

Trusteeship of an Endowment in Islamic Law: Theory And Practice

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Abstract — Endowment in Islamic Law known as *waqf* or *habs*. In classical Islamic law, the jurists defined *waqf* as to devote the property in charity or family benefits in which the power of administration of the property is at the hand of the appointed administrator known in the law as *nazir* or *mutawalli* or in modern legal term known as trustee. Based on some prophetic injunctions the classical jurists developed significantly the roles of the trustee, his rights and responsibilities. It is admitted that there are very few prophetic injunctions that can be traced back to the time of the Prophet Muhammad but the classical jurists by virtue of their intellectual capacity have come out with rulings and interpretations in matters relating to the office of trustee. In Malaysia the law has provided that the trusteeship of the Muslims endowments vested in the hand of the state government which is parked under State Islamic Religious Council (SIRC). They are considered by law as the sole trustee of all the muslims endowments and they enjoy all the rights given by the law. This paper will explore this issue and aim to find tune between the classical Islamic law and the modern practice in relating to the trusteeship of endowments. (*Abstract*)

Keywords—endowment, *waqf*, *habs*, trustee, Islamic law, Malaysia (*key words*)

I. Introduction

In Islamic law, technically, when a person wishes to make an endowment or *waqf* in Islamic legal term, he has to appoint a trustee to manage the endowed property. This is because the law does not recognize the endower as an owner anymore once he makes a declaration of endowment. The trusteeship of the property is transferred to the appointed trustee who is responsible in managing the property in accordance with the endower's wishes. The classical jurists have developed legal rulings to this trusteeship based on a few available prophetic injunctions. They actually have come out with a standard set of rulings as can be found in the classical literatures on Islamic law of endowment and we find that there are differences of opinions among the jurists regarding some issues in these rulings. The person in charge of trusteeship is called *nazir* or *mutawalli* or *qayyim*. Of these three *qayyim* is very rarely used and can be found in some literatures of Hanafi school of law. In modern legal term this person is called trustee.

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The position of trustee is a kind of trust in which he is responsible for preserving the *waqf* property and is expected to exercise this responsibility for the sake of God. However, he has no exclusive right to the property, since the ownership is not vested in his hand. He can only manage the property in accordance with the rules and stipulations laid down by the endower.

II. The Office of a Trustee

In the Islamic Law of Endowment it is a requirement that a trustee is appointed when an endowment is made, and this is based on the Tradition of Umar in which he appointed his daughter, Hafsa, to the office of the trustee.

Al Nawawi mentions in his *al Majmu'* that all the companions of the Prophet who made an endowment designated someone to manage it. These reports form a concrete evidence for the classical jurists in all of the schools of law to establish the need of the trusteeship entity in an endowment. However there are disagreements among the jurists and some technical issues regarding as can be found in later discussion.

A. Qualifications

The person who is to be appointed as trustee must fulfil the conditions required. Failure to do so may invalidate the appointment, or, if the failure happens after the appointment, the trustee is removed automatically. There are two conditions laid down by the jurists, namely, honesty and competence. Honesty termed in Islamic law as *'adalah*.

Honesty in Islamic law is something very important for certain positions and it is defined as not to indulge in major sins or continuously indulging in minor sins. According to the Shafi'i school of law, honesty is compulsory for the trustee. If the trustee becomes dishonest after the appointment, he is automatically removed from the post, in which case the trusteeship will be passed to the judge. This condition is required because the trustee is dealing with the property of other's interest and it is therefore important to have an honest person for that position. In the Hanbali school of law honesty is not a condition if the appointment is made by the endower himself. It is a condition when the appointment is made by the judge. It is very technical but this aspect is among the peculiarities of Islamic law in dealing with trusteeship matters.

Whereas competence (*kifayah*) is defined as sane and matured person. It is soundly acceptable because this is a very basic requirement for any position. Men and women are treated equally in this appointment. According to Hanbali

school of law, if this condition is breached the trusteeship is transferred to his guardian in replacing him.

