

Governance Regulatory Framework for Waqf in Selected Countries¹

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Abstract

Waqf is one of a social finance instruments that had been practiced in Islamic since the time of Prophet Muhammad (pbuh). The practice of waqf is prevalent for the funding of public goods of religious activities, education and health services. Waqf is a special form of charity, which requires that the corpus of the assets to be kept intact, with only the benefits to be distributed. The unique requirements calls for accountability, transparency and market discipline of waqf governance. Thus, this study aims to identify the governance measures that include the accountability, transparency and market discipline outlined in the waqf regulations in the countries where waqf is widely practiced. This study discusses the governance dimensions in Turkey, Malaysia, Indonesia and India, benchmarked against the U.S foundations law so that the measures could be compared with the international best practices. The study first provides the literature on the dimensions of waqf law and regulations, that is whether dedicated waqf law, court monitoring and oversight function exists in each countries under the analysis. Under waqf management theme, this study identifies each of countries' waqf law on waqf management's appointment, composition, role and managers' competency criteria. Regulatory governance measures of waqf laws are examined from the perspective of transparency and market discipline. This includes the transparency and disclosure on waqf operation and investment activities, reporting and performance audit of the management. In addition, the donors' and beneficiaries' protection mechanisms as well as distribution mechanisms provided in the waqf laws are also identified and discussed. The survey conducted in this study found that, waqf law and regulations for most of the countries are similar, which waqf trustee are regulated at the national level, with an exception of the case of Malaysia where separation of control between regulator and waqf management does not happen. On the issues of transparency of waqf operation and investment activities, mixed practices were found. Reporting practices mainly depending on the structure of regulations adopted by each country. In term of performance audit, all of waqf laws analysed lacked the performance measurement framework and monitoring measures of waqf management. Finally, this study found that the donors' and beneficiaries' protection mechanisms and distribution mechanisms are similar in each of the waqf laws. Based on the findings, it is crucial that improvements to the waqf laws in relevant countries to be made with regards to transparency of operation and performance of waqf trustee for waqf governance to better reflect the accountability measured required of the waqf trustee.

Keywords: waqf governance, waqf transparency, waqf reporting, waqf performance

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I. INTRODUCTION

Islamic approach to social security is multi-dimensional and comprehensive. It encompasses compulsory and voluntary charity to include zakah (religious tithing), waqf (religious endowment), *sadaqah* (donation) and *hibah* (grant/gift). These instruments serve as social safety in the society so that the poor could be ensured of basic needs and the wealth gap within and among the societies can be minimized. The waqf instrument is important and it plays a significant role in Muslim societies. It is used to support the aged, the poor and the orphans, with the provision of educational, health and religious foundations. To manage a *waqf* property, a pious person or *bayt al-mal* (an institution managing public money) is appointed to manage the establishment called *mutawalli*. The designation of the waqf property cannot be changed once it is created. It is therefore, not to be sold or disposed to anybody.

In essence, waqf is a wealth sharing mechanism with the other person. Waqf is one of the oldest charitable institutions in the world that represents the relationship between religion and economic life of Muslims. A foremost characteristic of waqf is perpetuity. It is a private possession or asset in any form that has been put under injunction from any form of transaction and its physical source remains intact and unchanged and the benefits of the waqf must be utilized for Shariah compliant purposes. It is distinct from ordinary *sadaqah*, the difference being the repeatability of the benefits that flow out of it. In Shariah, unlike zakah, a waqf is a voluntary, permanent, binding dedication of a portion of one's wealth (in cash or kind) to Allah. Thus it is vital to study to examine the governance mechanisms that include the accountability, transparency and market discipline outlined in the waqf regulations in the countries where waqf is widely practiced.

Many publications were written on waqf that focused on waqf management, waqf financing, and experience of waqf practices in the various jurisdictions and fiqh of waqf, among others. Despite of the agreement of various authors on the need of good governance as one of the critical success factors for revitalizing awqaf institutions (Cajee, 2007; Ayedh and), number of studies on waqf governance is limited. This fact is owed to the natural progression of loose governance in the non-profit sector. Ihsan and Ayedh (2015) argued that one of the possible reasons behind the absence of study on waqf governance is due less attention given by the scholars on the issue (Hoexter, 1998). Speckbacher (2008) is in the opinion that research on governance mechanism in the nonprofit sectors is relatively underdeveloped and only developed and promoted in the last few years.

Governance of waqf is vital to promote the level of transparency and accountability that is important for a sector reliant on the confidence and trust of its stakeholders. Waqf, as other players in non-profit sector survived on self-regulation and, with minimal or even without external oversight. Compared with for-profit entities who are obliged to produce financial reports compliant with international financial reporting standards, non-profits are exposed to 'minimal' regulation and 'under-developed' financial reporting requirements (Cordery & Baskerville 2007).

Conceptually, Ihsan and Ayedh (2015) studied waqf governance structure to promote waqf managers' accountability when managing waqf. They examined the aspects of governance of waqf by examining governance and accountability in waqf by i) reviewing the discussion on governance and accountability in the charitable and not-for profit organizations and ii)

examining the *tawhid* theoretical underpinnings relating to Islamic accountability and governance that builds up upon the concept of (one of God), *amanah* (accountability), *adalah* (fairness) and *shura* (collective/consultative decision-making). Their study on waqf governance is exploratory and conceptual in nature which deficient of the discussion on waqf governance and performance mechanisms.

Realizing the gap, the study of waqf governance is timely to ensure accountability so that waqf institutions could be revived and its potential could be further promoted in the Muslim world. Thus, this research studies the regulation and governance focusing on the waqf stakeholders, i.e. how waqf regulations are passed (classical practices and modern regulations in selected countries) are taking into account the preservation of rights of stakeholders of waqf. To examine the role of regulations to stakeholders of waqf, we benchmark the analysis to the law on Foundation in the U.S.

This paper reviews the role of regulation for non-profit organisations in order to learn how the regulations are securing the rights of stakeholders of non-profit organisations. The management of waqf is performed by *mutawalli* who is the trustee to manage the assets according to the prescriptions of the waqf deeds of the waqif. As waqf is categorized as charity, learning how the regulations of non-profit organisations are affecting the stakeholders of conventional charity could provide us with the benchmark to check for the aspects of regulations that are needed to protect the rights of the stakeholders of waqf, namely waqif (donor), *mauquf-alaih* (beneficiaries), *mutawalli* (trustee), employees and regulators. This is in addition of the responsibility of *mutawalli* to ensure that the waqf operations are run according to the Shariah requirement of waqf, namely that the waqf is managed in a manner that it is irrevocable, perpetual, and inalienable. The operations of Shariah-compliant institutions are to be conducted in a manner that it does not contradict Shariah in term of its strategic and operational policies, investment policies and conducts and human resources policies.

Section II outlines the fundamentals of waqf. Section III provides the comparative analysis of the aspects of waqf laws and regulations. Section IV offers the discussion on waqf management. Section V offers policy recommendations and concludes the paper.

II. FUNDAMENTALS OF WAQF AND ITS ROLE FOR FINANCIAL INCLUSION

The role of waqf in the services of housing and urbanization which are regarded as the indicator of the civilization level of a society, especially in Ottoman administrative organizations have been very important so far in history. Typically, in Ottoman Empire, “*kulliyes*” comprised of a combination of various facilities and called as “imaret system” and also established and managed via waqf have played considerable role in the establishment and development of Turkish and Muslim cities, generally in the social and economic life of the country. It also contributes to cover for roadhouses and arcades, bakeries, grinders, workshops of candle and lead, abattoirs, etc., fair and market places, which were built in order to provide religious, cultural and social institutions, generally located around a mosque, such as madrasah, library (Saduman & Aysun, 2009).

The waqf institution in Ottoman Empire also would lend money to households and merchants in order to earn income. The income will then be used to provide public services such as soup kitchens for the poor, inns for travelers, water fountains, places for worship, educational services and other basic infrastructural facilities (Alias, 2012).

Waqf is one of the oldest charitable institutions in the world. It is also one of the economic backbones of Islam that existed since the time of Prophet Muhammad (S.A.W) that catalyzes economic development of Muslims from various aspects of life. Waqf is a private possession or asset in any form that has been put under injunction from any form of transaction including sale, inheritance, *hibah* (grant) and *wasiyyah* (will) whilst its physical source remains intact and unchanged. A dominant characteristic of waqf is perpetuity. Therefore, waqf typically applies to non-perishable properties whose benefits and usufruct can be extracted without consuming the property itself. Waqf is *sadaqah jariyyah* (running charity). It is distinct from ordinary sadaqah, the difference being the repeatability of the benefits that flow out of it. In Shariah, unlike zakah, a waqf is a voluntary, permanent, irrevocable dedication of a portion of one's wealth (in cash or in kind) to Allah SWT. Waqf is flexible in the sense that its beneficiaries need not be restricted to Muslims and the fruits of the waqf must be utilized for Shariah-compliant purposes.

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2.1 Fiqhi Fundamentals of Waqf

There is no explicit injunction in the Al-Quran pertaining to waqf. However, the al-Quran contains a great number of verses indicating the practice of making charitable and benevolent gifts as well as the redistribution of wealth. Allah SWT says in Al-Quran; *“O you who believe! Spend of the good things which you have (legally) earned, and of that which We have produced from the earth for you”* (Surah Al-Baqarah: 267), and

“By no means shall you attain al-birr (piety, righteousness- here it means, Allah SWT's reward i.e. paradise), unless you spend (in Allah SWT's cause) of that which you love; and whatever of good you spend, Allah SWT knows it well” (Surah Ali Imran: 92).

Islamic scholars and jurists (the four prominent schools of thought, Shafie, Hanbali, Maliki and Hanafi) agreed that the verses are to be referred to as the source of the subject matter (Yacoob, 2006). The verse states that Muslims will not be rewarded with goodness unless they are willing to give their best to others. The gift must be of value and which is dear to the giver.

Waqf is stipulated in the traditions of the Prophet Muhammad SAW. The Prophet Muhammad SAW said: *“When the sons of Adam die, their deeds come to an end, except charity with enduring benefits, their knowledge which benefits others and their virtuous sons, they pray for them (bless them)”* (Hadith narrated by Al-Bukhari and Muslim).

The Prophet Muhammad SAW said about the waqf in one Hadith; which through the saying of Caliph Umar said: *“Oh Prophet! I got wealth that I never got it before and I want to be*

closer to Allah through it. After that the Prophet answered: You tried to keep the origin wealth and making charity (by giving it to the needy people). Then the Caliph Omar r.a. donate his land which he get from the battle of Khaibar, seems the land can't be sell, even to bought as well as to inherit it" (Hadith narrated by Imam Al-Bukhari). As a special kind of benevolence, waqf has the following characteristics:

i. Perpetuity

It means that once a property, often a real estate, is dedicated as waqf, it remains waqf forever. Elimination of the waqf character off a property requires difficult and lengthy procedure. It requires a process of exchanging the waqf property for another property of equivalent value and equivalent benefit for its objectives in addition to the approval of a local Islamic religious authority. Upon completion of such an exchange the new property must be dedicated a waqf for the same purpose and beneficiaries as the former property. Theoretically at least, perpetuity implies that waqf properties should not decrease.

ii. Permanence of Stipulations of the Waqif

Since creating a waqf is a voluntary act founded on the principle of freedom of an owner to do whatever she or he likes with her or his own property, conditions specified by the waqif must be fulfilled as long as they do not contradict or violate any of the Shariah rulings. This implies that revenues of waqf should exclusively be used for the objectives stipulated by its waqif. Furthermore, the conditions of the waqifs may not be changed by the Islamic religious authority as long as they are still feasible to execute. If a waqf purpose becomes infeasible, the revenue of this Waqf should then be spent on a closest purpose available and if not it goes to the poor and needy, being the default beneficiary of waqf.

