This paper argues that waqf does not play its historical role to support and finance religious, charitable and educational institutions in the Muslim world. It argues that the traditional way of appointing an individual as a mutawalli to manage waqf properties and the modern way of leaving the management of waqf properties in the hands of state institutions need to be revised. In particular, it examines the modern practice of appointing a government institution as a trustee (mutawalli/nazir) for the management of waqf properties. The paper contends that the practice has not contributed to the efficient management and productivity of the waqf properties. The paper subsequently concludes that educational and welfare institutions should be allowed to act as a trustee and manage the waqf properties for the benefit of the beneficiaries. This would enable these institutions to actively promote the creation of new waqf for educational and welfare purposes, provide professional support for the management of individual waqf properties and contribute to the socio-economic development of the society.

INTRODUCTION

This paper begins with a discussion on the administration of waqf properties. It discusses fiqh rules on the appointment and removal of trustee (mutawalli) as well as his powers and duties. It also highlights the role of the Shariah Court in the appointment and removal of a mutawalli. The paper then discusses the problems that may arise from the appointment of an individual as a mutawalli and the subsequent nationalisation of the management of waqf properties. It next refers to the various provisions of the State Enactments on the administration of waqf in Malaysia. The paper examines the impact of appointing a government institution as a mutawalli in the creation and management of waqf properties. It concludes that existing institutions such as universities, schools and other NGOs dedicated to the socio-economic development of the community should be allowed to act as trustees (mutawallis).

HISTORICAL PERSPECTIVE ON THE ADMINISTRATION OF WAQF

The word waqf literally means stopping, preventing, detaining and keeping in custody. In legal terms, waqf is defined as dedicating a certain property to Allah SWT and devoting its usufruct perpetually for a religious cause for the benefit of human beings. The history of waqf is traced back to the time of the Prophet himself on whose recommendation, the companions made waqf of properties. The perpetual nature of waqf which
benefits the founder even after his/her death has provided the motivation for the creation of waqf throughout the Muslim history. Waqf has the potential to alter ownership patterns in a society. It converts a private property into a public property which individuals cannot own, inherit, sell or purchase. An individual voluntarily gives up ownership of a certain asset in favour of the public which generally benefits the poor and the needy. A religious cause for which a waqf is created is not necessarily confined only to mosques and cemeteries. 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.

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/nazer). Classical fiqh rules state that the power to appoint the mutawalli primarily rests with the founder of the waqf (waqif) himself who may also choose to become the first mutawalli to manage the waqf property. The founder (waqif) could also choose an individual known for his piety, honesty and dignity as a mutawalli to manage the waqf property for the benefit of the beneficiaries. After the founder’s death, the office of the manager would go to the person appointed by him. In the absence of such an appointment, the Shariah court will appoint a mutawalli for the waqf. The founder (waqif) could also have laid 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 could also appoint a successor who would take over from him after his death. This could be any person who, in his opinion, was best suited to manage the waqf property. In cases where the office of the mutawalli fell vacant and no successor was appointed to take over, the power to appoint the mutawalli rested with the Shariah Court. The court had an absolute discretion to appoint, as a mutawalli, any person who in the opinion of the court is capable of managing the waqf property. It was also possible to leave the management of the waqf property to institutions such as mosques or schools to which the waqf was dedicated.

A mutawalli had to manage the waqf property in accordance with the terms and conditions laid down by the founder of the waqf. The mutawalli was under the obligation to carry out the instructions of the founder (waqif) and to safeguard and protect the waqf property and its revenue. He was responsible of maintaining the waqf property and ensuring that it is in good condition, collect its revenues and distribute them to the beneficiaries. He also had the power to do all the acts which were necessary for the maintenance, management and development of the waqf property. He had 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 mutawalli was entitled to receive a fixed salary from the revenue of the waqf property. The amount of salary receivable by the mutawalli could be decided by the waqif himself or by the Shariah Court, upon the application by the mutawalli, in cases where the waqif had not specified any amount. The amount of salary was decided with reference to and in proportion to the waqf income.

Classical fiqh rules also state that the responsibility to supervise the efficient administration of waqf property primarily rested with the Shariah Court. Thus, the mutawalli could be removed if the court, upon complaints lodged by the beneficiaries, was satisfied that he was unsuitable for the job or was 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.2

THE PROBLEMS WITH THE INDIVIDUAL MUTAWALLI

Most of the time, the right to administer the waqf property was kept within the founder's or trustee's family. The right of the trusteeship 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 trusteeship and the potential of converting a waqf property into a private property of the descendants. The practice also led to the mismanagement of waqf properties and denial of the beneficiaries' due rights assigned to them in the original waqf declaration. This particularly was the case with regards 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. Furthermore, the first *mutawalli* chosen for his piety, honesty and character and the subsequent *mutawallis* often lacked managerial and developmental skills that are necessary for the proper and efficient management and development of the *waqf* properties. Subsequently, this had a discouraging effect on the creation of *waqf* made for the general welfare of the poor and the needy.

