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# Creation and Management of Lease of *Waqf* Properties in Sri Lanka: Issues and Challenges

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**Abstract:** Throughout Islamic history, *Waqf* (Islamic endowment) has played an important role and gives positive impact on the community, especially on the socio-economic aspect. This has been made possible by having appropriate management and financing of the *Waqf* properties in order to improve the socio-economic growth of the Muslims. However, the implementation and management of *Waqf* property in Sri Lanka have witnessed a considerable deterioration since the last amendment of the *Waqf* Act in 1982 but not all. This study analyses the *Waqf* management in Sri Lanka concerning the development of leases of *Waqf* property. It discusses the application of the current *Waqf* lease and identifies the contemporary challenges as well as issues of the *Waqf* lease Act and its practices. It adopts a doctrinal analysis of the primary and secondary data and documents including statutes, practices, case law, and reports. The findings of this investigation show there are positive and operative management of *Waqf* lease, but overall awareness and specialist understanding are also important since *Waqf* lease requires sustainable support and cooperation from the community, private sector and the government.

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## 1. Introduction

*Waqf*, an Islamic endowment institution, is the caretaker of the various religious properties. This institution is entrusted by the law and people to hold various assets and land such as for mosques, institutions of Islamic culture, educational establishments, and other income-generating properties. The institution of *Waqf* assists the societies in carrying out their responsibilities, hence playing a significant role in ensuring the growth and sustainability of the social and economic advancement (Sadique, 2010). Furthermore, the evidence of *Waqf* institutions perform as the foundation of social welfare organizations exist in Islamic law. Moreover, effective, systematic, and efficient *Waqf* property administration will contribute to the community's socio-economic development. *Waqf* property management can be targeted at both, the operational and senior management levels (Maamor, 2018). The successful effects and beneficiaries on the socio-economic and its society have been linked to the proper management and development of the *Waqf* properties. This is to execute or control the *Waqf* property in order to achieve some specified objective with very skillful management.

Furthermore, the key principle of *Waqf* property administration and supervision is to fulfill the objectives such as financial support for mosques, institutes of Islamic religious

bodies, and the poor and needy sectors of society. As a result, a substantial economic and social institution can be substituted by *Waqf* itself for the purpose of generating economic activities, while major advantages can flow to the disadvantaged portion of society. However, the contemporary practice of the *Waqf* property is no additional assistance for economic development and advantage for portion of society in Sri Lanka. This can be seen particularly in the management of the *Waqf* property including Islamic lease contract, its performance, infrastructure system which is not a well-recognized *Waqf* property management currently in Sri Lanka. Thus, primarily, there are various legal and practical concerns and challenges in the effective management of *Waqf* lease contracts.

This study investigates the issues and challenges of the current practice of lease over *Waqf* immovable properties (land and premises) in Sri Lanka. The problem is that while *Waqf* and its legal framework are subject to *Shari'ah* principles that govern *Waqf* jurisprudence, contemporary practice of *Waqf* particularly in Sri Lanka is being practiced without considering in the dictates of *Shari'ah*, namely as a general lease practice. Islamic lease or *Ijārah* transaction model itself has rules and regulations under Islamic law. Therefore, there is a need to have a new dimension of the legal framework for the management of *Waqf* which will contribute to socio-economic growth. This discussion aims to highlight the significant of *Waqf* lease, *Shari'ah* concerns as well as legal issues and challenges in its implementation.

## 2. *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 the voluntary and irrevocable dedication of one's wealth or a portion of, immovable property and the movable property. For example, a dedication of a piece of land or a horse and cow-like cattle, as well as its disbursement for *Shari'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. This is supported by the *Hadith* of Khaybar narrated by al-Bayhaqiyy that, "Nāfi' Ibn 'Umar (RḌ) said: 'Umar came to the Messenger of Allah said: 'O Messenger of Allah, I have found land in Khaybar, Wāllahi (my swear on Allah), I have never acquired property more valuable for me than this, what do you command me, he said: "If you like, endow it as a *Ṣadaqah* for them and hold their origin". Thus, 'Umar (RḌ) did not sell, donate or inherit the land, but he donated charity to the poor people, the needy, and the traveler, and in the way of Allah" (Abu Bakkar al-Bayhaqiyy, 1996, *Hadith* No. 12012, Vol. 9, 134.). This is very important *Hadith* related to *Waqf*. It is the first *Hadith* which provides the rules and regulation on *Waqf*. This *Hadith* marks a primary legal framework of *Waqf* in Islam. Moreover, its disbursement of returns is done following the endower's wishes. In contrary, charity is a much wider concept. It encompasses grants alms inheritance and even *Waqf*.