According to Monzer Kahf (2003), waqf practices comprise of:

- a) Religious waqf: referring to waqf for mosques and religious schools.
- b) Philanthropic waqf: in humanitarian waqf, benefits are allocated to support the society and promote social activities. For instance the library, educational centers, health care etc.
- c) Family waqf: waqf from parents to children and heirs.

Alias (2012) has further discussed on another type of waqf which is called cash waqf. Alias has defined cash waqf as:

".....an endowment of cash by a founder with the intention that the corpus or principal should be managed by a trustee so as to earn an income that could be spent towards righteous purposes as designated by the founder."(Alias, 2012).

Cizakca (2003) has suggested a model in which the concept of cash waqf can be used in contemporary times to serve the social objectives such as to provide microfinance to the poor. Cash waqf started receiving attention among companies and private property of Islam. By this method, it becomes the instrument to collect contributions from Muslims to help Muslim entrepreneurs who have the ability, expertise, efficiency and entrepreneurship spirit to open-up businesses and turn them to be successful businesses. In Hassan & Shahid (2010), Cizakca (2003) proposes a model in which the concept of cash waqf can be applicable to serve the

social objectives. Elgari (2004) also suggests on establishing the Qard Hassan (non-profit) bank that gives interest free loan to finance consumer lending for the poor. The capital provider of cash waqf would come from wealthy Muslims. Waqf assets are employed for repeatedly extracting its usufruct for the benefit of an objective representing righteousness or philanthropy. The permanent nature of waqf resulted in the accumulation of waqf properties all over the Muslim lands and the variety of its objectives provide support for widespread religious and philanthropic activities.

2.2 Role of Waqf on Financial Inclusion

Iqbal (2014), asserts that institutionalisation of Islamic redistributive instruments such as zakah, waqf and qard-al-hasan could play a catalyst in enhancing accessibility of finance of the poor. In addition to the importance of proper institutional framework and governance, waqf could be one of the strategies to improve financial inclusion in the Muslim countries.

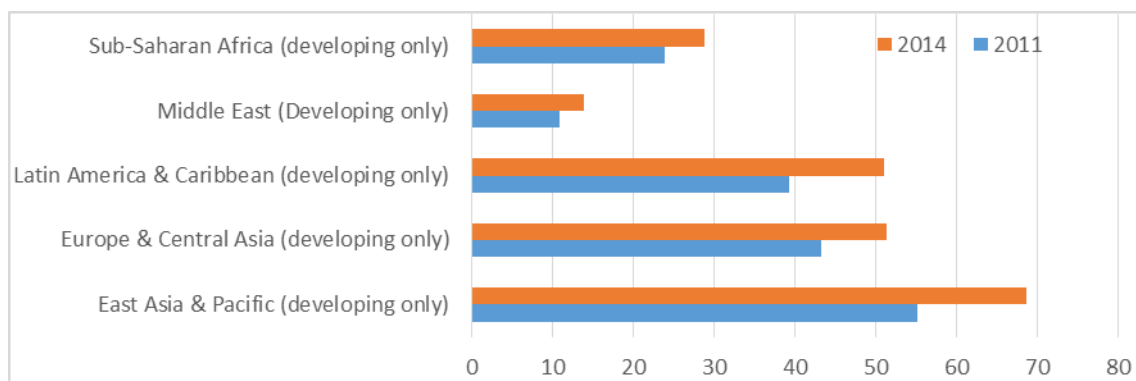
Many poor families in the world have limited access to financial services such as credit, saving instruments, insurance. One of the main reasons for why the penetration ratios for the very poor segment of the society are low is because the conventional banks and financial firms consider the profitability of services designed for poor households to be of low profitability. Furthermore, the high risk, lack of sound collateral and high monitoring costs have contributed for the poor to be ignored by the mainstream financial industry (Nenova, Thioro and Ahmad, 2009).

There is growing evidence identifying linkage between the economic development and financial inclusion. Galor and Zeira (1993) and Banerjee and Newman (1993) imply that financial exclusion not only holds back investment, but results in persistent income inequality, as it adds to negative incentives to save and work and encourages repeated distribution in a society. Empirical studies by Demirguc-Kunt and Levine (2007) show that countries with deeper financial systems experience faster reductions in the share of the population that lives on less than one dollar a day. Almost 30% of the cross-country variation in changing poverty rates can be explained by variation in financial development. From this perspective, the new initiative by World Bank to promote financial inclusion and achieve universal financial access by the year 2020 is a huge step in the right direction.

One of the main sticking aspects of the recent growth episodes in the world is that it not only benefited the very few on top of the income bracket but also marginalized and left people with little or no income out of the system with no hopes and opportunities to be part of social mobility chain. These groups tend to lack the necessary skills to join and compete in the work force, lack the necessary education and access to financial services.

Graph 5: Account at a financial institution (% age 15+)²

² Global Findex (Global Financial Inclusion Database) 2014



To overcome these problems and get the marginalized extreme poor in the societies WBG in addition to increasing growth rates is also focusing on enhancing the social and financial inclusion of the society.

Increasing financial and social inclusion would not only enable the extreme poor to better cope with negative income shocks but also help the overall economic growth by creating a countercyclical economic policy and helping poor people to maintain their human capital for future and assist in recovery of the economy. Furthermore not only increasing financial access to those marginalized groups but also increasing financial literacy of those low income groups is important in order for the extreme poor to maximize the usage of the financial services.

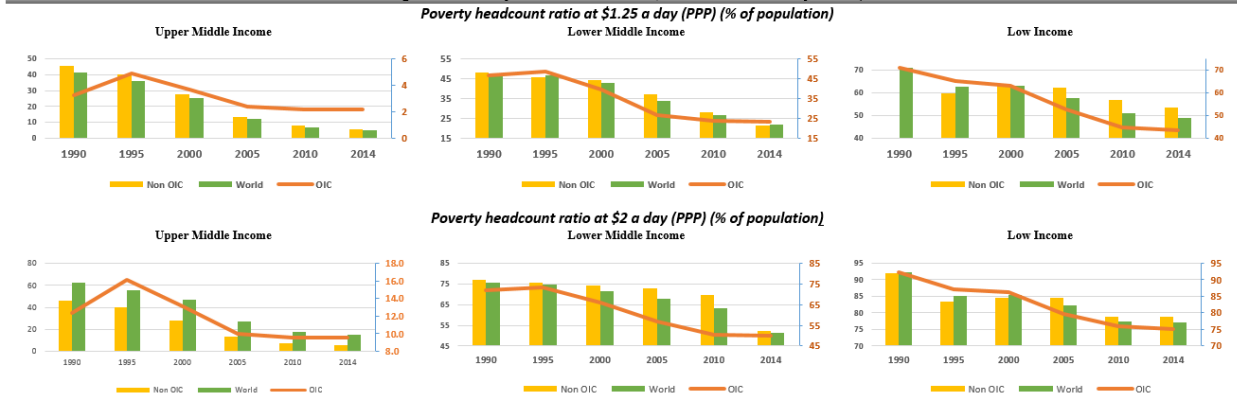
The large pool of waqf assets in most Muslim countries are dormant and not being used for socio-economic development purposes. For example, IRTI & TR (2013) report that Indonesia has 1400 sq. km of waqf land valued at US\$ 60 billion. If these assets yield a return of 5% per annum, then US\$ 3 billion could be used for various socio-economic purposes. Considering that there are other forms of waqf assets, the potential of utilizing waqf for effective social development schemes is huge but remains untapped.

Ahmed (2011) and Kahf (2004) suggest a model of a *waqf*-based Islamic microfinance institution to serve the poor, which would be capitalized by cash *waqf*. *Zakat* and *waqf* can be used to reduce the vulnerability and enhance the resilience of the poor. While traditionally *zakat* and *waqf* have acted as safety nets, their application can be expanded to protect the non-poor who are vulnerable to becoming poor due to adverse shocks.

In the last 20 years the world has managed to halve the share of people living in extreme poverty but this success was not distributed evenly across different income groups of the world. Figure 1 shows the state of poverty by two different benchmarks—poverty headcount ratio at \$1.25 and \$2 a day grouped by different income level.³ Figure 1 shows that overall the headcount ratio of people living under extreme poverty (less than \$1.25 a day) has declined considerably both among OIC countries and in the world. However there is a great heterogeneity between the distributions of the ratio of people living under less than \$1.25 a day.

³ Source: World Development Indicators (WDI) 2014. For detailed analysis of how the weighted values were calculated see appendix. There was no data for high income OIC countries hence they were excluded from the analysis. The income and regional classification are adopted from World Bank group's classifications. For each data metric, we classify the countries according to this criteria and compute the aggregate values by a weighted average using the overall population of a given country. For each five year period, we use the latest data available of a country for the given country.

Figure 1: Poverty Headcount Ratios (Income Level Classification)



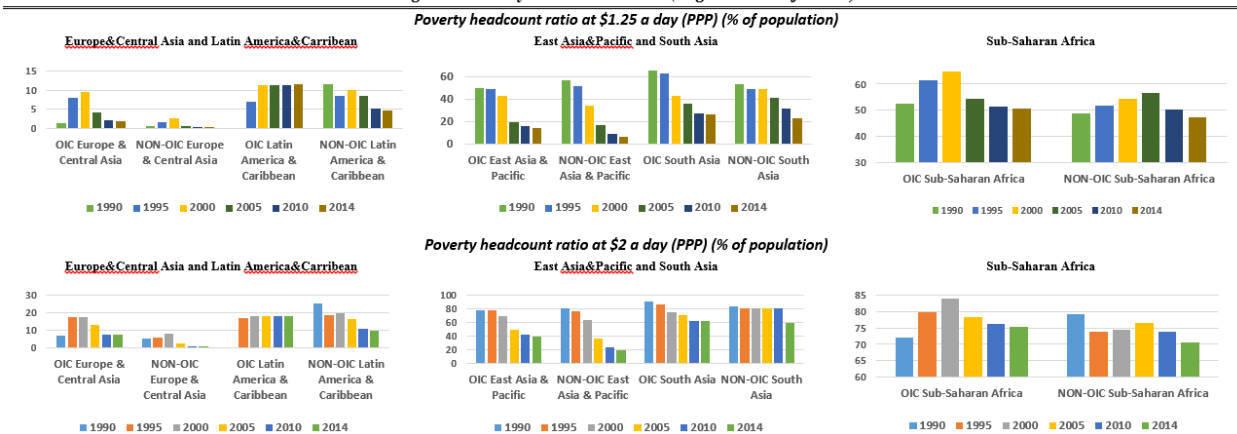
In upper middle income group OIC countries are in a better state compared to Non-OIC countries, in both poverty metrics, in the same group. However, the pace of reduction of extreme poverty has stalled especially after 2005.

