitable purposes. The list of <i>waqif</i> may extend to organisation, government as well as non-Muslim.
<i>Waqfiyyah</i> or <i>waqf</i> deed or <i>waqf</i> contract	A document which describes the way in which a <i>waqif</i> states his/her asset or fund as <i>waqf</i> . Islam provides that the intention of <i>waqf</i> is as good as the injunctions of Allah swt. It cannot be simply cancelled or changed unless through proper channel and based on a valid cause. Nevertheless, a dedication of property without any proper document is also valid as long as the pillar ( <i>rukun</i> ) <i>waqf</i> are fulfilled.

<sup>4</sup> There are many literatures which discuss the concept of *waqf*. For example, Mohamad Tahir Sabit, *The Concept and Objective of Waqf*, accessed May 30, 2018, [http://www.academia.edu/576257/THE\\_CONCEPT\\_AND\\_OBJECTIVE\\_OF\\_WAQF](http://www.academia.edu/576257/THE_CONCEPT_AND_OBJECTIVE_OF_WAQF).

<i>Mawquf alaih</i> (beneficiaries)	Persons who are indicated as those who can benefit from the <i>waqf</i> or areas which are the purpose of <i>waqf</i> . In other word, those people are entitled to benefit from the return of <i>waqf</i> (manfaah or usufruct). The <i>mawquf alaih</i> are not confined to human being alone, animals, or non-Muslim may also benefit the <i>waqf</i> .
<i>Mawquf</i>	Assets or fund, tangible or intangible, which is endowed as <i>waqf</i> in charitable purposes and so on. The Muslim jurists have consensus that intangible items may form as <i>Mawquf</i> such as intellectual property or cash.
<i>Mutawalli or Nazir</i>	A person or an institution that is assigned as legal custodian over <i>Mawquf</i> which is not belonging to him in order to comply with the <i>waqf</i> deed.

Source: Author's description

*Waqf* can be divided into several categories. From the perspective of the use and the beneficiaries, *waqf* can be divided into *waqf khairy* and *waqf ahli*. *Waqf khairy* refers to the use of *waqf* which is for the benefit of the general public while *waqf ahli*<sup>5</sup> refers to the use of *waqf* which is restricted for the identified family members as the main beneficiaries and others.

It is a common finding that *waqf* has no clear provision in the Quran.<sup>6</sup> Most of the authorities are derived from the *ahadith* of the Prophet Muhammad peace be upon him (s.a.w) and the practices of the companions of the Prophet (s.a.w).<sup>7</sup> In contrast to English law of trust

<sup>5</sup> This type of *waqf* is also known as *waqf dhurri*, *waqf 'ala al aulad* or family *waqf*.

<sup>6</sup> Haitam Suleiman, *The Islamic Trust Waqf: A Stagnant or Reviving Legal Institution?*, (2016), Vol. 4, 30.

<sup>7</sup> There are different opinions as to the first *waqf* established in the Islamic history. For example, one opinion refers the earliest *waqf* made by a learned Jew named *Mukhayriq* who embraced Islam after *Hijra* and fought in the *Uhud* battle in 3<sup>rd</sup> AH/624 See Moshe Gil, "The Earliest *Waqf* Foundation", *Journal of Near Eastern*, (1998): Vol. 57, no. 2: 126.; Muhammad Yousuf

where a charity dedicated for family members were held invalid, giving charity in Islam may be done for one own family. In fact, Al Quran emphasizes that:<sup>8</sup>

"Righteousness is not that you turn your faces toward the east or the west, but [true] righteousness is [in] one who believes in Allah, the Last Day, the angels, the Book, and the prophets and gives wealth, in spite of love for it, to relatives, orphans, the needy, the traveler, those who ask [for help], and for freeing slaves; [and who] establishes prayer and gives *zakah*; [those who] fulfill their promise when they promise; and [those who] are patient in poverty and hardship and during battle. Those are the ones who have been true, and it is those who are the righteous."

