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WAQF ACCOUNTABILITY: A CORPORATE GOVERNANCE ANALYSIS

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ABSTRACT

This study aimed to determine best method of governing the *Waqf* accountability of *Majlis Nethara*. There are four interviewees that have been selected through consulting with bankers, business men, and academics which have knowledge and experience in the *waqf*. The participant profiles were conducted as well as a thorough personality test was conducted. The study duration for data collection began from March 2015 until May 2015. In this study, semi-structured method was used for interview. In the interview, data was also collected through abbreviated notes in a hardbound note book. The interviews were divided into five main themes. First theme was consisted of a historical brief overview as per the interviewee's opinion. Second theme had discussed the reasons behind non development of *Waqfs* in the current Islamic world. Third theme had debated the legal personality of *Waqf*. Meanwhile, fourth theme was discussed some legalities and last theme was lope whole in the Saudi system. The study found all participants were optimistic towards developing the *waqf* institute in the sense that observed as core puzzle in the Islamic financial system if governed correctly. However, the participants also agreed that the current *waqf* was vastly mismanaged. Another interesting finding was that the *Majlis Nethara* was not required to publish their financial statement which leave room for manipulation.

INTRODUCTION

Waqf play important role as an Islamic finance instrument which has potential mechanism to play as a significant role in generating main finance source for the Muslim ummah needs and state [1]. According to Islamic terms, *waqf* is defined as "detention of eternal things to take and devote the profit for charity of the poor or other good causes and to the Islam glory" [2]. *Waqf* is known under Islamic law as voluntary charitable act that recommend by Prophet

Muhammad in early age of Islam [3]. The *waqf* was introduced as potential mechanism to reduce poverty problem and act as socio economic development tool of poor nation [4].

Waqf consists of four basic area included waqif (person who donate the *waqf*), mauquf (the *waqf* item), mauquf alaihi (the person who receives the advantage from *waqf*) and sighah (*waqf* declaration) [5]. The cash *waqf* is usually formed where the donations are used to build school, hospital and orphanages and provided flexibility in fund utilisation compared to zakāh (almsgiving) [6]. The *waqf* has three unique characteristics included perpetuity (an asset dedicated as *waqf* will remain as *waqf* forever), irrevocability (lack of power of the settler to revoke their donation anytime), inalienability (*waqf* cannot transferred either by the waqif or mutawalli nor their heir once valid declaration) [7]. The *waqf* is divides into two types included family *waqf* (*waqf* ahli) and charitable *waqf* (*waqf* Khairi). Family *waqf* which is created for family members such as children, grandchildren and others while charitable *waqf* is purpose for charity which classified into two sub categories included nazir *waqf* and special *waqf* khairi [8].

In the aforementioned Conference Proceedings (1322H), some studies had discussed the ambiguity that many people have in perceiving the conventional trust and the *waqf*. In a capsule the conventional trust is not an Islamic *waqf* because most Islamic scholars agreed that there was lack of the main conditions of *waqf*. Some scholars argued that a trustee does not have full ownership of the trust so can acted as an agent. Furthermore, another reason that makes the trust is not a *Waqf* which beneficiaries of the trust are already defined by the law. Thus, the endowers wishes are not fully respected. Even though, the conventional trust looks very similar to the Islamic *waqf* but both are different included investment trust, charity trust and investment charity trust.

The trust is considered a legal entity that accountable for its actions and held liable. Furthermore, the law codifies the relationship of the trustee and provided with regulated authorities. In addition, if the trustee loses money due to any cause other than the negligence or gross negligence. Hence, the trust may act as a separate entity without the trustee being liable for such. The main characteristics of the Islamic *Waqf* as a special kind of benevolence perpetuity, and permanence of stipulations of the *Waqf* founder.

Most Muslim countries recognized the concept of legal personalities in their legislations and drafted their laws along such lines. Islamic jurists made the distinction and differentiated in form and substance from the individuals and shareholders who manage legal personalities. Based on the aforementioned definition Ahlia is a capacity that qualifies a person to acquire rights, conduct actions, bear obligations, and transactions that give the ability to produce legal affects. The hereunder characteristics are essential to the juristic person included perpetuates its legal status independently, right and can own property and obligations and enjoys the power of borrowing or taking loan.