In lower middle income group the pace of poverty reduction levelled after 2005 for \$1.25 and after 2010 for \$2 metric. Interestingly there is an upward trend of poverty headcount ratio between 1990-1995. As of 2014, however, the OIC countries are slightly worse than the Non-OIC countries in \$1.25 metric and on a par according to \$2 metric.

In low income category, especially between 1990-2010 OIC countries have managed to reduce extreme poverty more effectively when compared with the Non-OIC countries in the same category. Although as of 2014, OIC countries are in a better situation than the Non-OIC countries as around 43% of population in OIC countries still lived with under \$1.25 a day while this ratio jumps to 75% when considering ratio of people living with less than \$2 a day.

Figure 2 provides the regional distribution of poverty ratios by both measures. As one might have expected, the region that is worse in terms of people living under extreme poverty is Sub-Saharan Africa. Thanks to the high growth rates achieved by East Asian nations, they have succeeded in reducing the extreme poverty ratios significantly between 1990 and 2014.

Figure 2: Poverty Headcount Ratios (Regional Classification)



OIC countries are worse off than their counterparts in Europe and Central Asia and Latin America and Caribbean regions. Furthermore while the Non-OIC countries in both regions follow a declining trend in both poverty metrics, the poverty ratios in OIC countries either stalled or even increased in the same time frame.

In East Asia and Pacific region both categories of countries experienced considerable level of poverty reduction but the pace of decline seems to have slowed down in OIC countries in the poverty metric that looks at ratio of people living under \$2 a day.

Sub-Saharan Africa region has the highest ratio of people living under extreme poverty. Between 1990 and 2000 the ratio of people living under extreme poverty has been increasing but this trend reversed itself after 2000s. In addition to this, OIC countries in this region perform worse than their counterparts and the pace of poverty reduction seems to be slower than the pace among Non-OIC countries.

Second pillar of the World Bank's development strategy is to boost the income of the lowest 40 percent in every country. The main idea behind including the shared prosperity as one of its goals is that even though economic growth has been sound during 1990s and the beginning of the 2000, the income inequality worsened in many countries. The proceeds of the economic growth seemed to be stuck at the very top layer of the societies, creating social unrest. We first depict the current situation of the bottom 40 percent and the overall population in a given country of OIC countries relative to the world from the consumption surveys.

In Figure 5⁴, it is clear the share of the income going to the top 10 percent is significantly higher than the income of the rest the deciles throughout the world. Furthermore this statement holds true for both the OIC and non-OIC countries.

III. WAQF LAW AND REGULATION

To examine the institutionalisation of waqf in the countries under the analysis, this section discusses the provisions of the law in the countries with waqf law from both the view of regulator and trustee that manages the waqf. First, an analysis of the provisions of law, court monitoring and supervision and oversight from the regulator's point of view is offered for Indonesia, India, Malaysia, Singapore and Turkey.

This paper examines the most developed countries for the waqf-foundations. On the eastern and the Islamic side Malaysia and Indonesia selected thanks to their deep roots and well-structured back ground. On the secular or liberal side Turkey and India studied to shed the light on how they operate under western secular regulatory format. Over and all United States formulated as one of the most efficient system for the foundation.

In addition the that this paper will come up with a holistic approach on waqf from various aspects and introduces innovative policy recommendations which fits well with the waqf practices and changing needs of the industry.

3.1 Law, Court Monitoring and Supervision and Oversight

The study first provides the literature on the dimensions of waqf law and regulations, that is whether dedicated waqf law, court monitoring and oversight function exists in each countries under the analysis. Table 1 summarises the comparative analysis of the waqf laws in the respective countries.

⁴ Calculated using data from <http://iresearch.worldbank.org/PovcalNet/>

Table 1: Law, Court Monitoring, Supervision and Oversight of Waqf

| | | Turkey | Indonesia | Malaysia | India | US Foundations |
|----------|--|---|--|--|--|---|
| 1 | Dedicated Law on Waqf/Endowment | Foundations Law 2008. | Indonesian Waqf Regulation 2007 and Cash Waqf Act 2009 | Federal Law-Section 25 of the Civil Law Act 1956-Each states has own Enakmen Wakaf (13 states, 1 federal territory) | The Wakf Act 1954, Wakf Amendment Act 1984, Wakf Act, 1995 and the Wakf Amendment Act 2013 | Several Codes are designed to regulate foundations. In term of governance, Code 22 (290f) Inter-American foundation provides guidelines on powers and functions of the foundation, disposal of assets, BOD's number, term and appointment, authority of the board to appoint committees and councils, appointment of president |
| 2 | Related laws and provisions related to waqf | Secondary rules and regulations amended by Directorate General of Foundations | No corporate waqf practice in Indonesia. Trust law is also applied to manage waqf. Waqf donor could appoint own trustee to manage his waqf upon registration with Indonesian Waqf Board through of IWB branches, and representatives of Indonesian Ulama Council. | <ol style="list-style-type: none"> 1. Companies Act 1965 (In case waqf is operated as corporate waqf, the company managing waqf has to also observe Companies Act) 2. Trustee Act 1949 (via the concept of Amanah Hibah, waqf could be initiated) 3. Labuan Islamic Financial Services and Securities Act 2010 (LIFSSA), Section 105 allows for establishments of <i>Labuan Islamic Trust</i> | N/A | <ol style="list-style-type: none"> 1. Code 26 (509) Private Foundation defines the rules pertaining private foundation 2. Section 501(c)(3) of the US Internal Revenue Code that allows for federal tax exemption of nonprofit organizations (public charities, private foundations or private operating foundations) |

| | | | | | | |
|---|---|---|---|--|---|--|
| 3 | Central Supervisory Authority | Directorate General of Foundations | Indonesian Waqf Board (IWB). Consists of supervisory board and board of director (management) | <p>No central regulator</p> <p>Majlis (State Islamic Religious Council) of each state. SIRC acts as regulator and governing bodies that manage waqf in each state. Waqf Management Committee is established to manage waqf for its behalf.</p> <p>A Department at the Federal Level (Jabatan Wakaf dan Haji) under the Ministry. JAWHAR plays coordinative and advisory role, as it does not the power to regulate waqf matters.</p> | Central Waqf Council | US Department of Treasury through the Internal Revenue Service |
| 4 | Shariah/legal Court for Legal and Dispute Resolutions | As for Shariah related disputes, as Turkey is a secular country, no such an institution exists. For the legal disputes, the authorized court is the one where the foundation settled. | Shariah court in each city | Mufti (Head of Islamic Religion) of each states | Supreme Court of India | Sue and be sued in its corporate name, and complain and defend in courts of competent jurisdiction |
| 5 | Shariah Advisory (In case mutawalli or managers are not sure of any Shariah aspects of waqf operations) | Not available | Majelis Ulama Indonesia (MUI) | Fatwa Council in each states | N/A Central Waqf Council empowered to advise the Central Government/State Governments and the State Waqf Boards for due administration of the Auqaf. | Not applicable |

3.1 Dedicated Law on Waqf/Endowment

The state of a country's seriousness could arguably be measured by the allocation of a specific law on waqf. In this paper, we discuss dedicated laws or provisions on waqf in the countries under the analysis.

In Malaysia the government has formed a department for zakat, waqf and hajj on the 27th March 2004 with the aim of making the administration systematic and effective. This department however does not have an authority to administer and manage waqf properties but rather plays a role as a planning coordinator and observes the waqf matter.

Section 25 of the Civil Law Act 1956 stated that the administration of Muslim's property shall in accordance with the Islamic law. There are 14 State Islamic Religious Councils, one for each of the 13 states and one for the Federal Territory. Section 89 of the Administration of the Religion of Islam (State of Johor) Enactment 2003 states that notwithstanding any provision to the contrary contained in any instrument or declaration creating, governing or affecting it, the Majlis shall be the sole trustee of all waqf. Later on in 2006 "Manual for Management of Waqf" issued and the objective was to provide standard guidelines, precise and transparent data of waqf lands and to inculcate professionalism in the management of waqf lands (Hasan and Abdullah, 2008).

In general, the Manual provides very comprehensive guidelines to the whole states in Malaysia almost in all aspects of the administration of waqf lands. This initiative taken by the Department of Wakaf, Zakat and Hajj may solve a lot of administrative problems such as procedures and substantive provisions on waqf. The effectiveness of this Manual however has not been proven yet since it still in the early period of its implementation.⁵

Besides, one of the important characteristics of waqf in Malaysia is that every waqf shall be registered in the name of the Islamic Religious Council as proprietor in accordance with the National Land Code 1965.

In Turkey the foundations are ruled by the Foundation Law updated in 2009. The objectives of Foundation law in Turkey are stated in the article 1 in law as "*to set out the rules and procedures relating to the management, operations and monitoring of the foundations; to ensure that their movable and immovable listed properties at home and abroad are to be registered, safeguarded, repaired and maintained; to secure that the assets of the foundation are economically managed and exploited; and to define the organization, tasks, powers and responsibilities of the Directorate General of Foundations.*" and in the following article the scope mentioned as "*This Law covers fused (mazbut), annexed (mülhak) and new foundations, Non-Muslim community and artisans' foundations, and the Directorate General of Foundations. The international principle of reciprocity shall be reserved in the implementation of the law hereof.*"

In the hierarchy, laws and regulations are ranked as just after the constitution, in other words waqf are regulated in law level, where we can say this shows the importance given in Turkey on foundations/waqf. The law embodies 82 articles and includes general provisions, Provisions Governing Foundations, Directorate General of Foundations, Foundations Council, Organization of the Directorate General and Recruitment and Miscellaneous

⁵ Supra note 3

Provisions. As it can be seen here, the law drafted with a broader perspective to regulate the market and the regulatory body as well.

India has witnessed multiple enactments of waqf laws beginning the year 1810. The more recent enactments have been the Wakf Act 1954, Wakf Amendment Act 1984, Wakf Act, 1995 and now the Wakf Amendment Act 2013. The first comprehensive legislation for waqf in independent India was the Waqf Act, 1954. However, this Act failed to address the concerns relating to awqaf and therefore, a Waqf Enquiry Committee was constituted by the government in 1969 comprising public representative. The Committee held nation-wide deliberations and made wide-ranging recommendations. This led to the passage of the Waqf (Amendment) Act 1984. However, for a variety of reasons, this Act remained dormant. The Waqf Act (1995) is the first comprehensive piece of law that defined the rules of the game. The operation of the law however, continued to attract criticism and it was largely perceived to be ineffective in preserving the waqf assets. This led to further calls for reform. The Waqf Reform Bill (2010) was formulated after extensive consultations but could take the shape of Waqf Amendment Act (2013) only three years later (Obaidullah, 2015).