It further provides that:

"They ask you, [O Muhammad], what they should spend. Say, "Whatever you spend of good is [to be] for parents and relatives and orphans and the needy and the traveler. And whatever you do of good - indeed, Allah is Knowing of it" <sup>9</sup>

The Holy Prophet (s.a.w) himself had directed Abu Talhah (r.a) to assign the *mawquf* (*waqf* property) to his close family. When the verse "You shall never attain virtue (*birr*) until you spend out of that which you love".<sup>10</sup> The companion Abu Talhah (r.a) came to the Messenger of Allah (s.a.w) and said: Surely, the most beloved of my properties to me is Bayraha'—a garden where the Holy Prophet (pbuh) used to enter and sit in the shade of its trees, and drink from its water—it is (hereby given) for Allah and His Messenger (pbuh) I seek its virtue and recompense; so place it, O the Messenger of Allah, where Allah directs you. The Prophet

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Farooqi, "The Institution of *Waqf* in Historical Perspective", *Hamdard Islamicus*, (1990): Vol. 13, Issue 1, Hasanuddin, A., "Strategies to Develop *waqf* administration in India", (Research paper No. 50, Islamic Research and Training Institute (IRTI), Islamic Development Bank, Jeddah, Saudi Arabia, 1998), Paul Stibbard, David Russel QC and Blake Bromley, "Understanding the *Waqf* in the World of the Trust", in *Trust & Trustees*, (2012), vol. 18, no. 8.

<sup>8</sup> *Al Baqarah* (2): 177.

<sup>9</sup> *Al Baqarah* (2) : 215.

<sup>10</sup> Surah Ali Imran (3): 92.

(pbuh) thereupon said: Fine, Abu Talhah, surely that is a profitable investment; we have accepted it from you, and have returned its benefit to you. Assign it (for the benefit) among your relatives. Thus, Abu Talhah (r.a) donated it to his close kin. The act also sourced upon a hadith of the Prophet (pbuh) that " When a man dies, his acts come to an end, but three, recurring charity, or knowledge that benefits people, or pious son (daughter) who prays for him."<sup>11</sup>

## THE PHILOSOPHY AND THE ELEMENTS OF ISLAMIC WEALTH MANAGEMENT

One of the objectives of Shari 'ah (*maqasid al Shariah*) is to protect property.<sup>12</sup> This is in line with the natural desire of human being to own, protect and preserve property or wealth.<sup>13</sup> Al Quran clearly states that it is a virtuous act for a parent to plan and save for their children's future (Al Quran (18):18). This verse enjoins a righteous man to take necessary measure for proper succession plan that will minimise harm and ensure as much as possible that they will live in a better spiritual, moral and material conditions.

There are many *quranic* injunctions on *faraidh* (law of inheritance) in which Allah (swt) reminds the Muslim to be concerned about succession for their children.<sup>14</sup> Spending in the cause of Allah s.w.t is a broad concept and varies. It includes *sadaqah* (voluntary giving), compulsory giving i.e. *zakat* and voluntary act of *waqf* (endowment). Since the early Islam<sup>15</sup>, Muslims have utilised the benefit of *waqf* and *waqf ahli* to support the needy, providing public utilities in supporting the government, and ensuring the security of family for their future needs. Being a perpetual deed, the act of *waqf* ensures the future security and if

<sup>11</sup> *Sahih Muslim*, No 1631, 3/1256; Muslim, [1992]:Chap 3, *hadith* no. 14.

<sup>12</sup> Lahtasna A, *Maqasid al-Sharia'ah in Islamic Finance*, (Kuala Lumpur: IBFIM, 2013) 27.

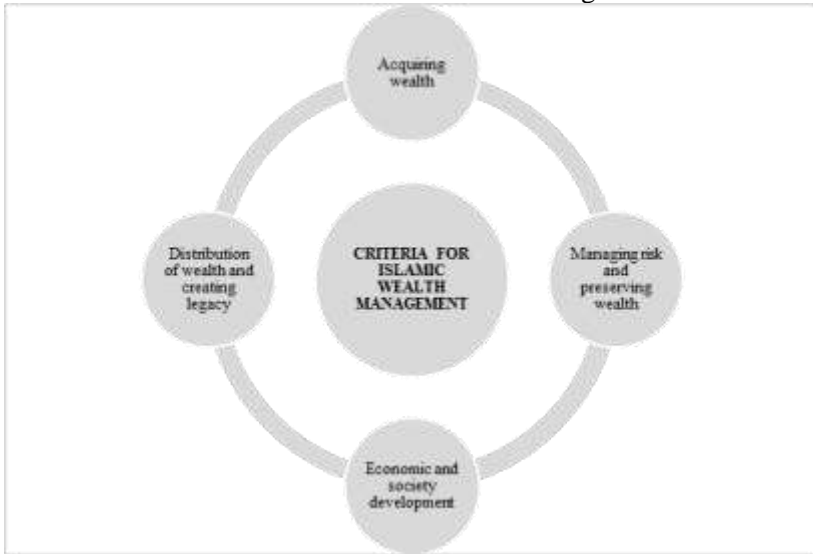
<sup>13</sup> Mohamad al Tahir Ibn Ashur, *Treatise on Maqasid al Shariah*, Mohamed el Tahir el Mesawi, trans., (The International Institute of Islamic Thought, 2006), 271.