Mansor et al. (2017) had studied new proactive reporting system for *waqf* based on Islamic accounting and integrated reporting framework. This study found *waqf* institutions also faced the risk of poor governance and accountability since no governing standards of reporting to externally report *waqf* performance and programmes and services delivery [9]. Most studies found there was variety in accounting practices among *waqf* institutions with no specific guideline in *waqf* report preparation and maintenance. This situation happened due to absence of accounting standard for *waqf* and accounting for *waqf* is important to improve *waqf* institution accountability [10]. In this study, the best method of governing of *waqf* accountability of *Majlis Nethara* would be determined.

METHODOLOGY

There are four interviewees that have been selected through consulting with bankers, business men, and academics which have knowledge and experience in the *waqf*.

The participant profiles were conducted as well as a thorough personality test was conducted. Nevertheless, the interviews were conducted permission to record was obtained and all four participants accepted. The duration for data collection began from March 2015 until May 2015.

There were three fundamental types of research interviews included structured, semi-structured, and unstructured. In this study, semi-structured method was used for interview. The latter method consists of several key questions to help define the areas to be explored but also allows the interviewer or interviewee to diverge to pursue an idea or response in more detail. Nevertheless, the aforementioned method provided a deeper understanding of the social phenomena of *waqf* as opposed to gathering the information via a purely quantitative method such as questioners.

In the interview, data was also collected through abbreviated notes in a hardbound note book. This method was considered as the initial “raw” field notes. Then, weekly revisions were made and compare contrast methodology was followed.

The interviews were divided into five main themes. First theme was consisted of a historical brief overview as per the interviewee’s opinion. Second theme had discussed the reasons behind non development of *Waqfs* in the current Islamic world. Third theme had debated the legal personality of *Waqf*. Meanwhile, fourth theme was discussed some legalities and last theme was lope whole in the Saudi system.

Content analyses was used either in an inductive or deductive way, however both follow the same process (preparation, organization, and reporting). This study was used the deductive approach because all four participants were from different sectors. The participants profiles are represented in Table 1.

Table 1. The Participant Profiles.

Participants	Profiles
X	A financier who founded an Islamic Trust in Labuan
Y	A finance lawyer who had some expertise in accountability
Z	A practising lawyer who was an expert in litigation
T	A CEO in a financial consulting firm with expertise in this field
A	A Sharia compliance consultant in the research department in the Islamic Development Bank "IDB" with rich background in the Waqf structure
B	Sharia compliance researcher in the IDB
C	The manager of World Waqf Organization in the IDB

RESULT AND DISCUSSION

Interview Result

The interview showed all participants had very similar views as per the history of *waqf*. In additions, all participants agreed on the collapse of Ottoman Empire was main reason for non-development of *Waqf* in the current Islamic world. However, participant X opinion was another major reason behind such was non-ability of an alien to own property in Makkah and Medina. Meanwhile, participant Y shared same opinion of participants Z and T. Participant Z mentioned non-accountability of *Majlis Nethara* and participant T also mentioned *Waqf* entities were embedded under the courts and not treated as separate entities such as corporations that not fast developed. Participant A mentioned that the lapse of corporate governance accountability within the structure of *Waqf*. Participant A also suggested that current method of governed the *Majlis Nethara* was no longer sufficient. In additions, participant B had view were different in the sense which major reason behind non-development of *Waqf* was the lapse of corporate governance accountability within the *Waqf* structure. Participant B suggested that current method of governing *Majlis Nethara* was no longer sufficient. Participant C was more practical which suggested that currently on hand and worked. Besides, Participant C was observed on *Waqf* as an investment and established many government Awqaf that had exceptions to the law.