Waqfs in India are formed under the act no 27 of 2013 is called the Wakf (Amendment) Act. Within the act, “waqf” means the permanent dedication by any person, of any movable or immovable property for any purpose recognized by the Muslim law as pious, religious or charitable and includes;

- i. a waqf by user but such waqf shall not cease to be a waqf by reason only of the user having ceased irrespective of the period of such cesser;;
- ii. a *Shamlat Patti, Shamlat Deh, Jumla Malkkan* or by any other name entered in a revenue record;
- iii. “grants”, including *mashrat-ul-khidmat* for any purpose recognised by the Muslim law as pious, religious or charitable; and
- iv. a *waqf-alal-aulad* to the extent to which the property is dedicated for any purpose recognized by Muslim law as pious, religious or charitable, provided when the line of succession fails, the income of the waqf shall be spent for education, development, welfare and such other purposes as recognized by Muslim law, and “*waqif*” means any person making such dedication’.

American foundations dates to the colonial period, although, much like European foundation on which they were modeled, these early foundations were trusts and bequests dedicated to a particular institution. The US has been unusually receptive to letting the private sector, in both its for-profit and nonprofit expressions, do what elsewhere is a state responsibility (Hall, 2006).

A foundation in the United States is a type of charitable organization. However, the Internal Revenue Code distinguishes between private foundations (usually funded by an individual, family, or corporation) and public charities (community foundations and other nonprofit groups that raise money from the general public). Private foundations have more restrictions and fewer tax benefits than public charities like community foundations.⁶

Tax-exempt charitable organizations fall into two categories: public charities and private foundations. Community foundations are instruments of civil society designed to pool

⁶ [https://en.wikipedia.org/wiki/Foundation_\(United_States_law\)](https://en.wikipedia.org/wiki/Foundation_(United_States_law))

donations into a coordinated investment and grant-making facility dedicated primarily to the social improvement of a given place. In other words, a community foundation is like a public foundation. This type of foundation requires community representation in the governing board and grants made to improve the community. Often there will be a city that has a community foundation where the governing board comprises many leaders of the business, religious, and local interests. Such grants that the community foundation would then make would have to benefit the people of that city. Private foundations typically have a single major source of funding (usually gifts from one family or corporation rather than funding from many sources) and most have as their primary activity the making of grants to other charitable organizations and to individuals, rather than the direct operation of charitable programs. When a person or a corporation founds a private foundation frequently family members of that person or agents of the corporation are members of the governing board (Olk, 2014). This limits public scrutiny over the private foundation, which entails unfavorable treatment compared to community foundations.

The differing treatment of private foundations compared to public charities including community foundations is as follows: (a) foundation must pay out 5% of its assets each year while a public charity does not; (b) donors to a public charity receive greater tax benefits than donors to a foundation; (c) a public charity must collect at least 10% of its annual expenses from the public in order to remain tax-exempt while a foundation does not.

In Indonesia, the regulation for waqf was embedded in the Act No 5/1960 on Agrarian Matters. Later on at the end of the 2004, the Indonesian government enacted the Act No 41/2004 on Waqf. The act consists of nine chapters which are divided into 71 sections (Ihsan, 2013). Besides the establishment of cash waqf in Indonesia was led by a non-profit organization. This organization, which was established in 1993 by a group of journalists, is driven by a mission to help the needy through zakat, infaq, sadaqah and waqf (Dodik, 2007). Recognizing that cash waqf has the potential to provide the necessary funds for charitable projects, including poverty alleviation, the Indonesia Waqf Board launched a cash waqf scheme known as Tabung Wakaf Indonesia or the Indonesian Waqf-shares (Annual Reports of State Islamic Councils, 2006) (Mohsin, 2012).

The development of waqf in Indonesia cannot be separated from the role of BWI (Indonesian Waqf Board). The birth of Indonesian Waqf Board (BWI) is the embodiment of the mandate outlined in Law No. 41 Year 2004 on waqf. The presence of BWI, as described in section 47, is to promote and develop the waqf in Indonesia. For the first time, BWI membership appointed by the President of the Republic of Indonesia, in accordance with Presidential Decree (Presidential Decree) No. 75 / M in 2007, which is set in Jakarta, July 13, 2007. So, BWI is an independent agency to develop waqf in Indonesia in carrying out their duties free from the influence of any authority, and is accountable to the public.⁷

On January 8, 2010, the President has launched the National Waqf Money Movement at the State Palace. Presidential policy and decisions will never happen without first considering, pay attention and make sure that the real potential of waqf that can be provided by the 200 million Indonesian Muslims are so great. Wakif can hand over cash waqf only through Islamic Financial Institutions (LKS) that is appointed by the Minister of Religious Affairs.

⁷ <http://www.islamiceconomic.org/waqf>

3.2 Related laws and provisions related to waqf

In addition to the dedicated waqf law, some other provisions that facilitate waqf adoptions are passed in the countries under our analysis. There may be related laws and provisions are the ones needed to supplement the main law/s.

In Indonesia trust law is also applied to manage waqf. Waqf donor could appoint own trustee to manage his waqf upon registration with Indonesian Waqf Board through of IWB branches, and representatives of Indonesian Ulama Council. Waqf property is controlled by the state, and indirect endowments are considered part of national wealth (Article 33 clause 3 of the Indonesian Constitution).

Meanwhile, the waqf system in Malaysia is implemented through several laws, namely, the Federal Constitution 1957, the National Land Code 1965 (NLC), Administration of Islamic Law (Federal Territories) Act 1993 (Act 505), Selangor Wakaf Enactment (No. 7 of 1999), Trustee Act 1949 (Act 208), Malacca Wakaf Enactment 2005, Negeri Sembilan Wakaf Enactment 2005 and the respective Administration of Islamic Law Enactments of the various states as well as other laws having effect on the administration of waqf like the Trustee Act 1949, Specific Relief Act 1950, Contracts Act 1950 and others (Mohamad, 2012).

Not all states in Malaysia have enacted specific rules or enactments relating to *waqf*. The laws relating to *waqf* at state level can therefore be divided into 2 categories, firstly, provisions in the state Administration of Muslim Law enactments and secondly, specific rules or enactments relating to *waqf* (Kader, 2015).

In United States there is not any dedicated law on waqf. It is regulated as foundations and the amendments are as follows;

According to the 1.509(a)-1, “private foundation” is defined as; *In general. Section 509(a) defines the term private foundation to mean any domestic or foreign organization described in section 501(c)(3)⁸ other than an organization described in section 509(a) (1), (2), (3), or (4). Organizations which fall into the categories excluded from the definition of private foundation are generally those which either have broad public support or actively function in a supporting relationship to such organizations. Organizations which test for public safety are also excluded.*”⁹

The foundation, called private foundation is regulated within the Code of Federal Regulations, title 26 - Internal revenue, chapter Internal Revenue Service, Department of the Treasury, Subchapter A – Income tax as private foundations with 25 articles.

⁸26 U.S. Code § 501 - Exemption from tax on corporations, certain trusts, etc. (c)-(3) - Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office. (<https://www.law.cornell.edu/uscode/text/26/501>)

⁹<https://www.law.cornell.edu/cfr/text/26/1.509%28a%29-1>

In Turkey detailed law, circular and communique exist within foundation law. These regulations covers a broad spectrum on and accounting principles, internal audit, renting waqf assets, preparation of performance programming, general directorate administrative structure etc. As a continuation of detailed regulation approach, there more than 50 circulars, communiques etc. in that respect.¹⁰ On one hand it is good for foundations to have clear, detailed guidelines to operate, but on the other hand it will slow down the procedure in bureaucracy.

Finally in India foundations, waqf are regulated in law level and besides those regulations, there is not any secondary rules and regulation dedicated on waqf.

3.3 Central Supervisory Authority

In order market to operate smooth the role of central supervisory authorities (CSA) are critical. They, CSAs, have a mandate to determine the thin red line between having strict rules and keeping the market breathless versus tolerant rules but convenient (that might result in) financial fragilities. Within this respect in this title we will mainly focus on the roles and responsibilities of the CSAs and the structure and functioning of the system as well.

In Turkey directorate general of foundations is the main governmental body in charge of the waqf/foundations. As per the article 35 in Foundations Law, “*Directorate General of Foundations with a legal entity status has been set up under the Prime Ministry in order to fulfill the tasks assigned to them hereunder.*” and the tasks of the tasks of the Directorate General is listed as follows in the next article;

“a) To fulfill and carry out charitable, social, cultural and economic terms and services set out in the charters of fused (mazbut) foundations or, where there is no charter, in its firman, deed or title of privilege that substitutes the charter.

d) To conserve or restore the cultural assets of foundations located at home or abroad;

e) To audit annexed (mülhak), Community, artisans' and new foundations;

f) To carry out training, research, development, cultural and publication activities in issues related to the foundations; to maintain national and international coordination;

g) To make up collections comprising foundations' cultural assets; to establish museums, libraries and cultural centers...”

The mission, vision and the scope of the Directorate General is very broad from establishing foundations and supervision and oversight of them to setting up a museum, library and cultural centers. This also highlights the importance given to foundations and the deep heritage from the Ottoman Empire.

To improve and develop the national waqf, a productive waqf management has been fully arranged by the National Act 41/2004 on Waqf. This act led to the establishment of the Indonesian Waqf Board (IWB), an independent institution whose elected members perform their duties for three years and can be reelected with a maximum of two consecutive terms.

¹⁰ <http://www.vgm.gov.tr/icerik.aspx?Id=20>

The vision of the Indonesian Waqf Board is “*towards a trusted independent institution, with high capacity and integrity to develop national and international waqf assets*”. Its mission is to enhance its status as a professional institution capable of realizing the potency and economic benefits of waqf assets for the sake of religious interests and human empowerment. The main duties of IWB are to manage waqf assets through *nazir* both nationally and internationally and also to collaborate with communities, mass organizations, experts, and international institutions. The Indonesian Waqf Board consists of divisions, responsible for accomplishing the vision, mission and strategy of the Indonesian Waqf Board.

Strategies to accomplish the Indonesian Waqf Board’s vision and mission include:

- i. To increase competency, national and international networks of the Indonesian Waqf Board.
- ii. To compose regulation and waqf management policies.
- iii. To enhance public awareness and willingness to contribute waqf.
- iv. To boost professionalism and honesty of Nazirs in managing and developing waqf assets.
- v. To coordinate and develop Nazirs.
- vi. To improve waqf asset administration.
- vii. To monitor and protect waqf assets.
- viii. To collect, manage, develop both national and international waqf assets

IWB has performs two functions. As a waqf regulator, IWB decides, officiates, dismisses, replaces and improves Nazirs. IWB also approves waqf assets and considerations for the government when making waqf policies. As an executor and administrator, IWB also collects, manages, and develops waqf assets either from national or international sources. At times, these double functions can overlap and create a conflict of interest in practice (Masyita, 2012).

