

A PROPOSAL FOR A NEW COMPREHENSIVE WAQF LAW IN MALAYSIA

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Abstract

Waqf assets, if regulated properly and managed according to sound principles, may grow in trillions which will certainly have enormous positive impact on the poor and marginalised of a given society. Keeping in mind the potential of waqf institutions in enhancing the economic development of the society, two issues should be the focus of attention of the policy makers: reforming the management style of waqf organisation and the enactment of laws that provides an environment conducive for the growth of waqf activities. This paper touches on both the issues.

A brief review of the existing waqf laws calls for an urgent reform of these laws. This is needed even though recently some laws have been improved on compared to those passed in the 20th century. The Negeri Sembilan Enactment, 2005 followed by that of Malacca are the examples which are quite detailed. Nevertheless, these laws still lack rules that can provide for effective organisational administration, appropriate assets management, and innovative Shariah compliant financial mechanism that can facilitate waqf institutions to develop and revive their properties, or manage their assets as required under fiqh for the interest of waqf and its beneficiaries.

This paper proposes some important amendments to the aforementioned contemporary laws. This paper is based on the appraisal of the existing law which proposes a comprehensive code of waqf law that deals with full uniform legal framework for organisational structure of waqf institutions, legal personality of waqf, the creation of waqf, its validity, its registration, administration, management, and protection of waqf property throughout Malaysia.

INTRODUCTION

The Malaysian law on waqf can be divided into two categories: the old, and the new. The old laws go back to a period prior to 80s of the past century. The new laws may be categorised as such from the 80s onward beginning with Kaedah Kaedah Wakaf (Johor) 1983. The new laws will include in addition to the Kaedah Kaedah Johor, the Selangor Wakaf Enactment, 1999, the Negeri Sembilan Wakaf Enactment, 2005, and the Malacca Enactment 2005. States that have not enacted separate law about wakaf are having few provisions in their respective Enactments dealing with general issues of Islamic law (the Administration of Religion of Islam (Islamic Law), Enactments). The laws of this nature passed after the third millennium (2000) are also considered new. A sense of reform is observed in the first category largely while it is at minimum at the second category. However, in both categories the reform is not far reaching enough to tackle the majority of problems entangling waqf properties.

This paper contains a basic proposal made after the evaluation of these new laws. The paper presents rules that should be contained in the new law. Rules enacted in the existing laws sometime are made part of this draft proposal and reference to the relevant section of the given law is made in the footnote. Occasionally, it rationalises the proposed rules; other times, it omits to do so for the sake of brevity. Some proposal for deleting provisions in the existing laws or the difference between the existing provision and the proposed ones are mentioned in the footnotes. The writer considers some section of the existing laws (e.g. that relating to enforcement) perfect at this stage, thus gives mere reference to the scheme and content of the relevant sections. This is a rush work; it is just an idea that needs further thinking and refinement.

The proposal is based only on the Negeri Sembilan Wakaf Enactment, 2005, and the Malacca Enactment 2005, as these two laws are the most recent and relatively comprehensive compare to Selangor and Johor laws. a brief mention of the Administration of Religion of Islam (Islamic Law), Enactments is also made, but as most of these enactments carry similar provisions reference to Selangor, Negeri Sembilan and Malacca Enactments relating to the Administration of Islamic laws is made.

The main proposals contained in this paper are the recognition of legal personality for individual waqf, the corporation, and Majlis, the new institutional structure for waqf management, the nature of waqf instrument and its effect, the management of waqf properties, and accounting thereof. Other minor proposals are made too, which are discussed on sections on registration, creation of new waqf offences, monitoring, and power of courts.

The Definition of Waqf

Today, what is understood from the term waqf (also referred to as wakaf) is the following: (i) an entity or institution, as recognised by early jurists, (ii) a concept of charitable endowment under Islamic law, and (iii) the property donated for purposes mentioned under the concept of waqf which is evidenced in its declaration. The definitions offered by Malaysian law¹ are of the third category in the above list.

The Classification of Waqf

The Administration of the Religion of Islam Enactments and Waqf Enactments² divide waqf into waqf am and wakaf khas the same as in the old version. Additionally, waqf is also classified as irsod (of land belonging to baitulmal, government, Corporation), muabbad (perpetual), musyak (dedication of an undivided share in a jointly owned property), or musytarak (the consolidation of waqfs into one e.g. created through istibdal, or waqf shares)³. It is perhaps time to divide waqf based on the usage of the subject matter. This is to say, waqf may be income generating or otherwise; some called it consumptive and beneficial⁴. The last classification may help the financial planners, accountants and others to adopt appropriate approach to the properties of the particular waqf based its income generating capacity.

¹ See for example Section 2(1) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003, s 2 (property) Wakaf (Negeri Sembilan) Enactment 2005 (WNSE), Waqf (State of Malacca) Enactment 2005 (WSME).

² s 3(2) the Wakaf (State of Malacca) Enactment, 2005(WSME)

³ s 9 (1)(2)

⁴ Indonesian Author

LEGAL PERSONALITY OF WAQF

1. Each waqf declaration under Islamic law creates a legal person. It is therefore an entity, institution and a legal person by itself. The administrators, managers or institutions in charge of waqf properties can be treated as the nazir who owe a duty to the waqf entity alone. For practical purposes an umbrella organisation consisting all or a group of individual waqf entities (represented in the form of waqf properties) should exist, which should be responsible for the management of waqf properties. No property can be recorded under its name. Such an organisation hereafter is called Waqf Management Committee as for consumptive waqf properties and Waqf Corporation for productive.

2. In the context of Malaysian land and financial laws it is prudent to recognise waqf as institutional entity that has legal personality⁵ which is capable to sue and be sued, own land in its own name, and exist in perpetuity. Public and corporate bodies and entities are accorded such a status under Malaysian law. It is now time to accord such a status to waqf too, in order to safeguard the assets of waqf, and facilitate conducive development environment for its assets.⁶

In Malaysia as the Majlis is the sole trustee, all waqf properties are vested in the Majlis Agama Islam of a given state in the federation of Malaysia. This is evident in all state Enactments.⁷ Following the civil law principle, the ownership of the trust property is vested in the trustee. This, it seems, is extended to waqf properties too.⁸ This is not entirely correct from fiqh perspective⁹, but also it endangers waqf properties¹⁰. Once mixed with other properties of the Majlis it may lead to the loss of waqf properties in some point of time. Legally speaking, the properties of the Majlis may be subjected to liabilities. Further, as long

⁵ Legal personality of waqf is recognised under Qatari Law expressly (s 1). Jurists such as Ali al-Khafif and al-Zarqa have recognised the legal personality of waqf based on the views of early jurists who treated waqf property different from that of Nazir (the custodian). That the nazir was not personally liable for debt he has correctly incurred on waqf estate, was interpreted as rule showing the split between the trustee and the waqf.

⁶ Similar section as s 3 of the Sabah Baitulmal Enactment, 1998 should be enacted. The waqf Corporation will have similar entity and powers as the baitul mal Corporation.

⁷ In light of 5, 57 and 58 of the Wakaf (Negeri Sembilan) Enactment 2005 s 30 WSME and sections 89-90 of the Administration of Region of Islam of other states (including that of Negeri Sembilan), ss 77 and 78, (the State of Malacca) 2002, the state is the sole trustee. No other person or entity shall be appointed as such. In case of appointment of nazir other than the Majlis, the appointment is null and void. These sections need to be deleted if one has to reapply the classical view before the practice of the Ottomans.