## 3. Islamic Laws on *Waqf* property

*Waqf* (endowment), plural *Awqaf*, is a religious institution. In general understanding, it is a perpetual charity (*Sadaqāh Jariyy'ah*) by a Muslim of a specific corpus or property for religious purposes. This general understanding has changed due to various methods of new activities carried out in implementing and managing *Waqf*. The real purpose of donating by way of *Waqf* is to obtain value in both worlds. This is proven by one of the Sunnah of Prophet Muhammad (SAW), where he said: "If a person dies, his work is discontinued and finished, except for three: a continuing charity, or knowledge of the righteousness, and the supplication of mankind" (Muslim bin al-Hajjaj, *Hadith* No. 1631.). Islam focuses on prioritizing social welfare by paying the greatest attention to poor people in comparison to other religions. Thus, all Muslims should care for others to not only benefit their piety, spiritual and theologically wellbeing but also for the benefit of society. This is

because it is a basic rule for human beings to behave according to the ways mentioned in the *Qur'ān* and the practices of Prophet Muhammad (SAW) (Fawzer, 2011).

The Islamic jurists have developed the details of *Waqf* law under the principle of *Shari'ah* perspective based on the primary sources of the *Qur'ān* and *Hadith*. These jurists' views on *Waqf* are elicited firstly from the primary sources and secondly from the *Ijmā'* (consensus), *Qiyās* (analogy), *'Urf* (custom), and *'Istislah* (public good) (Abbasi, 2013, 37). According to the traditional legislation of *Waqf*, there are three general important characteristics of *Waqf* property. These are mainly perpetuity, irrevocability, and inalienability. As three characteristics are obligations on *Waqf* property to fulfill the objectives. These explanations are as follow:

- 1) Perpetuity: - this is one of the most significant characteristics of *Waqf* property. The meaning of perpetuity here is that naturally, the endowed property must be perpetual and endless, hence, the perpetuity is fixed. It is elicited in a *Hadith* of Prophet (SAW), where he said that "when sons of 'Ādam die, all their good deeds will stop, except for three things; firstly, his donation, which people continuously use; secondly, knowledge, which is continuously used and benefited and, thirdly, good sons/daughters who always pray for his/her good" (Muslim bin al-Hajjaj A. a.-H., *Hadith* No. 1631). The part of this *Hadith* "his donation, which people continuously use" is proof of the endowment which continually uses and gets benefits for the beneficiaries, it also should be perpetual.

Accordingly, the majority of Muslim jurists agreed that the character of perpetuity is important in the *Waqf* property, and it should be always possible to use permanence. This opinion was also clarified by al-Sharbīniyy, who said that one of the significant conditions of *Waqf* endowment is the perpetuity of the property, and it is intended for permissible use (al-Sharbīniyy, 1995, Vol. 2: 511). Hence, the *Waqf* property cannot be temporary in nature (Mohamad & Abdul Kader, 2017), but it is always as continually on the beneficiaries and needy people.

- 2) Irrevocability: - this is the second characteristic of *Waqf* property that is irrevocability which is implied by jurists such al-Shāirāzī said that the *Waqf* is not valid except for a specific thing, as long as it is not stable because this is a condition on its validity of property for *Waqf* (Ibn Yūsuf al-Sharbīniyy, 1994, Vol. 1, 575), However, the property of *Waqf* is regarded invalid if there is any clause in the *Waqf* deed suggesting any inference of revocation to the owner. The property is assumed to have been moved to the ownership of Allah (SWA), thereafter making the declaration irreversible (Mohamad & Abdul Kader, 2017).
- 3) Inalienability: - the third characteristic of the *Waqf* property is inalienability. It means that once the endower has committed his property for endowment it comes to be like a "frozen asset" (Mohsin, Volume 7, Issue 2, 2012). This could not be subject to sale, mortgage, disposition, gift, inheritance, attachment, or any alienation whatsoever. This is elicited from the understanding of the *Hadith* and practice of companions of Prophet (WAS) that the characteristic of irrevocability of *Waqf* is indicated. This is supported by the *Hadith* of Khaybar this is narrated by al-Bayhaqiyy states that, "Nāfi' Ibn 'Umar (RD) said: 'Umar came to the Messenger of Allah said: 'O Messenger of Allah, I have found a land in Khaybar, Wāllahi (my swear on Allah), I have

never acquired property more valuable for me than this, what do you command me, he said: "If you like, endow it as a *Ṣadaqah* for them and hold their origin". Thus, 'Umar (RD) did not sell, donate or inherit the land, but he donated charity to the poor people, the needy, and the traveler, and in the way of Allah, and the slave, and there is no misdemeanor for those who are in charge of that (property) to eat from some of it, then it was recommended to give it to Ḥafsah (RD), the daughter of 'Umar (RD) (to manage), then to the elders of the family of 'Umar (RD)" (Sunan al-Kubbra lil-Bayhaqiyy, 1996, Ḥadith No. 12012, Vol. 9, 134.).

From the *Ḥadith*, the words "must not be sold or inherited or given away as a gift" elicited on the legislation related to the irrevocability of the *Waqf* endowment, it is one of the qualities that has essential to being packed with the property.

Hence these characteristics of the *Waqf* property are thoroughly intertwined. Furthermore, these are related to the necessity to preserve and protect the *Waqf* properties continuously to benefit the beneficiaries and needy public. According to a study of classical jurists' early works, the majority of Muslim jurists agreed these three qualities of *Waqf* property should be always considered, where the *Waqf* properties have been benefitted by such lease (*Ijārah*), *Salam* and other investment methods ((AAOIFI), December 2015: 824-825). Therefore, the consideration of these characteristics is important to the development of *Waqf* properties including lease.

