

OPTIMISING WAQF LAW FOR EFFECTIVE ADMINISTRATION: A COMPARATIVE ANALYSIS OF THE TRUSTEE ACT 1949 AND STATE WAQF ENACTMENTS

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ABSTRACT

Waqf, an Islamic social finance instrument, can be a tool for sustainable economic development if efficiently managed and optimally implemented. As more states in Malaysia seek to improve the governance and administrative responsibilities of their Waqf trustees through a regulatory framework, this article aims to propose statutory amendments that emphasise the principles of integrity and fairness in the pursuit of justice, ultimately improving the governance and administrative responsibilities of Waqf administrators in Malaysia. Using qualitative and comparative legal analysis, this study compares the duties of trustees under the Trustee Act of 1949 with those of *Mutawalli* and *Nazhirs* in selected Waqf enactments to provide insights for perfecting the current Waqf laws in Malaysia. The findings suggest that there is room for improvement in terms of administration and governance, and the provisions of the Trustee Act of 1949 can serve as a useful reference.

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MENGOPTIMALKAN UNDANG-UNDANG WAKAF UNTUK PENTADBIRAN YANG BERKESAN: ANALISIS PERBANDINGAN AKTA PEMEGANG AMANAH 1949 DAN ENAKMEN WAKAF NEGERI

Abstrak

Wakaf, satu instrumen kewangan sosial Islam, boleh menjadi alat untuk pembangunan ekonomi yang mampan jika diurus dengan cekap dan dilaksanakan secara optimum. Memandangkan lebih banyak negeri di Malaysia berusaha untuk menambah baik tadbir urus dan tanggungjawab pentadbiran pemegang amanah Wakaf mereka melalui rangkakerja kawal selia, artikel ini bertujuan untuk mencadangkan pindaan berkanun yang menekankan prinsip integriti dan saksama dalam mengejar keadilan, akhirnya menambahbaik tadbirurus dan tanggungjawab pentadbiran pentadbir wakaf di Malaysia. Dengan menggunakan analisis undang-undang kualitatif dan perbandingan, kajian ini membandingkan kewajipan pemegang amanah di bawah Akta Pemegang Amanah 1949 dengan Mutawalli dan Nazhir dalam enakmen Wakaf terpilih untuk memberikan pandangan bagi menyempurnakan undang-undang Wakaf semasa di Malaysia. Penemuan menunjukkan bahawa terdapat ruang untuk penambahbaikan dari segi pentadbiran dan tadbirurus, dan peruntukan Akta Pemegang Amanah 1949 boleh menjadi rujukan yang berguna.

Kata Kunci: Wakaf, Pemegang Amanah, Tadbir Urus, Pentadbiran, Undang-Undang Wakaf.

INTRODUCTION

The pursuit of justice is a fundamental aspect of human society, and the principles of integrity and fairness play a critical role in the administration of justice. The late Tan Sri Dato' Harun Mahmud Hashim, a distinguished legal scholar and jurist, was a tireless advocate for these principles, and his contributions have significantly influenced the legal landscape.

Trusts and Waqfs have long-standing historical significance as institutions that manage property for the benefit of others. Ensuring the equitable and just administration of these institutions is vital to

maintaining public trust and upholding the integrity of their operations. This paper conducts a comparative analysis of the duties of trustees under the Trustee Act 1949 and the duties of *Nazhir* and *Mutawalli* under the State Waqf enactments in Malaysia.

There are no direct stipulations in the *Qur'an* in terms of the administration and management of Waqf. Current regulations are based on the interpretation of *hadeeth*, *sunnah*,¹ and the practice of the *Sahabah*.² In the past, it was up to the donor (*Waqif*) to dictate the guidelines to be followed by the trustee (*Mutawalli*) in managing the Waqf.³ However, with the complexity of the present economy coupled with the centralisation of Waqf management, self-regulation is no longer feasible. Presently, many Muslim-majority countries such as Malaysia have regulated the administration of Waqf based on the *Qur'an* and *Sunnah* through laws which have been incorporated into the national legal system.⁴

In Malaysia, Islam is regarded as a state matter and Waqf is under the administrative jurisdiction of each state's Islamic religious councils (SIRCs).⁵ More and more states in Malaysia are promulgating their own Waqf laws which regulate the creation and administration of Waqf in their state. It has also been observed that even states that have

¹ *Hadeeth* and *Sunnah* refers to the collection of sayings, actions, and teachings of the Prophet Muhammad. *Sahabah* refers to the companions of the Prophet Muhammad, who were the earliest converts to Islam and lived during his lifetime.

² Magda Ismail A. Mohsin et al., *Financing the Development of Old Waqf Properties: Classical Principles and Innovative Practices around the World*, ed. Magda Ismail Abdel Mohsin (Kuala Lumpur: Palgrave Macmillan, 2016).

³ Mohammad Abdullah, "A New Framework for Corporate Governance for Waqf: A Preliminary Proposal," *Islam and Civilisational Renewal* 6, no. 3 (2015): 356.

⁴ Zati Ilham Abdul Manaf, Sharifah Zubaidah Syed Abdul Kader, and Nor Asiah Mohamad, "Examining the Evolution of Waqf Regulations in Selangor: An Analysis of the Governance Framework and Transformative Approach," *IIUM Law Journal* 27, no. 2 (2019): 338.

enacted Waqf laws in the past are also reviewing them to align with evolving social developments and practices.

Historically, Waqf was sometimes interpreted as a form of trust, particularly by the courts of the Straits Settlements.⁶ This interpretation was based on the idea that Waqf involved the dedication of property for religious or charitable purposes, similar to the concept of a trust. However, with the establishment of state laws governing Waqf in Malaysia, this interpretation has become irrelevant. Nevertheless, the idea of Waqf as a form of trust continues to influence the way Waqf is understood and managed in Malaysia today.