B. **Appointment of the trustee by the endower**

An endower has the exclusive right to designate anyone he wishes as the trustee. The appointment can be made by specifying the name or the character of the person preferred. For example, the endower could stipulate that the trusteeship must be given to the most knowledgeable of his children. In this case the one who possesses that quality is appointed as the trustee. If, say, two of his children qualify, both of them should be appointed and they would share the responsibilities. This is considered as his stipulation that must be adhered to, which comes under the injunction of the Tradition of the Prophet, who said : “*The Muslims should abide by the conditions imposed upon them*”. The appointment can be made to take effect either in the endower’s lifetime or after his death, that is, by way of will.

According to the Shafi’i and Hanbali schools and the accepted view in the Hanafi school, an endower can even designate himself as the trustee. This is based on the example of Umar who designated himself as the trustee in his lifetime, and after him, Hafsa. We find that this view is also supported by the report of al Shafi’i that the companions like Ali, Fatima, Zubayr, ‘Amr Ibn ‘As, Musawwar Ibn Makhrama, and many of the Ansar administered their own endowment themselves until their death. Abu Assuming the validity of this report, this view seems to have a strong basis in Islamic law. Abu Yusuf from Hanafi school of law also supported this by reasoning that if we accept that a trustee can enjoy the position of trusteeship according to the endower’s stipulation, then it is hard to accept that the endower himself cannot enjoy that position, because he is the one who gives it to the trustee. Moreover, an endower stands in a closer relationship to the property than anyone else, and therefore he is entitled to have the authority of trusteeship over it.

However, this view is very unlikely to be accepted in the Maliki school of law. According to them it is unlawful for an endower to designate himself as the trustee, and should he do so the endowment will be invalid. They see that it will contradict with the requirement of taking possession (*hiyaza*) when an endower confers the right of trusteeship on himself. According to them an endower can only confers the trusteeship on himself only when the beneficiaries are denied the right to enjoy the endowed property because they are not qualified to do so for some reason. In this case the endower can stipulate that the right of trusteeship is given to him because the beneficiaries are still legally incapable of taking possession and the endower himself will take care of the property on their behalf. The question put into here by the Maliki school of law is on the issues of the requirement of taking possession which is, in Islamic law, among the central issue in matters relating to transferring the right of ownership.

C. **Appointment of the trustee by other than the endower**

There are occasions where an endower is silent on the appointment of a trustee. This does not affect the validity of an endowment, but the jurists disagree about who should be appointed. According to the accepted doctrine of the Hanafi school, which is the view of Abu Yusuf, the position remains in the hands of the endower. This means that it is the endower’s responsibility to manage the endowment as long as he wishes until he appoints someone to the position. If the endower dies, the responsibility is given to his executor, if any, and to the judge if there is no will regarding this. In appointing a trustee, the Hanafi school suggests that the judge should give preference to those who are closely related to the endower if there is suitably qualified person among them. However, according to Ibn Abidin, from the same school of law, this is not a compulsory condition. If a stranger is appointed in the presence of a qualified member of the endower’s family, then the appointment is valid.

According to the Maliki and Hanbali schools, the position should not remain in the hands of the endower, rather it should be given to the beneficiaries if they are a specified group of people, such as the endower’s sons or individuals. This means that each of the beneficiaries will exercise his right to his share in the property in two capacities, as a beneficiary and as a trustee. If the beneficiaries are minors or insanes then the position is held by their guardians until they are mature or regain their sanity. If the beneficiaries are an unspecified group of people, such as the scholars, the needy, etc., or if the endowment is for the establishment of a mosque, the position of trustee is taken over by the judge and he will appoint whoever he wishes as the trustee.

In the Shafi’i school, when no appointment has been made by the endower, the judge will take over responsibility for the endowment since, in Islamic law, he is authorized to hold public trusteeship. This authority qualifies the judge as the most suitable person to manage the property, even in preference to the endower or the beneficiaries themselves. Unlike the Maliki and Hanabli schools, the Shafi’i school does not differentiate between an endowment made for the benefit of a specified group of people or individuals, an unspecified group of people, or the establishment of mosques. In any type of endowment the position will be given to the judge. Regarding the jurisdiction of the judge, it is accepted by the Shafi’i school that the judge of the province where the endowed property is situated will be responsible for conserving the property, whereas the judge of the province where the beneficiaries are living will be responsible for other administrative matters.