#### 4. The Modes for *Waqf* Lease or *Ijārah*

Lease refers to 'hiring' and '*Ijārah*' in Islamic jurisprudence as well as product in Islamic banking and finance (Taqi Usmani, 1998. 109). In the literature, objective of these two contracts have been stated similarly (Shamsu al-Diyyin, Pp. 15). This study attempts to investigate the traditional and contemporary methods of the lease relating to *Waqf* and their practices in Sri Lanka.

##### 4.1. Contemporary Model of Lease (*Ijārah*)

*Ijārah* is derived from the Arabic word "*al-Ijārah*", which means "to give an asset or something on rent" (Taqi Usmani, 1998). Another interpretation is "providing goods and services for a wage on market price," which is used in Islamic jurisprudence ("*Fiqh*"), also this is a model of financial product for Islamic banking and financial institutions in the contemporary economic world (Jamaldeen, 2012). Similarly, the technical meaning of Islamic jurisprudence is an agreement for the hire of a person or service or usufruct of a property that can get the usufruct from that. The practical experience of *Ijārah* in the current practice is that this usually refers to an Islamic leasing contract of land, equipment, or property which is leased to a lessee and client for a stream of payments of rent (Fatma). Hence, in our discussion, *Ijārah* is a contract between a lessee, who is the enjoyer of the usufructs of the property, and a lessor, who is the owner of the property, where he/she agrees to a rental amount that should be paid by the lessee for the whole period of the lease. This type of contract is *Shari'ah* compliant and permissible in Islamic law.

*Ijārah* as practiced in the development of *Waqf* is required to be undertaken by the *Mutawalli* or manager, trustee, or caretaker in a proper way that is accepted by the *Shari'ah*. The traditional methods of financing such as *Ihtikār* and *Istihkār* (It mean a long-term lease contract) would most likely be insufficient to successfully reap benefits in the contemporary world. For this reason, various scholars, and those in charge of *Waqf* institution or trust properties continuously work on how to develop and upgrade new financing methods in the light of *Shari'ah*. Hence, new alternatives and more advanced

financial models which are Shari'ah compliant should be promoted and reorganized by Islamic jurists.

One of the traditional models for the financing of *Waqf* land is the *Ijarah* (lease) model. Sadique noted that various older modes had been adopted for investment and financing by the trustees of *Waqf* (Sadique, 2010). These traditional investment methods include the lease of land and buildings for rent to earn income as well as agricultural lands for farming. Al-Nawawi stated that the *Mutawalli* is the ruler and decision-maker for the lease of *Waqf* land as an owner of the property. As the *Nāzir*, he can lease the *Waqf* to earn an income from the rent to be used by the beneficiaries (al-Nawawī, 1991, Vol. 5, 351). However, the literal meaning of these words *Mutawalli* and *Nāzir* is the same (Ibn 'Ābideen, 1992, Vol. 4, 458). These words are currently used to apply to different situations. This inconsistent practice in the application of *Mutawalli* and *Nāzir* is that the *Mutawalli* may monitor the *Waqf* property or may appoint a person as a *Nāzir* for the *Waqf* affairs.

In determining the lease period, al-Bagawi says that the earlier jurists identified the maximum lease period is limited to three years because it has effects on the payment of the lease practically (al-Nawawī A. Z., Vol. 15, 49). Thus, based on al-Bagawī's opinion, the lease duration should be just three years, and this lease period of the *Waqf* property could be included as a legal agreement under the Shari'ah perspective where the parties have to practice the lease contract.

However, the issue on the period of three years and above period for lease agreement is preferable in certain situation, for example, in *Istisnā'a* and Build Operate Transfer (B.O.T) agreements. These kinds of financing on the *Waqf* property are applicable according to the principle of *Shari'ah* ((AAOIFI), December 2015: 824-825), should be permissible in order to *Ḍarūrah* and *Maṣlahah* (Public Interest). Otherwise, the lease activities will be only for short term thus there will be less benefit and may not be preferable for big projects by developers. Therefore, in this kind of transaction, perhaps, it could be 10 years or more depending on the nature of the development. This is only viable based on the *Ḍarūrah* and *Maṣlahah*. In short, the *Waqf* lease either 3 years or more and all its terms and conditions should be compliant with the Islam law guideline and adhered to by both respective parties during the lease period. Hence, the lease must be Shari'ah compliant unless it is in a very exceptional circumstances on the basis of the public interest (*Maṣlahah*).

As for payment of the rent, Ḥanafi texts suggest that the payment of the lease of *Waqf* should be based on the current market rate, which is known by "*Ujrah al-Mithil*" in Islamic law. Their opinion states that the *Waqf* lease cannot be valid if it is not at the market rate. The manager or those who are in charge of the *Waqf* property can fix the market rate. However, if the payment of the lease is just for the normal rate, then it will be not valid in the consideration of the lease rate under the *Shari'ah* perspective. The lessor should pay the rental based on the market price, and it does not matter if the rate is higher or lower than *Ujrah al-Mithil* (Ibn Nujaiyym, Vol. 7, 299).