The trust concept and its practices can be historically traced to the doctrines and practices of the early courts of equity in England. The Civil Law Act 1956 in Malaysia allows for the application of English common law, rules of equity, and selected statutes, as long as they fall within the designated cut-off date. Although among the primary sources of Malaysian trust law are common law and English equity, the Trustee Act 1949 (TA 1949) is the principal statute in Malaysia which regulates trustees. The powers and duties conferred by the TA 1949 are deemed to be in addition to the powers bestowed by the trust instrument. These powers and duties however are not conferred if they are contrary to the intention of the trust instrument.

Conceptually, Waqf and trust have always been compared to each other. The parallel points between Waqf and Trust were summarised below by Cattán:⁷

“Under both concepts, property is reserved, and its usufruct appropriated, for the benefit of specific individuals, or for a general charitable purpose; the corpus becomes inalienable, estates for life in favour of successive beneficiaries can be created...without regard

⁶ Sharifah Zubaidah Syed Abdul Kader, “Analysis of the Law Applicable to the Creation of Waqfs During the British Era in Penang,” in *Waqf: Past, Present and Future*, ed. Mohamad Nor Asiah et al. (Kuala Lumpur: International Islamic University Malaysia, 2021), 24.

⁷ Henry Cattán, “Law of Waqf,” in *Law in the Middle East*, ed. Majid Khadduri and Herbert Liebesny (Washington D.C.: The Middle Eastern Institute, 1955), 212.

to the law of inheritance or the right of the heirs: and continuity is secured by the successive appointment of trustees or Mutawallis.”

A study by Sharifah Zubaidah and others observed that similar to a trust, the relationship of parties in Waqf is undoubtedly based on trust and confidence and therefore imposes fiduciary duties. It was further observed that the present rules and regulations on Waqf in Malaysia do not directly address the fiduciary nature of the duties of either the Waqf trustee or their liabilities. The authors have therefore recommended a more comprehensive law for the management of Waqf.⁸

A *Nazhir* and *Mutawalli* both play important roles in the administration of a Waqf. However, they have different responsibilities and functions. *Mutawalli* is defined by Magda A. Mohsin and Aishath Muneeza as the custodian of Waqf.⁹ The *Mutawalli* undertakes the management of the Waqf property including maintenance, investment, and distribution of the benefits to the beneficiaries.¹⁰ The *Nazhir* on the other hand is defined as the supervisory body which supervises the management and the condition of the Waqf property. The *Nazhir* enforces the punishments in cases of mismanagement of Waqf by the *Mutawalli* or other parties. In short, while both the *Nazhir* and *Mutawalli* play important roles in the administration of a Waqf, the *Nazhir* is responsible for overseeing the management and administration of the Waqf, while the *Mutawalli* is responsible for carrying out the day-to-day management and administration of the Waqf's properties and assets.

In this paper, the SIRC's are deemed as the *Nazhir*, while the *Mutawallis* are the third parties which have been appointed to administer and manage the Waqf on behalf of the SIRC.

⁸ Sharifah Zubaidah Syed Kader, Nor Asiah Mohamad, and Zuraidah Ali, “Examining the Fiduciary Duties of the Waqf Trustee Benchmarking with the Law of Trusts and Islam,” *Shariah Law Report Articles* 1 (2018).

⁹ Magda Ismail A. Mohsin and Aishath Muneeza, *The Institution of Waqf: An Innovative Financial Tool for Socio-Economic Development* (Kuala Lumpur: Pearson, 2020), 10–11.

¹⁰ Nur Khalidah Dahlan et al., “Waqf (Endowment) Practice in Malaysian Society,” *International Journal of Islamic Thought* 5 (2014): 56–61.

As the duties and functions of Waqf administrators are conceptually similar to the concept of a trustee under civil law, it would be appropriate to undertake a comparative study of the statutes which govern the two to see whether the power and statutory duties in the Waqf enactments are sufficient to ensure administrative efficiency and whether certain powers and duties under the TA 1949 could be emulated by the Waqf laws in Malaysia. This analysis must also take into account the importance of upholding the principles of integrity and fairness in the pursuit of justice in the administration of Waqf properties. It is believed that constant appraisal of the Waqf enactments, with due consideration for these fundamental values, is necessary to ensure Waqf in Malaysia can be optimally implemented to benefit the community at large while maintaining the highest standards of ethical conduct and equitable treatment in the management of these religious endowments. This paper, therefore, conducts a comparative analysis of the powers and statutory duties of trustees as stipulated in the Trustees Act 1949 and those of *Mutawalli* and *Nazhirs* under the Waqf enactments in the states of Selangor¹¹ and Terengganu¹². These two state enactments were selected due to their comprehensive nature and status as pioneers of the second generation of Waqf laws in Malaysia. The examination centres around the processes of appointment and removal of trustees and a critical evaluation of key duties such as investment, reporting, and property management, as prescribed by the Trustees Act 1949, to determine the extent to which they can be replicated within the current Waqf laws. In order to provide practical and feasible solutions, the paper not only examines the legal provisions of the TA 1949 and state Waqf enactments but also proposes a set of recommendations that are based on the findings of this comparative analysis.

In undertaking this analysis, it is essential to acknowledge the late Harun Mahmud Hashim's legacy, whose work was characterised by an unwavering commitment to the importance of integrity and fairness in the pursuit of justice. Through this comparative exploration of the legal frameworks governing trusts and waqfs, this paper aims to contribute to ongoing efforts to ensure that these institutions continue

¹¹ Wakaf (State of Selangor) Enactment 2015

¹² Wakaf (Terengganu) Enactment 2016

to fulfill their intended purpose, adhering to the highest standards of justice and equity.