These are the three different views regarding who should be appointed as trustee where no decision has been made by the endower. It is a necessary appointment to ensure that the endowed property is managed effectively. Therefore it is preferable to apply the judgement of the Shafi’i school which gives the authority of the trusteeship to the judge, who can manage the property as his capacity as public trustee not only

on matters relating to endowment but also in other matters relating to the public interest more professionally than the other parties.

D. Appointment of a successor to the trustee

If the trustee dies then the office of trustee must be filled by a successor. This is to avoid the property fall under malfunction condition and cease to benefit the named beneficiaries. According to the Islamic law of endowment, an endower can specify in his original declaration who will succeed to the office after it has been left vacant by the first trustee. This is based on the practice of Umar, who stipulated in his endowment that it was to be administered by his daughter after his death and then by knowledgeable members of his family. According to al Sarakhasi, it is also acceptable for an endower to make a general stipulation that he will have the authority to appoint whoever he wishes to succeed to the office in the event of the death of the first trustee.

According to the Hanafi and Maliki schools, the right to appoint a successor to the office after the death of the first trustee is given to the endower, and it is not necessary for him to make a stipulation to that effect. If the death of the endower occurs before the death of the trustee, the right of trusteeship is given to his executor, if any, or to the judge if the endower has left no will with regard to his successor. So, according to these two schools, the right of an endower in appointing a trustee still exists even after the death of the first trustee.

In this context the Shafi'i and the Hanbali schools take a different view. According to them, an endower has no right to appoint a successor to a trustee unless he has made a stipulation to that effect. This is based on the principle established in these schools that once an endower has made a stipulation regarding the first trustee, he no longer enjoys the right of the ownership and trusteeship. On this basis, when the trustee dies, then according to the Shafi'i school, the right to appoint the successor is given to the judge, whereas according to the Hanbali school, it is given to the beneficiaries, following the same principle where the endower has not appointed the first trustee.

The appointment of a successor for the trustee can also be made by the trustee himself if an endower has authorized him to do so in his stipulation. The legal term used in this matter is known as the right of consignment (*tafwid*). This can be in the form of either by leaving a will to his successor, or by resigning and appointing the other to take his post. The legal effect of the consignment is the person who takes the office will administer the property independently and he has authority over the property as the first trustee did has. There is no longer legal connection between the two. However, if no authorization has been given to this effect the trustee has no right at all to appoint his successor. This is what has been agreed upon unanimously by the four schools of laws. The principle that we should accept here is that a trustee does not enjoy a full authority to exercise his post in the way that he owns the property. His post is created by the endower and he

is subject to the rules that the endower wishes. When the endower gives no authority for the trustee to appoint his successor, he cannot do it on his discretion. It should be understood that if the trustee appoints his successor without the authorization given to him, it is deemed to breach the endower's stipulation which has named him as the trustee. However, this should not be confused with the right of the trustee to delegate (*tawkil*) his post to the other. The jurists unanimously agree that this practice is permissible and it is on his discretion. Delegation is different from the consignment as mentioned above. It is to appoint someone as his authorized agent to manage the property. The agent is working according to the order from the trustee. The original authority is still belongs to the trustee and he can vacate the agent's office at any time. The agent's office also will be automatically vacated upon the death of the trustee.

E. The Removal of a Trustee

For the sake of preserving the *waqf* property a trustee will be removed from his office upon he is proven to be treacherous or disqualified by failure to fulfil the conditions required. This ruling is even extended by Ibn 'Abidin to the trustee who is not doing his job as he is expected to, that he must be removed as well. For this the judge is given the full authority even if it is objected by the endower There are also some jurists suggested that the disqualified trustee is not necessarily be removed but a co-trustee can be appointed if that can protect endowed property from the mistreatment. In this respect the Maliki school holds that it is lawful to keep the disqualified trustee in the office as long as the beneficiaries can tolerate with him. This view may be seen from the perspective that an endowment is for the benefit of the beneficiaries and when the beneficiaries themselves can tolerate with the condition of the trustee then the law will has no problem with that.