It was in response to these concerns that in the late 19th and early 20th century, certain reforms were initiated in the Muslim countries to nationalise the management of the *waqf* properties. Centralised government institutions such as the Ministry of *Awqaf* and Religious Affairs and *Awqaf* Departments were set up to take over the management and administration of the *waqf* properties in the Muslim countries. 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*.

THE ADMINISTRATION OF WAQF IN MALAYSIA

In Malaysia, the Constitution assigns the power over *waqf* to the states which have jurisdiction to make laws on *waqf* and its administration. State laws are applicable to the creation, management and development of *waqf* properties. Islamic Religious Council (*Majlis Agama Islam*) in the various states deals with *waqf* and its management and acts as the sole trustee (*mutawalli/nazir*) for all the *waqf* properties in a state. State enactments on the administration of the religion of Islam have provisions that govern the creation and management of *waqf* properties in the states. The three states of Selangor, Melaka and Negeri 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 authorise the Islamic Religious Council (*Majlis Ugama Islam*) of each state to act as a *mutawalli* to administer and manage all *waqf* properties in their respective states. For instance, s 89 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 states that:

> The *Majlis* shall be the sole trustee of:
> all *wakaf*, whether *wakaf* am or *wakaf* khas;
> all *nazr* am; and
> 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 *Hukum Sharak*, 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 *wakaf*, *nazr* am and trust properties shall vest in the *Majlis*. Section 32 of the *Wakaf* (State of Melaka) 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 Melaka'. Section 5 of the *Wakaf* (Negeri Sembilan) Enactment 2005 states that 'the *Majlis* shall be the sole trustee of any *mawqif*, situated in the State of Negeri Sembilan'.

These provisions in Selangor, Melaka 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 states are acting as *mutawallis* for the *waqf* properties in their respective states. In Melaka 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. In Melaka, 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 Melaka. Section 24 of the Enactment spells out the functions of the Wakaf Management Committee as follows:

- 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;
- to administer the Wakaf fund; and
- 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 s 36 empowers the Majlis to:

- supervise the activity and the management of the Wakaf Management Committee;
- inspect any account and records which are kept and maintained by the Wakaf Management Committee;
- direct the Wakaf Management Committee to furnish it with any report or statement it deems fit; and
- direct the Wakaf Management Committee to register the mawquf whose rights has been forfeited by the Majlis.

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

- to draft policies on wakaf for the approval of the Majlis;
- to monitor the development of the affairs of wakaf;
- to advice and make recommendations to the Majlis relating to the affairs of wakaf;
- to control the management and development of any mawquf;
- to advice the Majlis on investment of mawquf;
- 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
- to carry out any functions provided under this Enactment or as may be directed by the Majlis from time to time.

Section 33(1)(a) 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:
(a) These State Enactments abolished the position and functions of the private waqf administrators (mutawallis).
(b) Some State Enactments allow the Majlis Ugama Islam to outsource the management of waqf properties to other bodies established by the Enactments.
(c) These State Enactments do not provide for the Shariah court to supervise and adjudicate on issues related to waqf.

In 2004, the Government of Malaysia has established 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 INSTITUTION AS A MUTAWALLI

This paper does not argue that the power over waqf be transferred from the states to the Federal Government. 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 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 that could always be inspected. An institutional mutawalli as a professional body 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 of creating awareness and promoting the creation of waqf in favour of educational and welfare activities where universities, 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 governmental efforts aimed at 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 Shariah 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 and cemeteries. The Majlis Ugama Islam would still play its role as the mutawalli for these types of awqaf.

CONCLUSION

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 as the mutawallis for all the waqf properties has also not contributed to the efficient management of the waqf properties. The introduction of non-governmental institutional mutawallis should be the main focus of waqf reforms. 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 the institution of 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.


2 For a detailed discussion on these rules, see Tanzil-ur-Rahman, A Code of Muslim Personal Law, (Karachi: Islamic Publishers, 1980) at pp 150-173. See also Syed Ameer Ali, Mahommedan Law, ibid at pp 441-492.

3 See the Federal Constitution Ninth Schedule State List item 1.

4 Enactment No 5 of 2005.


6 See s 21 of the Wakaf (Negeri Sembilan) Enactment 2005.

7 Ibid, s 22.

8 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 P3.