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Chapter One

Introduction

1.0 Introduction

When Prophet Mohammad PBUH¹ came with the Islamic Risala² he accepted some of the already existing –Muamalat³- Practices in Finance, however he regulated it and gave it the Halal⁴ Islamic flavor. This paper will discuss Waqf; why it flourished in the Islamic world, how and when it started to collapse as a concept, and then give reasons behind such collapse. It will further link the corporate governance in companies with the Waqf Board –Majlis Nethara⁵- in a legal manner that protects the Waqf entity's sustainability. Nevertheless this chapter will define Waqf as a concept, give a brief overview on the history of Waqf and the current situation in the Islamic region especially Saudi Arabia, the problem statement, research objectives, and significance of research. The chapter will conclude with an outline of the current thesis.

1.2 Definitions of Waqf

Waqf in the Arabic language literally means: contain, preserve, or stop. However in the Islamic jurisprudence as per Imam (2011) Waqf is an endowment made by a “Muslim, Non-Muslim” to immobilize the ownership of property, it is derived from Waqafa or stand still. Another definition is to freeze the asset from the ownership of the owner and transfer it to the will and ownership of God i.e. the owner is constrain from usufruct of the said asset. In Islamic terms, Waqf usually refers to a religious endowment which deems it a voluntary irrevocable dedication of one's wealth or a portion of the said wealth⁶ and its disbursement for Sharia Compliant projects⁷ (Alshibani, 1999). To clarify the difference between Waqf and Charity, Gashoop (2008) suggested that Waqf is a permanent donation. Once a Waqf is established it leaves the will and ownership of the person and is transferred to Allah⁸ so it cannot be bequeathed, inherited, sold, or even donated as a gift. Furthermore disbursement of its returns is done in accordance with the endower's wishes i.e. Shart al Waqif. Charity, on the other hand, is a broader concept; it encompasses alms, grant, loan, Waqf etc.

¹ Peace be upon him

²The calling of our Prophet Mohammad PBUH to spread Islam

³ Any dealing between humans, whether it involves monetary exchange or not

⁴ Permissible

⁵ The administration; usually a range of beneficiaries. Thus the founders of the Waqf to appoint the administrator i.e. Nather or Mutawali or Kayyim

⁶ In cash or kind

⁷ Educational facilities mosques wells..etc.

⁸ God almighty

1.2 History of Waqf

As per the First Islamic Waqf Proceedings (1422H) the Waqfs developed in a manner that no economic system saw before, because when somebody endowed or Awqafathey did so to please their creator. Nevertheless hereunder is brief glance of Waqf in Islam.

1.2.1 The Age of the Prophet Mohammad PBUH

With reference to the aforementioned proceedings the first Waqf was established at the time of the prophet by the prophet PBUH. This was represented in seven garden bequeathed by The Jewish Makhreek should he pass in GhazwatUhud⁹ to the prophet Mohammad. After the latter events taking place the prophet received the bequeathed property and set it as an endowments for the Muslims. This story represents the first action of Waqf.

1.2.2 The Age of the Sahaba i.e. the prophets friends

Many of the Sahaba including, but not limited to the following established Waqfs. Firstly all of the kuhalafaa' Rashideen established Waqf. Secondly the following names are known to establish Waqfs: (Saad Bin AbiWaqass, Khaled Bin Al Waleed, Jaber Bin Abdulla, Ukba Bin Amer, Abdullah Bin Al Zubair, last but not least the Prophets Wives our Mothers.

1.2.3 Umawi Era

KhaleefaHisham Bin Abdulmalek ordered the establishment of management of Waqfs center in Egypt. At this Era the revenue and dividends received on behalf of the Waqf was purely for the poor and needy. However the management of the Waqfs center developed that idea of the Subject Matter¹⁰, and increased the scope of things that are endowed.

1.2.4 Mamaleek Era

Due to the increasing number of Waqfs and Subject matters the Mamaleeks decided to establish something called Deewan Al Awqaf¹¹. So this is the Era when the codification of Waqf began.

⁹GhazwatUhud: Ghazwa is an Arabic word that means battle. Uhud is a land mark "mountain" near Medina Munawara. The aforementioned battle was won by the kufarkuraish. In other words the non-Muslims.

