Towards Institutional Mutawallis for the Management of Waqf Properties

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Abstract
This paper examines the management of waqf properties in Malaysia. Waqf comes under states’ jurisdiction and state laws are applicable to the creation, management and development of waqf properties. The institution of the Islamic Religious Council (Majlis Agama Islam) in the various states deal with the issues related to waqf including its management and act as the sole trustee (mutawalli) of all the waqf properties in the states. This paper argues that waqf as an institution is not as productive and beneficial as it was during the Islamic history. It contends that the practice of appointing government institutions as a mutawalli has not contributed to the productivity and efficient management of the waqf properties. The paper argues that in order to make waqf contribute to the socio-economic development of the Muslim communities it is essential that some changes be brought to the management of the waqf properties. The paper concludes that non-governmental institutions should be allowed to act as a trustee (mutawalli/nazir) and to manage the waqf properties for the benefit of the beneficiaries.

Introduction
Historically, waqf tremendously contributed to the welfare and educational development of the Muslim societies. It was a successful model for supporting Islamic charitable and educational institutions. It financed and sustained mosques, schools, universities, hospitals and other public utility charitable institutions in the fields of education, healthcare, and even
infrastructural works such as road, water canals and bridges. However, today the institution of *waqf* does not play its historical role to support and finance religious, charitable and educational institutions in the Muslim world. This paper argues that the methods for the administration and management of *waqf* properties are in urgent need of radical changes. The traditional way of appointing a *mutawalli* to manage *waqf* properties and the modern way of leaving the management of *waqf* properties in the hands of the state institutions need to be revised. This paper examines the impact of appointing government institutions as a *mutawalli* on the creation and management of *waqf* properties. It concludes that specific non-governmental institutions should be created to act as *mutawallis* for the *waqf* properties. It also argues that existing institutions such as universities, schools and other NGOs dedicated to the socio-economic development of the Muslims should be allowed to act as *mutawallis* for the *awqaf* that are created in their favour.

**The Administration of Waqf**

When a person wants to create a *waqf* he would declare a certain property perpetually as *waqf* and dedicate its usufruct or benefit for a religious cause to a certain beneficiary or a group of beneficiaries. Historically the administration of *waqf*, depended on the terms of the *waqf* deed which usually included a provision for the appointment of an administrator or a trustee (*mutawalli* or a *nazer*) to administer and manage the *waqf* property for the benefit of the beneficiaries. Traditionally the founder of the *waqf* would himself act as a *mutawalli* or he would choose an individual known for his piety, honesty and dignity as a *mutawalli* to manage the *waqf* property for the benefit of the beneficiaries.

Classical *fiqh* rules state that the power to appoint the *mutawalli* primarily rests with the *waqif* himself who may also choose to become the first *mutawalli* to manage the *waqf*
property. After the waqif’s death the office of the manager would go to a person appointed by him. In the absence of such an appointment the Shariah court will appoint a mutawalli for the waqf. The waqif can also lay down the rules and conditions for the appointment of subsequent mutawallis or stipulate that the subsequent mutawallis should be appointed from a certain group of persons. A mutawalli can also appoint a successor who would take over from him after his death. This could be the mutawalli’s son or another person who in his opinion is best suited to manage the waqf property. In cases where the office of the mutawalli falls vacant and no successor is appointed to take over, the power to appoint the mutawalli rests with the Shari’ah court. The court has an absolute discretion to appoint as a mutawalli any person who in the opinion of the court is capable to manage the waqf property. It is also possible to leave the management of the waqf property to the institution to which the waqf was dedicated.