Thus, Sadique suggests that the adjustment of the rental rate is considered to be able to influence the changing market price of lease land (Sadique, 2010). Similarly, it is a significant fact that the rent will increase if the influence market rental moves up considerably. Certainly, in the current practice situation, rentals seem to have remained unchanged for a long period of time. Furthermore, the payment of market rental is impossible when finding a lessee is willing to pay under one arrangement.

Hence, no matter what kind of lease contract available in market practice, a fresh agreement of the lease for *Waqf* property could cast a follower over all the rules and regulations of *Shari'ah* guideline. Similarly, there may consider the market practice of lease as a convention custom (*'Urf*) among the people and their society.

#### 4.2 Classical Model of *Ihtikār*

*Ihtikār* is derived from the Arabic term "*al-Ḥikīr*", also this is called by *Istihkār*. It means a long-term lease contract intended to keep and protect the land after donated as a *Waqf*, from being made a gift, inherited and misused, for the project of construction and agriculture planting or any one of two contracts respectively ('Ābidiyyn, 1995, Vol. 6, 309). *Ihtikār* is the first mode of the lease in classical jurists and it is developed and practiced in the middle of the third century of Islamic years in different modes of financing (M.I.A. Mohsin Et Al, 2016). As well as, it is adopted as the long-term lease contract in the financing of the *Waqf* properties.

According to the early works of classical jurists, the Muslim jurists agreed that the *Hikīr* (long-term lease) is permissible according to Islamic laws. Moreover, several important obligations are the requirement to fulfill the valid contract of the transaction. Examples of these obligations areas long as the rental of all periods is paid and depending on how long the property has to be rent, the rate could be based on the market rental rate (*'Ujru al-Mithli*) (*al-ʿAlāqāti al-Khariyyah*, 2017, Vol.3, 15). Also, the contract of *Hikīr* (long-term lease) should be approved by the regulator such a *Qāzi* or *Hākīm*. The lessee (*Mustahsir*) could pay the rental immediately, which is on the agreement day, the amount that has equal value or approximate value of the *Waqf* property, and he is also required to pay a small rental annually to the utility of *Waqf* property or if he wants, he can spend the amount of rental on its beneficiaries. After the lease agreement with the *Waqf* property, if it is destroyed by any natural disaster, the school of *Shāfi* said that the lessor should pay the previous period of its rental because the contract of lease was a viable transaction (Ibn Ḥajar al-Hāitamiyy, 1983, Vol. 6, 241). The rental of lease may be fixed based on the property and it does not consider the period that either the period is long or short. Likewise, in the case of a plantation of any agriculture in the *Waqf* land after lease agreement, the *Shāfi* school stated that if a lessor made a condition after the agreement that the cost of plantation of agriculture will cover from the profit of the *Waqf* land, the condition of the *Waqf* lease agreement should be invalidated according to Islamic law (Ibn Ḥajar al-Hāitamiyy, 1983, Vol. 6, 241).

However, contemporary Muslim scholars stated that there is a weight of the advantage and disadvantages of the leasing method of *Hikīr* contract. Accordingly, the advantage of the *Hikīr* is clear that it enables the *Waqf* property to get a sum of money that is nearly equivalent to the value of the property. The disadvantage of that, it actually surrenders all rights of utilizing the *Waqf* property in the future (al-Zarqa, 43-44). Although, instead of the sum of money on behalf of the *Waqf* property from advantage is emphasized to think the lessee to control the property as his own. This is also *Sharī'ah* non-compliant under the guideline of the Islamic lease contract. The reason is that when the donor endows his property as *Waqf*, the ownership of the property transfers to Allah (SWT) automatically. Therefore, the surrendering of all rights of the *Waqf* property based on the sum of money is a non-*Sharī'ah* complaint.

#### 5. *Ijāratayn* (Dual Lease)

*Ijāratayn* (dual lease) method is another financing mode of *Waqf* property which was suggested by the Muslim Jurists in the early time. This mode has become popular during

the Ottoman empire. The reason was that the current capital of Turkey, Istanbul was affected by the large-scale fires and destroyed a large number of *Awaqaf* properties and the environment (Sadique, 2010, p. 81). Based on the dual lease "*Ijāratayn*" agreement and its period's structure, the school of Shāfi literature stated that if the lease period of an endowment is used for ten years continually in the different of the ten lease agreements, so, each contract has been assumed for every year with a rental for each year. In this situation, the entire lease is valid under the Islamic point of view (Ibn Zakariyyā', 2001 Vol. 5, 390). The summary of this statement has been suggested by Sadique on the dual lease agreement that if this lease contract annually renews, then this should be avoided violation of the prohibition on the sale of *Waqf* properties and their long-term lease. This is a kind of protection from violation of the restriction on the sale and long-term leasing of *Waqf* properties although it is an alternative model to finance reconstruction (Ibn Zakariyyā', 2001 Vol. 5, p. 81).

