

Legal Framework of Waqf in Sri Lanka: An Analytical Study

Muhammed Buhary Muhammed Thabith¹³²

Ahmad Ibrahim Kulliyah of Laws
International Islamic University Malaysia
thabith786@gmail.com

Abstract

Waqf (Wakf) or endowment as an institution being with religious intention to do good performances for the benefit of the beneficiaries. However, the effect of the Waqf legal framework has witnessed a deterioration since the end of the Ottoman Empire. Therefore, the Waqf institutions have gone through several reforms such as the ministry of Waqf or department of Waqf, which has been created independently with supporting the Muslim jurists. Presently, the legal framework of Waqf has enactment by the regulator of every country to manage and maintain the Waqf properties. This study explores the origin of the Waqf content in Islamic Law. Also, this paper discusses the application of the Waqf Act in Sri Lanka which is related to the existing legal framework. This investigation gives an awareness of the existing Waqf legal framework of Sri Lanka. Also, it will identify the contemporary challenges and issues of the Waqf legal framework for the Muslim Charitable Trusts or Waqfs in Sri Lanka.

Keywords: Waqf, Legal, Framework, Enactment, Sri Lanka

INTRODUCTION

Waqf has been gaining academic attention as it is unique in nature. It is known as the third sector. It is not equity financing or debt financing which is also known as internal financing and external financing respectively. *Waqf* is the third sector and finances projects which cannot be taken up by the other two modes. Throughout Islamic history, *Waqf* has played a significant part in promoting social welfare and justice. However, today *Waqf* management lacks efficiency and effectiveness which does not really achieve the purpose of wealth distribution, social upliftment, etc. Even, a business out of *Waqf* has started in Islamic finance which is the Takaful. Hence, there is a dire need to reiterate the lost Prophetic (SAW) tradition of *Waqf* and also to look at those who manage well and learn lessons from them.

Hence, this paper has taken Muslim Charitable Trusts or *Waqfs* in Sri Lanka as an analytical study that has a *Waqf* (*Wakaf*) subsidiary to know their operations and management. This will enlighten the modern ways of developing a *Waqf* structure which can achieve its ultimate motive. This study of sections which can stand on its own which are the history of *Waqf* which includes its importance in Islam, the background of the *Waqf* Act and its operations and finally the analysis of the legal framework of *Waqf* in Sri Lanka. This analysis aims to explore, learn and understand from their challenges and issues such as the jurisdiction of competition from *Shari'ah* court, *Waqf* has to manage either as a *Waqf* or as a

trust and others. This research gives a brief idea about the current *Waqf* legal framework of Sri Lanka as an investigative study. Also, it will identify the contemporary challenges and issues of the *Waqf* legal framework of Muslim Charitable Trusts or *Waqfs* in Sri Lanka.

WAQF IN ISLAM

In Arabic lexicons, *Waqf* is used to denote stop, contain, or preserve. In Islamic purview, however, it means a religious endowment, such as voluntary and irrevocable dedication of one's wealth or a portion of it--in cash or kind (for example, a piece of land or a fish pond) as well as its disbursement for *Sharī'ah* compliant projects like mosques and Islamic educational institutions. In Islam *Waqf* is different than charity because *Waqf* is a permanent donation. Once it is created it can never be rescinded or donated as a gift nor inherited and sold. Its disbursement of returns is done in accordance with the endower's wishes. Contrarily charity is a much wider concept. It encompasses grants alms inheritance and even *Waqf*.

Definition of *Waqf*

Waqf, as a vehicle of financing, is construed as a religious endowment emanating from “*Taqwa*” or piety. Its inception is in the precepts of charitable deeds in Islam. Its original whereabouts remain shrouded in mystery and cannot be outright tracked to a singular source (Mahamood, 2006). However, a wide range of academia has laid claim to its concept springing from Mesopotamian, Greek, and Macedonian civilizations. Some have also pointed at similar structures followed in Iran, Turkey, and Byzantine empires (Mohsin, 2009). The great Hanafi jurist Abu Zahrah notes that the existence of religious establishment of churches and Jewish temples and 12 prominent Islamic mosques: namely, the al-Masjid al-Aqsa in Jerusalem and the al-Masjid al-Haram in Makkah implies the existence of *Waqf* practices before the spread of Islam.

Contrarily, Shafi'i jurists used to insist that *Waqf* did not exist prior to the existence of Islam and it is, therefore, appropriate only to map out its beginning back to the period of the Prophet Muhammad (SAW) and his companions. Islamic Historians record the first instance of *Waqf* in the seventh century after Hijrah (hereinafter AH) in hands of Umar ibn al-Khattab. This has been alluded to extensively by Muslim jurists from prominent schools of laws in their jurisdictions on *Waqf* (Mahamood, 2006). Caliph Umar endowed a piece of land in Khaybar named *Thamagh* on the advice of the Prophet Muhammad SAW. Nevertheless, a substantial number of scholars consider the Mosque of *Quba*, which the Prophet Muhammad SAW erected upon his arrival in *Madina*, as the first *Waqf* in Islam (Abu-Zahrah, 2007). Different scholars interpreted differently the meaning of *Waqf*. The Kufan school headed by

Abu Hanifa dictates *Waqf* as the detention of a specific thing in the ownership of its founder or creator and dedicating its usufruct in charity, to the poor or other good objects in the manner of loan, lending or commodity loan (Mahamood, 2006). Despite the diversity in definitions, the fundamental legal meaning is agreed upon by Muslim jurists as the dedication of property or asset in expressed or implied terms for charitable or pious purposes or to secure benefits to a community.