A mutawalli appointed as such has to manage the waqf property in accordance with the terms and conditions laid down by the founder of the waqf. The mutawalli is under obligation to carry out the instructions of the waqif and to safeguard and protect the waqf property and its revenue. He is responsible to maintain the waqf property in good conditions, collect its revenues and distribute them to the beneficiaries. He also has the power to do all the acts which are necessary for the maintenance, management and development of the waqf property. He has no right to sell, exchange, or mortgage waqf property or borrow money in order to spend on waqf without the permission of the court. A mutwalli is entitled to receive a fixed salary deducted from the income of the waqf property. The amount of salary receivable by the mutawalli could be decided by the waqif himself or by the Shari’ah court, upon the application by the mutawalli, in case where the waqif has not specified any amount. The amount of salary is decided with reference and in proportion to the waqf income.
Classical *fiqh* rules also states that the responsibility to supervise the efficient administration of *waqf* property primarily lies on the *Shari’ah* court. Thus, the *mutawalli* could be removed if the court, upon complaints lodged by the beneficiaries, is satisfied that he is unsuitable for the job or is guilty of mismanagement or neglect of his duties. For instance, if the *mutawalli* neglected to repair the *waqf* premises and allowed them to fall into ruins.¹

**The Problems with the Individual *Mutawalli***

Most of the time the right to administer the *waqf* property was kept within the founder’s or *mutawalli*’s family. The right of the *mutawalliship* would be transferred along with other properties to the legal heirs and subsequently would devolve on their descendants. This effectively granted the family members the right to a perpetual lease and had the potential to convert a *waqf* property into a private property of the descendants. This not only led to the mismanagement of *waqf* property but also denied the beneficiaries their due right assigned to them in the original *waqf* declaration.

Furthermore, the *mutawalli* chosen for his piety, honesty and character often lacked managerial and developmental skills that are necessary for the proper and efficient management and development of the *waqf* properties. This particularly was the case with regard to general *waqf* made for the benefit of the poor and the needy as *waqf* made for the benefit of the institutions were often managed by the institutions themselves. Subsequently this had a discouraging effect on the creation of *waqf* made for the general welfare of the poor and the needy.

**The Administration of *Waqf* in Malaysia**

In the 20th century centralized government institutions such as the ministry of *awqaf* and religious affairs in other Muslim countries and in Malaysia the various State Islamic Religious Councils (*Majlis Agama Islam*) were established. Subsequently, all *waqf* properties and their administration were transferred to these institutions which in some cases replaced the traditional *mutawallis* and other cases assumed supervisory role over the existing *mutawallis*.

In Malaysia the Constitution assigns the power over *waqf* to the states which have jurisdiction to make laws on *waqf* and its administration.\(^2\) State enactments on the Administration of the Religion of Islam have provisions that govern the creation and management of *waqf* properties in the state. The three states of Selangor, Malacca and Negere Sembilan have *waqf* enactments that exclusively deal with *waqf* and its related issues. There are 14 State Islamic Religious Councils, one for each of the 13 states and one for the Federal Territories. Every *waqf* shall be registered in the name of the Islamic Religious Council which enables the Council to record and possess a complete database of all *waqf* properties in the state.

State enactments authorize the Islamic Religious Council (*Majlis Agama Islam*) of each state to act as a *mutawalli* to administer and manage all *waqf* properties in their respective states. For instance section 89 of Administration of the Religion of Islam (State of Selangor) Enactment 2003 states that the *Majlis* shall be the sole trustee of:

(a) all *wakaf*, whether *wakaf am* or *wakaf khas*;

(b) all *nazr am*; and

(c) all trusts of every description creating any charitable trust for the support and promotion of the religion of Islam or for the benefit of Muslims in accordance with

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\(^2\) See *Federal Constitution*, Ninth Schedule, State List, item (1).
Hukum Syarak, to the extent of any property affected by the wakaf, nazr am or trust and situated in the State of Selangor.

Section 96 states that the Majlis shall be the sole trustee of all mosques and related lands in the State of Selangor. Section 90 declares that all waqf, nazr and trust properties should vest in the Majlis. Section 32 of the Wakaf (State of Malacca) Enactment 2005 states that “the Majlis shall be the sole trustee of all wakaf, whether wakaf am or khas, situated in and outside the State of Malacca”. Section 5 of the Wakaf (Negeri Sembilan) Enactment 2005\(^3\) states that “the Majlis shall be the sole trustee of any mawquf, situated in the State of Negeri Sembilan.”