⁸ For instance, section 90 of the Selangor Enactment implies ownership of the waqf properties to be given to the Majlis. Further clarification is found in provisions (Sabah, Baitulmal Corporation Enactment, 1998, s39) dealing with baitulmal where it is expressly provided for the ownership of waqf properties by Majlis and subsequently by baitulmal of a given state.

⁹ The jurists in fiqh literature have no unanimous opinion on the ownership of waqf properties. To some the owner is the donor or settlor, to others the beneficiary. But no one express the opinion that the nazir (the trustee) of the waqf property is its owner.

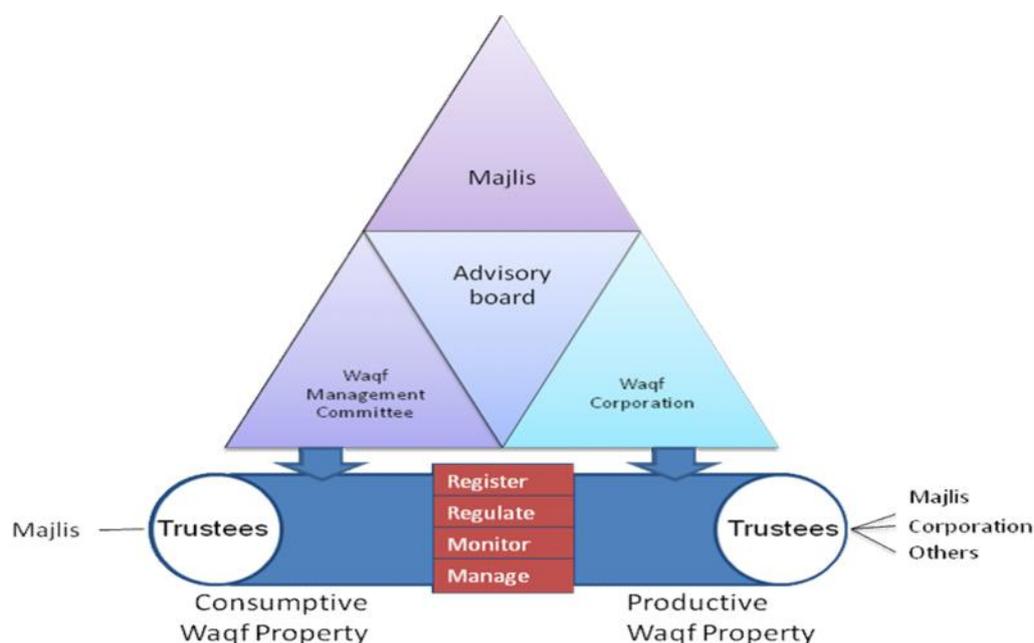
¹⁰ In *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2008] 6 MLJ 488 the argument for the Majlis was not specific to waqf and thus the Majlis lost the case. Have had they argued under s 89 and s 90 of the Enactment 2003, there would be a chance for the Majlis to obtain the ruling as they prayed for. Under section 89 the Majlis would be proven to be the trustee and by virtue of s 90 as the owner of the waqf property. Nevertheless, they still needed to have recourse to the old court decision regarding the effect of registration under National Land Code on the validity of waqf. In *Re Dato Bentara Luar Decd Haji Yahya Bin Yusof & Anor V. Hassan Bin Othman & Anor* [1982] 2, it was held that upon a declaration of waqf the owner relinquishes his ownership in property; it becomes the property of God the Almighty irrespective of it being registered as waqf or otherwise. All these might be due to the confusion regarding the relationship between the Majlis and the waqf properties. Where the waqf is recognised to have legal personality, and the nazir (i.e. the Majlis) is under duty to protect the interest of waqf, the judges would not be unwilling to accept the prayer.

as the Majlis is part of government, the restrictions inherent to it, may negatively affect the waqf properties.

WAQF INTUITIONAL STRUCTURE

3. A good institution is as urgent as the good administration, management and development of waqf properties. For this reason, there shall be powers vested in Majlis to register, regulate, monitor all and manage consumptive waqf properties. Similarly, subject to the aforementioned powers of Majlis, there must be a waqf Corporation that can manage productive waqf properties independently and professionally.

Figure 1. Organisational structure of Waqf Institutions



ADMINISTRATION AND MANAGEMENT

The Majlis

4. In addition to a limited function under section 5 (1)(a)¹¹ of the Wakaf (Negeri Sembilan) Enactment (WNSE) 2005 and similar provisions in other laws (that shall make the Majlis one of trustees) it is suggested that the Majlis should have mainly regulatory and supervisory powers. It can also be the manager of consumptive lands and properties. Therefore, it can be in charge of registering¹², regulating, and monitoring the administration and management of waqf properties including those under its management and administration¹³.

¹¹ Section 5(1) (a), WNSE and section 3 WSME needs to be amended by making the Majlis a trustee of consumptive waqf properties.

¹² Sections 6, 7 and 8 WNSE still need retaining. Additional sections, empowering the Majlis to regulate and monitor productive waqf property's management, need to be inserted.

¹³ s 24 of the Malacca Waqf Enactment will be applicable to those committees which are in charge of non-consumptive waqfs

5. Only consumptive properties (i.e. mosques, schools, orphanages, welfare houses, and graveyards) can be administered and managed¹⁴ by the Majlis. Where the property of the consumptive waqf need utilisation as seen appropriated by the Majlis, the management thereof can be delegated to the Waqf Corporation, the latter being accountable to the former and the former being sole recipient of the income after deduction of management charges by the Corporation.

6. The Majlis may have the advisory board as well as the waqf properties management Committee. While the former will be responsible to advice on policy and regulatory matters, the latter can be the executive committee that is responsible for the enforcement of the policy and the administration, planning and management of the consumptive waqf properties.

Advisory Board

7. There must be an advisory board established by the Majlis¹⁵ which can, but not limited thereto, draft organisational policies, advice and control and monitor the general activity of the Majlis and the Corporation including administration, management, investment, development and finance¹⁶.

8. The board shall have the power to establish specialised committees, and incur expenses for the purpose,¹⁷ as well as in carrying out functions as advisory board or the payment of allowance to the members of the board¹⁸. The Advisory Board may undertake or contract out research and development studies, paid for from a fund dedicated to the purpose.

9. The Advisory¹⁹ Board shall consist²⁰ of individuals having policy, legal, and Shari'ah expertise appointed by the Majlis from within or outside. The Mufti, the secretary of the Majlis, State Legal Adviser, and State Director of Land and Mines shall be the permanent²¹ members of the Board. Other members shall be State Financial Officer, independent scholars and practitioners in professions relating to Shari'ah, law, property management, investment and finance management.

10. The view of the board on consumptive waqf property as to their planning and management would not be more than recommendations. All policies and activities approved by the board, however, shall be binding on the Corporation as if they were approved by the Mufti or the Majlis fatwa. This however shall not prevent the Corporation, but not a precondition for the application of the advice given by the board, from letting the Majlis

¹⁴ The format of the Malacca waqf management committee (s 24 and 25) can fit here.

¹⁵ This is somehow in line with that under s 21 WNSE. The committee under s 21 WSME however does not seem advisory. It is more to a sub-branch of the Majlis which can be one proposed under the Majlis.

¹⁶ s 22 WNSE; s 21 WSME. The Malacca Enactment fuses the administration and management activities at the hand of the Committee. The Committee seems to be not advisory rather having executive powers.

¹⁷ s 22 WNSE

¹⁸ s 28 WNSE

¹⁹ The Malacca Waqf Enactment 2005 calls the board as Wakaf Management Committee. Compare to Negeri Sembilan the composition of the committee is more logical.