¹⁰ The term Subject Matter is discussed in detail in chapter two literature review

¹¹ A Dewan in the Arabic language translates to a division that lies under a ministry or district. This is very similar to the Wazeers or Mayor job, but leaves every specified area with a Deewan to have the option to register their Waqf.

1.2.5 Ottoman Era

When the rein of the Ottoman Empire gazed on the Muslim world the Sultans of the Empire were very interested in the Waqf concept and almost every Sultan established a Waqf of his own. When such happened they codified and legalized this institute in a manner that one still uses in the modern days. That being said after the fall of the Islamic Empire the Muslim world still keeps some of the old ruled and traditions set forth by the Islamic Empire.

1.3 The current situation in Saudi Arabia

When King Abdulaziz established Saudi Arabia the first order of business was to look at Makkah and Medina. He found that Makkah al Medina had many Waqfs so he released a Royal Decree on 27/12/1354H governing the mechanism of managing the ministry of Waqf. Nevertheless as the Waqf ministry developed in the region, only the management of the ministry was governed in a detailed manner, but unfortunately because Saudi Arabia is a relatively new country in the legal world the laws of Waqf and Governing the Majlis Nethara was not developed in a manner that protects all parties. Even though the manner was left to Islamic jurisprudence it was not codified so it is left to the views of the judge and is governed by a case by case standard.

1.4 Problem Statement

How can one govern Majlis Nethara accountability through the Endowers' wishes?

1.5 Research Objectives

The current thesis has two main objectives. First setting forth adequate Majlis Nethara accountability mechanisms that contributes to the sustainability of Waqf. Second aims to link the Joint Stock Company's Board of Directors Saudi Laws with the Endowers' wishes to modernize the Waqf.

1.6 Significance of the research

This paper will be a significant endeavor in promoting Waqf establishment via setting forward a Template that makes it easy for the Endower –Waqif- to bequeath his Waqf without fear of the Majlis Nethara accountability. Moreover, this paper provides recommendations via linking the conventional Companies with the Waqf, and treating the Waqf as an entity that could revive any country economically if handled in the right manner.

1.6 Scope and Limitations

This paper was conducted to determine the best method of governing the Waqf accountability of the Majlis Nethara. It further discusses the current situation in Saudi Arabia through Islamic Jurisprudence, law, and experts' opinions. The limitation in the paper is that the data concerning Waqf is treated as confidential. Hence, one must rely on the Law and Experts opinions.

1.7 Thesis Outline

This thesis is organized into five chapters. Chapter One discusses Waqf via a brief definition. This chapter also presents the problem statement, research objectives, scope, and limitations of the present study. Chapter two will be the literature review of this paper will discuss the Accountability of the Waqf via Islamic Jurisprudence, then it will discuss the Saudi Companies' Law. Chapter three will discuss the methodology adopted to answer the questions set forth in chapter One. Chapter four will present the analyses of interview data and present findings from the analyses of the data. Finally, chapter five will conclude the study and set forth a Template governing the Waqf Majlis Nethara derived from the Joint Stock section of the Saudi Companies' law.

Chapter Two
Literature Review

2.0 Introduction

This chapter presents literature review on Waqf Accountability, different types of Waqf, comparison of Waqf with other Islamic and conventional institutions, and the accountability of Waqf. The objective of this review is to find gaps in the literature and highlight the contributions of the present study.

In light of the aforementioned the graciousness of the Waqf lies with the potential of increasing the income of an Islamic society as well as the potential it could hold for development in the educational, health, and economic sector. Even though there is no direct injunction in the Qur'an regarding Waqf there are some Hadiths¹² that encourage Muslims to found or establish a Waqf Prophet Mohammad PBUH said: "when a man dies, only three deeds will survive him: continuing alms, profitable knowledge and a child praying for him" First Islamic "Waqf" Conference Proceeding (1422H).