These provisions in Selangor, Malacca and Negeri Sembilan Enactments are as representatives as other states also have similar provisions. It is clear from these provisions that the Majlis in the various Malaysian States are acting as mutawallis for the waqf properties in their respective states. In Malacca and Negeri Sembilan the Enactments also empower the Majlis to establish a Wakaf Management Committee and Advisory Panel on Management of Waqf in these states respectively.\(^4\) In Malacca the state Enactment stipulates that “The Majlis shall establish a Wakaf Management Committee to administer and manage all matters relating to wakaf in the State of Malacca”. Section 24 of the Enactment spells out the functions of the Wakaf Management Committee as follows:

(a) to carry out any direction, policy and decision made by the Majlis in relation to any mawquf;

(b) to supervise, arrange, manage and administer the mawquf;

(c) to develop, improve and upgrade the mawquf;

(d) to administer the Wakaf fund; and

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\(^3\) Enactment No. 5 of 2005.

\(^4\) See Section 21 of the Wakaf (State of Malacca) Enactment 2005, and Section 21 of the Wakaf (Negeri Sembilan) Enactment 2005 (Enactment No. 5 of 2005).
(e) to carry out any other powers of function as provided under this Enactment or as directed by the Majlis from time to time.

Section 25 states that “the Wakaf Management Committee may, with the consent of the Majlis and subject to the terms of such consent istibdal any mawquf; or develop or invest the mawquf.

Section 35 affirms the power of the Majlis to “from time to time give any general direction to the Wakaf Management Committee in the execution of its powers and functions” and section 36 empowers the Majlis to:

(a) supervise the activity and the management of the Wakaf Management Committee;
(b) inspect any account and records which are kept and maintained by the Wakaf Management Committee;
(c) direct the Wakaf Management Committee to furnish it with any report or statement it deems fit.

In Negeri Sembilan the Majlis is empowered to establish an Advisory Panel on Management of Waqf. The Advisory Panel has the following functions:

(a) to draft policies on wakaf for the approval of the Majlis;
(b) to monitor the development of the affairs of wakaf;
(c) to advice and make recommendations to the Majlis relating to the affairs of wakaf;
(d) to control the management and development of any mawquf;
(e) to advice the Majlis on investment of mawquf.

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6 Ibid, section 22.
(f) to monitor the management and development of any mawquf situated elsewhere than in the State of Negeri Sembilan of which the Majlis is its mawquf-alaih; and

(g) to carry out any functions provided under this Enactment or as may be directed by the Majlis from time to time.

Section 33(1) states that The Majlis, on the advice of the Advisory Panel, may “appoint any person whom the Majlis reasonably considers competent and qualified to manage and develop any mawquf, including to manage investments of the mawquf”.

These and other similar provisions in other state enactments clearly indicate the followings:

1. These state enactments abolished the position and functions of the private waqf administrators.

2. Some state enactments allow the Majlis Agama Islam to outsource the management of waqf properties to other bodies established by the enactments.

3. These state enactments do not provide for the Shar‘iah court to supervise and adjudicate on issues related to waqf.

In 2004 the Malaysia government has formed a department for zakat, waqf and hajj under the Prime Minister’s Department with the aim to make the administration of waqf more systematic. However it does not have an authority to administer the waqf properties but rather plays a role as a planning coordinator and observe the waqf matters.

**Government Institutions as a Mutawalli**

It is however, arguable whether the Majlis or for that matter any government-run institution in other Muslim countries is a suitable body to perform the functions of the mutawalli.
Besides the administration of *waqf* properties, the *Majlis* also has to manage bait al-mal, the *zakat* fund and deal with many other religious issues such as mosques and the appointment of imams. The shortage of qualified human resources is always a relevant issue in this context and the *Majlis* in the states may not be able to pay individual attention to the hundreds of *waqf* properties in each state. It has to be carefully examined whether the appointment of the *Majlis* as a *mutawalli* has made the *waqf* institutions and in particular their management more efficient?

Another pertinent question that could be asked here is whether government institutions should interfere in the provision of charities and *waqf*.