²⁰ See subsection 21(2), Second Schedule WNSE; s 22 WSME. Under the above proposed draft emphasis is shifted more to the professional advice, as such is considered to be more beneficial to the waqf and its beneficiaries.

²¹ Under s 22 of the Malacca and 2nd schedule of Negeri Sembilan laws the posts are not permanent as the office holders can resign, or be terminated by the Committee.

Fatwa pass ruling to the same effect. The Corporation will be still bound to apply for leave of court when and as necessary under Islamic law.

The Management Committee

11. This committee should consist of the servants and officers of the Majlis who are trustworthy, some of whom must have professional qualification. It will be responsible to carry out any direction, policy, and decision made by the Majlis in relation to any mawquf; to supervise, arrange, manage, and administer the mawquf; to develop, improve, and upgrade the mawquf.²² The Committee can also do istibdal on waqf land provided approved by the Majlis²³ and is according to rules of istibdal.

The Waqf Corporation

12. There can be a waqf Corporation (a government/Majlis linked organisation) in charge of collective management of all productive waqf properties. All such properties including those solely dedicated to the Majlis (Majlis being the mawquf alaihi) can be managed by the professionals of Waqf Corporation. The Corporation will be accountable to the Majlis who shall work according to its general guidelines, and be supervised by the Majlis.

13. The institutional set-up of the Corporation must be divided into two: the Advisory Board (which shall be the same body responsible for advising the Majlis) and the professional branch. The professional branch should consist of professionals having qualifications such as legal, Shari'ah as well as economic, management and other fields of relevant sciences.

14. The Corporation shall have the powers to protect, manage, invest and develop waqf properties in a manner that puts the properties under its care to the best use and retain the highest value. The Corporation will have the highest standard of the duty to manage the properties, in good faith, due care, diligence and utmost skill and professionalism. The breach of any of these duties, if proved, will not only make the Corporation legally responsible but also subject the managers and servants of the Corporation personally liable.

15. The Corporation in no way whatsoever should affect the legal personality of each waqf registered with the Majlis. Where the Corporation is appointed by the waqif as the trustee, it can delegate its responsibilities and powers to individual trustee for a given property or recognise the trustees appointed by the waqif who shall manage and be answerable to the Corporation, in line with guidelines drawn by the Corporation for the management of the properties under their trusteeship.

16. There must be a document that forms the constitution of the Corporation. Such a document shall leave room for applying the terms and conditions spelled by the waqif. Other terms implied by law and the principles of Shari'ah should also be read into the document. Additionally, the constitution shall include the powers, functions, the duties and the liabilities of the managers, and the employees, including those listed below.

²² Section 24 WSME.

²³ section 25 WSME

The Appointment, Removal, and Disqualification of Managers, Servants and Individual Trustees

17. Against the prescription of s 32 WSME , 5 WNSE, and other State as well as Federal laws²⁴, there is need to recognise the freedom given to the waqif under Islamic law to appoint and dismiss the nazir.²⁵ The same power can be vested in the nazir (the Corporation) to appoint a substitute trustee or the manager for waqf property according to the waqf instrument. Hence, nazir, the Majlis and the Corporation can appoint their substitutes who may have the same powers, authority, and discretions provided for in the instrument of waqf or the written document. Similarly, the court shall be permitted to appoint the trustee and manager. The fiqhi principles need to be codified explaining in detail the circumstances under which one of the above parties can appoint the nazir.

18. The Majlis or the Corporation should appoint competent and qualified servants who can manage, develop and invest waqf assets²⁶ and manage and distribute its income in the interest of the beneficiary²⁷ or the waqf²⁸, according to the rules provided in the relevant laws relating to waqf.

19. The Majlis or the Corporation may engage professionals²⁹, for a fee³⁰, including but not limited to, lawyers, accountants, bankers, property managers, financial advisors etc as advisor, agent, and employee. The Majlis and the Waqf Corporation shall be under duty to act in the interest of waqf, and thus to act in good faith without neglect, and exercise due skill and care in the selection of any agent³¹, advisor, and employee. All such professionals shall be subjected to professional liability.³² Both the professionals and ordinary servants of the corporation should be subject to a higher standard of duty of care, which will make them liable if there was any evidence of negligence or conflict of interest or any act or omission considered breach of duty under any law relevant to the protection of waqf.

Criteria for Appointment and Removal

20. The prime criteria for appointment of a nazir (trustee or a manager) should be amanah (trustworthiness) and kifayah (skill and professionalism). To realise the distinct nature of waqf (i.e. a cross between public, private sector and NGO), other special qualifying criteria such as volunteerism, altruism etc must be considered additional qualifying factors for appointment where are equal. The Corporation shall appoint managers (nazir) and employees who are not only trustworthy but also must have special skill valuable for the management and administration of waqf properties; who can work independently and professionally, and is not influenced by politics and bureaucracy.

21. A trustee can be removed based on natural and legal incapacity. While embezzlement and misappropriation of the funds shall disqualify the trustee, negligence and the lack of good performance and not putting the waqf properties to the best and highest use as demanded by

²⁴ ss 61, 62, Administration of Islamic Law (Federal Territories) Act, 1993

²⁵ The court and the nazir who may delegate his duties to another person are to be given the same powers too.

²⁶ S 33(1)(a) WNSE

²⁷ S 33(1)(b) WNSE

²⁸ The dealing of a nazir according to the Muslim jurists is based on the interest of the waqf and its beneficiary.

²⁹ S 33(c) WNSE

³⁰ S 33(2) and s 16 WNSE

³¹ S 33(5) WNSE

³² See s 33(4) WNSE.

the established standards of the business community can be considered additional factors for removal of the trustee.

22. Under an efficient mechanism the trustee should be subjected to individual scrutiny as well as property and financial management tests. Proper corporate-like accounting and audit system shall be in place whereby all dealings made by the trustee, in the productive properties, are properly entered and examined.

Powers Functions Duties and Liabilities

23. The powers, functions, duties and liabilities of nazir need to be exhaustively and clearly defined, as ambiguous legal framework in this regard is the cause of weak institution. The Majlis and the Corporation shall be vested with administrative and managerial powers. The Majlis shall have powers including giving direction³³, regulating, monitoring³⁴ and enforcement as well as entering into valid transactions (see further details at p.). Any action taken by the Majlis or the Corporation shall be valid if it is according to the terms of the waqf instrument and fiqhi principles. Otherwise, their action shall be considered *ultra vires*.

24. The Majlis³⁵ or the Waqf Corporation may delegate some of their powers or impose restriction on their use to particular conditions, without affecting the powers to act on their own.

25. The Majlis shall have the power to register waqf. The Majlis and the Corporation can create waqf fund, purchase property, and declare it as waqf³⁶, transfer waqf assets through istibdal, (sometime mandatory to do so if the document of waqf requires it), must evict squatters and errant tenants, and claim rental and value from those who are not entitled thereto³⁷. The corporation shall have the mandatory power to distribute the income from waqf assets on the beneficiaries, and can retain a portion of the income for administrative costs. The managers and servants of the Majlis or the Corporation can also hold these powers.

26. It shall be the duty of the nazir to uphold the principles of good governance (to act in good faith and without neglect and exercise due skill and care). It shall protect, maintain, develop, and invest waqf assets.³⁸ Consequent to proof of any breach of duties, the trustee not only can be dismissed but should also be sued in the court of law for wilful or negligent mismanagement of waqf properties.

27. The Majlis³⁹ and the Corporation has the duty to act in good faith and without neglect and exercise due skill and care in the selection of any person or agent to for the management and investment of waqf assets, their benefits, interest, or profits or execution of transaction requirement for the management and investment. The managers should be liable personally.