Legal Framework of *Waqf* in Islam

Waqf emerged in the Islamic context despite the fact that there is no specific reference to it in the *Qur'an* (Babacan, 2011). Its legitimacy in the Islamic field is only confirmed by substantiation of its presence during the Prophet Muhammad's (SAW) phase and of his consent to it. Its parameters have only been structured over centuries by jurists who were stimulated by the repeated highlighting on charity as an act of fidelity to Allah (SWT) (Kuran, 2001 & Sait, 2006). In developing the legal jurisdictions on *Waqf*, Islamic jurists of different *Madhāhib* exercise *Ijtihād* based on the sources of *Sharī'ah*. This has resulted in a wide array of intra-Madhab and inter-Madhab opinions and counter opinions.

The legality of *Waqf* in Islam

Concerning permissibility, Muslim jurists from all schools of law are in consensus that a *Waqf* is created upon the existence of a *Wāqif* (founder), a *Wāqfiyyah* (declaration or deed for a pious endowment), *Mawqūf alayh* (recipient or beneficiary) and a *Mawqūf* (specific property to be converted into a *Waqf*) (Abu-Zahrah, 2007). A *Wāqif* can be an individual, a group, an institution, a corporation or a ruler. More importantly, a *Wāqif* must be *Mukallaf* (legally fit) as the *Wāqif* needs to determine the objectives, the beneficiaries, and the management of his/her *Waqf* as well as imposing any restriction or qualification on it (Ahmed, 2007). A *Wāqfiyyah* is a legal document that stipulates the important aspects of a *Waqf* made by the founder pertaining to the internal infrastructure of his or her *Waqf* (i.e. choice of assets, beneficiaries, and administration).

In certain instances, the declarations were made verbally. In cases of *Waqf* of buildings, *Wāqfiyyas* provide physical descriptions, their use and its maintenance for future references while it also contained information about the private life of public figures such as their children, the wife (or wives) and their freed slaves if created by public figures.

The corpus or the property to be converted into a *Waqf* (*Mawqūf*) must be real estate or anything which has some form of perpetuity to allow the permanence and the long-lasting benefits (Mohsin, 2009). Movable properties like livestock, weapons, and agro-tools qualify

as endowed properties. However, the most common properties remained agricultural lands and real assets (Babacan, 2011). The majority of jurists contended that the original corpus of endowed properties needs to be intact or possess the trait of not diminishing in value (Cizakca, 1998). Such disputes still persist among jurists of different madhhabs (schools of jurisprudence) pertaining to the legality of movables due to diminution of value. This holds true especially for cash and its equivalents.

ANALYSIS OF WAQF LEGAL FRAMEWORK IN SRI LANKA

The history of Sri Lanka, the Arabs' traders were to Sri Lanka for the business purpose, and it was before born Muhammad Prophets (S.A.W). The author, Sir James Emerson Tennant¹³³, in his book: A History of Ceylon, London 1861, said that Ceylon has found in the first Christian Century (Mahroof, 1985). Furthermore, the first legislation of Muslim Law in Ceylon, which is another name of Sri Lanka, was been by the Code of Muhammadan Law in 1806, during the time, did not any content of legal framework relate to the Muslim Charitable Trust and *Waqf* (Zarook, 2018). According to Jaldeen, he said that the legislation of *Waqf* in Sri Lanka was enactment in 1927 by Muslim representatives of the legislative council and it was the first attempt to introduce the legal framework of *Waqf* in Sri Lanka. Therefore, the Trust Ordinance was enactment at 1917 as a Charitable Trust, then, it was improved by Muslim Charitable Trust as the name of *Waqf* under the category of trust in 1931. As a consequence, the current *Waqf* law has indirectly brought some though of the principle of conventional trust law. Also, there is no specific definition between *Waqf* and Charitable Trust, and its deference is only by name (Jaldeen, 1993).

The insufficient and shortcoming of the Muslim Intestate Succession and *Waqf* legal framework have been legislated by a special committee of justice with the recommendation of justice M.T. Akbar in 1931. After that at 1952, a committee including of Muslim Parliamentarians and Senators have appointed to examine the whole question again, as the result, the Muslim Mosques and Charitable Trusts or *Waqfs* Act N0.51 have been approved as a preliminary of the principle legal framework of *Waqf* and Trusts that rules the Muslim Charitable Trusts or *Waqfs*. Therefore, this regulation of Charitable Trust or *Waqfs* came into operation in 1957 (Zarook, 2018).