## 6. Sri Lankan Lease agreement

Sri Lankan common law recognizes the concept of a lease. This type of contract is accepted from the local law (Roman-Dutch Law) ((SLRPCLD), n.d.). The lease agreement and its related laws and regulations are legislated by the Finance Lease Act (FLA) in Sri Lanka. Under this Act, there are several rules and regulations with regards to the body and person who shall make a lease contract such as the requirement of certificate of registration issued by the FLA.<sup>1</sup>

Generally, Sri Lankan lease provision makes the following matters: (1) period of the lease (2) security deposit (3) rental and how and when payable (4) responsibility for repairs (5) responsibility for payment (6) agreements of lessee (7) contracts of the lessor and mutual covenants ((SLLPL), 2015). Furthermore, certain legal requirements must be followed when it comes to leasing. According to the Prevention of Frauds Ordinance, no promise bargain contract or agreement for establishing an interest in land, other than a lease at will or for a period not exceeding one month, shall have legal force or effect unless it is in written and signed in the presence of a Notary and two witnesses. The rules governing significance of the lease of point of view under the registration of document ordinance, the registration of property lease falls under the land registry.

With respect to FLA<sup>2</sup>, three responsibilities are imposed on the lease as followed, and this is with in order to the utility of property given by the lessor: (a) the lessee shall take care of the equipment that is provided under the finance leasing; (b) the lessee shall use the property that is provided which for the purpose it is provided; and (c) the lessee shall, subject to fair wear and tear and any modification agreed to by the parties to the finance lease, keep the property that was provided in the condition in which it was delivered to the lessee.

According to the FLA, when the lease contract ends, the lessee is required to return the leased property to the lessor in such conditions as specified in Section 12 (c).<sup>3</sup> Where the lessee did not return the leased property in such a way, the lessor is granted the right to recover possession of the property.<sup>4</sup>Moreover, regarding the rental fee, the lessor is en-

<sup>1</sup> Section 2, Finance Leasing Act.

<sup>2</sup> Section 12, Finance Leasing Act.

<sup>3</sup> Section 15, Finance Leasing Act.

<sup>4</sup> Section 15 of the Finance Leasing Act.

titled to request accelerated payments besides failing the rental payment of such accelerated payments. In the event of failure to pay the rental, there is an option for the lessor to terminate the lease agreement and recover the possession of the property (Section 20).

Based on the recovery possession of the equipment, the FLA said that Under Section 27, the lessor who gains the right to recover possession of equipment under this Act or a financing lease clause, may; -(a) "the lessor has to notify to in charge of the officer in the area of the police station within which the equipment is located; (b) Obtain the assistance of the police officer to prevent a breach of peace in the exercise of the right;(c) And the lessee can recover possession of the equipment from the place where it is found, if it is not on the possession of any particular person, without the resistance from any person. Where the lessor fails to recover possession of this equipment under this Section. Then the lessee is entitled to make an application to the District Court. This petition and affidavit are based on the respondent and contain the date of the finance lease, and the circumstances constituting the default by the lessee and accompanied by a certified copy of the Finance Lease.<sup>5</sup>

## 7. The Status of Lease of *Waqf* property under the Sri Lankan *Waqf* Legal System

### 7.1 *Waqf* Legal Framework in Sri Lanka

The first legislation of Muslims laws in Sri Lanka was the Code of Muhammadan Laws which was introduced in 1806. However, it did not cover *Waqf* or Muslim charitable trusts and these related legislations. The statute covered Muslim marriages, divorces, and inheritance. The first attempt to introduce the *Waqf* legal framework in Sri Lanka was done in 1931. The legislation was passed as an ordinance by the Muslim representative of the Legislative Council. Prior to this enactment, *Waqf* was governed by the Trust Ordinance, 1917 as a Charitable Trust. In 1921, some issues were identified and resulted in the introduction of another Ordinance. Mahroof M. M. explained the need for a separate ordinance for *Waqf* since the Charitable Trust Ordinance of 1917 was initially adopted from the Indian Charitable Trust Act and The English Trustee Act. Therefore, it had several issues and challenges. For instance, the manager (*Mutawalli*) of the trust cannot manage the *Waqf* properties directly. The manager, however, can manage the person who is in charge of the Mosques. Therefore, the 1931 Muslim Charitable Trust or *Waqf* Ordinance came to fruition. Nevertheless, this Ordinance too was not comprehensive enough to manage *Waqf*.

Having acknowledged the shortcomings of the Muslim Intestate Succession and *Waqf*, Justice M.T Akbar recommended the establishment of a special committee. In 1952, a committee consisting of a representative from Muslim Parliamentarians and Senators was formed to examine the issues comprehensively. As a result, the Muslim Mosques and Charitable Trusts or *Waqfs* Act (No.51 of 1956) appeared as the first legal document providing a preliminary legal framework for *Waqf* and trusts in Sri Lanka. This regulation came into effect in 1957.