To ensure the applicability and relevance of the proposed recommendations, the paper considers the insights of a Waqf practitioner¹³, who has extensive experience in the administration of Waqf properties. Her expertise and practical knowledge of the challenges faced in the day-to-day management of Waqf assets helped to validate the recommendations, ensuring that they are not only theoretically sound but also practically implementable within the context of the Malaysian Waqf system.

In this study, several limitations should be acknowledged. Firstly, the limited scope of the research, which focuses on the comparative analysis of the Trustee Act 1949 and the Waqf enactments in the states of Selangor and Terengganu, may constrain the generalisability of the findings to other states in Malaysia or other countries with different legal and regulatory frameworks for Waqf administration. Secondly, the lack of empirical data presents another limitation, as the research primarily relies on qualitative and comparative legal analysis without incorporating actual performance data from Waqf administrators. Such empirical evidence could potentially provide additional insights into the effectiveness of the proposed recommendations in real-world settings. Lastly, while the study offers statutory amendments to enhance the governance and administrative responsibilities of Waqf administrators, it does not address the potential challenges or barriers to implementing these recommendations in practice. Further research may be needed to explore the practical aspects of adopting the suggested amendments and assess their impact on the administration and governance of Waqf institutions.

LEGAL ADMINISTRATIVE FRAMEWORK

As highlighted above, although trust and Waqf both share the same characteristics, the TA 1949 does not apply to matters involving Waqf.

¹³ An interview was conducted with Dr. Nur Azlin Ismail, an officer from Majlis Amanah Rakyat in charge of Wakaf Amanah Rakyat (WARak), a Mutawwali appointed by MAIWP.

This can be seen in the interpretation of Waqf under Section 2 of the Selangor Waqf Enactment 2015, which states that Waqf can include both Waqf Am and Waqf Khas, according to Hukum Syarak, but does not include a trust as defined in the TA 1949.

In Malaysia, the states' Waqf enactments and administration of Islamic law enactments dictate that each state's State Islamic Religious Council (SIRC) is to be the state's sole Waqf trustee and that all Waqf properties are to be vested in the name of the SIRC. Statutorily, each SIRC is granted the power and duty to administer and solely manage Waqf in their state.

The general powers and duties bestowed on the SIRC's under the Waqf enactments are on the maintenance of the Waqf registry and *Wakaf Fund*, reference to the Fatwa Committee, as well as the general monitoring and management of Waqf properties. More recent Waqf enactments however have bestowed power to SIRC's to appoint third parties to administer and manage the Waqf on its behalf and have also introduced offences related to Waqf.

On the other hand, the TA 1949 regulates the powers and provides the list of duties conferred to the trustee, as well as govern matters on appointment and removal, the scope of liabilities, and powers of the court. In short, the enforcement of the TA 1949 is to provide control over the course of action belonging to that of a trustee through the list of specific provisions, which serves as needful guidance for the trustee in carrying out his duty. The statutory powers under the TA 1949 are meant to supplement the existing power imbued by the trust instrument as well as to ensure that the conduct of the trustee is in line with the requirements under the law.

ANALYSIS OF STATUTORY PROVISIONS

Appointment, Removal and Disqualification of Waqf Managers

It has been criticised that the centralisation of power to only one Waqf authority may lead to inefficiency due to a lack of resources.¹⁴ To

¹⁴ Mohsin and Muneeza, *The Institution of Waqf: An Innovative Financial*

address this, the Waqf enactments have empowered the SIRC's to appoint third parties as *Mutawalli* to manage Waqf on their behalf.

The Waqf enactments in both Selangor and Terengganu grant the SIRC's the authority to be the sole trustee, as well as the capacity to establish a corporation/company to administer such Waqf and appoint *Mutawalli* to manage it.¹⁵ However, it has been noted that the provisions in the Waqf enactments are not as comprehensive as they lack clear and defined procedures for the appointment of *Mutawallis* and do not establish criteria for their selection. The absence of specific provisions outlining circumstances under which a *Mutawalli* should be automatically removed raises concerns regarding the administration and management of Waqf properties. Thus, a more comprehensive and thoroughly developed approach is deemed necessary for the effective administration and management of Waqf properties.

Furthermore, while the SIRC's have the ultimate authority to approve or reject appointments and the right to withdraw the appointment of a Waqf administrator or manager if they see fit¹⁶, the *Waqifs* themselves have limited autonomy to appoint their own administrator to manage the Waqf they have established. The appointment, however, must comply with the guidelines set by the SIRC.

It is crucial to establish proper regulations for the *Mutawalli*, who are appointed as third-party managers under the oversight of the SIRC's as *Nazhirs*. These managers play a significant role in the management, development, investment, and distribution of the Waqf assets to the designated beneficiaries. To ensure transparency and

Tool for Socio-Economic Development; Raja Aishah binti Raja Adnan, Mahazan Abdul Mutalib, and Muhammad Ridhwan Ab Aziz, "Factors Necessary for Effective Corporate Waqf Management for Malaysian Public Healthcare," *ISRA International Journal of Islamic Finance* 14, no. 1 (2022): 73–88, <https://doi.org/10.1108/IJIF-11-2019-0178>.

¹⁵ Section 4 (1)(a) of Selangor State Waqf Enactment 2015 and Section 4 (1)(c) of Wakaf (Terengganu) Enactment 2016

¹⁶ Section 4 (3) of the Selangor State Waqf Enactment 2015 and Section 4 (3) of Wakaf (Terengganu) Enactment 2016

accountability, the appointment and removal procedures of *Mutawalli* must be clearly outlined in the Waqf enactments.