<sup>14</sup> For example, *Surah An Nisa'*(4):11.

<sup>15</sup> There are discussion in which *waqf* was also referred to the Prophets before Islam. Baitul Haram is said as the first *waqf* for the Muslim *ummah* since the time of the Prophet Ibrahim *alaihissalam*.

used properly, shall produce continuous benefits not only for one own family members but also the general public as well as other god-creations. The criterias of Islamic wealth management as shown in Chart 1 are very much supported by *waqf*.

Chart 1:  
Criteria for Islamic Wealth Management



## SELECTED LITERATURES REVIEW ON *Waqf Ahli*

Table 2:  
Literatures on *Waqf Ahli*

YEAR	AUTHOR(S)/ Sources	VIEWS
2016	Abdul Rahman Sadique	Literatures devoted to the specific topic of <i>family waqf</i> are hard to be traced, as the latter is discussed in the relevant literature along with other types of <i>waqf</i> .
1999	Seminar on Awqaf Experiences in	Since <i>waqf</i> includes <i>waqf alal-aulad</i> , hence <i>waqf</i> legislation must also cover family awqaf instead of



	South East Asia held in May 1999	confining regulatory measures to non-family <i>waqf</i> , in order to protect the interests of future generations of beneficiaries.
	Muhammad Hasanayn Mahloof in <i>Manhaj al-Yaqin fi Bayan anna al-Waqf al-Ahli min al-Din</i>	Addresses the nature of such awqaf and their importance in Islamic law. It sheds light on the arguments put forward by the Egyptian government for the abolishment of family awqaf with responses to them both from the Islamic as well as from a social perspective. <sup>16</sup>
	<i>The Manual of Egyptian Judicial Orders</i>	Details the laws pertaining to awqaf with special reference to family <i>waqf</i> , and provides an important insight into their abolishment.
	Prof. Syed Khalid Rashid in <i>Awqaf experiences in South Asia</i>	Addresses family <i>waqf</i> briefly, yet provides arguments supporting its revival.
	Miriam Hoexter	Discusses the awqaf in Algeria dedicated to the Haramayn Sharifayn in Saudi Arabia, indirectly alluding to the flourishing nature of the family awqaf that were found in abundance in Algeria and other Muslim lands

<sup>16</sup> M. Ubaid al-Kabisi, *Ahkam al-Waqf fi asy-Syar'iah al-Islamiyah*, (Baghdad : Al-Irsyad, 1977) cited in Tanti H.T, "Wakaf Ahli Dalam Konsep Fikih Tradisional", accessed May 30, 2018, [http://www.academia.edu/5196894/WAKAF\\_AHLI\\_DALAM\\_KONSEP\\_FIKIH\\_TRADISIONAL](http://www.academia.edu/5196894/WAKAF_AHLI_DALAM_KONSEP_FIKIH_TRADISIONAL).

## WAQF AHLI

*Waqf ahli* requires similar act of a normal *waqf*. It requires a fulfilment or compliance of similar pillars and terms with other types of *waqf* but the benefits of the *waqf* may be dedicated specifically to the family members in order to ensure their securities in terms of education, future life etc. depending on the intention of the donor. According to Cizakca<sup>17</sup> the revenues from *waqf ahli* are reserved for the benefit of the founder or the offspring. Initially public benefit is of secondary importance; it assumes primary importance only when there are no more descendants of the founder and so the entire revenue of the *waqf* accrues to public purposes. The benefits of *waqf ahli* are sometimes overshadowed with the claims that it is also possible to avoid Islamic inheritance rules and to bequeath to a specific member of the family through *waqf ahli*.<sup>18</sup> Such claims find their similarities with the principles of English law of charitable trust where family members are not legally categorized as the valid beneficiaries thus such dedication is void. The impact of colonialism in some Muslim countries such as Egypt, Malaysia, or India showed that *waqf ahli* has been declared as void, invalid or restrictions are imposed on the *waqf* before it can be legalized.<sup>19</sup>