The jurists however differ regarding the removal of the trustee without any cause. According to the accepted view in the Hanafi (which is originally the view of Abu Yusuf), the Maliki and the Shafi'i school, an endower has the authority to remove the trustee at any time without any cause. This is based on the ground that the trustee acts as an agent to the endower and this give an exclusive right to the endower to remove the trustee. In this respect, we find the Shafi'i school has made an exemption to the trustee who has been appointed through the endower's stipulation in his declaration, that he cannot be removed without any cause, subscribing to the principle that the endower's stipulation cannot be altered.

F. The Remuneration of a Trustee

Since the office of a trustee deals with administering and manipulating the *waqf* property which require a proper attentions and cares there is a provision in Islamic law for giving remuneration to the trustee . The basis for this is as

found in the endowment's declaration of Umar where he said : *"The trustee of this endowment is entitled to have a just and reasonable remuneration from the property"*.

The jurists agree that an endower is allowed to stipulate this remuneration in his endowment's declaration and it may be in the form of a fixed sum or a residue of the income of the *waqf* property after defraying the expenses necessary for the maintenance of the property. This remuneration is considered not only as the wages for the work of the trustee but also as the fulfillment of the endower's stipulation which must be adhered to. In this matter if the trustee finds that the remuneration fixed is too small it is his right to apply to the judge to increase the remuneration and the judge must determine, by his discretion, the proper wage for him but not exceed than the customary allowance. The trustee deserves that remuneration so long he does his job properly. If the trustee confers the right of the office to the other, the latter will be entitled only the customary allowance even if the first have more than that for the first trustee had received the remuneration by the endower's stipulation while the customary allowance for the latter is considered as the wage.

If the endower has fixed nothing to the trustee then according to the majority of the jurists the judge may determine a customary allowance for him. In the Hanbali and Shafi'i schools there are two opinions regarding this matter, one is that the trustee entitles nothing but what is just and reasonable. This is the opinion of Al Nawawi and the minority of the Hanbalis. While the other holds that the trustee entitles to the customary allowance. The Hanbalis further hold that the remuneration is only for the trustee who is accustomed to take remuneration for this kind of job. If he is made used to have him paid nothing for the job then he is considered to do the job voluntarily unless he asks for the remuneration.

G. The Duties of a Trustee

In the Tradition of the Prophet Muhammad we do not find any details about the duties of a trustee except the in a very general one. It all goes to the report of Umar as mentioned several time above. However, in the classical literatures of Islamic law we find there are some jurists outlined the duties of the trustee. Al Bahuti from the Hanbali school listed the duties as follows:

The duties of a trustee are : preservation of the endowment, edification, leasing the property, planting, handling the litigation, collecting the revenue from its rent, planting, or striving to increase its yields, distributing the proceeds to the objects of waqf such as its edification, paying the beneficiaries etc.

Qadhi Khan from Hanafi school listed down as follows: *Edification, preservation of the endowed property, leasing the property, planting, collecting the income of the endowed estate from its rent, crops and fruits, striving to increase its yields,*

distributing the proceeds among the beneficiaries, repairing, paying its beneficiaries, taking all precautions to preserve the properties and their proceeds, hiring and firing, and handling all disputes and litigations.

Al Qarafi from the Maliki school laid down the duties as : *the trustee handles the jobs of edification, leasing the property, collecting the revenue, and distributing it after making the necessary repairs. The priority is to repair the property for the sake of preserving the original property.*

These are among the duties of the trustee laid down by the classical jurists. We find that the duties are focusing on preserving the endowed property, making profit from the property and distributing the benefit to the beneficiaries.

So far the discussion is purely and entirely in classical Islamic law form. It is in some aspect very technical but it is can be appreciated because Islamic law is always based on revealed text and jurists will try not to overstep the limit of it. Any opinion given and laid down was on fully understanding the spirit of the revealed text which is in this law is based in principle on the prophetic injunctions.

III. Application in Malaysian Law

Malaysia, which comprise of 14 states, is among the Muslims countries in South East Asia. The governing law is mostly based on English law. However the law relating to personal law, which is Muslims endowment is part of it, is in principle based on Islamic law. The Federal Constitution of Malaysia scopes the Islamic law within the provisions under Article 1 of Ninth Schedule, List II-State List for the state level. The list clearly covers, among others, matters relating the Muslim endowment. This is to effect that by law the muslims endowment is come under the state control, not at the federal level. The state will have power to legislate matters come under this list as provided in article 74 (1)(2) of the Federal Constitution. However for the Federal Territories, which are 3 out 14 states, the power of legislation is under the Federal authorities.

