Trusteeship of an Endowment in Islamic Law: Theory And Practice

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

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

1. Introduction

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

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

2. The Office of a Trustee

In the Islamic Law of Endowment it is a requirement that a trustee is appointed when an endowment is made, and this is based on the Tradition of Umar in which he appointed his daughter, Hafsa, to the office of the trustee. Al Naawawi mentions in his book Majmu’ al Ahadith that all the companions of the Prophet who made an endowment designated someone to manage it. These reports form a concrete evidence for the classical jurists in all of the schools of law to establish the need of the trusteeship entity in an endowment. However there are disagreements among the jurists and some technical issues regarding as can be found in later discussion.

A. Qualifications

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

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

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