No central regulator exists in Malaysia. Majlis (State Islamic Religious Council) of each state. SIRC acts as regulator and governing bodies that manage waqf in each state. Waqf Management Committee is established to manage waqf for its behalf. A department at the Federal Level was established in 2004 under the Prime Minister’s Department of Malaysia, namely Jabatan Wakaf, Zakat dan Haji. JAWHAR plays coordinative and advisory role, as it does not the power to regulate waqf matters. The objective of the department is to develop the socio-economy of the ummah via waqf, hajj and umrah activities. The department aims to empower the governance of waqf, zakat and hajj by working together with the state religious councils in various states in Malaysia. The department has approved millions of grant allocation to mobilise waqf projects in states of Negeri Sembilan, Perak and Terengganu. The department also works with the general public, government agencies, government-linked and private companies to increase their awareness on the concept of waqf as their instrument for legacy building. The department also conducts research, publication on issues related to waqf and provide the support for information technology and human resources to SIRC.

In India, The Central Waqf Council a Statutory Body was established in December, 1964 by the Government of India under the provision of Section 8A of Wakf Act, 1954 for the purpose of advising to the Central Government, the State Governments and the boards on matters concerning the working of the State Waqf Boards and due administration of the Auqaf. As per the provision given in the Waqf (Amendment) act 2013, the council has been vested with more powers to issues directives to the Boards to furnish information to the

Council on the performance of the State Waqf Boards, particularly on their financial performance¹¹.

Section 9-12 of the Wakf Act (1995) provided for the creation and functions of the CWC as;

- i. to advise the Government of India on matters concerning the working of Waqf Boards and the due administration of awqaf in the country
- ii. to undertake development of waqf assets to ensure preservation

These provisions were clearly governed by a need to ensure physical preservation of endowed assets.

The Waqf Amendment Act (2013) sought to strengthen the role of the CWC as a central and key pillar in waqf administration. Among other things, it sought to address the concerns about physical preservation of endowed assets by:

- i. Empowering the CWC to issue directive to the State Waqf Boards (SWBs) on their financial performance, survey, maintenance of waqf deeds, revenue records, and encroachment of wakf properties seeking annual report and audit report, and
- ii. Providing for any dispute arising out of its directive to be referred to a high-level Board of Adjudication (Obaidullah, 2015).

In order to ensure smooth functioning of the Council, the following four Sub-Committees have been appointed from amongst the members of the Council, as planning and advisory committee, waqf development committee, education and women welfare committee and monitoring committee.

In United States, the US Department of Treasury is regulated through the Internal Revenue Service.

3.4 Advisory on Shariah Issues and Court Recognition

Islamic finance has two main pillars, as it can be understood from its name, one root comes from Islam, the other from finance. Waqf is one of the prominent way of redistribution of wealth in Islam. In order waqf to fulfill the specific criteria all activities must be in line with the Shariah rules and principles. In this title we will shed the light on the Shariah parameters on waqf.

In Turkey, as for Shariah related disputes, as Turkey is a secular country, no such an institution exists. For the legal disputes, the authorized court is the one where the foundation settled.

In Malaysia the establishment and jurisdiction of the Syariah Court are the concerns of the respective states. The respective states are responsible to make laws relating to matters that fall within the List II of the 9th Schedule to the Federal Constitution (FC). The State list, that is List II (1) of the Ninth Schedule to the FC, as regards waqf, reads as follows:

¹¹ <http://centralwakfcouncil.org/about-us.php>

“Except with respect to the Federal Territories of Kuala Lumpur and Labuan, Islamic law and personal . . . Waqf and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State. . .”

In summary, waqf is considered as one of the State matters. The jurisdiction of the respective State Syariah Courts is to be found in each state administration of Islamic affairs enactments.

Basically, every decision or ruling relating to Islam is seen as the sole authority of the States. It is placed under a body known as the National Council for Fatwa Committee of Islamic Religious Affairs Malaysia (Jawatankuasa Fatwa Majlis Kebangsaan Bagi Hal Ehwal Agama Islam Malaysia). At the state level, institutional fatwa is a legal entity other than the State Islamic Religious Council, State Islamic Religious Department, and Syariah Court granted recognition by each state’s Islamic law. The problems and disputes arising in respect of Waqf property involving Islamic law will be referred to the Fatwa Committee Meeting and the committee itself will address these problems. Laws enacted in the states have delegated authority to the respective state governments to set up a committee to help the department to issue a fatwa of Mufti Council (Suwaid Tapah, 2004).

According to the waqf act 2013 India, article 11-c/5, *“Any dispute arising out of a directive issued by the Council under sub-section (4)¹² shall be referred to a Board of Adjudication to be constituted by the Central Government, to be presided over by a retired Judge of the Supreme Court or a retired Chief Justice of a High Court and the fees and travelling and other allowances payable to the Presiding Officer shall be such as may be specified by that Government.”*

In the US, in carrying out the purpose, the foundation may sue and be sued in its corporate name, and complain and defend in courts of competent jurisdiction¹³.

The 1989 Act granted Islamic court’s jurisdiction in three broad areas: 1) marriage; 2) inheritance, which included wills (*wasiat* or *wasiyya*) and gifts (*hibah*); and 3) religious endowments (*wakaf* or *waqf*)¹⁴. The courts’ inheritance jurisdiction was made subject to an

¹² The State Government or, as the case may be, the Board, shall furnish information to the Council on the performance of Waqf Boards in the State, particularly on their financial performance, survey, maintenance of waqf deeds, revenue records, encroachment of waqf properties, annual reports and audit reports in the manner and time as may be specified by the Council and it may suo motu call for information on specific issues from the Board, if it is satisfied that there was prima facie evidence of irregularity or violation of the provisions of this Act and if the Council is satisfied that such irregularity or violation of the Act is established, it may issue such directive, as considered appropriate, which shall be complied with by the concerned Board under intimation to the concerned State Government.

¹³ <https://www.law.cornell.edu/uscode/text/42/290b> , <https://www.law.cornell.edu/uscode/text/42/290b>

¹⁴ Religious Judicature Act, Act No. 7 of 1989, art. 49. The scope of the courts’ wakaf jurisdiction is not specified and presumably encompasses all matters related to the creation and management of wakaf property. The Act on Wakaf, approved in 2004, contains substantive regulations on matters related to the creation and management of wakaf. Act No. 41 of 2004. It states broadly that disputes on issues related wakaf are to be decided by Islamic courts. Id. art. 62(2). Whatever the scope of the courts’ powers on the issue, the number of wakaf cases in the Islamic courts is very small. In all of 2009, there were only twelve wakaf cases decided by the Islamic courts nationwide. Supreme Court Of Indonesia, Directorate For Religious Courts, Total Cases Decided By Islamic Courts Within The Jurisdiction Of The Islamic High Courts For All Of Indonesia In 2009

important qualification, however. The Act made the courts' inheritance jurisdiction voluntary by offering Muslim litigants the option of having inheritance questions decided by the Islamic courts according to Islamic law or by the civil courts according to customary law (*adat*).

Waqf is distinct from other charitable foundations, and is under the supervision of the Ministry of Religious Affairs, and the Waqf Agency rather than the Ministry of Justice. Other charitable disputes are settled by the local State Administrative Court, while waqf disputes are brought to the local religious court. The waqf system is regulated by numerous national laws.

A large non-governmental institution, the Indonesian Waqf Board, is tasked with holding the *nazir* accountable for properly handling waqf assets. The Waqf Board also is in charge of managing and developing national and international waqf funds, approving and giving permission for waqf assets status, and consulting with the government in waqf policy-making. The Waqf Board has local representatives at the provincial or city level to better facilitate effective and efficient waqf fund allocation (Bernadette, 2012).

The Act has ousted the jurisdiction of civil courts in disputes relating to Waqf and has vested it in the Waqf Tribunals (Khan, 2014). Every Tribunal is to consist of one person who shall be a member of the State Judicial Service, not below the rank of a District, or a Sessions or Civil Judge Class I who shall be the Chairman. One person as a member from State Civil Services not below the rank of ADM and one person as a member having knowledge of Muslim law and jurisprudence. The Tribunal shall have all the powers of a civil court exercised by it under the Code of Civil Procedure 1908. Its decisions shall be binding on the parties and shall have the force of a decree of a civil court. The Tribunal has jurisdiction to entertain appeals against decisions of the Board and Chief Executive Officer. That there can be no appeal against the decision of the Tribunal, be it interim or final¹⁵.

As per the Wakf Law article 6/1; *"If any question arises whether a particular property specified as wakf property in the list of wakfs is wakf property or not or whether a wakf specified in such list is a Shia wakf or Sunni wakf, the Board or the mutawalli of the wakf or any person interested therein may institute a suit in a Tribunal for the decision of the question and the decision of the Tribunal in respect of such matter shall be final: Provided that no such suit shall be entertained by the Tribunal after the expiry of one year from the date of the publication of the list of wakfs."*

There is no specific court procedure for the foundations and waqf in Turkey. Authorized court is the nearest court in charge for such matters.

3.6 Shariah Standards on Waqf

[hereinafter DIRECTORATE FOR RELIGIOUS COURTS, TOTAL CASES], available at http://www.badilag.net/data/ditbinadpa/TABEL_JENIS_PERKARA_DIPUTUS_TAHUN_2009.pdf.

¹⁵ Indian Waqaf act section 83. <http://indiankanoon.org/doc/631210/>

In addition to the dimension on laws and regulation, the management of waqf is guided by Shariah standard issued by AAOIFI, No 33. The standard provides guidelines on waqf management but not specifically on performance and evaluation.

According to AAOIFI's *shariah* standard No. 33 concerning *Waqf*, *awqaf* benefits can be distributed for any purpose, even it may not for a charitable one, as long as the benefits are not be made for *shariah* non-compliant purpose. The benefits are also permissible to be distributed to non-Muslims, provided that the cause to be served does not involve a sin. In sum, waqf benefits could be made to any beneficiaries stated by the waqf giver, including to the rich. The *awqaf* beneficiaries are generally stated up front, AAOIFI's *shariah* standard opines that they do not need to be present at the time of declaring the *awqaf*. However, when the beneficiaries of the *awqaf* are no longer existent, the benefits of the *awqaf* should go to charity purpose. If from the beginning, *waqif* stated that the *awqaf* are to be made for specific mosque(s), any income generated from the *awqaf* has to be spent on the mosque's own interest. But, if there is still an excess amount of income which has not been spent, it is permissible to transfer such amount to other mosques that do not have enough income to cover its expenses, or the cost of its maintenance and renovation.

In relation to waqf asset maintenance, AAOIFI's *sharia* standard No.33 article No. 8/1/1 mentions the following:

“Spending on maintenance reparation and renovation of the *waqf* assets should precede distribution of the *waqf* income among beneficiaries. In this connection, due consideration should be given to the technical schedules of periodical maintenance. Maintenance and reparation of *waqf* assets also do not require a prior condition to be stipulated by the *waqif*.”

The standard above implies that TWI should prioritize the reservation of the *awqaf* assets rather than distribute the income among the beneficiaries. However, the standard also mentions that *awqaf* institution may use solidarity insurance for maintenance or renovation of the *awqaf* assets. The institution may also allow the tenant of its *awqaf* assets to perform the maintenance and renovation. In return, the *awqaf* institution should give priority to the tenant to continue his/her rental until the *awqaf* institution fully repays the maintenance and renovation payable to the tenant.