A. Muslims Endowments in the States Legislation

Every state has their own law governing the administration of the muslims endowments. The governing law are named as Administration of Islamic Law Enactment in Johor (1978), Kedah (1962), Malacca (1991), Pahang (1991), Perak (1992), Perlis (1993) and Sabah (1992). In Kelantan (1994) the governing law is named as Council For The Religion of Islam and Malay Custom Enactment, in Serawak (1954) named as Majlis Islam (Incorporation Ordinance), in Terengganu (1986) known as Administration of Islamic Religious Affairs Enactment, and Federal Territories of Kuala Lumpur, Labuan and Putrajaya known as Administration of Islamic Law Enactment (Federal Territories) Act, 1993.

These enactments, ordinance and act are the law that govern matters come under the state's jurisdiction as provided

by Federal Constitution of Malaysia. Its included muslims endowments, family law, succession, etc. Muslims endowment in Malaysia is known as Wakaf. Among these states there are 3 states that legislate the specific governing law on muslims endowments or wakaf. They are the states of Selangor, Malacca and Negeri Sembilan. The enactments are Wakaf (State of Selangor) Enactment 1999, Wakaf (State of Malacca) Enactment 2005 and Wakaf (Negeri Sembilan) Enactment 2005. Unlike the other states these three states, with the specific enactments on muslims endowments, they provide details of aspect of administration of muslims endowment and more substantive in nature. They cover matters relating to formation of muslims endowments, beneficiaries, subject of endowments, exchange of endowed property and the powers of trustee, offences and penalties, enforcement and investigation, etc. In the other states their law of muslims endowment are less elaborated and confined to an administrative aspects.

B. *The Right of Trusteeship*

At the state level the trusteeship of an endowment is vested upon the Majlis Agama Islam or State Islamic Religious Council (SIRC). This body is constituted under the provisions of the Islamic legislations of each state passed by legislative assemblies and for the Federal Territories by the Parliament. The function of SIRC is to aid the Ruler (Sultan) and advise him on matters relating to Islam and Malay customs in the state. All the state provides in their legislation that the Majlis is the sole trustee for all the muslims endowed property. The state of Selangor, for example, provide in Section 32 Wakaf (State of Selangor) Enactment 1999: “*Notwithstanding any provision to the contrary contained in any instruments or declaration creating, governing or affecting any wakaf, the Majlis shall be the sole trustee of all wakaf, whether wakaf am or khas, situated in the State of Selangor*”. This and also another states legislation give effect that the Majlis has the powers and rights in overseeing and managing the endowed property and also in developing the property. In exercising this the Majlis is expected to administer the property in accordance with the stipulation of the endower. If for example the original endowment is declared for the benefit of the mosque, the Majlis should act in accordance with that stipulation. Any income should be distributed to the mosque and not considered as an income to the Majlis.

If in certain situation the Majlis need to develop the endowed property the Majlis have to refer the matter to the State Fatwa Committee which later will be holding the meeting to decide whether to approve or disapprove the proposal in accordance with Islamic law. In making the decision the Fatwa Committee will normally following the rulings of the four *sunni* schools of law or will exercise their capacity as the highest authority in fatwa to decide in accordance with the public interest.

Though the endowment comes under the state’s jurisdiction, at the Federal level efforts have been done to

assist the states in developing the endowments. In 2004 the Department of *Wakaf, Zakat and Haji (JAWHAR)* has been established and parked under the Prime Minister’s office. This department is to coordinate and facilitate the states in planning and managing the endowed property at the state level. However this department has no executive rights to interfere in the state’s decision.

iv. Conclusion

At this point we can derive that the rulings regarding trusteeship of muslims endowment in the classical Islamic law has been developed by the jurists based on their understanding of the prophetic traditions. There are some disagreements among the jurists in certain issues but they agree in certain basic principles of the trusteeship of the endowments. It is understood from the discussion among the classical jurists that the trusteeship is on individual in nature. In modern practice, in Malaysia in particular, this trusteeship has been entrusted by law to SIRC, an entity created to manage the endowment.

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