Nevertheless, throughout the history of Islam, *waqf ahli* has been used as an instrument of wealth planning or succession planning. This is important in order to help a person planning for his family in the future. In *waqf ahli*, the donor or the endower will declare his property as *waqf*, an asset to be used for the benefit of his children or any members of his relatives. Since *waqf* is perpetual, the children or other close family

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<sup>17</sup> Cizakca, M., *A History of Philanthropic Foundations: Islamic World from the Seventh Century to the Present, 8th draft* (Istanbul: Bogazici University Press, 2000).

<sup>18</sup> Gaidiosi, Monica, M., "The influence of the Islamic Law of Waqf on the Development of the Trust in England: the Case of Merton College", *University of Pennsylvania Law Review*, (1988): Vol. 136, 1231-1261; Makdisi, "The Guilds of Law in Medieval Legal History: An Inquiry into the Origins of the Inns of Court", (1986-86), 34 CLEV. ST. L. REV. 3, 15.

<sup>19</sup> For example, most of the states in Malaysia make a condition attached to *waqf ahli* that it requires permission from the ruler.

members will be entitled to the benefit generating from the *waqf* property forever or until there is none to receive the benefit. The government can thereafter declare that the benefit from the property shall be used for public benefit. *Waqf* deed may serve various specific purposes or *niyyat* of the founder. For example, a parent with special disability child may wish to preserve certain properties for their special child without worrying that the property shall be abused or taken illegally by other children. In *waqf* deed, the founder may clearly state his intention and appoint a person to manage the property on his behalf. In this situation, the child may enjoy the benefit of the *waqf* property but he is not the owner of the property. By making *waqf ahli*, the founder may plan to protect his properties or estates from being misused by his prodigal children and thus protecting his family for their long term future welfare.

Another important advantage of *waqf ahli* is that the law now facilitates the use of *waqf mushtarak* (hybrid *waqf*) which means that *waqf ahli* may be created together with *waqf khairi* (charitable *waqf*). The income or the benefit (*manfa'ah*) generated from the *waqf* assets is shared by the family or the private beneficiaries and the public. The combination of these two products of *awqaf* is dynamic and contemporary in nature. It promotes family financial security while at the same time contributes to the general needs of the society.<sup>20</sup>

The best framework for *waqf ahli* is to create *waqf mushtarak* i.e a combination of *waqf khairi* and *waqf family*. The terms of the *waqf* should be made in the form of *waqf muaqqat* (temporary *waqf*) where the purpose of the *waqf* or the intention of the donor shall only to protect the minors or the orphan among the family members and if the predicament is over, the *waqf* then should be used for public purposes. In this regard, the *waqf* has obtained two rewards i.e. the rewards for helping the public as well as building brotherhood (*silaturrahim*) among his family members which is of high regards in Islam.

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<sup>20</sup> *Waqf mushtarak* has been widely used in Sudan. For example, *Waqf* of Hotel Ambassador and Alzaytona Specialised Hospitals are two *waqfs* in which the owner clearly states in the *waqf* deed that benefits of *waqf* shall be utilised for a certain identified percentage for the public as well as family members. See, Magda Ismail et.al, *Financing the Development of Old Waqf Properties*, (Kuala Lumpur: Springer, 2016) 37-220.