Whatever method will be used by TWI, it is suggested to record the expenses based on each *awqaf* assets in the future. Therefore, the margin it generates from the utilization of the *awqaf* assets can be calculated. Later, this ratio may give information on how TWI could maintain and improve this achievement to sustain the benefits of the *awqaf* assets.

Another guideline on waqf was issues by the Securities Commission of Malaysia in 2014. The guideline has set several criteria for retention of a licensed or supervised intermediary to professionally manage waqf assets. Such an intermediary must (i) adopt international best practices and standards, (ii) have technical knowledge and resources, (iii) must be subject to strong governance providing adequate level of investor protection and (iv) must have an established technology infrastructure. The SC has also come up with a range of principles and recommendations to be implemented by the waqf institutions

In conclusion, existence of sound and robust regulatory framework is essential and critical for waqf and foundations. This robust regulatory frame refers not only to the dedicated laws on waqf also having the related amendments and provisions. Such an environment will designate the market participants, stakeholder in which frame to conduct the activities. On the other hand, it will ease the supervision and oversight exercise to treat in an objective criteria's. It also brings forward the emphasis on the central supervisory agencies and handling those activities from a single center. There is no doubt that the abovementioned findings and recommendations are valid for the systems whether it has common law or civil law. Because it is embraced in collaboration with having a sound and stable system and remedy on legal disputes. Recognition of court resolutions and existence of proper legal procedure will increase the credibility and reliability of the system as a whole. Last but not least, as the waqf is based on the pillar of Shariah, same as in the legal disputes on the conventional side, Shariah advisory mechanism is prerequisite for foolproof waqf/foundation mechanism. Some countries may not come up with such mechanism due to different legal restrictions and historical background, but it is not preclude at least having the proper scheme to hamper the breaches accordingly.

III. WAQF MANAGEMENT: COMPOSITION, ROLE AND COMPETENCY OF MANAGERS

This section discusses how the law and regulations in each of the countries addresses the issues of waqf management. The focus of the comparative analysis will be on the issue of management composition, role and performance framework for waqf management.

Waqf assets are the assets which the ownership had been relinquished by the donor, which creates the accountability responsibility to the waqf trustee who manages the waqf assets on behalf of the donor. This is the reason for waqf management to be another dimension included in waqf laws. Waqf foundation manager is the trustee or *mutawalli* manages waqf assets on behalf of waqf providers (*waqif*). Regulators in the waqf practicing countries outlined how waqf should be appointed and who should be in the trustee board. This is to ensure independence and manages conflict of interest of the board when deciding management matters including investment and distribution decision.

In all the jurisdictions, waqf trustees are independent from the regulating institutions, except for in Malaysia. In countries other than Malaysia, waqf trustee manages the waqf while being watched by the regulator. Alina (2011) has discussed this issue and lamented that Malaysia's waqf governance structure suffers serious agency issue. This is because the SIRC manages as well as govern waqf. For governance of waqf to be effective, separation of role between the managers and regulators has to exist. For example, in the US, Inland Revenue and states' attorney general regulates the foundations managed by private foundations. Similarly, in Turkey, the General Directorate of Vakıflar governs private foundations while itself subjected to court supervision (Alina, 2011).

Alina (2011) suggested for the introduction of proper waqf governance framework incorporating law of trustees, law on fudiciaries and code of waqf governance. In term of control and governance, Alina (2011) suggested that SIRC has be transformed to become the oversight body for unincorporated waqf. The management of waqf also could be released to professional waqf managers, instead of to be managed by state's SIRC.

IDB/IRTI and The Kuwait Public Foundation Law that was established adoptable by IRTI member countries states that trustees are to be appointed by the founder. Cizakca (2014) lamented that this requirement will challenge the current implementation of waqf management in Malaysia. If this law to be implemented, the current implementation in Malaysia will be considered null and void as in Malaysia, waqf founders are not able to appoint their trustees, but have to make do with their waqf being managed by a centralized waqf trustee in each of the states in Malaysia.

In Malaysia, institutions other than state religious councils are now allowed to manage waqf assets, starting with the establishment of Johor Corporation's subsidiary; Waqf Annur. Waqf Annur is a company established to manage waqf assets of Johor Corporations. State religious council of Johor (Majlis Agama Islam Johor) granted the sub-mutawalli status for Waqf Annur. Another private institution that is allowed to collect waqf funds from the general public is Bank Muamalat Malaysia Berhad (BMMB). The power is conferred by Kuala Lumpur Federal Territory Religious Council (Majlis Agama Islam Wilayah Persekutuan Kuala Lumpur). Other institutions granted the power their own waqf assets are waqf institutions of public and private universities. Table 2 lists waqf establishments in universities in Malaysia.

Table 2: Waqf Establishments in Universities in Malaysia

| No. | University | Type of University | Designation of Waqf Fund | Year Established |
|-----|--|--------------------|---|------------------|
| 1 | Universiti Sains Islam Malaysia | Public | Al-Abrar Waqf Fund USIM | 2013 |
| 2 | Universiti Islam Antarabangsa | Public | IIUM Islamic Endowment Fund ¹⁶ | 1999 |
| 3 | Universiti Putra Malaysia | Public | Knowledge Waqf Fund | 2011 |
| 4 | Universiti Kebangsaan Malaysia | Public | UKM Waqf Endowment Fund | 2010 |
| 5 | Universiti Teknologi Malaysia | Public | UTM Endowment Fund | 2010 |
| 6 | Islamic University of Malaysia (UIM) | Private | The whole university established via waqf | 2013 |
| 7 | International Islamic University College Selangor (KUIS) | Private | KUIS Foundation | 1995 |
| 8 | Bestari University College | Private | The whole university established via waqf | 1998 |
| 9 | Sultan Azlan Shah Islamic University College (KUISAS) | Private | The whole university established via waqf | 1999 |

Source: Asuhaimi, Shafii and Alias (2015)

Specific issues examined on waqf management in the relevant institutions are the i) the appointment, reappointment and removal of members in waqf management/administration, ii) roles and responsibilities of managers, iii) criteria on the competency of managers and iv) the

¹⁶IIUM's endowment fund uses the endowment provision, thus not regulated by waqf enactment in the state of Selangor.

existence of independent committees advising management and Table 3 summarises the provisions of the issues highlighted above in each of the countries having dedicated law regulating waqf practices.

Table 3: Waqf Management: Appointment, Composition, Role and Competency Criteria

| | | Turkey | Indonesia | Malaysia | India | US foundation |
|----------|--|---|---|---|--|---|
| 1 | Waqf/foundation Manager | Management of Foundation | Lembaga Keuangan Syariah-Pengelola Waqf Uang | State Religious Councils in each states in Malaysia | Each State Board of Waqf | Management Foundation (BOD) |
| 2 | Appointment, reappointment and removal of members of waqf/foundation management | Foundations can appoint and/or assign such members within the institution according to deed of trust. | Nadzir institutions or LPS-PWU can appoint and/or assign such members within the institution. | Waqf Administration Committee (Panel Penasihat Wakaf) in each SIRC | The Board is made up of nominated and elected members from various categories and the Chairman is elected by the members. The staff of the Board is headed by the Chief Executive Officer who is an Officer in the Senior scale. | Foundations appoint and assign members within the institution according to deed of trust. |
| 3 | Roles and responsibilities of managers | Regulated within the foundation's law | The responsibilities of nadzir (managers) regulated within the waqf law. | The functions of Waqf Administration Committee (Majlis Penasihat Wakaf) are regulated within waqf state enactment. | The role of mutawalli is regulated within the law. | Regulated within the foundation law |
| 4 | Criteria for managers' competency | No provision | The membership of IWB should fulfill the criteria spelled out in waqf law | Only general negative lists of who should be appointed as Waqf Administration Committee are provided in the state waqf enactment. | No provision | No provision |

| | | | | | | |
|---|--|--------------|--------------|--------------|--------------|---|
| 5 | Independent Committees (Advising the management). For e.g. Board Audit Committee, Board Risk Committee | No provision | No provision | No provision | No provision | Provided in the Code 22 (290f) Inter-American foundation on appointment of committees and councils to assist the management and affairs of the foundation. Each committee to consist of two or more members of the Board. |
|---|--|--------------|--------------|--------------|--------------|---|

Agency problem between the donors and managers (waqif and mutawalli) exists as in the management of profit-based institutions. Charity non-profits face many of the same challenges of corporate governance which face large, publicly traded corporations. In a non-profit corporation, the "agency problem" is even more difficult than in the for-profit sector, because the management of a non-profit is not subject to removal by the charitable beneficiaries. The board of directors of most charities is self-perpetuating, as new members chosen by vote of the existing members.

Alina (2011) highlighted that in the U.S, the administration of foundations remains under the control of private citizens, overseen only by regulatory supervision of the Inland Revenue Service and the Attorney General of the respective states. The current Malaysian scenario resembles to the management of waqf in Turkey that Turkish General Directorate of Vakıflar controls all Ottoman awqaf and pre-1967 republican awqaf, except the Malaysian position is more extreme as SIRC is sole trustee for waqf in the relevant state.

3.1 Waqf Management

In Malaysia, SIRC is sole *mutawalli* of waqf. Management of waqf is done by Wakaf Management Advisory Panel (Panel Penasihat Pengurusan Wakaf) established in each SIRC. In the case of Negeri Sembilan, the panel is referred to as Waqf Administration Committee. The panel consists of:

- i. Mufti as the chairman of the Committee
- ii. Deputy of Chairman elected among the members of SIRC
- iii. Secretary of SIRC
- iv. A member of Fatwa Committee named by Fatwa Committee of the State Chairman of Jabatan Hal Ehwal Agama Islam
- v. Three other members appointed by SIRC, nominated by the Chairman of this committee

In Indonesia, Nadzir of Waqf Institutions and cash waqf nadzir referred to as Lembaga Keuangan Syariah-Pengelola Waqf Uang (LPS-PWU) which consists of financial institutions, BMT, etc appointed by Indonesian Waqf Board. Nadzir institutions or LPS-PWU can appoint and/or assign such members within the institution.

- i. The members of central IWB are appointed and terminated by the President of Indonesia.
- ii. The termination before the end of the tenure is regulated by IWB.
- iii. The members of IWB branches in province or states are appointed and terminated by IWB
- iv. The tenure is three years and reappointment is valid for one tenure

In Turkey, foundations can appoint and/or assign such members within the institution according to deed of trust. Article 9 of the Foundations Law 2008 prescribes the parties not eligible to act as Foundation Management. Article 10 states that foundation managers are obliged to act in line with the foundation's purpose and to comply with applicable law. The Article also states the incidences of dismissal of foundation management:

- i. Fail to act in accordance with the purpose of the foundation.
- ii. Not to have used the goods and income of the foundation in accordance with its purpose.
- iii. To cause the foundation to suffer a loss because of his/her gross negligence and deliberate act.
- iv. To have failed to complete or amend in the permitted term the errors and missing points identified by the Supervision authority, or insist on acting in violation.
- v. To have lost the legal competence to exercise legal rights, or to have contracted a disease or disability which prevents him/her from fulfilling the task on a permanent basis.
- vi. To have been imposed an administrative fine twice pursuant to Article 11 of the Foundations Law

In India, the role of *mutawalli* is regulated within the waqf law. The management is operationally conducted by waqf committees. Among Committees are Planning and Advisory Committee, Education and Women Welfare Committee and Waqf Development Committee.