The governing body of Muslim Mosques and Charitable Trusts or *Waqfs* Act (MMCTWA) came under the Department of Muslim Cultural Affairs and was managed by the office of the Commissioner. The implementation of this Act proved to be difficult after it came into effect. Lack of manpower resulted in a gradual decrease in the litigation of *Waqf* properties. At the same time, Muslim scholars disputed the Act as it did not fully reflect the *Shari'ah* principles.

<sup>5</sup> Section 28 (2), (3), Financing Leasing Act.



This Act was amended twice since then, in 1962 and 1982. Hence, the current law of MMCTWA in Sri Lanka is Act No. 33 of 1982. The major improvement in 1982 was to establish *Waqf* Tribunal to settle disputes regarding *Waqf*. The introduction of the Tribunal was a visionary effort done by the government in 1982 while such tribunal may be still an early bell in some Asian countries. Prior to this amendment, the hearing took place at the District Court where the *Waqf* property was located. The major drawback was some of the judges primarily lacked knowledge in *Shai'ah*. Hence, there was a need to separate the *Waqf* related disputes from the District Court. Therefore, the Honorable Minister M.H. Mohammed brought this amendment and passed it in the parliament to settle *Waqf* Tribunal under the Muslim Mosques and Charitable Trusts or *Wakfs* Act (No.33 of 1982). The purpose of the establishment of the *Waqf* Tribunal was to resolve all disputes relating to *Waqf* properties under the *Waqf* Act. The first *Waqf* Tribunal was established in 1985 in Colombo, the capital of Sri Lanka.

### 7.2 Lease of the *Waqf* property under the *Waqf* Act in Sri Lanka

By the introduction of the MMCTWA, all mosques or any other Muslim shrines and places of religious resorts, whether incorporated or not, come under the purview of MMCTWA. MMCTWA also prescribes the powers, duties, and functions of the trustees of registered mosques and Muslim Charitable Trusts or *Waqfs* (I. Zarook, 2018, p. 07).

According to *Waqf* Act, the *Waqf* lease legislation of Sri Lanka states that the trustee or trustees of a mosque, as *Mutawalli* or manager, has a right to lease the *Waqf* immovable property that is registered under the MMCTWA. They may lease all property from time to time, or any of the property vested in such (Section 16) that this provision states that the movable and immovable property may finance on any income, such as rents or profits, generating investment and this income made for the use of religious ceremonies such mention in Section 34 (1) (f).

The Act elaborates on when and what kind of property can be leased on the lease agreement. Accordingly, the trustee shall not lease any such immovable property without the previous approval of the *Waqf* board that its function is as a regulator of the *Waqf* law, and it related to the *Waqf* matters. As well as the immovable property shall not be granted in favor of any trustee or in favor of any person in whom any such trustee is directly or indirectly interested. However, the *Waqf* Board is satisfied that the lease of the *Waqf* property has been in the convention of the preceding provision of this Section. Thus, the *Waqf* Board must direct an authorized officer to institute a legal proceeding in a competent court to declare the lease null and void and to recover possession of the property of *Waqf*.<sup>6</sup>

## 8. Analysis and Findings

The *Waqf* and Muslims charity legal framework in Sri Lanka has gone through several amendments in order to protect and enhance the management of *Waqf* properties and to execute the objectives set by the endower (*Waqif*). This effort is commendable as the legal framework is developed in a minority Muslim country which represents 10% of the population. However, there are several issues and challenges in the application of the Act and thus there is a need to consider revision of the Act for further improvement.

Firstly, there is no clear definition of *Waqf* in the Act. Having a clear definition of *Waqf* is necessary to differentiate *Waqf* contract from other similar acts which are non-religious in nature. As practice in some other countries like Malaysia, *Waqf* is clearly associated with the element of '*Taqarrub*' or to get the blessing from Allah (SWT). Similarly, a clear explanation of *Waqf* shall distinguish a mere act of donation or trust or a *Waqf* which is subject to more stringent management as compared to another trust deed. The emphasis on the

<sup>6</sup> Muslim Mosques and Charitable Trusts or *Wakfs* Act, Section. 22 (1,) (2), and (3).

element of perpetual is crucial to ensure total protection of *Waqf* property and any change of use must be done with a proper procedure through *Istibdal* (change or exchange of *Waqf* asset). Furthermore, all *Waqf* properties come under the purview of the respective mosque's committee in that area. The wide authority and lack of monitoring have resulted in mismanagement of *Waqf* properties. This study reveals that most *Waqf* properties are given on lease and some of the agreements have not been renewed.<sup>7</sup> This has resulted in mosques collecting low rentals, which are significantly lower rates as compared to market rates.<sup>8</sup> In many cases, the lessee subleases the property and earns a significantly higher amount, and the mosque and its societies do not benefit from it. Often than not, the lessees who are also, the trustees of the mosques give more attention to their private dealings rather than acting to the benefit of the mosque. This results in a conflict of interest. Hence, for a better administration, the Act should specify who is eligible for the lease, matters on the bidding process of the lease must be clear, the renewal period must be transparent, calculation of lease amount and the prohibition of sub-lease must be made known, etc. The absence of all these has brought to the problem of mismanagement and other misconduct by the mosque committees or their counterparts.