## **Waqf Ahli Under the Malaysian Law: Past and Present**

*Waqf ahli* in Malaysia was made legal though restrictive with the introduction of *Islamic Waqf Validating Enactment, 1972*. The law declared that a *waqf* will not be held invalid simply among others that the *waqf* was for the maintenance and support of the settlor's or donor's family. The law also provided for the transfer of the *waqf* properties to the State Religious Councils. There is a clear expression in the Enactment, which states that "notwithstanding any provision" which means that despite the instructions in the *waqf* deed, the State Islamic Religious Council or the *Majlis* shall be the sole trustee. The provision about the role of *Mutawalli* remains under the present State *Waqf* Enactments and the Administration of Islamic Law Enactment governing states that have no specific *waqf* law.<sup>21</sup> One of the critics about *waqf ahli* is that it has been purposely created to avoid tax. Some orientalist argued that *waqf ahli* was also resorted to in order to protect the family property from arbitrary confiscations of the rulers. Köprülü argues that this motive cannot provide the best explanation. For instance, historically, in Turkey, it was reported that the palace eunuchs who had no offspring but established substantial foundations.<sup>22</sup> It shows that *waqf* was created for other reasons but not simply avoiding arbitrary confiscation or tax-avoidance. Gerber also refuted the allegation and demonstrated that the women of Edirne, who had nothing to fear from confiscations, established 65% of the *waqfs* they endowed as family *waqfs*, while 80% of the *waqfs* endowed by those who had the most to fear, the elite, were charitable. It is obvious that the reasons for creation of *waqf ahli* are not for all the above-mentioned allegations of the

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<sup>21</sup> See for example, Section 4 Selangor *Waqf* Enactment 2015, Section 27 of the Perak *Waqf* Enactment 2015.

<sup>22</sup> F Köprülü, "Vakıf Müessesesinin Hukukî Mahiyeti ve Tarihî Tekâmülü", (Vakıf-lar Dergisi, S.II, Ankara 1942) cited in Koc, Muammer. "Role of Foundations (*Awqaf*) in Education in Turkey-An Analysis of Past and Present", in *The Islamic Waqf and The Charitable Trust: A Comparative Perspective Istanbul Workshop, Istanbul, Turkey*, (September 2013), 5-6.

orientalists but for religious purpose in which the rationales are beyond the human intellect.

Similarly, a French orientalist, for instance, argued that *waqf ahli* originated in reaction to the principles of Islamic law of inheritance, which aimed at improving the position of women in the society.<sup>23</sup> In Malaysia, Cizakca wrote that due to the Islamic law of inheritance, fragmentation occurred thus some landowners, realizing the futility of managing such smallholdings, simply endowed these lands in the hope of keeping them together and getting rewards in the hereafter.<sup>24</sup> The ill intention of the colonials did not end there. The British perceived that *waqf ahli* frustrated the British attempts to purchase land in order to open big plantations. Thus in 1894, the *Privy Council* in *Abdulfata vs. Russomoy*<sup>25</sup> had declared *waqf ahli* as invalid. As a result of the application of English principles of *stare decisis* or binding precedent, this principle directly affected the decision from the Malay states.<sup>26</sup> This was followed in 1911, when the *Waqf Prohibition Enactment* was promulgated. The impact of the enactment was as follows: while it preserved private *waqf* lands which were created prior to that date, the full ownership of these were now deemed to be vested in their beneficiaries. In short, these *waqf* properties were divided among the beneficiaries and thus converted into private ownership in conformity with the general British policy. Meanwhile, section three forbade the freezing of ownership of lands, thereby effectively prohibiting the establishment of any new *waqf*. Thus, it could be said that as a result of British rule in Malaya, the Malay Muslims lost the freedom to declare their lands as *waqf* and this situation continued until 1978 when this enactment was finally repealed.<sup>27</sup> The whole process of declaring *waqf ahli* as null and void was based upon the notion that the Privy Council

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<sup>23</sup> Cizakca, Murat, "The British Legislation in Malaya and Its Impact upon the Malaysia *Waqf* System", (paper submitted to Second Harvard Conference: "Law of *Waqf*, Modern State Control and Nationalization", May 16-18, 2008, Harvard Law School) 1

<sup>24</sup> Cizakca, Murat, "The British Legislation", 1.

<sup>25</sup> [1894] (22) Cal.

<sup>26</sup> *Commissioner for Religious Affairs v. Tengku Mariam* [1970] 1 MLJ 222 and *Haji Embong b. Ibrahim v. Tengku Nik Maimunah* [1980] 1 MLJ 286 .

<sup>27</sup> Cizakca, Murat, "The British Legislation", 1.

rulings in response to appeals from India would be valid for all the countries under the British rules or known as Commonwealth countries.