For legal personality, Participant X mentioned Saudi Arabia did not treat *Waqf* as separate legal personality. For the mere technicality that not defined as a legal personality through regulation. Participant Y, Z and T considered *Waqf* was a legal personality due to practice. Participant A suggested that *Waqf* was subject to liability because *Waqf* was accountable for its debt and considered as legal personality. Participant B considered *Waqf* was legal personality but explained that separate entity that had no relationship with the Sultan during

Prophet's era. Meanwhile, legal personality under the judge and deewan in Egypt. However, after the colonization, *Waqf* period was cancelled and falls under the government.

For whole in Saudi system, participant X and Z did not discuss legal whole that the lawyers discussed. Participant Y mentioned SPV discussed under theme and suggested that accountability mechanism was almost not existent. Participant A suggested that lack of codification in Saudi system was the reason behind non-popularity in the *Waqf*. Participant B stated that every case needs a lawyer. Meanwhile, C suggested that the lawyer was specialized in *Waqf*.

DISCUSSION

Brief overview of *Waqf* according to the participant X suggested that *Waqf* was one of most important bricks of the Islamic financial system. However, the political changes in the last century affected the development of *waqf*. Nevertheless, some *waqfs* were still standing from the prophet. Another phenomenon that participant X discussed was the rapped development of *waqf* in the Islamic Jurisprudence until the Ottoman Empire. However, the lack of knowledge and current regulation or nonregulation is affected establishing new *waqfs*. Meanwhile, participant Y suggested that *waqf* was an entity that essential to Islamic finance unlike the trust which was a shield not an entity. According to participant Y, different between *waqf* and trust was trust is appointed to beneficiaries and *waqf* did not appointed beneficiaries directly.

Participant Z stated that the perception of *waqf* khairi is known as charitable endowment and *waqf* thari is known as family endowment which was overlap because the source of money is not clear. Participant T stated that the *waqf* is Sunna and stated that some of the conventional laws crippled the development of *waqfs*. In addition, participant A, B, and C suggested that *waqf* has been neglected by the private sectors as well as the conventional governments in the last couple of years after the colonization in the last century and after the relatively new banking system emerged. Furthermore, all participants agreed that in the case of charitable *waqf* which people were not enthusiastic because the banking system focused on risk and return and neglects the afterlife as well as the concept of freezing the assets for Allah. However, participants A, B and C suggested due to lack of codification people have lost interest in creating *waqf* for family endowment.

All participants agreed on the political factor after the Ottoman Empire collapse. Furthermore, all participants agreed that lack of knowledge and development of codifying laws in Saudi Arabia. However, participant X had established an Islamic trust in Labuan Malaysia and lobbied for the Islamic trust law in Malaysia, because passionate about Islamic finance there. Nevertheless, participant X thought that one major obstacle in development of *waqfs* in Saudi was the non-ability of a foreigner–aliento own property in Makkah and Madinah. Participant X observed that the regulations in the Islamic countries was not very affective because falls under the Ministry of *Waqf* or *Awqaf*. As mentioned earlier, participant X had adopted another method and abstained from called *waqf* to avoid potential conflict. Participant Z thought that non development because the lack of accountability or

regulation under the accountability of the *Majlis Nethara*. Participant T's opinion in the matter was the lack of development was for administration, population perception and legislative reasons. Furthermore, participant T stated that because the *Waqf* entities are embedded under the courts and are not treated as separate entities such as corporations *Waqfs* were undeveloped in the expected manner.