The significant issue of lease is that the majority of *Waqf* properties have been leased for around 90 years of periods, apart from that, some of the lease periods are being not mentioned in the agreement especially.<sup>9</sup> Concerning this issue, it is irrational to say that the same security deposit payable payment for *Waqf* property from signing of the contract until the end of 90 years period. Sometimes the leased property has been subleased to non-Muslims. In this kind of situation, they have been permitted to rent the *Waqf* property neglecting the fulfillment of legal conditions which are ought to be completed for usufruct. Several practitioners have lack of knowledge of *Shari'ah* law has more emphasizing on how leased property is going to be used. Also, the payment or lease amount will be determined upon the establishment of the lease agreement. Once the lease deal comes into effect, the rental amount mentioned and mutually agreed upon for the lease period shall not be changed during the whole period.

According to the unchanged rental amount, this is a matter of great concern yet loss. Likewise, this practice is happening presently in one of the Sri Lankan Mosque that is located in the capital of the country. There are 72 shops under the management of the mosque, and those are registered under the MMCTWA. This lease contracts have been made around 25 years ago. Its rental amount has been decided approximately three hundred thousand (300,000) Sri Lankan rupees (LKR) for the total shops. However, after more than 25 years the existing rental rates of all the shops are the same rates as the beginning of the contract. In addition to that, there have been some cases that the first lessee has taken the shop under a lease agreement for a very lower rate, for an example 10 thousand LKR monthly, then the lessee subleases the property to another person for new rate of hundred thousand (100,000) LKR monthly. Once he receives the rental amount from the sub-lease then he settles his rental fee of 10,000 LKR to the mosque.<sup>10</sup> Due to that, he earns 90,000 LKR from the sublease contract, but there are no alternatives accessible to resolve such issues under the management of the mosque, *Waqf* Board, and the *Waqf* Act. This is a common phenomenon across Sri Lanka with regards to *Waqf* property.

Moreover, the researcher analyses a case study of a *Waqf* trust that has been endowed by Mahath Hajjar Maraicar Mohamed Ehuthar Hajjar in 1921. There are 12 types of *Waqf* properties, for instance, a farming lot, a piece of field, an undivided one three (1/3) shares

<sup>7</sup> This has observed by the researcher based on an examination and discussion with the trustee, manager and lessee of the *Waqf* properties.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

of piece of land, coconut trees plantation, and others.<sup>11</sup> During this endowment time, a trusty from his family shall be appointed as a *Mutawalli* or a manager by his deed, with the direction to look after and maintain the land and its income. Also, the benefits from the trust should be spent on the Madrasah<sup>12</sup> and taken over its financial expenditures, for example, payment for *Ustāzs* (religious teachers) who are teaching on the Madrasah, buying religious book for students and offering daily meals services for staff and students. Likewise, he attached a condition to his endowment that after his family member, was appointed as a manager, the properties should be managed by his male descendant or descendants of all or any of the trustees, and they shall be entitled to carry out the trust. As well as he further attached that the trustees or their successors shall not have the right to sell and mortgage the trust properties, also they do not have the right to let or lease all or any part of the lands at any time exceeding a period of five years.

However, currently, the trust and the *Waqf* properties are in under the control of one of his family members. Likewise, the properties have been divided among his children, and the same are being utilized by them as their own properties. Among this, a piece of field has been leased by someone, and the lessee said that the rent of the land will be deposited to the bank account of the trustee, who is one of the donor's family members. There is no proper system of transparency, rendition of accounts, or audit as required by the *Waqf* Board's guidelines and Act, also the lease period is more than ten years. In addition to that the Madrasah cannot function properly if it opens for five months and then closes down for another five months. Additionally, he fails to pay the salaries for religious teachers in good manner, to buy religious books for students, and neglects to keep the Madrasah's expenses completely up to date. Not only a single trust, but a number of other charitable trusts and mosques are also dealing with similar issues and challenges. Moreover, these are the general problems that have been spread like wild grasses across the Sri Lanka meantime.

Considering the trust of Madrasah, there are several challenges and issues could be highlighted such as the appointment of the trusty relating to managing and financing of the properties, auditing of the accounts, how to earn profits, to general profits and spending it in a right way to benefit overall, and the transparency issues.<sup>13</sup> Hitherto, there do not have any appropriate communication between the trust and *Waqf* Board. It can be expounded by this analysis the flaws in the existing implementation of the *Waqf* Act in order for the *Waqf* Board to make significant reforms in its administration, management, and development. Furthermore, Sri Lankan *Waqfs* Act has several issues that need to be addressed particularly in terms of administration, management, and development of *Waqf* properties and manpower.

The *Waqf* legal framework should be amended promptly in a comparable contact of practice of the contemporary world based on the *Sharī'ah* principle to overcome these critical challenges and issues. In addition, the Act must emphasize the special provision of development of *Waqf* properties under the Islamic laws. As well as immediately the Board should issue a circular on existing lease agreements stating that the contract of lease is not valid and dissolved, however, it should be renewed on a new contract. This contract could be based on a new security deposit fee, the rental rate is also based on the current market

<sup>11</sup> Deed of Trust endowed by Mahath Hajjar Maraicar Mohamed Ehuthar Hajjar, Mathirisa, Registration No: D 46, No.3891, Madrasah al-Sa'diyyah, located in Kinniya eastern province was established in 1899.