The issue on whether a decision of the Privy Council pertaining to a certain region could be held valid elsewhere in the Empire was discussed by the late Professor Ahmad Ibrahim. He criticized the Federal Court's decision<sup>28</sup> which upheld the decisions of the Privy Council and suggested that the Court may differ and reject the decision from India for various reasons among others; the differences in court system i.e. Shariah Court, different school of law applied in Malaysia and India, the sovereignty of the ruler as well as the opinion of the Mufti should be given preference.

In addition, the mismanagement of *waqf ahli* by the *Mutawalli* or *waqf* trustee has been held to be the main reason for the non-recognition of *waqf ahli* in many Muslim countries.<sup>29</sup> Although the practice of *waqf ahli* in Malaysia is very restrictive and discouraging<sup>30</sup>, the new trend in other countries may be used as best practice to revive *waqf ahli*. Turkey and most of the Middle Eastern countries have legalised and provided an encouraging platform for their people to create *waqf* including *waqf ahli*. *Waqf ahli* protects and preserves family wealth from fragmentation, serves religious and family objectives. Under *waqf ahli*, the management of the *waqf* can be entrusted to the offspring of the founder so that careful and loyal management are assured. The offspring would also pray for the deceased thanking the deceased *waqif* for his *waqf*, so that the family members do not fall in destitute<sup>31</sup> Furthermore, the recognition of temporary *waqf* (*waqf Muaqqat*) by the Muslim jurists (Kahf, 1999) would provide an avenue for a parent to allocate part of his wealth, in cash or kind as *waqf ahli* for a certain period to facilitate some special needs of the children or relatives such as awaiting the age when the children become independent or graduated from any educational

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<sup>28</sup> Cizakca, Murat, "The British Legislation", 1.

<sup>29</sup> Onuoha, B Chima. "Wealth Creation, Retirement and Succession Planning of Entrepreneurs in South East Nigeria" *International Business and Management* 7, (2013): No 1: 99-105.; Cizakca, Murat, "Awqaf In History", 44-7.

<sup>30</sup> Generally, most of the State *waqf* enactments do not have a clear provision for *waqf ahli* except for a few such as *Waqf* Enactment Perak, 2015. The administration of Islamic law statutes, among others state that the creation of *waqf ahli* must obtain the permission from the Sultan.

<sup>31</sup> Cizakca, M., *A History of Philanthropic Foundations*.

institution. In Malaysia, despite having restriction to create *waqf ahli*, the provision for *waqf khas* in the *Waqf* Enactment in most of the states in Malaysia can be a basis to create *waqf ahli*. Among others, the *waqif* can identify a certain specific purpose of *waqf* which may also include his family member.

The needs seem apparent in the case where the parent dies living children who are underaged, minor or disabled. Under the normal practices, the property of the deceased shall be divided according to the *faraidh*. In a special case, if the next of kin is underaged or requires special needs, he is certainly unable to manage his properties and shall be left in the administration of others as determined by the authority. The founder may dedicate his properties for temporary *waqf ahli* thus delaying the division of the property according to *faraidh* unless and until the period expires. During this period, all children, irrespective of boys or girls shall enjoy the same benefit of the *waqf* according to the terms stated in the *waqf* deeds.

In Malaysia, it is high time to get rid of the colonial legacy. Although no doubt the government has played important role in the preservation and development of waqf locally and globally but there are still areas for improvements especially to revive *waqf ahli* as one of the Islamic wealth management instruments. Even if the *Waqf* Enactments are silent and amendment is expected, a way out may be achieved through the issuance of *fatwa* to such effect.<sup>32</sup>

## **LABUAN WAQF FOUNDATION: A GATEWAY FOR FAMILY WAQF**

While the laws relating to *waqf* in almost all states in Malaysia are not encouraging for the creation of *waqf ahli*, the Labuan International Business and Financial Centre Malaysia (LIBF) has taken a proactive and progressive initiative by introducing an Islamic Foundation product which accommodates *waqf ahli* and facilitates wealth management based

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<sup>32</sup> As there is no clear provision in the Quran about *waqf* especially on the know how *waqf* to be created, the framework of *waqf* in Malaysia has been developed through the issuance of *fatwa* especially by the National Fatwa Council. The examples are *fatwa* on the position of *istibdal*, cash *waqf* as well as *waqf* family.

on principles of Shariah.<sup>33</sup> The pioneer effort by Labuan International Business and Finance Centre in Malaysia is welcomed to push *waqf* into international arena with a clear message that *waqf* is for all, Muslim and non-Muslim.