Comparatively, there are two ways in which a trustee can be appointed. The first method involves the appointment made by the settlor himself through an express clause in the trust deed. In such a scenario, the court will not question or interfere with the settlor's decision in appointing the desired trustee as it is a matter of sole discretion. However, if the trust deed is silent on the matter, the appointments and discharge of trustees are stipulated in Part IV of the TA 1949.

In contrast to the Waqf enactments, which vest the sole authority of appointment and removal of trustees in the hands of the SIRC, the TA 1949 accords such powers to the High Court. Section 45 (1) (a) of the TA 1949 states that the High Court may appoint a trustee in the event that it is deemed inexpedient, difficult, or impracticable to make an appointment without the court's assistance. This means that the appointment by the court is situational and subject to the court's discretion. The same rule also governs the appointment of a substitute trustee in the event that the previous trustee has been sentenced to a term of imprisonment, is mentally disordered, is a person of unsound mind, is bankrupt or is a corporation in liquidation or has been dissolved. In the case of *In re Tempest*,¹⁷ Lord Justice Turner outlined three key principles that the court should follow when exercising its discretion in appointing a trustee: (1) take into account the settlor's wishes, as expressed in the trust instrument or clearly inferred from it; (2) avoid appointing an individual who would favour the interests of other parties; and (3) consider whether the appointment would facilitate or hinder the trust's execution.¹⁸

It is important to note that, according to Section 39 of the TA 1949, the appointment of trustees should not exceed four individuals. The rationale behind this is to prevent potential mismanagement of the trust fund through having too many trustees at once. However, having a single trustee alone may not be sufficient, especially in the case of

¹⁷ 1 Ch App 485

¹⁸ Mary George and Balan Sujata, *Malaysian Trust Law*, Second (Petaling Jaya: Sweet & Maxwell Asia, 2021), 672.

managing a large and diverse range of income sources belonging to the settlor.

Furthermore, Section 40 (1) of the TA 1949 provides for the removal of trustees. The provision dictates that the court may exercise its power of removal in the event that the trustee remains out of Malaysia for more than twelve months, refuses or is unfit to act, or is a minor. The court's discretion to remove the trustee is coupled with the authority to replace them with another trustee to ensure the smooth management of the trust assets.

Recommendations

It is recommended that the provisions under Part IV of the TA 1949 be taken into consideration in order to incorporate a similar framework into the Waqf enactments for the appointment and removal of *Mutawallis*. This will ensure that the procedures for appointment and dismissal are conducted in a proper and transparent manner by the SIRC's. The three key principles as proposed in the case of *re Tempest* in regard to the appointment of the trustee could also be taken into consideration and be incorporated into the Waqf enactments. The implementation of a clear and comprehensive framework would mitigate the risk of disputes between the SIRC's, *Waqifs*, and *Mutawallis* and provide an objective basis for the SIRC's' decisions. Additionally, it may be advisable to grant powers to the Shariah court in cases where the SIRC may refuse to remove a *Mutawalli*, in response to a party's request for removal. This would provide a mechanism for addressing such disputes in a fair and impartial manner.

Incorporating the principles of the TA 1949 into the Waqf enactments would provide additional protections for the Waqf assets, ensuring that they are better managed and safeguarded. The well-defined and comprehensive approach in the TA 1949 would increase trust and confidence in the Waqf system.

Duty towards beneficiaries

Like trusts, Waqf is frequently established for a specific goal or to benefit a particular group of beneficiaries. The Mutawalli bears the responsibility of allocating the income generated from the Waqf for the stated purpose or beneficiaries as outlined in the Waqf instrument. Since the appointment of the SIRC as the trustee of Waqf from early independence, there have been numerous cases involving dissatisfaction of the *Waqif* and beneficiaries on the management of Waqf by the *Nazhir*, such as *Kamarolzaman Bin Hajar v. Majlis Agama Islam Selangor*¹⁹ and *Tengku Zainal Akmal bin Tengku Mahmud v MAIDAM*²⁰. These cases were brought to court as a result of the dissatisfaction by the parties in terms of the accountability of the *Nazhir* in managing the Waqf properties.²¹ Part VI of Selangor State Waqf Enactment 2015 regulates matters regarding “*mawquf ‘alaih*,” meaning a person who is eligible to receive any benefit, interest or profit from a “*mawquf*,” or property given by way of Waqf.²² The SIRC is given a broad autonomy to oversee matters regarding the distributions of benefits, interests or profits deriving from *mawqufs* in their respective states. Apart from overseeing that the benefits, interest, and profits from these *mawqufs* are distributed evenly to their eligible recipients, Section 29 dictates that the *Nazhir* is under a duty to make sure that all distributions are made appropriately according to their respective portions.

To allow for easier management of Waqf properties, both the Selangor and Terengganu enactments authorise their SIRC to be the recipient of benefits, interests, or profits from Waqf properties within or outside their respective states.²³ The *Waqifs* or any person intending to put up his/her property for Waqf are allowed to determine any specific condition to a *mawquf ‘alaih* before the *mawquf ‘alaih* is

¹⁹ [2016] 4 SHLR 44

²⁰ [2012] 3 SHLR 39

²¹ Zati Ilham Abdul Manaf, “Management of Waqf Disputes in Malaysia : Issues and Recommendations” (International Islamic University Malaysia, 2020).