3.2 Appointment, Reappointment and Removal of Members in Waqf Management

Agency problem between the donors and managers (waqif and *mutawalli*) exists as in the management of profit-based institutions. Charity non-profits face many of the same challenges of corporate governance which face large, publicly traded corporations. In a non-profit corporation, the "agency problem" is even more difficult than in the for-profit sector, because the management of a non-profit is not subject to removal by the charitable beneficiaries. The board of directors of most charities is self-perpetuating, as new members chosen by vote of the existing members.

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- i. The members of central IWB are appointed and terminated by the President of Indonesia.
- ii. The termination before the end of the tenure is regulated by IWB.
- iii. The members of IWB branches in province or states are appointed and terminated by IWB
- iv. The tenure is three years and reappointment is valid for one tenure

Whereas in Malaysia, SIRC is the sole mutawalli of waqf, management of waqf is done by Wakaf Management Advisory Panel (Panel Penasihat Pengurusan Wakaf) established in each SIRC. In the case of Negeri Sembilan, the panel is referred to as Waqf Administration Committee. The panel consists of:

- i. Mufti as the chairman of the Committee
- ii. Deputy of Chairman elected among the members of SIRC
- iii. Secretary of SIRC
- iv. A member of Fatwa Committee named by Fatwa Committee of the State
- v. Chairman of Jabatan Hal Ehwal Agama Islam
- vi. Three other members appointed by SIRC, nominated by the Chairman of this committee

In India, the role of mutawalli is regulated within the waqf law. The management is operationally conducted by waqf committees. Among Committees are Planning and Advisory Committee, Education and Women Welfare Committee and Waqf Development Committee. Comparatively,

Comparatively, in the case of management of foundation in the U.S, it is managed by Management of Foundation (BOD). Foundations can appoint and/or assign such members within the institution according to deed of trust. Alina (2011) highlighted that in the U.S, the administration of foundations remains under the control of private citizens, overseen only by regulatory supervision of the Inland Revenue Service and the Attorney General of the respective states. The current Malaysian scenario resembles to the management of waqf in Turkey that Turkish General Directorate of Vakıflar controls all Ottoman awqaf and pre-1967 republican awqaf, except the Malaysian position is more extreme as SIRC's are sole trustee for waqf in the relevant state.

3.3 Roles and Responsibilities of Waqf Managers and Criteria on Competency of Waqf Managers

In addition to the law requirements on the appointment of, re-appointment and removal of management of waqf, the laws also provides provisions on the roles and responsibilities of waqf managers. Turkish Vakiflar foundation's law regulated the roles and responsibilities within the law. The same is also provided in the Indonesia's waqf law. The responsibilities of nadzir (managers) regulated within the waqf law. In Malaysia, the functions of Waqf Administration Committee (Majlis Penasihat Wakaf) are regulated within waqf state enactment. The same goes to India's waqf law, which regulated the role mutawalli managing waqf.

On the criteria on the competency of waqf managers, Turkish Vakiflar's foundation law did not provide any provision on managers' competency. In Indonesia, the membership of IWB should fulfil the criteria spelled out in waqf law. In the state of Negeri Sembilan, one of the states in Malaysia, its waqf enactment only provides general negative lists of who should be appointed as Waqf Administration Committee. India's Wakf law, similar to the case of Turkey, is silent on the criteria of managers' competency.

To ensure the management of waqf are performed in an independent manner, waqf management may be advised by independent committees such as Board Audit Committee, Board Risk Committee and Investment Committee. U.S foundations, follows the practice of corporate bodies that benefits from the operation of independent committees. For example, Code 22 (290f) Inter-American foundation on the appointment of committees and councils to assist the management and affairs of the foundation. In the case of the foundation, each committee is to consist of two or more members of the Board.

IV. TRANSPARENCY AND MARKET DISCIPLINE

This section discusses the provisions of the law with regards to measures ensuring transparency and market discipline of waqf management. Transparency measures include how waqf management's activities and performance is monitored and reported to the stakeholders; waqif, beneficiaries, the regulators and the general public. Transparency measures also includes performance audit against waqf management for its operation and investment management and efficiency to grow its assets and distributing the assets to the beneficiaries. Another dimension of the transparency measures are the measures specific to ensure the donors and beneficiaries position and the mechanisms for distribution of waqf funds.

Regarding transparency and accountability, *Mutawalli* should provide report to *Waqif* (donors), Waqf board, beneficiaries and public. Information provided by *Mutawalli* can be used to assess its performance. Examining the performance could be useful to assess *Waqf's* perpetual existence. In the context of business organizations, financial ratios which rely on the bottom line can be the tools to examine the performance. However, these do not seem sufficient to the non-profit context. Zuki (2012) suggested that there is scope for enhancing the management and business operation of waqf institutions by adopting modern approaches that will equip the institutions to provide better and more efficient services to the community. *Mutawalli's* performance could be assessed via:

- i. Financial and non-financial performance measurement
- ii. Financial transparency via financial reporting
- iii. Programmatic verification

Another issue of waqf management is the protection of workers. Generally, non-profits and people operating non-profits must comply with all of the same laws which would apply to for-profit businesses. Non-profits can have to manage the liability arise from injuries caused by their employees or volunteers to third parties, such as by traffic accidents. For this reason it is prudent for any non-profit to obtain liability insurance. Non-profits which have paid staff must comply with minimum wage laws, and with the requirement in most states to obtain workers compensation insurance.

Waqf management is also subjected to money laundering issue. Although waqf is not mainly a profit generating institution, the operation of waqf involves profit making businesses. Regulators fears religious establishments could attract money laundering and terrorism financing. This fear is not a new phenomenon. French and English, during their occupation in the Muslim world were skeptical and feared that informal, endogenous Islamic-based organizations are difficult to regulate and monitored (Babacan, 2011). Supervision and oversight of waqf/foundation is vital to deal with the issue of money laundering and terrorism financing.

The comparative requirements for transparency, performance monitoring and reporting provided by the laws of the countries adopting waqf are as follows. Table 4 summarizes the measures:

Table 4: Transparency, Performance Monitoring and Reporting Initiatives

| | | Turkey | Indonesia | Malaysia | India | US Foundati |
|----------|---|--|---|---|---|--|
| 1 | Transparency and disclosure on investment/operation activities | Waqf investment and asset portfolios are reported in the annual reports prepared by Foundations' management. | Waqf investment and asset portfolios are reported in the annual reports prepared by Nadzir Waqf. | EnakmenWakaf states that Waqf Administration Committee shall advise SIRC on the investment of mauquf. Waqf portfolios are reported in the annual reports. | No provision | No provision |
| 2 | Reporting (reporting lines and modes of reports) | Foundation Management reports to Directorate General of Foundations. | LKS-PWU provides report to Indonesian Waqf Board which in turn reports to the President of Indonesia and Department of Religion and publishes the | Waqf Administration Committee (Panel Penasihat Wakaf) has the responsibility to report to SIRC. SIRC in turn publishes annual report to the general public. | Wakf State Board reports financial performance to the Central Waqf Council. | Private published year report to the p |

| | | | | | | |
|----------|---|------------------------------------|--|---|--|--|
| | | | annual report through national mass media. | | | |
| 3 | Performance Audit against Waqf Management (Is the function in operation? Performed by whom?) | Directorate General of Foundations | N/A Only financial statements are audited by audit firm | N/A As waqf is managed by the SIRC that regulates the waqf activities, audit of operation does not take place. Only financial statements are audited by audit firm | Wakf State Board undertakes audit of the major institutions. The financial transaction of the Board itself is audited by the Government (State Accounts Dept.) and the Accountant General. | Private performance monitored by government |
| 4 | Efficiency/productivity valuation | No provision | No provision | No provision | No provision | Private foundation performance monitored by government |

For the transparency and disclosure on investment/operation activities, waqf laws for all the jurisdiction under the study requires for disclosures to be properly reported in the annual reports, by the waqf management. However, it is not required in the enactment that the members of the Committee to include professionals in portfolio and investment management.

In term of reporting, waqf management in each jurisdictions are to report to their central waqf board and to the public. In Turkey, foundation management reports to Directorate General of Foundations. In Indonesia, Indonesian Waqf Board provides annual reports to President of Indonesia and Department of Religion. LKS-PWU provides report to Indonesian Waqf Board and publishes the annual report through national mass media.

In Malaysia, Waqf Administration Committee (Panel Penasihat Wakaf) has the responsibility to report to SIRC. The annual report of waqf, in turn is reported to the general public. In India, Wakf State Board- reporting the performance particularly on the Financial Performance, Survey, Maintenance of Waqf Deeds, Revenue Records, Encroachments of Waqf Properties, Annual Reports and Audit Reports including leasing of waqf properties to the Central Waqf Council.

With regards to the performance audit against waqf management, the requirements of the regulators are mixed. Some regulations under the analysis do not require for the performance audit to be specifically conducted. In Turkey, audit of performance of waqf management is conducted by Directorate General of Foundations. In India, some degree of performance measures are needed since all the waqf institutions are required to submit their budget estimate and financial accounts to the Board. The Board undertakes audit of the major

institutions as a measure of performance. The financial transaction of the Board itself is audited by the Government (State Accounts Dept.) and the Accountant General.

The performance of waqf managers is starting to become the concerns for regulators. IDB/IRTI and The Kuwait Public Foundation Law passed in 2012 is one the laws that has included performance as one of the law requirements for the management of waqf. The law allows for the determination of trustee's wage by the founder as a certain percentage of the waqf's profit or revenue. Performance-based incentive proposed in the law makes the trustee interested with the performance of waqf and making them dynamic.

Another guideline on waqf was issues by the Securities Commission of Malaysia in 2014. The guideline has set several criteria for retention of a licensed or supervised intermediary to professionally manage waqf assets. Such an intermediary must (i) adopt international best practices and standards, (ii) have technical knowledge and resources, (iii) must be subject to strong governance providing adequate level of investor protection and (iv) must have an established technology infrastructure. The SC has also come up with a range of principles and recommendations to be implemented by the waqf institutions. The principles are as follows:

a) Principle 1. Strengthening the Oversight of Waqf Institutions

Recommendation 1.1: The waqf trustee should establish clear roles and responsibilities reserved for them and those delegated to the waqf institutions,

Recommendation 1.2: The waqf trustee should ensure that the waqf institutions are governed by a satisfactory code of conduct.

Recommendation 1.3: The waqf trustee should oversee and monitor the business operations and conduct of the waqf institutions.

Recommendation 1.4: The waqf trustee should be given access to information and advice.

b) Principle 2. Strengthening the Effectiveness of Waqf Institutions

Recommendation 2.1: The waqf institutions should have the necessary expertise to manage waqf assets.

Recommendation 2.2: The waqf institutions should have a clear strategy in managing waqf assets.

Recommendation 2.3: The waqf institutions should have in place adequate internal controls including risk management and internal audit.