Chart 2:  
Labuan International Waqf Foundation



Source: Labuan IBFC

In this relation, the Malaysian government has established the Labuan International *Waqf* Foundation in 2015 with the aims to manage *waqf* properties based on Shariah principles. One of the uniqueness of the Centre is that it recognises different types of *waqf* to attract domestic and international participants, including charitable *waqf* (*al-waqf al-khairi*), family *waqf* (*al-waqf al-ahli*), joint *waqf* (*al-waqf al-mushtarak*) and self-dedicated *waqf* (*al-waqf 'ala al-nafs*). There are three main laws that directly govern the administration and operation of foundation in Labuan shown in Table 3.

<sup>33</sup> "A Guide to International Waqf Foundation: Introducing the concept of waqf in wealth and Estate Management", accessed May 30th, 2018, [https://www.labuanibfc.com/clients/Labuan\\_IBFC\\_78C2FF81-703A-4CAA-8926-A348A3C91057/contentms/img/resource\\_centre/publication/download/Labuan-International-Waqf-Foundation-Fact-Sheet.pdf](https://www.labuanibfc.com/clients/Labuan_IBFC_78C2FF81-703A-4CAA-8926-A348A3C91057/contentms/img/resource_centre/publication/download/Labuan-International-Waqf-Foundation-Fact-Sheet.pdf).



Table 3:  
List of Statutes

1.	Labuan Foundation Act 2010
2.	Labuan Islamic Financial Services and Securities Act 2010 (LIFSSA)
3.	Anti Money Laundering Act and Anti Terrorism Financing Act 2001

The Labuan Centre has also issued Guidelines on the establishment of Labuan International *Waqf* Foundation (LIWF) which outline specific requirements for the establishment of an international *waqf* foundation. This is to ensure that the governance, management and operations of the *waqf* foundation are in accordance with the Shariah principles. In addition, the Guidelines promote best practices in managing *waqf* assets in the best interest of the beneficiaries and based on the intention of the founder. The Guidelines include a sample charter (*waqfiyyah*) to assist founder to identify the aims or objectives of the *waqf*.

Section 107 of LIFSSA provides for the establishment of Shariah compliant foundation in Labuan. Labuan Foundation Act 2010 shall apply to Labuan Islamic foundation unless provided otherwise. The officer of a Labuan Islamic foundation is required to appoint a Shariah adviser to advise matters relating to the operations. The foundation must have a clearly executed legal transfer of ownership of the properties from the founder to the foundation. Another special feature of this *waqf* product is that the endowment of the property into the Labuan Islamic foundation could be done through *Hibah* or *Hadiah*.

In essence, LIWF is an Islamic private foundation which holds and manages properties for identified beneficiaries based on the Shariah principles on *waqf*. In this regard, Labuan IBFC is the first jurisdiction to revive the concept of *waqf* in wealth preservation and management using internationally recognised foundation laws thus provide a basis for the creation of *waqf ahli* to benefit the next of kin of the founder or endower.

The obvious advantage of establishing a *waqf* using a foundation is that it offers the founder (*Waqif*) legal certainty, thus allowing for proper control and management of the *waqf* in accordance with his wishes based on the Shariah principles. In addition, it gives the founder flexibility and exclusive control on how to structure and wisely manage his *waqf* foundation, as well as how to distribute the benefits and preserve the assets over a long-term period. Adhering to the general principle of *waqf*,

the *waqf* property (*mauquf*) cannot be sold, mortgaged, given away as a gift or inherited.<sup>34</sup> Only the income or usufruct can be distributed to the beneficiaries. When the beneficiaries are no longer in existence, the benefits of the *waqf* shall be distributed to charitable purposes as agreed by the Shariah adviser of the *waqf* foundation. In addition, LIWF recognises and honours the conditions of the founder in accordance with the Shariah principles on *waqf*. Furthermore, Shariah compliance principles are endorsed by Labuan FSA's Shariah Supervisory Council (SSC), comprising of leading Shariah scholars and practitioners. In Labuan IBFC, the rulings of the SSC can be used as reference in the court of law.