³³ s 35 WSME

³⁴ s 36 WSME

³⁵ S 53 WNSE

³⁶ s 33 WSME

³⁷ S 15 WNSE includes the claim of rental and value of a property but not the possession of the property which is unlawfully occupied by some party.

³⁸ The term duty should not only impose heavy burden on waqf institution in terms of liability for breach but will also convince other agencies and individuals to accept and recognise the acts carried out in course of performing such duties.

³⁹ s 33(1)(a)-(c), 33(5) WNSE

The Corporation should also be vicariously liable for those actions of managers and employees, which were ultra vires according to the waqf document, or the provisions of law.

28. It shall be the duty of the Corporation to ensure that the beneficiaries enjoy the benefit, interest, or profit from waqf property, which they are entitled to⁴⁰. It shall manage the waqf property according to the terms of the waqf instrument, in cases where the beneficiary ceases to exist.⁴¹ Where due to lapse of time or change of circumstance, the Majlis or the Corporation cannot distribute the income from the mawquf, as provided for in waqf document it can use it as closely as possible to the original purpose or add it to general waqf fund.⁴²

29. All persons or agents working for the Majlis/the Corporation, and for the management of waqf properties or their investment shall be under duty to act in good faith, without negligence, and to exercise due skill and care. Any loss caused by the manager, servant or agent, directly or remotely, shall be recoverable by the Majlis or the Corporation from such person or agent who ought to have acted in good faith, due care, skill and diligence. The Majlis and the Corporation shall monitor all activities⁴³ of its administrators, managers, servants, and or agents.

30. The Majlis⁴⁴ and the Corporation shall assume the responsibility to expend money⁴⁵ where waqf suffers any loss due to an action of any person including that appointed by them. Where the appointed person or agent wilfully or negligently through any act or omission causes such loss on the waqf property, the Majlis and the Corporation should claim any expenditure incurred due to his action. In case the person or the agent causes the loss on waqf property due to his incompetence, which was overlooked during the appointment of the said person, the Majlis, the Corporation, the appointment committee, or the person in charge of any such appointment shall pay compensation.

WAQF REGISTRATION

31. The Majlis should be the sole registering authority for all waqf properties⁴⁶, moveable, immovable, or a particular type of scheme,⁴⁷ including new⁴⁸ and those which, for any reason, were not registered⁴⁹, by itself⁵⁰ or by an order of court⁵¹ or by waqif⁵². For the purpose of security of the title, it is suggested that prior to registration, a notice informing the public that the scheduled land is likely to be registered as waqf, be published in

⁴⁰ The current law imposes this duties listed in this paragraph on the Majlis: s 13(1) WNSE

⁴¹ S 13(2) WNSE

⁴² s 38 WSME

⁴³ For instance, the appointment of persons and agents acting for the Majlis or Corporation, the management, the monitoring, the enforcement and so on.

⁴⁴ S 33(3) WNSE

⁴⁵ The waqf institution not only should have duties towards waqf to fulfill a condition, but also must be liable for breach of any such duty.

⁴⁶ See s 10 (1)(2)(a), 18-20, WNSE; section 6 of WSME.

⁴⁷ S 11 WNSE

⁴⁸ S 16 WNSE

⁴⁹ Section 7 and 50 WNSE

⁵⁰ S 10(1)(2)(a) WNSE

⁵¹ S 7 WNSE

⁵² Section 6, 10(2)(b) WNSE

Government's Gazette⁵³. An appropriate notice shall be served on all those having interest in the scheduled land prior to registration, irrespective of the fact whether or not the registration is made on the initiative of the waqf or by an order of court⁵⁴. Only after the process of adjudication, if necessary and when a protest is lodged, or on the expiry of deadline, the scheduled property be registered as waqf.

32. The Majlis shall have the power to appoint Registrars⁵⁵, deputies, officers and servants for the purpose. The registrar shall be under duty to keep, maintain the register, or caused to be so⁵⁶. Upon registration, the registrar of waqf shall issue certificate of waqf⁵⁷ and manage the process of vesting⁵⁸ the waqf property in the Majlis or Waqf Corporation (by entering a note on the Register, kept by the registrar in the Land Office).⁵⁹ It shall be the duty of the Land Officer to endorse, as soon as possible, the change of status of the land caused by the registration of waqf in the Majlis⁶⁰. The process of vesting of waqf property shall not cause any transfer of name, change of title, or the name of the waqf.⁶¹ The certificate of registration of waqf should not create title; it shall be an evidence of a charitable estate that entitles the scheduled registered waqf property to be exempted from quit rent, tax and rates⁶². The Majlis shall also keep any instrument, document, title⁶³ and evidence proving the property being declared, registered and endorsed as waqf.

33. The register that shall be kept in the Majlis shall have all the characteristics of a modern integrated cadastre. The register shall exhibit (by collecting from various departments) all relevant information about the given land parcel⁶⁴ or be linked to data kept by department of national land administration, planning, surveying and valuation system(s), as when they themselves become integrated. The title as waqf to the land is not obtained by registration. The certificate will be the evidence of validity of the particulars of waqf as

⁵³ s 33 of Wakaf(State of Malacca) Enactment requires so if a property is purchased through baitulmal money and declared as waqf.

⁵⁴ Currently s 50 of the WNSE requires such declaration when an application to the Court by the Registrar of waqf is made.

⁵⁵ Currently the Secretary of the Majlis shall be the registrars under Negeri Sembilan laws: s 21(4) WNSE or a member of public service s 34(1) WSME

⁵⁶ s 19 WNSE; s 34(1)(a) WSME

⁵⁷ S 8 WNSE

⁵⁸ S 9(1), 19(b) WNSE; s 50(1) WSME. Note, the vesting shall not imply ownership, as understood from s 90 of the Administration of Religion of Islam Enactments (NS, Malacca, Johor, etc).

⁵⁹ It is suggested that an amendment to the National Land Code might be necessary. Having such a provision in the land code as the waqf legislation will shorten the time for completion of the process of vesting.

⁶⁰ Currently s 9(1) and (2) WNSE is vague about the procedures of vesting the waqf property in Majlis. Subsection 9(4) makes the vesting of waqf to be in compliance with the provisions of NLC despite the fact that s 4(e) of the NLC enlists waqf lands among lands to which the provisions of NLC shall not apply; in case of inconsistency the laws of waqf will prevail. Section 36(1) also subjects its application to the provision of NLC. This trend need to be discontinued, and any such reference be deleted. See the case of *Re Dato Bentara Luar Decd Haji Yahya Bin Yusof & Anor V. Hassan Bin Othman & Anor* [1982] 2, which affirms the rule in s 4(e) of the Code.

⁶¹ See s 9(2), 90 the Administration of Religion of Islam Enactments (NS, Malacca, Johor, etc)

⁶² See Fatwa under section 36 of the Administration of Religion of Islam (State of Malacca) 2002, recommending exemption from taxes; published in gazette No 231, vol. 53 No. 10 at p 431, 7th May, 2009.

⁶³ S 19(c) WNSE; s34(1)(b) WSME

⁶⁴ The register will include the legal data concerning the ownership in land office, the locational information, including of those neighbouring properties, from surveyors, fiscal information from valuation department and developmental control information from Local Government office. In addition it should exhibit the type of waqf as am or khas (s 10 WNSE); a new category of waqf as consumptive or productive be further added.

exhibited on it⁶⁵, but should not be the sole criteria for validating a waqf. The title to waqf land and all incidents of title (i.e. transfer of ownership from waqif and freeze on its transferability) shall be effected right after the declaration is made by the waqif.