Recommendation 2.4: The waqf institutions should produce an annual report which is made public.

c) Principle 3. Strengthening the Engagement with Stakeholders

Recommendation 3.1: The Waqf Institution should continuously engage its stakeholders.

Recommendation 3.2: The Waqf Institution should establish a clear and effective communication policy to manage relationships with its stakeholders.

Performance monitoring of waqf management is outlined by Securities Commission in its Recommendation 1.3 which states that 'the waqf trustee should oversee and monitor the business operations and conduct of the waqf institutions. The following annotations further clarify the monitoring requirements:

- i. The waqf trustee together with its waqf institutions should clearly establish and agree on the objectives in managing the waqf assets, including performance target to be met by the waqf institutions. Regular review of the waqf institutions' performance should be conducted to ensure that the interest of stakeholders are protected and met.
- ii. The waqf trustee should oversee and monitor the performance of its waqf institutions and ensure that the waqf assets are being properly managed. It should have in place appropriate measures to assess the waqf institutions' performance and effectiveness. The obligation to oversee the performance of the waqf institutions reflects a collegial relationship that is supportive yet vigilant.
- iii. In the event a decision is made to distribute the profit, this should be fairly undertaken to preserve the altruistic purpose of waqf institutions. The waqf trustee and waqf institutions are encouraged to agree on a profit sharing arrangement, which should be formalized and made transparent.
- iv. The profit sharing arrangement should outline the proportions of the returns on investments that will be utilized as:
 - a. Trustee fee for the waqf trustee
 - b. Management fee for the waqf institutions, where the amount should reflect the extent of responsibilities and expertise of the waqf institutions as well as complexity of the activities undertaken by them in managing the waqf assets
 - c. Re-investment and
 - d. Distribution to beneficiaries, including charitable organisations.

Another dimension of the transparency measures are the measures specific to ensure the donors and beneficiaries position and the mechanisms for distribution of waqf funds. The comparative requirements on donors' and beneficiaries' rights provided by the laws of the countries adopting waqf are as follows. Table 5 summarizes the measures:

Table 5: Donors and Beneficiary's Rights

| | | Turkey | Indonesia | Malaysia | India | US F |
|---|--|--|---------------------------------------|--|---|--------------------------------|
| 1 | Donors/beneficiary protection mechanism | The Foundations Law states that foundation management responsible to act according to the purpose of the foundation | IWB issues certificate for the donors | SIRC is responsible ensure that <i>mawquf-alaih</i> enjoys the benefit from the mauquf | The Action Taken Report (ATR) are mentioned by the Sub-Committees of the Council and if any grievance from the public, the case is looked by the concerned Committee for appropriate action | Bene found via purpo the found |
| 2 | Mechanism for distribution of waqf help/aids /funds | N/A Since waqf is operated under foundation law, managers of foundation decide distribution amount. Thus may need the | Waqf deeds | Waqf deeds | Waqf deeds | Privat usual of e inten |

| | | | | | | |
|--|--|-----------------------------|--|--|--|--|
| | | mechanisms for distribution | | | | |
|--|--|-----------------------------|--|--|--|--|

Laws in each of the jurisdictions provide protection mechanisms for their donors and beneficiaries. In Turkey, its Foundation Law states that foundation management responsible to act according to the purpose of the foundation. Meanwhile, in Indonesia, to protect the donors, IWB issues certificate for the donors. In Malaysia, SIRC is responsible ensure that *mawquf-alaih* enjoys the benefit from the *mauquf*. In case that *mawquf-alaih* no longer exist, SIRC is responsible to manage the mauquf as prescribed by the waqif. SIRC will seek the advice from State Fatwa when the *mauquf-alaih* has died or cease to exist in case of institution or the *mauquf-alaih* is unable to be traced. In India, a form of report referred to as the Action Taken Report (ATR) submitted to the Sub-Committees of the Council when complaints from the public were received. The case is investigated by the concerned Committee for appropriate action. For the US foundations, the beneficiaries of relevant foundation are protected via the declaration of purpose of each of the foundation. For example, Code 22 (290f) Inter-American foundation states that it ‘shall place primary emphasis on enlargement of educational opportunities at all levels, the production of food and the development of agriculture, and the improvement of environmental conditions relating to health, maternal and childcare, family planning, housing, free trade union development, and other social and economic needs of people’.

Mechanisms for distribution of waqf or aids are provided by the each of the laws under the analysis. In Turkey, distribution mechanisms of benefits are needed since waqf operates under the Foundation Law. In Indonesia, Malaysia and India, waqf distributions are done as the specific requirements of donors via waqf deeds. Foundations in the U.S allocate the endowment income to the beneficiaries up to 5% of their endowment income. For example, Code 22 (290f) Inter-American foundation provided provision on authorization of money to be appropriated.

According to Rosenthal (2012), nonprofit and for-profit board governance are similar in term of its board’s oversight role, its decision-making power, its structural place within the organization, and its members’ legal duties. In addition, non-profit organization has a multiplicity of stakeholders, more complex business models, and self-accountability rather than external accountability. We will be discussing the aspect of diverse groups of stakeholders, complexity of business models and self-accountability issues as these attracts regulations and governance issues in waqf establishments. Dimensions of regulations of non-profit organization that are relevant to the preservation of rights of donors and beneficiaries of waqf are discussed in turn.

Waqf is an institution similar to corporations with shareholders, Board and management, but with the objective that the profit from the ventures are to be distributed for the intended beneficiaries according to the waqf deed and some portion is to be re-invested for maintenance and future improvements of the assets as well as growth of the waqf institutions, i.e. rights of investors. In the conventional companies, investors or shareholders have the right to appoint BOD. However in waqf establishment, waqif does not have the right to appoint BOT or *mutawalli* (the board members will be re-elected from the recommendation of fellow members). In the corporation setting, shareholders have the rights as follows:

- i. attend AGM and vote
- ii. share the company’s profit

- iii. receive final distribution during winding up
- iv. receive copy of annual accounts
- v. assured that the company is run legally

The preservation of *mauquf* of the assets of waqf also falls under the preservation of rights of waqif. Waqf regulations should take into account the appropriate measures to ensure assets' value are improved or maintained. We will discussing the provisions of waqf laws with regards to measures that ensure the rights of beneficiaries or *mauquf-alaih*.

[to insert: How to develop trust in nation on waqf and transparency (Zamir will draft)]

V. POLICY RECOMMENDATIONS AND CONCLUDING REMARKS

[to insert Dr Zamir's comments: Investment policies (Zamir will draft)]

Lingering issues we identified:

1. How to make waqfs and their operations independent from governments?
2. How to set a performance benchmark for waqfs? In US there may be criteria on certification charity accreditation-please check.

Dr Zamir, I found this which is similar to what Dr Obaidullah is proposing on NPOs performance evaluation, which we feature in this paper.

<http://www.give.org/for-charities/How-We-Accredit-Charities/>

3. Mus mentioned that: In Turkey there is not specific regulation on performance on Waqfs. We may come up with such recommendation in last policy recommendation part.]
4. Policy recommendation for AAOIFI to take up the lack of performance measurement in current AAOIFI standard no 33 Waqf.

Draft so far:

This section offers policy recommendations that could be taken by waqf regulators and managers in order to enhance waqf regulatory framework and waqf management. The recommendations are provided to address the each of the issues discussed in this paper; law and regulations, management and transparency and market discipline.

With regards to waqf laws, all countries under the analysis requires waqf to be managed by waqf trustees. Waqf law and regulations for most of the countries are similar, which requires waqf trustee to be regulated at the national level, with an exception of the case of Malaysia where the separation of control between regulator and waqf management does not exist. In order to promote independence and accountability, regulators are to establish or reform waqf framework that reflects international standards. For this, regulators in Malaysia could benchmark its regulatory

practice to the Kuwait Public Foundation Law passed in 2012 which requires independence between waqf regulator and waqf managers.

In addition to specific recommendations in the case of Malaysia, waqf regulators could work in these areas to streamline waqf regulations in their countries:

- i. Comprehensive definition of waqf law on both permanent and temporary waqf
- ii. Stipulations on the need for preservation and development of waqf assets
- iii. Definition of waqf assets to include all Shariah-compliant assets (to include all ranges of movable assets), not limited to immovable assets. This is to expand the base of waqf assets.
- iv. Provisions of waqf family (*waqf khairy*). Many waqf laws do not clear stipulation of family waqf. This limits the attractiveness of waqf as an instrument that could cater for the future generations.
- v. Provisions that clearly states that waqf could be given and received by both Muslims and non-Muslims. This is to capture the spirit of waqf practice that benefits all.
- vi. Mechanisms for Shariah advisory and disputes to foolproof waqf/foundation. Some countries may not come up with such mechanism due to different legal restrictions and historical background.
- vii. Institutionalisation of Islamic redistributive mechanisms that interact with waqf practices. When waqf is used as micro finance and banking products, the provisions on these activities are to be spelled out in waqf laws for stakeholders' protection.

Under waqf management theme, this study identifies each of countries' waqf law on waqf management's appointment, composition, role and managers' competency criteria. To enhance the managers' competency criteria, waqf regulators should clearly stipulate clear criteria for a *mutawalli*, *nadzir* or trustee not only covering the aspects of integrity and trust-worthiness but also professional competence. Alina (2011) calls for human capital development to address the mismatch of talent in waqf sector.

In addition, waqf laws should express the responsibility of waqf management which includes waqf preservation, growth and development. Islamic Social Finance Report (2015) goes further to state that waqf management to be a mandatory obligation of waqf management. This could be done with via the innovation of instruments such as partnerships and sukuk issuance to raise waqf capital.

For waqf managers' appointment and remuneration, waqf laws should contain the provision on waqf managers' remuneration and professional management. For instance, laws in other countries under analysis could benchmark waqf law of Indonesia that expressly states that waqf nadzir's compensation should not exceed 10% of the waqf income in the case of the nadzir having no beneficial interest related to waqf established under management. In case of nadzir having no vested interest related to waqf, court of law has the power to allow higher remuneration.

In addition to positive measures stated above, the law should include expressed provisions on punitive actions exercisable deter irresponsible conduct of waqf managers such as corruption, misappropriation and negligence. The punitive action could include financial action that commensurate the amount of loss faced by the waqf establishment.

Under the final theme, transparency and market discipline, it was found that reporting practices mainly depending on the structure of regulations adopted by each country. In term of performance

audit, all of waqf laws analysed lacked the performance measurement framework and monitoring measures of waqf management. Due to that, transparent and honest reporting of waqf operation should be clearly spelled out in the waqf laws (Islamic Social Finance Report, 2015). Waqf laws in the countries under the analysis could impose financial penalties if waqf managers fail to submit the audited annual reports to the regulator or for submitting misleading or untrue report. It is also crucial that improvements to the waqf laws in relevant countries to be made with regards to transparency of operation and performance of waqf trustee for waqf governance to better reflect the accountability measured required of the waqf trustee to protect the donors and beneficiaries.

As the concluding remarks, the streamlining of waqf laws in these countries with regards to the provision of waqf laws, management and transparency and market discipline promotes robust internationally benchmarked waqf practices. This will result to waqf best practices that could serve the intention of waqf as a recurring charity to benefit the society.

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