²² The same provision can be found in Part VII of Wakaf (Terengganu) Enactment 2016

²³ Section 27 of the Selangor State Waqf Enactment 2015 and Section 28 of Wakaf (Terengganu) Enactment 2016

entitled to the benefit or interest of the *mawquf*.²⁴ In the event that there is more than one *mawquf* ‘*alaih* in a “*wakaf khas*” or waqf for a specific purpose, and the *waqif* fails to determine their respective parts for the benefit, interest or profit of the *mawquf*, the Majlis shall step into the shoes of the *waqifs* and proceed to distribute the benefit, interest, or profit equally among them.²⁵ The Terengganu Enactment is more thorough in this sense, where it provides for situations where the waqf is endowed to “*asnaf zakat*” or persons eligible under the *hukum syarak* to be a recipient of *zakat*. Under Section 30(2), the benefit, usufruct or interest from the *mawquf* endowed for *asnaf zakat* shall be divided according to the portion of the *asnaf zakat*, after obtaining certification from the Fatwa Committee.²⁶

The duty to submit audit accounts of the Wakaf Fund to the SIRC falls on the Waqf Corporation as the Mutawalli. However, there is no legal obligation to provide the SIRC with reports on the management of individual Waqfs. Additionally, there is no requirement for the Mutawalli to keep the Waqf beneficiaries informed of its progress. Furthermore, the SIRC’s are not bound by any statutory duty to report to the Waqf beneficiaries on the management of the *Wakaf Fund*.

In comparison, the TA 1949 imposes a legal obligation on the trustee to report to the beneficiaries regarding the status of trust management. The trustee must ensure that the information provided is accurate and truthful. This obligation is interconnected with other duties owed by the trustee, such as the duty to distribute and ensure equality. Beneficiaries, as recipients of the trust property, have a right to know the status of trust management, particularly its financial status. As a result, the trustee must provide a financial statement of the trust account to the beneficiaries upon request.

The trust account shared with the beneficiaries must be accurate and not misleading. To ensure this, Section 27(3) and (4) of the TA 1949

²⁴ Section 28 of Selangor State Waqf Enactment 2015 and Section 29 of Wakaf (Terengganu) Enactment 2016

²⁵ Section 29 of Selangor State Waqf Enactment 2015 and Section 30 of Wakaf (Terengganu) Enactment 2016

²⁶ Section 30(2) and (3) of the Wakaf (Terengganu) Enactment 2016.

gives the trustee the power to request the valuation of assets and an audit of the trust account. The trustee must continuously monitor the account and be prepared to provide it upon request by the beneficiaries. In addition to this point, Halsbury's Laws of Malaysia Vol 5 states:

"A trustee must furnish to a beneficiary, or to a person authorised by him, on demand, information or the means of obtaining information as to the mode in which the trust property or his share in it has been invested or otherwise dealt with, and as to where it is and full accounts respecting it, whether the beneficiary has a present interest in the trust property or only a contingent interest in remainder, or is only an object of a discretionary trust. If the trustee neglects or fails to do so, he is liable for the costs of proceedings to compel production of information or accounts. He must also allow a beneficiary to inspect the trust accounts and all documents relating to the trust, and has a duty to explain to a beneficiary what his rights are."²⁷

It is imperative to acknowledge that the obligation to furnish the beneficiaries with financial statements is contingent upon a request from the beneficiaries themselves. With regard to investments, for instance, the trustee has a responsibility to keep the beneficiaries apprised of developments, including any gains or losses incurred. Nevertheless, only the pertinent information is expected to be reported, and information that is not germane to the beneficiaries' understanding is not required to be disclosed. Therefore, the trustee cannot be held accountable for a violation of trust if they fail to do so.

Recommendations

The duty of care and diligence and the fiduciary duty owed by both the trustee and *Mutawalli/Nazhir* to the Waqf and its beneficiaries is a crucial aspect of the management of Waqf properties. This duty requires the trustee and *Mutawalli/Nazhir* to act in good faith, with the utmost care, and in the best interests of the Waqf and its beneficiaries.²⁸

²⁷ LexisNexis, ed., *Halsbury's Laws of Malaysia: Equity, Remedies, Trusts*, Volume 5 (Lexis Nexis Malaysia Sdn Bhd, 2009).

²⁸ Siti Aishah Hassan and Rusnadewi Abdul Rashid, "Towards the Improvement of the Rights and Duties of Mutawalli and Nazir in the Management and Administration of Waqf Assets," in *9th ISDEV International Islamic Development Management Conference*, 2015.

The law recognizes the importance of ensuring that Waqf properties are managed in a responsible and transparent manner and that the beneficiaries are protected and their rights are upheld.

However, a review of the Waqf enactments reveals that the statutory duty of the *Mutawalli* towards the beneficiaries is not as clear as those outlined in the TA 1949. While the *Mutawalli* has a duty to distribute the proceeds from the Waqf to the beneficiaries and to submit audited accounts of the *Wakaf Funds* to the SIRC, there is no clear obligation for the *Mutawalli* to report to the beneficiaries on the performance of the Waqf. This lack of clarity and transparency can potentially lead to issues and disputes between the *Mutawalli*, the Waqf, and the beneficiaries.

To address this issue, it is suggested that the statutory duty of the *Mutawalli* be expanded to include the obligation to report to the beneficiaries on the performance of the Waqf. This would ensure that the beneficiaries are kept informed about the management of the Waqf and the distribution of its proceeds, and would enhance the transparency and accountability of the *Mutawalli* towards the beneficiaries. In addition, this would provide the beneficiaries with the opportunity to verify that the Waqf is being managed properly and that the *Mutawalli* is fulfilling their duties under the law.

However, similar to the provisions under the TA 1949, it is suggested that the duty to report be triggered only upon request from the beneficiaries and that only critical information be disclosed. Irrelevant details that are not integral to the knowledge of the beneficiaries need not be reported, thus alleviating the burden on the *Mutawalli*.