34. For the good governance and management of waqf properties, an integrated register will exhibit all geographical/physical, legal, financial and planning/development information about a parcel of land.

WAQF INSTRUMENTS

35. The word of the donor is like the word of the lawgiver. An instrument or the document of declaration of waqf is valid and enforceable if it complies with provision of Islamic law⁶⁶, and not contradicting any existing laws. The compliance with law shall be seen in matters relating to the language of the instrument (sighah), waqif, the subject matter of waqf, the purpose or objective of waqf, the beneficiaries, the appointment and dismissal of nazir, and the conditions imposed by the waqif.

The Instrument or Declaration (Sighah)

36. A waqf can be validly declared by words (oral, written or gesture before two witnesses⁶⁷), express or implied, or the conduct of the donor. The terms and conditions of any declaration⁶⁸ of waqf shall be clear, certain and not ambiguous. No instrument of waqf will be valid⁶⁹ if it makes the enforcement of waqf conditional, contingent, and dependent on a future event⁷⁰ except a declaration of waqf that is effective after the demise of the settlor, which will be subjected to the rule of wasiyyah. However, the mere ambiguity of words shall not invalidate the declaration, as long as it can be construed as such, as to reveal the intention of the donor. A waqf declaration is invalid if made for immoral purpose, or to any person but not for devotion to Allah, or it is inconsistent with Shariah or written law. Similarly, it is invalid, or if it is made only to some of the beneficiaries who are entitled to inherit from the estate of the waqif, unless it is made with the consent of all remaining beneficiaries.⁷¹

37. All terms and conditions permissible under Islamic, or written laws⁷² and not contrary to the interest of waqf or its beneficiaries are binding on the Majlis or the Corporation.

⁶⁵ See s 8(2)(3) WNSE. An additional clause in the Enactment is needed to clearly show the creation of waqf soon after the declaration, orally or in writing, by the waqif, is made.

⁶⁶ section 3 of WNSE reads: ‘the creation of wakaf, invalid waqf, wakaf to invalid heirs, right of waqif to stipulate condition and other rights of waqif, wakaf by a person in a state of marad al-maut, wakaf taklik, wakaf irsod, wakaf muabbad, wakaf musyak, wakaf musytarak, and conditions for a valid mawquf, shall be in accordance with Hukum Syarak.

⁶⁷ ss 2(1), 3(1) of WSME

⁶⁸ A declaration here means the document of waqf or the pronouncement by the waqif manifesting his intention of giving the given property as waqf for a specific purpose as prescribed in Islamic law. It is not the same as the notice given to public.

⁶⁹ S 8(1) of WSME recognises the validity of the contingent waqf, provided the waqif according to s 13(a) does not pass away before the condition is fulfilled. A declaration of waqf during marad al-maut (s 7)) and that which is made to be effective after the demise of the waqif (s 8(2)) are subjected to the rule of Islamic will or wasiyyah.

⁷⁰ S 8(1) of the Malacca Enactment permits such a waqf.

⁷¹ ss 1, 12, 13, 14 WSME. Under 13 the Malacca Enactment 2005 waqf for self interest and if the waqif dies before the condition, under waqf ta’liq (contingent waqf), is met.

⁷² 13(e) WSME

38. A condition imposed by the waqif may be invalid for being contrary to Shari'ah or the interest of waqf and beneficiaries (e.g. the condition to rent out waqf property for an amount that is not sufficient for the maintenance of the waqf property, or the said rental falls below the prevailing market rate⁷³). Nevertheless, the declaration of waqf will be held enforceable in the court of law.

39. The Majlis or the Corporation shall have the power to seek the donor to amend the instrument, if he is alive and known and if he can be reached; otherwise, the power of amending the instrument shall be vested in the Majlis (if permitted by donor or under Islamic law) or court or both.⁷⁴

The Parties

40. The instrument shall be made by a waqif (the settlor) who shall be capable of donation, one who is major, sane, prudent⁷⁵ (rashid) and sober, free, not restrained by an order of the Court, and he is the owner⁷⁶ of the subject property.

The Subject Matter (Mawquf)

41. The subject matter of the waqf (waqf property) can be any halal valuable property, interest, service which is capable⁷⁷ of generating benefit, interest,⁷⁸ and income which is not restrained by an existing encumbrance⁷⁹. It includes moveable, immoveable⁸⁰, cash⁸¹, tangible and intangible⁸², irrespective of whether dedicated in perpetuity or for a brief period of time. Any mode of donation is valid as long it is in compliance with the principle of Shari'ah. The donation will be valid if it involves halal property, shares, rights and bonds backed by assets or income therefrom, cash funds, and waqf shares⁸³.

⁷³ Some other examples may be added to legislation. They are: (1) If acted upon the condition, the result will be against the interest of the waqf. For example the condition of the donor prevents people to show interest in waqf property unless the condition of the donor is ignored. (2) The condition of the donor will be ignored if it is against the interest of the beneficiaries, for instance the donor stipulates that the beneficiary shall remain unmarried. (3) Where the fulfilment of the condition conflicts with the objective of the donor. For instance where the donor names an individual as imam, however, such an individual lacks the capacity to lead prayers. (4) Where the ignorance of the condition is in the highest interest of the waqf. For instance a waqf land may be dedicated for cultivation. In times such may not be possible but can be used for constructing building on it. In this case the highest interest of the waqf will demand that the condition should be ignored, otherwise, the donated land will benefit no one including the donor in terms of reward from Allah (swt).

⁷⁴ See s 5 of WSME which is not clear as whether it implies the interpretation or the right to impose conditions.

⁷⁵ See s 3 of WSME. The WNSE does not have such provision.

⁷⁶ s 15(1)(a) WSME

⁷⁷ This will include a land which has not yield now but has potential for it: s 15(2)(a) WSME.

⁷⁸ see for definition of property s 2 (property), s 15(1)(c) WSME

⁷⁹ Under the Malacca Wakaf Enactment, the property, which is restrained, cannot be donated. The Enactment however allows the donation of waqf property which is rented or leased out by Majlis to another party (15(1)(2)(b)). Similarly, one can donate as waqf any building or structure or crop on leased waqf land (s16). The Negeri Sembilan Enactment 2005 should such a provision too. It is, however, noted that the meaning of restrained property will apply only to those lands, which are encumbered by obligations such as that under pledge or charges and the like.

⁸⁰ s 2(1) WNSE is the most revolutionary which needs to be followed by other states; 2 (1)(property), s 15(1)(c) WSME; s 2(1) Section 2(1) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003;

⁸¹ This is not explicit in legislations so far. The Malacca Fatwa 2009 on the cash shall be made part of legislation.

⁸² This is to include copyrights in any work produced by a waqif.

⁸³ where cash is exchanged for a share in the immoveable property, or invested in business and its income is distributable on the beneficiaries.

The Beneficiaries of Waqf (Mauquf Alihi)

42. The declaration of waqf is valid if it is for use and enjoyment of the property by an individual, including the waqif⁸⁴, a group thereof, without any discrimination based on sex, age, relationship, religion and others as long as it is not against the general principle of Islamic law. Similarly, a waqf declaration shall not be invalid if the income of the subject property was for the use and benefit of a specified person, group of persons or things (e.g. for maintenance of mosque etc) according to the provisions of Islamic law. A declaration will be valid if the waqif omits the name of the beneficiary (mawquf alaihi), the beneficiary is dead, or cannot be traced within four years. The Majlis will have the power to declare in Gazette the said waqf as waqf am. The beneficiary however will be able to revert it to waqf khas by a leave of court⁸⁵.