Furthermore, participant X mentioned the *Waqf* in Saudi Arabia did not have a legal personality. However, the trust had established in Labuan has a separate legal entity and governed by a different set of laws that gave the trustee and initiator of the trust much more flexibility which renders the trust as an investment and treats as a company. Besides, participant Y discussed that since the *Waqf* has financial liability and can borrow and lend as a company which rendered as a legal entity with legal personality. Participant Z gave another reason in established as legal entity due to existing of birth certificate which considered as legal personality. Hence, waqif endowed the *waqf* became separate from their financial liability which also considered as legal personality due to ability to borrow and lend. Participant T suggested that law and financial corporations always treated *waqf* as legal personality which not an issue. Nevertheless, participant A, B and C agreed that *waqf* acted a legal personality in Saudi due to the practice. Both participant Y and Z had correlated between company's board directors and *waqf Majlis Nethara*. Participant Y suggested that the companies were responsible for the board of directors' actions that were within the scope of their published authorities in the official gazette. However, the company was not liable for any actions outside capacity. Participant Y also stated that *Majlis Nethara* was subject to preliminary and subsequent control. The courts control the real estate aspect. An example of the aforementioned was if the Real Estate was confiscated the Ministry of *Waqf* will receive the payment, and *Majlis Nethara* cannot act without the courts orders which cripples the development of the *Waqf*. For the mere reason of preliminary and subsequent control that many businesses without or within the *Waqf* accountability. Participant Z suggested that the rules be codified regarded the accountability of the *Majlis Nethara* and not be under one person, and it rather be under a committee. Participant Y said that control and transparency need not be under a certain court or entity but rather a committee. The transparency should be developed in such a sense that measures to same accountability standards of the board of directors set forth in the Saudi Companies law. Participant A, B and C were working in the IDB and have exposure around the world makes more flexible in the sense that considered that no problem did not have a solution.

According to participant Z and Y, the *waqif* had the ability to establish a special purpose vehicle (SPV) with shares that were owned by the *waqf*. Furthermore, this SPV was not subject to the same control by the judge. The aforementioned was an excellent example of the people stepping forward and tried to maximize the profit of the *waqf*. According to participant Z and Y, the *waqf*'s essential to generate benefits.

Majlis Nethara Governance Template Agreement

Waqf is an important factor in the socio-economic development of the Islamic *ummah*. Nevertheless in 2015, Muslims were also governed by the law and Islamic Jurisprudence. Furthermore, Saudi Arabia considered the Quran and Sunna was a source of law. The set forth hereunder were suggested guidelines that the *waqif* or endower set forth in *Shart al Waqif* document. In addition, this study suggested that the endowers wishes were documented and authenticated at the notary public in a manner adopting. All of the hereunder upward accountability methods were derived from the aforementioned law.

The aforementioned had suggested that the trustee in *Majlis Nethara* be treated like a member of the board of directors in the joint stock company in terms of having a minimum quorum of three Trustees. Moreover, aforementioned also suggests that the term of the trustee's appointment shall not exceed three years. However, the trustee always eligible for re-appointment unless negligent or incompetent. The document was the termination clause of the agreement. The beneficiary was given the right to terminate at any time, and the trustee the right to resign through written notice. Besides, the suggested timeframe may be adjusted in accordance with the will of the beneficiaries.

The trustee be negligent and only be recused from their duties as a trustee and no punitive damages will be implemented. The aforementioned was optional and suggested because will provide the endower and the beneficiaries' tangible guarantee that the trustee will act their best interest. The aforementioned was clearly governs the conflict of interest.

The aforementioned was governs the accountability of the trustee toward the beneficiaries in the same manner that the board of directors was liable to the shareholders in the joint stock company. The aforementioned was governed the accountability of the trustee toward the beneficiaries in the same manner that the board of directors is liable to the shareholders in the joint stock company. The aforementioned Para also derived from the joint stock company to govern the financial liabilities of the *waqf* via corporate governance. Furthermore, the aforementioned was governs the benefits of the trustee in the same manner used in the joint stock company. The aforementioned was the core of accountability makes the trustee liable for punitive damages. Besides, the aforementioned also discussed the case if the majority votes on a failed decision, the dissenting trustee shall be exempted from such liability. The person who did not accept the decision is not liable. The trustees need to decide their financial for the *waqf* through recorded meetings. The *waqf* also have right to file liability claim against the trustees for wrongful acts that caused prejudice to all beneficiaries. Meanwhile, the trustee needs to maintain strict confidence in all matters related to the *waqf* included all documents, data and information. Both parties might terminate their relationship with written notice that the trustee need three months written notice and one month written notice by the beneficiaries.

CONCLUSION

In conclusion, all participants were optimistic towards developing the *waqf* institute in the sense that observed as core puzzle in the Islamic financial

system if governed correctly. However, the participants also agreed that the current *waqf* was vastly mismanaged. Another interesting finding was that the *Majlis Nethara* was not required to publish their financial statement which leave room for manipulation.

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