Waqf Asset Management

The SIRC or the appointed Waqf administrator/manager is also responsible for overseeing that these *mawqufs* are properly managed, and Waqf property management includes the maintenance, development, regeneration and redevelopment of the Waqf properties. To ensure the property can be of perpetual benefit, the *Nazhirs* must

ensure that any development and maintenance of Waqf properties are sustainable and in line with the spirit of the Shariah.

Apart from the prohibition to transfer, surrender, and assign the property, the SIRC's and *Mutawallis* must also be regulated in terms of their responsibilities in ensuring the properties are properly maintained, any surrendering of property to the state is appropriately compensated, and in protecting the property from any illicit use, trespass, or destruction. Delegation of power to monitor and enforcement powers must also be allowed to ensure that the protection of Waqf assets is done effectively.

This includes the necessity to ensure that every Waqf building is insured. Any property development exercises must also be referred to the state Fatwa Committee to ensure they are in line with the Waqf instrument as well as *Hukum Syarak*.

Section 10 of the Terengganu Enactment vests the duties of managing Waqf properties to the Waqf Management Committee,²⁹ where not only do they need to regulate and monitor the management, implementation, development, and investment of Waqf,³⁰ but they are also required to advise and make recommendations to the Majlis on the best course of action to be taken in managing the same.³¹ The Enactment also contains provisions for the redevelopment of Waqf properties, especially in cases where such *mawqufs* were abandoned or destroyed.³²

In managing and maintaining Waqf properties, Waqf administrators are permitted to utilise funds from the *Wakaf Fund*. The *Wakaf Fund* is established under Part IX of the Enactment,³³ where the

²⁹ The Selangor Waqf enactment lacks a specific section that outlines the duties associated with managing and maintaining Waqf properties. However, these duties can be inferred as being included in the general provisions regarding the responsibilities of the Majlis and Corporation.

³⁰ Section 10(b) of Wakaf (Terengganu) Enactment 2016

³¹ Section 10(c) of Wakaf (Terengganu) Enactment 2016.

³² Section 26 of Selangor State Waqf Enactment 2015 and Section 27 of Wakaf (Terengganu) Enactment 2016.

³³ Regulations on the *Wakaf Fund* are provided under Part VIII of the

usage of the fund is specifically authorised for financing the development of any *mawquf*, payment of management expenses, and payment of all costs of any waqf, which includes the cost of maintenance and repair of any *mawquf*.³⁴

Both Selangor and Terengganu enactments also contain provisions to protect Waqf properties against any illegal and inappropriate use by unauthorised persons. The enactments list specific instances of unauthorised use of Waqf properties, for which the Majlis will be entitled to take action under any written law in force against the offender. Among such acts are; inhabiting or trespassing on any *mawquf*, constructing any building or structure on any *mawquf*, cultivating or operating on any *mawquf*, taking out or destroying any produce from any *mawquf*, letting cattle wander onto the *mawquf*, and damaging any plants or crops cultivated on the *mawquf*.³⁵

The Trustee Act of 1949 also provides a framework for the management of trust assets, with a primary emphasis on the powers and duties of the trustee. Trusts, unlike Waqf, are not subject to the same restrictions in their management, and as a result, trustees are granted greater flexibility in managing trust properties. This includes the authority to sell trust properties, charge, and invest trust capital. While these powers may provide benefits in terms of managing trust assets, it is important to note that they are not available in the context of Waqf.

Given the significant differences between trusts and Waqf, it would be imprudent to recommend a total emulation of the powers and duties of trustees under the TA 1949 in terms of asset management. The restrictions imposed on Waqf properties, including the prohibition on transfer, surrender, and assignment, as well as the requirement for the proper maintenance and protection of Waqf assets, are crucial elements of Waqf law that must be respected.

Selangor Enactment

³⁴ Section 39 of Wakaf (Terengganu) Enactment 2016

³⁵ Section 44 of Selangor State Waqf Enactment 2015 and Section 57 of Wakaf (Terengganu) Enactment 2016

Duty and Power to Invest

As previously mentioned, Waqf must be administered sustainably. It is therefore one of the duties of the *Mutawalli/Nazhir* to ensure that the value of the Waqf is enhanced and maximised. For the *Mutawalli* to be able to safely generate income from Waqf properties, regulations must be in place to ensure the investments are Shariah compliant and are not risky and speculative. Investments can include investments in stocks, properties, leases of waqf properties, etc.

Both Waqf enactments contain provisions allowing the SIRC's or *Mutawallis* the power to invest Waqf assets to maximise their value. This can be seen from the establishment of the *Wakaf Fund*, where one of the objectives of such funds is to be used for the investment of waqf assets and properties.³⁶ The Majlis is also empowered to establish any waqf scheme,³⁷ and accept or offer any waqf shares to any person, society or institution as it deems necessary for investment.³⁸ Any property acquired or developed from the proceeds of the sale of such waqf shares will in return be regarded as *mawqufs*.³⁹

Part II of the TA 1949 imposes a duty on trustees to invest trust assets in a prudent and safe manner. Section 4 outlines the types of investments that are deemed to be authorised under the law, such as government stocks, bonds, and shares in companies incorporated under the Companies Act. Section 6 further provides that trustees have a duty to ensure that the trust assets are invested in a diversified manner, and to obtain proper advice from a stockbroker or an authorised accountant when making investment decisions. Trustees must also take into consideration the terms of the trust and the needs of the beneficiaries when making investment decisions.