In facilitating the creation of *waqf ahli*, the founder establishes a *waqf* for the benefit of his family members while the LIWF becomes the *Mutawalli* to manage the *waqf*. The family members are entitled to benefit from the income or usufruct from the *waqf* property (*mauquf*) *inter vivos*. When the beneficiaries are not identifiable, *waqf ahli* will turn to charitable *waqf* where the *waqf* income or usufruct will be distributed to a charitable purpose for the benefit of the society. LIWF also offers services to manage a joint *waqf* where the founder would stipulate the percentage of the *waqf* income to be shared between the family members and the specified beneficiaries for charitable purposes. Essentially, *waqf ahli* or *waqf mushtarak* serves not only the religious and family objectives of the founder but also contributes to the socio-economic wellbeing of the society. The added value of tax free haven would certainly capture a group of investors or players who wants to do business and at the same time plan for family future while not forgetting their duties towards the *ummah*.<sup>35</sup> *Waqf* has proven to be a long lasting way to do charity to the public, the trust leaves in the hands of trusted *Mutawalli*.

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<sup>34</sup> "Waqf: The Five Schools of Islamic Law", Al-Islam.org, accessed on May 30<sup>th</sup> 2018, Islam.org. <https://www.al-islam.org/five-schools-islamic-law-allah-muhammad-jawad-maghniyyah/10-waqf>.

<sup>35</sup> A Guide to International *Waqf* Foundation: Introducing the Concept of *Waqf* in Wealth and Estate Management, accessed May 30, 2018, [https://www.labuanibfc.com/clients/Labuan\\_IBFC\\_78C2FF81-703A-4CAA-8926-A348A3C91057/contentms/img/resource\\_centre/publication/download/Labuan-International-Waqf-Foundation-Fact-Sheet.pdf](https://www.labuanibfc.com/clients/Labuan_IBFC_78C2FF81-703A-4CAA-8926-A348A3C91057/contentms/img/resource_centre/publication/download/Labuan-International-Waqf-Foundation-Fact-Sheet.pdf).

Malaysia has attempted to revive *waqf ahli* through a *fatwa* issued in April 2013 that allows for the creation of family trusts based on Shariah. This *fatwa* allows family businesses to be preserved and passed down to ensuing generations in a non-disruptive way. In line with this development, Labuan Financial Services Authority (LFSA) is the best option for those who want to practice family *waqf* and enjoy other benefits offered by the Centre. The global development of *waqf* in the Muslim world should place a guideline for *waqf* authorities in Malaysia especially the State Islamic Religious Council to move forward towards having a dynamic model of *waqf* administration in Malaysia. In achieving this, the move must start from the top to the bottom. *Waqf* should be perceived as not only a religious act but an economic sector which has a very vast potential locally and globally. A small move to revive *waqf ahli* may spark a bigger scale of public *waqf* if managed by qualified and appropriate human resource.

## CONCLUSION AND RECOMMENDATIONS

This article addresses the issue of family security and a sustainable family economy through Islamic endowment of *waqf ahli*. The article suggests that *waqf ahli* shall provide financial security for family, society and support the country as a whole. It is shown that the position of *waqf ahli* in Malaysia is viable legally though restrictive in nature. It is also highlighted that the special product of Labuan Business and Financial Centre using *waqf ahli* in which the founder can prepare a shariah compliant succession plan is on time and of great benefit to secure family properties. Although it has been argued that some *Waqf* Enactments contain provisions which allow for the use of *waqf ahli* especially under *waqf khas* and *waqf mushtarak* as a basis to do *waqf ahli*, there is a need for more awareness on the advantages and procedures for *waqf ahli* or *waqf mushtarak*.

It is also observed that *waqf ahli* can solve problems relating to minors or underaged children whose father or parents die leaving behind properties. The property can multiply if it is left in the hand of entrusted *Mutawalli* until the children are able to manage their own properties. It is high time for all states in Malaysia to revive *waqf ahli* by having specific provisions in *waqf* enactments. There is urgent need to move forward with new strategies that can enhance *waqf* management instead of holding firm to the legacy of the colonial which suppressed the advancement of *waqf* in Malaysia. It is also shown that *waqf ahli* is

viable under the Labuan *Waqf* Foundation but more awareness is indispensable.