The Effect of Waqf Declaration

43. The declaration of a valid waqf made by a donor, concerning giving the specified property as waqf together with all stipulations and condition, is binding soon after the conclusion of the declaration;⁸⁶ provided, it is accepted by the beneficiaries as in case the declaration is for the benefit of a specific person or persons. The possession of the object of waqf by the beneficiary or the trustee is neither a condition to the validity of the declaration nor it affects its immediate enforcement. The property becomes frozen. With exception of the Court, no one including the donor, the nazir or the beneficiaries can do any type of dealing in it⁸⁷, except those permitted by law and the waqif. Upon declaration, if valid, the property is separated from the waqif; it automatically becomes, irrevocable and non-transferrable subject to the provision of need and necessity and the nature of waqf. The rule of non-transferability, however, will not apply to the income of the waqf property if declared as waqf. Such a property can be alienable.⁸⁸

44. Invalid waqf can be returned to its owners if found, otherwise to baitul mal⁸⁹.

45. The Majlis has to seek the opinion of the Court on the meaning or effect of any instrument or declaration creating or affecting any *waqf*, if obscure or uncertain. The Majlis shall act on any opinion so given by the Court⁹⁰.

46. A declaration shall be registered with Majlis in a form as prescribed by the Majlis.⁹¹

⁸⁴ The Malacca Wakaf Enactment 2005, (s 11(1)), considers a declaration invalid if the beneficiary is the waqif (s13(d)). This provision needs to be revised or modified for two reasons: there is apparent conflict between s 13(a) and s 18 (if the waqf is a waqf am the waqif can be one of the beneficiaries), and under classical fiqh this is otherwise.

⁸⁵ s 11(2) WSME

⁸⁶ See to the same effect s 4 and s 50(1)(2) WSME. This section however shall be read together with s 8 WSME, which permits contingent declaration that comes to effect only after the happening of the given event.

⁸⁷ see s 4(2) WSME

⁸⁸ Current law does not recognise such a distinction. The income of a waqf if converted to a waqf is treated perpetually non-transferrable: s 27(2) empowers the Majlis to purchase property from the money in the waqf fund and declare it as waqf.

⁸⁹ S 17(a)(b) WNSE

⁹⁰ S 51 WNSE

⁹¹ S 6 WNSE

WAQF PROPERTY MANAGEMENT

47. For the sake of accountability and transparency, the Waqf Corporation shall be responsible for the management of waqf property. Its responsibilities will include upkeep, maintenance, dealings in it for keeping it productive; development, regeneration or redevelopment; development and regeneration finance. It will also be responsible for the investment of capital, and the management of its income by way of reserving, paying debts and management fees, and distributing on the beneficiaries. The Corporation shall maintain proper accounts and make them audited, according to the waqf instrument, Islamic law, and other rules and regulations applicable thereto.

48. The Majlis shall be under duty to manage all consumptive waqf properties such as mosques, religious schools, dormitories, orphanages, old-folk welfare houses, graveyard etc. The Majlis may appoint under certain conditions⁹² another party to do so. The Majlis⁹³ shall appoint the Waqf Corporation to manage the properties which are dedicated for the interest of the Majlis (as mawquf alaihi) within or outside the jurisdiction.

Protection of Waqf Pproperty

49. To protect waqf property, the Majlis or the Waqf Corporation shall be under duty not to transfer, surrender, assign, charge or mortgage, and loan⁹⁴ except in accordance with terms and condition of the waqf instrument, in case the interest of the beneficiaries or waqf reeds it, after leave from the Fatwa Council⁹⁵ or Court is obtained.

50. It shall be the duty of the Majlis and the Waqf Corporation to keep the waqf property fit for being used for the purpose it was dedicated. The property shall be maintained and kept under repair. Where the property is wholly or partly destroyed⁹⁶, under any circumstances⁹⁷, it shall be redeveloped without changing its status as waqf⁹⁸. Financing the redevelopment of a land, totally destroyed whatever its cause may be, can be from the income of the same waqf, reserves, donations, state assistance, benevolent loan or any other financing method permissible under Islamic law⁹⁹.

51. The Majlis or the Corporation not only shall always avoid risky transaction but also be in possession of the property. In case of any violation of this right, the Majlis or the Corporation shall initiate litigation against the violators. There shall be no adverse possession against waqf property. Any trespass, illegal occupation, unlawful utilisation of the waqf property, without considering the length of time, shall be prevented.¹⁰⁰

⁹² S 31(1) WNSE

⁹³ S 31(2) WNSE excludes the delegation of such a power to another entity. This subsection needs to be deleted.

⁹⁴ S 9(3) WNSE

⁹⁵ S 9(3) WNSE

⁹⁶ S 32(1) WNSE

⁹⁷ S 32(3) WNSE provides otherwise. There should be no exception as long the land has potential for profitable development.

⁹⁸ S 32(2) WNSE

⁹⁹ S 32(1) WNSE mentions waqf fund as the source of financing the redevelopment of the ruined property. this can be one of the source. the section also mentions other sources, but is not clear. Under s 37 of the Malacca Wakaf Enactment the Majlis is empowered to use the usufruct of the waqf for this purpose.

¹⁰⁰ Currently the Negeri Sembilan law is quite clear about the course of actions to be taken against the wrongdoers, by the Majlis on its own, or in the courts of law. See part viii and part ix of the Waqf (NS) Enactment, 2005 of the offences, enforcement, and the powers of Shariah and civil courts

Asset Management

52. The waqf property needs the normal task of business management concerning the physical aspect of the property, i.e. protection and preservation of its value (through maintenance, repair, as mentioned above), utilisation, and others. Therefore, it must be the duty of the Majlis or the Corporation to protect and preserve the property, lease it, fix rental rate according to free market value of the land¹⁰¹, collect rental¹⁰², claim lost values and rentals¹⁰³. It will also have the power to evict errant tenants, remodel the property, provide value-enhancing utilities and facilities, insure it against major and known risks (through halal product e.g. Takaful), pay taxes¹⁰⁴, if any, and pay zakat¹⁰⁵, and provide accounting report for the cost, expenses, and income of all such transactions and services.

53. There must be an account for each individual waqf property, as entity.¹⁰⁶ There may also be a supplementary account for the same waqf where the funds and properties generated through the income or reserves thereof are kept. This is not the same as the reserves account. It is a secondary waqf account and all properties recorded thereunder shall be dealt as non-waqf assets. All properties under this account can be used and disposed, if needed. All matters relating to the management of the account in terms of investment, profit and loss, reserves etc have to be clearly recorded. No property belonging to a given account shall be used for any purpose except for its own incidents, as long the account is productive and in good condition. Any money used for the benefit of another waqf account shall be recorded, repaid with dividends and profits.

54. There shall be no restriction on the Corporation to establish a common waqf account with objective to keep all waqf funds and properties that are no more serving the purpose for which the waqf was originally established.¹⁰⁷

55. Where the tenant¹⁰⁸, insurance company, or a contractor for example fails to fulfil his part of bargain, the Majlis or the Corporation shall initiate litigation. The litigation shall include the eviction of the tenants who is failing to pay rentals. Any nazir leasing waqf property below market value as mentioned above, shall be guilty of an offence punishable with appropriate penalty, dismissal, and if proved guilty, shall be personally liable to pay compensation for the damage he has caused to waqf property.