Among other issues this may have discouraging effects on efforts to promote *waqf* in favour of institutions such as schools, universities, and other Muslim *Da’wah* institutions and NGOs. These institutions will have greater incentive to promote the creation of *waqf* in their favour if they also become the *mutawallis* for these *waqf* properties. This will enable these institutions to make their own efforts to attract and promote the creation of *waqf* in their favour, to manage the *waqf* properties created in their favour and to be self-reliant and self-financed. This is in line with the concept of self-effort, self-management and self-financing.

**Non-governmental Institutional Mutawallis**

Today technical and managerial expertise is needed to manage, maintain and develop *waqf* properties. It is almost impossible for a single individual to offer a combination of these services. Thus, the traditional position of appointing individual *mutawallis* to administer and manage each *waqf* property separately may not be feasible. There is an urgent need to

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7 For a good discussion see Daniela Pioppi, “From Religious Charity to Welfare State and Back. The Case of Islamic Endowments (waqfs) Revival in Egypt”, European University Institute, Florence, Robert Schuman Centre for Advanced Studies, EUI Working Paper RSCAS No. 2004/34. P.3
institutionalise the office of the mutawalli. An institution is always better than an individual mutawalli as it has the advantage of team expertise and can pull talents in different fields under one roof. The waqf properties will benefit greatly from the teamwork, expertise and professional management that an institutional mutawalli could offer. Furthermore, unlike a person an institution can last several generations and can also keep proper documentation and records for several generations that could always be inspected. An institutional mutawalli can also easily and efficiently manage many waqf properties for the benefit of the same beneficiaries at the same time.

Allowing universities, schools, Da’wah institutions and other Muslim NGOs dedicated to the alleviation of poverty, the provision of scholarship to the needy students and other welfare activities to act as a mutawalli would provide them with the incentive to promote the idea of waqf. They will take the initiative to encourage the creation of more new awqaf. The good performance of these mutawalli institutions will also increase people’s trust and confidence that will encourage them to create more waqf. With the availability of these institutions as mutawallis Muslims will have a variety of choices for the creation and dedication of their waqf properties and could appoint an institution of their choice as a mutawalli for their waqf. The federal government or the states may also allocate a small initial budget with the long-term objective to create awareness and promote the creation of waqf in favour of educational and welfare activities where the universities and welfare institutions and NGOs will act as mutawallis.

The activities of these mutawalli institutions should be coordinated with the government’s policies. This will enhance welfare activities and effectively contribute to the government efforts for poverty alleviation and socio-economic development of the society. The
institutional *mutawallis* should manage the *waqf* property with transparency and provide regular financial and performance reports of their welfare activities to the founder of the *waqf* and the public. Furthermore, the power of the *Shari‘ah* court should be restored in order to adjudicate on disputes whenever it is necessary. These measures will ensure that the *mutawalli* institutions act with the required independence, transparency and due diligence.

The idea of an institutional *mutawalli* is suitable for income generating *waqf* properties. It is not suitable for *waqf* that do not generate income such as mosques cemeteries, etc. The *Majlis Agama Islam* would still play its role as the *mutawalli* for these *awqaf*.

**Conclusion**

This paper concludes that the present legal and institutional framework in Malaysia and other Muslim countries is not conducive for the *waqf* to play its rightful and historical role. The appointment of government-run institutions such as the *Majlis Agama Islam* in Malaysia and the ministry of *awqaf* in other countries as the *mutawallis* for all the *waqf* properties has not contributed to the efficient and successful management of the *waqf* properties. This paper concludes that the institutionalization of the office of the *mutawalli* should be the main focus of *waqf* reforms. The law should provide for the establishment of institutional *mutawallis*. These institutional *mutawallis* would be active in areas such as education, *da‘wah*, health, poverty alleviation and other welfare activities. In addition, where a *waqf* is dedicated to institutions such as universities, religious schools, hospitals, NGOs and other charitable institutions they should be allowed to assume the job of *mutawallis*. These reforms are needed in order to provide the legal and institutional support for *awqaf* to enable them to function effectively in today’s changed circumstances. This will allow *waqf* to effectively support, as it did throughout the Islamic history, educational, health and other welfare activities and once again play its role in socio-economic development.
References