<sup>12</sup> The Madrasah which is known by al-Madrasah al-Sa'diyyah, this Islamic religious study center, located in Kinniya eastern province was established in 1899. The financial expenditure of Madrasah was in several manner such as by rich people, collection the money on a after Jumma'ah prayer time on every Friday and income of *Waqf* properties (M.N.M. Kamil Asad, 2007, Vol 1 4: 1 & 2, 21 Mar).

<sup>13</sup> Ibid.

practice, and this period of the lease should be three years, but it is considerable until ten years based on the projects.

Moreover, the *Waqf* Board should open branches in every province of Sri Lanka or in a place that where the majority of Muslim people are living in. It is a very useful manner to solve the problems related to the *Waqf* property and control the managers or *Mutawallis* who are mismanaging the properties. Moreover, the Board should appoint a *Shari'ah* advisor in every committee of trustees and on the group of managers or *Mutawallis*. Otherwise, at least they must assist *Shari'ah* scholars and the *Shari'ah* related awareness program so that the institution of *Waqf* can be governed from *Shari'ah* perspective. The *Waqf* Board by itself, its department, or its in charge person who is an expert on an audit and accounts, should do audit and account all trustees' and mosques' accounts, that have the *Waqf* properties, every six months as mentioned already in *Waqf* Act.

There is no proper accounting and auditing of *Waqf* properties and their financials (Jaldeen, 1993). This should be made in a systematic manner and transparent. This information should be accessible to the public. This transparency will increase the accountability of the trustees and other the management Committee thus builds the trust of the people. The Act should also provide for the tax exemption in order to encourage more members of society to contribute to *Waqf*. It is important to emphasize that *Waqf* is not just limited to Muslims, non-Muslims can also contribute. All members of society, irrespective of which background they belong to, can contribute and the benefit should also reach all parties. No race or religion shall curtail the benefit of *Waqf*, but *Shari'ah* determines that the *Mutawalli* must be a Muslim and the activities must be *Shari'ah*-compliant.

## 9. Conclusions

This This paper elaborates on the legal framework of *Waqf* lease in Sri Lanka. Moreover, this study analyses the Muslim Charitable Trusts or *Waqfs* to give insights into the strength and weaknesses of the *Waqf* act. The *Waqf* is a primary vehicle for poverty alleviation in Islam. Although in the case of Sri Lanka, the institution of *Waqf* has not entirely been able to support the whole society, it has contributed considerably to the Muslim community. Furthermore, whereas the degree of transparency in *Waqf* law and management varies, it may be the case for all *Waqf* institutions in Sri Lanka. Hence, Sri Lankan *Waqfs* Act has several issues that need to be addressed particularly in terms of administration, management, and development of *Waqf* assets and manpower. This paper highlights the vital issues that need to be resolved immediately so that *Waqf* properties will be protected managed and developed for the benefit of all people in Sri Lanka, especially Muslims.

The significance of this study is manifold. It discusses the weaknesses in the current implementation of the MMCTWA Act so that the *Waqf* Board could make significant changes in its management and operation. The study also highlights the current challenges in implementing the provisions in the Act, especially related to the lease of *Waqf* property. With a proper understanding of the law and *Shari'ah*, the Muslim community may help by self-monitoring the Mosque management or another *Waqf* trustee. A proper check and balance either through proper government mechanism or self-help are commendable to better improve *Waqf* administration globally. The Act should emphasize the particular provisions for property management and development under Islamic law. The *Waqf* Board by itself, its department, or its in-charge person who is an expert on an audit and accounts, should do an audit and account all trustees' and mosques' accounts. The Board should open branches in every province of Sri Lanka or at a place where the majority of *Waqf* properties has been leased.

Hence, the *Waqf* Act should be amended in order to make room for adapting the contemporary practice under the *Shari'ah* perspective. The *Shari'ah* advisor could be appointed on the *Waqf* Board and *Waqf* management to advise, monitor and take action against the mismanagement of *Waqf* property. Particularly, in the cause of lease, they must consider the rules and regulations of Islamic law along with the FLA of Sri Lanka.

Whether the lessor requires a long-term lease for commercial and residential purposes, this may consider to employ *al-Hikr* contract. The dual lease and *Hikr* agreement must have the clause prohibiting the sale of *Waqf* properties and their long-term lease. If this lease contract annually renews, then this should not be treated as a breach of the ban on *Waqf* property sales or leasing. The provision of *Waqf* lease would avoid the practice of sublease contract. The Act should specify who is eligible for a *Waqf* lease and make the process of securing a lease clear and transparent. The absence of these provisions has brought the problem of mismanagement and a number of other bad practices with regards to *Waqf* to the fore.

It is also acknowledged that the recent event of tensions among the Muslim and non-Muslim in Sri Lanka may slow down the effort towards improving the Act. Future research should also consider more quantitative research approaches to enhance or revise the findings of this study.

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