Investment Management

56. One of the duties of the nazir is to enhance the value¹⁰⁹ and maximise the income-generation of the waqf property. For that purpose, the Waqf Corporation shall have the power to acquire and dispose, develop, rehabilitate waqf property and seek its finance after proper

¹⁰¹ A rental fixed below market value is considered ghabn on waqf. If it is viewed as ghabn fahish the transaction will be invalid according to fiqh. The rationale for this is the nature of the waqf designed to maximize income for the beneficiaries. Any reason that contradicts this rationale will be invalid if it results in renting out the waqf property for less than market value.

¹⁰² s 15(1)(2) WNSE;

¹⁰³ s 40 WSME

¹⁰⁴ This item may not be present where waqf property is tax-exempted.

¹⁰⁵ The predominant view among jurists is that it should pay the zakat.

¹⁰⁶ This view is supplementary to the present form of the waqf fund where all waqf proceeds and income is kept (e.g. s 39 WSME). In contrast to zakat there can be a waqf fund, but this fund shall have individual accounts for each property.

¹⁰⁷ This can be in line with that under s 38 of Malacca Enactment.

¹⁰⁸ s 15(3) WNSE

¹⁰⁹ s 34(c)

study and planning. The nazir has to take into account payments of taxes, operational costs during the stage of investment planning.

57. The Corporation as well as the Majlis can create, encourage to be created new waqf both in the traditional sense and in the form of waqf funds schemes that not only can attract new resources but also help the Majlis and the Corporation to finance the development or redevelopment of waqf properties.

58. the investment decision making shall be based on the following principles: (a) it attracts benefits to waqf, its beneficiaries, or prevents harms there from; it is Shariah compliant, not inconsistent with public interest and is according to the conditions of the donor; (b) the conditions of the donor may not be followed if they result in the dilapidation of the waqf assets, decrease of its income or is not consistent with Shariah principles; (c) has advance strategic investment and financial planning with consultation with Shariah and management professionals; (d) applying waqf assets in new and traditional investment projects such as the development of housing estates, commercial buildings, securities and others; and (e) keeping waqf perpetual (daimumah) so that its income is generated continuously. Based on this principles of investment, the nazir has (a) to manage waqf assets by creating or participating in creating companies, purchase of existing companies, properties, goods, securities, involvement in commerce, industrial and agricultural development businesses (b) to conform to the conditions of the donors in realising waqf objectives, (c) conduct feasibility studies on planned projects, (d) study the financial method intended for the finance of development on waqf land and (e) project management even if its cost is high, or (f) giving agency to other entities or (g) development of the property through other investors.

59. No investment method shall be adopted if it is not risk-free except that which is beyond the control of the mangers.

60. The Corporation shall have clear guidelines on the management of income of the waqf assets. There shall be no distribution of income unless it exceeds the expenses for repair and maintenance of the waqf estate. In case the property is in good condition, there must be provision for improvement, potential repair needs, risks associated with property market, currency and investment at a fixed rate. A portion of the income can be deducted for management fees and operation costs which shall not include provisions for physical repair and maintenance of the fixed assets or risk aversion in case of fluid assets.

61. The Majlis and the Corporation may finance¹¹⁰ the development and redevelopment of waqf property from the income of the same or other waqf assets, reserves, if any¹¹¹, lease of waqf property, sale of other waqf (e.g. through istibdal), baitulmal, public donation, otherwise, benevolent loan from Islamic Institutions without charging waqf property as security for it, unless it is needed and is in the interest of waqf or its beneficiaries, any permissible scheme¹¹² that does not render the waqf property transferrable to the investor,

¹¹⁰ Section 32(1) WNSE is not clear as about the type of fund and other financial resource. A clear guideline is needed for the purpose.

¹¹¹ See Mohammad Tahir Sabit (2006) Conceptual Obstacles to the development of waqf property.

¹¹² This will include all methods whether debt based or otherwise. For further information see Mohammad Tahir Sabit, (2006) the Innovative Modes of Financing the development of waqf properties.

which is other than a waqf Corporation.¹¹³ Such a loan and some of the financial methods should be permitted by the donor or by leave of the Court as required under Islamic law.

62. The Waqf Corporation shall manage its finance, through proper planning, directing, monitoring, organising and controlling. An investment decision shall be based on the soundness of a selected financial mechanism in terms of its suitability to the nature of waqf and maximisation profits to the waqf. There shall be a list of financial methods approved by the Advisory board and recognised by regulatory body. Such a list may be changed from time to time, considering the attractiveness of methods. The advisory board shall not only allow the financial method based on its shariah compliance, but also for being less risky, more profitable and easily made available by financial institutions.

Marketing

63. The nazir has the power to market, through new and traditional means of media, waqf property, and the available investment opportunities in the development of waqf properties. This is to directly or indirectly invite from various trades and professions, investors, partners (public, private, corporate or individual), and donors as well as to attract donations for the implementation of various development projects. All costs can be deducted from waqf accounts.

Distribution of the Income on the Beneficiaries

45. Distribution shall take place only after the debts, obligations, expenses, and reserves are deducted from the revenue of the waqf properties.

46. The distribution of the benefit/income on the beneficiaries shall be on equal basis if the waqif has not determined their shares. Where the waqif has dedicated the income to asnaf zakat, the Majlis shall follow the formula applicable to the distribution of the zakat on asnaf too.¹¹⁴ Where due to lapse of time or change of circumstance, the income from the mawqf cannot be distributed as provided for under the declaration of waqf the Majlis or the Corporation can use it as closely as possible to the original purpose or add it to general waqf fund.¹¹⁵

Dealings in Waqf Properties

47. As a rule, the waqif cannot unfreeze waqf property, and it cannot be transferred. Exception to this rule is the sale of waqf property by way of ibdal and istibdal. It property can be disposed of in exchange for a similar land or for cash equivalent to market value of the land. The proceeds¹¹⁶ of the sale by istibdal may be used to develop the remaining waqf property or another. The sale through istibdal is subject to the following conditions¹¹⁷: when compulsorily acquired under existing law by the government; the waqf property does not yield any income or benefit intended by waqif; and the use of the waqf does not comply with the purpose of waqf, any other reason that is in the interest of waqf or its beneficiary.

¹¹³ It is the opinion of this writer that where the waqf fund or a waqf bank lend funds to another waqf the lender should be entitle to claim the property of the borrower waqf when the latter is proven to be insolvent.

¹¹⁴ s 12 WSME

¹¹⁵ s 38 WSME

¹¹⁶ section 20(1)(a) WSME

¹¹⁷ section 19 WSME

48. The income of the waqf property is disposable. A land or property bought through the income of the waqf is still waqf property but can be disposed of in the normal manner according to existing laws.

49. A waqf land may be leased on short term basis or long term. The modes of long term lease such as that under *ijaratain* and *hikr* shall not exceed 99 years. Any leased land, then, can be sold, subleased and charged under Malaysian Land Code. The rights under this lease shall be transferrable and transmittable to others subject to conditions imposed under the master lease.

THE CREATION OF NEW WAQFS

50. The Majlis or the Corporation can create new waqf. The Majlis or the Corporation can offer shares in a property for a defined amount of cash (as cash waqf) or request the public to contribute an amount of money whereby a property can be purchased and converted to a waqf (*saham waqf*).

51. A property, which is developed through waqf shares, is waqf property and shall be subjected to the rules applicable to normal waqf properties.¹¹⁸ The capital of the cash waqf shall be invested. Where a real estate is purchased through the capital of cash waqf, such property, though waqf, shall not be subject to the rule of perpetuity and inalienability.

ACCOUNTS AND AUDIT

51. There must be a special accounting system for the management of waqf properties. The system must take cognisance of the consumptive and productive *awqaf*; for each, a separate system of accounting must be created. Productive properties shall be subject to normal corporate accounting system.