An introduction of the principle of Act states are as follow:

¹³³ He was the colonial secretary of Sri Lanka.

“An Act to provide for the registration of Mosques, Muslim Shrines, Places of Religious Resort, whether incorporated or not, to prescribe the powers, duties and functions of the trustees of registered mosques and Muslim Charitable Trusts or Wakfs, to establish a Muslim Charitable Fund, to repeal Chapter II of the Muslim Intestate Succession and Wakfs Ordinance and provide for matters connected therewith or incidental thereto” (Zarook, 2018, p. 07).

Previous to 1982, the hearing of any disputes under the *Waqf* Act, the causes were applied at the District Court of the place where the *Waqf* properties located. However, this action did not fulfill the principle of *Sharī‘ah* to satisfy the requirement for a separate *Sharī‘ah* Court because as usual, the justices of the district court are non-Muslim or lack of *Sharī‘ah* knowledge. Therefore, the Minister Honorable M.H. Momhed was brought an amendment to stabilize the *Waqf* Tribunal under the Muslim Mosques and Charitable Trusts or *Wakfs* Act No.33 of 1982. The reason for this establishment of the *Waqf* Tribunal was being to resolve all disputes causes relating to *Waqf* properties under the *Waqf* Act. Moreover, since 1985, this Tribunal of *Waqf* has in the capital of Sri Lanka, which is Colombo, and this Tribunal is common to the whole Island.

Provision the *Waqf* Act is divided into 7 parts, namely as follow the table:

Muslim Mosques and Charitable Trusts or <i>Waqfs</i> Act	
Part-I	The Staff, the Board and the Tribunal,
Part-II	Registration of Mosques,
Part-III	Appointment, Power and Duties of Trustees,
Part-IV	Muslim Shrines and Places of Religious Resort,
Part-V	Muslim Charitable Trusts or <i>Wakfs</i> ,
Part-VI	Muslim Charitable Fund,
Part-VII	General Provisions.

Muslim Charitable Trusts or *Waqfs*

Muslim Charitable Trusts or *Waqfs* and Section 32 (1) of the Act, which is Application of Part-V of the Act says that “*The provisions of this Part shall apply to every Muslim Charitable Trusts or Wakf created for all or any of the following purposes other than a Muslim Charitable Trusts or Wakf which is solely for the benefit of a registered mosques-*

- (a) The relief of poverty among Muslim or any section thereof;
- (b) The advancement of the education of Muslims or any section thereof;
- (c) The advancement of Islam generally;
- (d) The management of any mosque or Muslim shrine or place of religious resort or performance of religious rites or practices as such mosque, shrine or place or in any other place whatsoever;
- (e) Any purpose beneficial to Muslim or any section thereof; and
- (f) Any other purpose recognized Muslim law as religious, pious or charitable¹³⁴.

According to this above law, Charitable Trusts or *Waqfs* can be created for the poverty elevation among Muslims, the purpose of Muslim education and the religion of Islam or for any other objective of religious, pious or charitable which has recognized by Islamic Law.

After observing of the derivation of the Muslim Mosques Charitable Trust or *Waqf*, Mahroof said that the rest of the Act appears to have been not derived from Islamic law, but these sources have been from civil law. Moreover, he said that the application of charitable Trusts such as additional power of the court in action, the appointment of trustees to mosques, commissioner and the power of institute action for enforcing the provisions of a Muslim Charitable Trusts of *Waqfs* are not from *Shari'ah* Trust law. On the other hand, this originates is from the Ceylon Trust Ordinance (Mahroof, 1985). Hence, the Muslim Charitable Trusts or *Waqfs* Act is several issues and challenges regarding *Shari'ah's* perspective. Therefore, there open for the scholar and juristic, who are in an expert on relating the matters, to recommend and propose their ideas which are acceptances by Islamic law also.

CONCLUSION

This paper explores the position of *Waqf* in Islam, Islamic law and its opinion of *Waqf* and modern management of *Waqf*. Then this study elaborates on the *Waqf* law in Sri Lanka which is relating to the existing legal framework. Moreover, this study analyses the Muslim

¹³⁴ The Muslim Mosques and Charitable Trusts or *Waqfs* Act No. 51 of 1956 as amended by Act No. 21 of 1962 and Act No. 33 of 1982.

Charitable Trusts or *Waqfs* to give insights to the strength and weaknesses of the *Waqf* act. The *Waqf* is a primary vehicle for poverty elevation in Islam as a society. Although in the case of Sri Lanka, the institution of *Waqf* has not entirely been able to support the whole society and social sphere for the Muslim community, it has not contributed significantly to the religious life of the community in Sri Lanka. Further, the transparency of *Waqf* law and management is highly commendable and should be the case for all *Waqf* institutions around the world. Hence, Sri Lankan *Waqfs* Act has several issues and challenges such as management, administration, and development regarding *Shari'ah's* perspective. Subsequently, there have to open for the researcher and juristic who are in an expert relating to the knowledge, to recommend and suggest their ideas which are acceptances by Islamic law.

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