³⁶ Section 38 of Selangor State Waqf Enactment 2015 and Section 39(1)(f) of Wakaf (Terengganu) Enactment 2016

³⁷ Section 19(1) of Wakaf (Terengganu) Enactment 2016

³⁸ Section 22 and 23 of Selangor State Waqf Enactment 2015

³⁹ Section 22(2) of Selangor State Waqf Enactment 2015 and Section 19(3) of Wakaf (Terengganu) Enactment 2016

To ensure that trust assets are invested in a safe and prudent manner, the act imposes a duty on trustees to regularly review their investments and make adjustments as necessary. Trustees must also keep accurate records of their investments and provide regular reports to the beneficiaries.

Recommendations

Although both statutes confer statutory power to the trustee and *Mutawalli/Nazhir* to invest, it is observed that the stipulations under the TA 1949 are more extensive and comprehensive, which in turn safeguards the trust property from risky investments. As Waqf necessitates the perpetual element of the *mawquf*, extra care must be imposed in terms of the power of the *Mutawalli* and *Nazhir* to utilise the *Wakaf Funds* for investment. Among the statutory duties which can be emulated into the Waqf enactment are the imposition to diversify the investments and consultation of Shariah-based financial experts. However, a detailed list of what qualifies as an authorised investment may be disregarded as it may curtail the potential of future forms of investment.

Account and Audit

Both Selangor and Terengganu require the SIRC's to prepare, issue, and publish in the Gazette a list of all property, investment and assets vested in the Majlis in respect of any waqf created under their authorities from time to time.⁴⁰ This is to ensure transparency and accountability in the administration of waqf in their respective States. The *Mutawallis* are also required to keep proper accounts and records of every transaction made regarding the *Wakaf Fund* and prepare a statement of account for each financial year.⁴¹ These statements of accounts need to be audited by qualified auditors at the end of each financial year and submitted to the Majlis for scrutiny. Apart from these annual audits, the Majlis may

⁴⁰ Section 16 of Selangor State Waqf Enactment 2015 and Section 20 of Wakaf (Terengganu) Enactment 2016

⁴¹ Section 39(1)(a) and (b) of Selangor State Waqf Enactment 2015 and Section 40(1)(a) and (b) of Wakaf (Terengganu) Enactment 2016

also require the *Mutawallis* to submit this statement of account from time to time as they deem necessary.⁴²

Similar to the management of Waqf assets, the duty of the trustee involves dealing with the various forms of assets, either immovable or movable, and it is important to know how the assets are being managed. The movement of the trust fund is displayed through the account, where to ensure transparency in managing these funds, it is essential to subject the account to an auditing process. The provision relating to the examination and audit of the trust account is provided under section 27(4) of the TA 1949:

“Trustees may, in their absolute discretion, from time to time, but not more than once in every year unless the nature of the trust or any special dealings with the trust property make a more frequent exercise of the right reasonable, cause the accounts of the trust property to be examined or audited by an independent accountant, and shall, for that purpose, produce such voucher and give such information to him as he may require, and the costs of the examination or audit, including the fee of the auditor, shall be paid out of the capital or income of the trust property, or partly in one way and partly in the other as the trustees, in their absolute discretion, think fit, but, in default of any direction by the trustees to the contrary in any special case, costs attributable to capital shall be borne by capital and those attributable to income by income.”

The above provision gives the discretion to the trustee to carry out the audit of the trust fund by appointing competent auditors to ensure reliability within the trust management and to give assurance and confidence to the beneficiaries. Concerning this, it is the right of the beneficiaries, especially those who have a beneficial interest in the trust fund to have access to the trust account. This entails the need for the trustee to be ready with the required documents and supply them upon request.

⁴² Section 39(2) of Selangor State Waqf Enactment 2015 and Section 40(2) of Wakaf (Terengganu) Enactment 2016

It is therefore pertinent for the trustee to act in good faith in giving access to the beneficiaries over the trust account and to display acts devoid of any form of malpractice as required by law.

Recommendations

Muhammad Iqmal Hisham and others pointed out that most scholars agree that the reporting practices among Waqf institutions in Malaysia need to be improved.⁴³ They stress that transparency is very important to gain the confidence of Waqf stakeholders. As previously mentioned, *Mutawalli*'s duty to report is also only confined to the SIRC, and not the beneficiaries or other waqf stakeholders. As such, it is recommended that power is given to the beneficiaries and *Waqif* under the Waqf enactment to demand from the SIRC a copy of the audited accounts of the particular Waqf to ensure transparency and integrity. Despite the potential challenge posed by the imposition of such a duty, it is crucial to achieve a harmonious equilibrium between the efficient and effective administration of Waqf assets and the transparency and accountability of their administration. This is a necessary measure that must be taken to ensure that Waqf assets are managed in a responsible and trustworthy manner.

Offences and Penalties

Both Waqf enactments penalise unauthorised management of Waqf in the state. According to Section 45 of the Selangor State Waqf Enactment, any person who administers or manages waqf without the written permission of the SIRC or Waqf Corporation commits an offence, and such person shall, on conviction, be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.⁴⁴ The same provision is found in the Terengganu Enactment but with a higher penalty, where such offender

⁴³ Muhammad Iqmal Hisham Kamaruddin, Mustafa Mohd Hanefah, and Rosnia Masruki, "Challenges and Prospects in Waqf Reporting Practices in Malaysia," *Journal of Financial Reporting and Accounting*, 2022, <https://doi.org/10.1108/JFRA-01-2022-0018>.