52. For sake of transparency, the Majlis¹¹⁹ and the Waqf Corporation jointly shall publish in Gazette the list of all waqf assets, within the jurisdiction or outside, old and new. This must include waqf schemes, the beneficiaries thereof, investments made, the proceeds, the profits, losses, and the rate of income distributed on the beneficiaries, the reserves and expenses spent on the repair or maintenance of waqf property and other operational cost, as required from any corporate entity.¹²⁰

OFFENCES AND PENALTIES

51. It shall be unlawful¹²¹ for anyone to occupy, use, and encroach on waqf land. Similarly, it will be unlawful for anyone who removes and disposes or takes any produces of waqf lands or unauthorised use or occupation of air space, destroys property or any plant or crop cultivated on any *wakaf* land. Anyone who causes any change, alteration, destruction, damage or defect to any *mawquf* or preventing or causing to prevent *mawquf-alaih* from enjoying benefit, interest or profit of *mawquf*, will commit an offence. All offences will be punishable with fine, imprisonment or both¹²².

¹¹⁸ s 17 WSME

¹¹⁹ S 20 WNSE

¹²⁰ The current section 29 of WNSE concerning the financial report of waqf fund can be amended to include all assets of the waqf under the care of Majlis or the Waqf Corporation, and include headings needed for a corporate entity as long it concerns the productive waqf assets.

¹²¹ The new law of Negeri Sembilan (and Malacca to an extent) is comprehensive in many aspects.

¹²² s 35(1)(a)-(d), s 36(1), 37(1), s38(1), s 40 WNSE

52. The Majlis or the Corporation can forfeit the structure illegally built or crops illegally planted¹²³. They can also have the power to claim compensation for any destruction to or of any plant or crop cultivated on the *wakaf* land, by either an individual or his livestock¹²⁴, or the restoration or replacement¹²⁵. The Majlis and the Corporation shall be entitled to claim costs incurred by them¹²⁶ in the course of destruction of the structure or the clearance of the crops.

MONITORING

53. The law is not clear on the monitoring though there are some sections outlining the functions of the Majlis to investigate offences committed by some members of public against the waqf property. That however is part of enforcement process.

54. Amendments to the parent law as well as proper regulations under s 53 of WNSE and 47 of WSME are needed.

ENFORCEMENT

55. This aspect of the Negeri Sembilan and Malacca law is quite comprehensive as long the unlawful occupation and use or destruction of waqf properties is concerned. Offences are defined¹²⁷ and several mechanisms are adopted for this purpose. They include the empowerment of the Majlis¹²⁸ and both the Shari'ah and civil courts¹²⁹ to recover losses. Clear powers are given to the officer of Majlis¹³⁰ and public Shari'ah prosecutors¹³¹ to investigate any offences.

56. The Majlis can order or at the cost of the offender carry out the demolition and other necessary action. Similarly, it can order the offenders to pay compensation for the unauthorized occupation of any *wakaf* land or *wakaf* building, clearing, ploughing, digging, enclosing or cultivating or otherwise working on any *wakaf* land or cutting, taking, removing or disposing any produce on or from any *wakaf* land. In case the order of the Majlis is not complied with, it can apply to the Court and the court has to issue an order to that effect.¹³²

POWER OF COURTS

57. The Shariah courts¹³³ shall have the jurisdiction to declare a waqf valid in terms of its instrument, the terms and conditions thereof, the time when it has become effective¹³⁴ and

¹²³ s 35(5) WNSE

¹²⁴ 37(2)(3)

¹²⁵ s 38(2)

¹²⁶ s 35-38 WNSE

¹²⁷ s 45 and 48 WSME

¹²⁸ s 38

¹²⁹ ss 35-38

¹³⁰ ss 43-45

¹³¹ s 46-49

¹³² s 39

¹³³ At present the Shari'ah court has the jurisdiction to decide on matters relating to waqf provided the dispute does not involve none-Muslim. Civil courts are still jealous of relinquishing jurisdiction to Shari'ah courts even though the spirit of the Art 121(1A) requires otherwise. One would presume, in a multi-religious society there would still be single body of law with many arms of equal strength and justification, dealing with issues of different colour. Art 121(1A) may have achieved that aim should the parties involved have appreciated that spirit. Contrary to that spirit, the civil courts try to decide on matter falling within jurisdiction of Shari'ah courts, despite an ongoing hearing on the same issue in Shari'ah court. It is often argued by judges in civil courts that

enforceable, its nature and its effect. Only the Shari'ah court should have the power to interpret, construct, declare valid or otherwise any instrument of waqf or any matter relating thereto¹³⁵. Such a declaration should be binding, and no civil court shall have the power to challenge or ignore and refuse to follow. The Shari'ah court, the same as any civil court, shall grant leave to the nazir to enter a transaction, appoint, or dismiss the nazir or his substitute.

58. The Shariah court can issue any order or injunction for enforcement of its declaration, interim, and final; and shall have the same effect as if it were issued by a civil court of an appropriate jurisdiction.

59. Where a non-Muslim is party to a dispute, the parties may bring action in both Shari'ah and civil courts. The civil court shall adjourn its proceedings until a verdict is entered by the Shari'ah court. The award of the Shari'ah court, as far as it relates to the validity of declaration of waqf, interpretation of such a declaration, transfer and transmission of title and any other issue that shall be decided according to Shari'ah, shall be acknowledged by the civil court. The Shari'ah court shall take cognition of the fact that the donor had a valid title to the subject property in the first place. Where the Shari'ah court misconstrues the law relating to titles, the decision of the civil court if made after that of Shari'ah court shall prevail. The order of the Shari'ah court can be enforced only after a similar award is made by the civil court.

60. The Majlis will have the duty to seek the leave of the Shari'ah court to register when it believes a given property is a waqf property including those involving non-Muslim as contestant. Only on the order of Shari'ah court then it will have to register such property as waqf. The Shari'ah court in its declaration shall rely on any evidence considered admissible under the established principles of Islamic Law.

61. The Shari'ah court can order to demolish, destroy any structure or building and order to clear any crops on waqf land¹³⁶.

62. The recovery of the debt is recoverable through litigation in civil courts¹³⁷.

CONCLUSION

This proposal envisions a major change to the laws of waqf. It recognises waqf as a legal person and based on its classification it proposes two types of management structures: one at the hands of Majlis and other at the hand of a corporate like entity. While protection of the properties at the hand of both the Majlis and the Corporation, management activities of the

Shari'ah courts have not been given expressly the power to issue orders for enforcement of its declaration. Surprisingly they may have a point, and this make the legal framework for waqf unclear and confusing. As it is hopeless to see immediate corrective ruling made by civil courts, there is need for legislative intervention. It is to be noted, the issue of summon, writs, injunction and other order is easy to tackle, the involvement of non-Muslim in a related dispute is contentious. A temporary solution perhaps is that a declaration by Shari'ah court be made first; only then the civil court can hear the argument put forward by a non-Muslim. Additionally, in all fairness and rationality, putting prejudices aside, a qualified lawyer will be able to defend the rights of the non-Muslim in Shari'ah court, the same as a Muslim is expected to do so in a civil court, perhaps against his wishes.

¹³⁴ s 43 WSME

¹³⁵ s 44 WSME

¹³⁶ s 35 (2)

¹³⁷ s 35(4)

productive properties is the main focus of this proposal which is proposed to be at the hand of the Corporation. While this proposal highlights the issues that must form the contents of the law of waqf amendments to other laws such as banking, taxation, companies and others are presumed to be considered necessary by the drafters of the legislation if this proposal was accepted to be a valid effort.

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