⁴⁴ Section 45 of Selangor State Waqf Enactment 2015.

shall be liable to a fine not exceeding five thousand ringgit, or imprisonment for a term not exceeding three years, or both.⁴⁵

Section 46 of Wakaf (Terengganu) Enactment 2016 also makes it an offence for any person to prevent or cause failure for any *mawquf* '*alaih* to enjoy the benefit, interest or profit from a *mawquf* to which the *mawquf* '*alaih* is entitled to. Upon conviction, such offender shall be liable to a fine not exceeding five thousand ringgit, or imprisonment for a term not exceeding three years, or both.⁴⁶

The Terengganu Enactment is more thorough in its provisions regarding offences and penalties, where it has a specific Part XIII dealing with specific enforcement and investigation procedures for offences related to the Enactment. Among matters provided under this part is the power of the Majlis to authorise an investigation,⁴⁷ the power of the Syariah Enforcement Officer to conduct an inspection,⁴⁸ as well as matters regarding the prosecution⁴⁹ and orders by the Court.⁵⁰

In contrast, the TA 1949 does not list any offences which are punishable by fine or imprisonment. Any breach of trust associated with the duties imposed under the TA 1949 or any fiduciary duties are remedied or punishable under different statutes.

⁴⁵ Section 45 of Wakaf (Terengganu) Enactment 2016

⁴⁶ Section 46 of Wakaf (Terengganu) Enactment 2016

⁴⁷ Section 48 of Wakaf (Terengganu) Enactment 2016

⁴⁸ Section 49 of Wakaf (Terengganu) Enactment 2016

⁴⁹ Section 51 of Wakaf (Terengganu) Enactment 2016

⁵⁰ Section 53 of Wakaf (Terengganu) Enactment 2016

Recommendations

In contrast to the TA 1949, which does not specify any penalties for breaches of trust associated with the duties imposed or fiduciary duties, it is recommended that the state Waqf enactments outline the penalties for *Mutawallis* who breach their statutory or fiduciary duties. The offences that could potentially be committed by *Mutawallis* should also be clearly defined, along with the penalties to be imposed for such breaches. The specification of offences that could potentially be committed by *Mutawallis* and the penalties to be imposed for such offences would provide clarity to *Mutawallis* on what constitutes a breach of their duties. This would help to ensure that *Mutawallis* are fully aware of the consequences of their actions and could potentially reduce the likelihood of breaches occurring in the first place.

Since the Shariah Court has limited jurisdiction and may not be equipped to deal with serious criminal breaches by *Mutawallis*, it is recommended that such serious breaches be referred to the civil court for appropriate sentencing. This would ensure that the full range of penalties, including fines and imprisonment, are available for the most serious breaches, and that the perpetrators of such breaches are appropriately punished.

However, it is important to acknowledge the limitations faced by the state Islamic religious bodies responsible for enforcing these provisions. Several factors, such as insufficient manpower, poor supervision, and lack of coordination, pose significant challenges to the effective implementation of any changes to the existing framework.⁵¹ As a result, if states choose to adopt the recommendations presented here, they must take into account the cost of enforcement. Adequate resources should be allocated to strengthen the capacity of these bodies,

⁵¹ Tan Sri Dato' Harun Mahmud Hashim, a distinguished contributor to the New Straits Times, has authored numerous articles for the 'The Benchmark' column, addressing contemporary legal and social issues, including the necessity for effective law enforcement. These thought-provoking pieces have been compiled and published as a book to reach a broader audience. See Tan Sri Dato' Harun Mahmud Hashim, "Better Late than Never to Boost Law Enforcement," in *The Benchmark*, ed. Zuraidah Omar (Kuala Lumpur: Peninsula Digital Sdn Bhd, 2001), 55.

ensuring that the proposed changes can be effectively enforced and that the objectives of enhanced accountability and transparency are achieved. Ultimately, a comprehensive approach that considers both the legal framework and the practical enforcement capabilities of the state Islamic religious bodies will be necessary for the successful implementation of these recommendations.

CONCLUSION

This comparative study highlights the importance of evaluating and updating the current Waqf enactments in Malaysia in order to ensure their efficacy and efficiency. The incorporation of certain provisions from the TA 1949, such as clearer appointment and removal procedures and requirements for investing can strengthen the Waqf system and increase its transparency and accountability. However, it is crucial to maintain the unique aspects of Waqf law, such as restrictions on Waqf properties, to preserve the principles and objectives of the Waqf system. After verifying with the Waqf practitioner on the proposed recommendations, it is further agreed that the drafting of provisions reflecting the proposed recommendations should be approached with a balanced perspective, ensuring that they are neither too specific nor too vague. This is crucial in order to maintain the flexibility of the provisions, allowing for adaptability and ease of application in various situations that may arise in the administration of Waqf properties.

In addition, the study recommends expanding the statutory duty of the *Mutawalli* to include the obligation to report to the beneficiaries on the performance of the Waqf. This would ensure that the beneficiaries are informed about the management of the Waqf and the distribution of its proceeds and would enhance the transparency and accountability of the *Mutawalli* towards the beneficiaries. Furthermore, giving power to the beneficiaries and *Waqifs* to demand a copy of the audited accounts of the Waqf from both the *Nazhir* and *Mutawalli* would promote transparency and integrity in the Waqf system.

In conclusion, this study underscores the significance of examining the powers and duties of *Mutawallis* and *Nazhirs* within the context of Waqf laws in Malaysia, and the potential advantages of

integrating select provisions from the TA 1949. By upholding the principles of integrity and fairness in the pursuit of justice, we can ensure that the administration of Waqf properties is carried out ethically and equitably. Through continuous appraisal and improvement of the Waqf enactments, with due consideration for these fundamental values, the Waqf system can be optimised to benefit the community at large while maintaining the highest standards of ethical conduct and equitable treatment in the management of these religious endowments.

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