2.1 Types of Waqf

2.1.1 Religious Waqf

According to Kahf (2007) the first known Waqf in Islamic history is Quba Mosque in Madinah Munawara, it is still standing in the same lot with a new enlarged structure. Six months later the Prophet's Mosque was established. He called the aforementioned type of Waqf a Religious Waqf. According to Kahf (2007) Religious Waqf adds to the social welfare of the community, because it helps satisfy the religious needs of people and reduces the direct cost of providing religious services to accommodate future generations. "By the same token the Sharia' did not give any religious body or person managerial privileges or even beneficiary rights on any religious ground" Kahf (2007). Nevertheless one can gather between this chapter and the previous one historians differed between what was the first Waqf. However they agreed that it was around the same timeframe. These small differences are for the mere reason that some scholars had small variations as to what is Waqf. A preacher –imam- may receive benefit from the revenue of such religious Waqf under one circumstance only, that is, if the name or position is assigned -Shart al Waqif¹³-such benefits by the Waqf founder.

¹² A form of Islamic Jurisprudence they consist of a traditional account of things said or done by Prophet Mohammad PBUH or his companions. If used in a plural verb it means the entire body of such accounts

¹³ Endowers wishes

2.1.2 Philanthropic Waqf

Philanthropic Waqf is the second type of Waqf. Kahf (2007) suggests that such Waqf supports the poor segment of the society and emphasizes on public utilities and well as education. After the Hijra¹⁴ from Makkah to Madinah Munawara the poor could not afford water so Prophet Mohammad PBUH called on Muslims to buy a well and turn it into a Waqf free to whomever takes water... Uthman¹⁵ bought it and descendants and only the surplus, if any, should be given to the poor.

The aforementioned Waqf is called the Posterity or Family Waqf. Unlike American foundations which restrict entities with almost the same nature to religious or philanthropic purposes. Islamic Waqf may be for one's family as well as their descendants. Kahf (2007) argued along the lines adopted by classical Fuqaha¹⁶ and suggested that the Family Waqf is charitable in its essence, because it generates income as well as usufruct to persons free of charge and improves the welfare of future generation in the sense that it reduces the future social welfare burden of philanthropies/governments.

2.1.3 Waqf types according to the Saudi and the Kuwaiti Legal system

Nevertheless the proceedings of the first Islamic Waqf Conference (1244H) restricted the types of Waqfs into three types. The first type is the Family endowment i.e. Waqf Thari which render the beneficiaries from the lineage of the endower. The second type is the Charity endowment "Waqf Khairy" which was defined in the same way Kahf (2007) defined the Philanthropic Waqf. Finally the Hybrid endowment which suggests that the Waqif¹⁷ bequeaths the Waqf to his offspring, and or charity as well, hence the Hybrid. However in the Kuwaiti Government in the Waqf Bill that was issued on 1404H states that the Waqf has only two types: (Benevolence Waqf, Non-Benevolence Waqf).

It term the Saudi By-Laws of the Charitable Waqf Cabinet Decision No.80 29/01/1339H under Part One of the bylaw, titled Limited Scrutiny and Registration; subtitled definition states

¹⁴ Migration in order to flee religion-based prosecution

¹⁵ A companion of the Prophet PBUM and the third Khaleefa in the Islamic Empire, and the financier of the Usra army

¹⁶ Scholars with knowledge in Islamic Jurisprudence. Whether Hanbali, Maliki, Shafie, or Hanafi

¹⁷ Endower

“Intended Waqfs charity in the application of this regulation are:

- General Endowment: defines all the general Waqfs for example: the two holly mosques, general schools, and any Waqf with a charitable cause
- Private Endowments: which in hand renders the lineage of the Waqif the beneficiaries of the Waqf. However the ownership of such devolves into the general public’s interest after the lineage of the Waqif becomes extinct”

After discussing the different views on the type of Waqf, this paper will mention the pillars of Waqf which is not disputable in all four sects of Islamic jurisprudence “Mathahib”. In simple terms according to Imam (2011), Alshibani(1999), and Gashoop (2009) Waqf has the following four pillars

- Al Waqif “the original owner of the subject matter”
- Subject Matter i.e. the asset or the property
- Expression
- The beneficiaries

Hereunder are some examples according to the aforementioned conference Proceedings (1422H) the conditions that come beneath the aforementioned pillars.

The Conditions of Waqif in other words the conditions that the endower must fulfill. Firstly puberty, in modern time it translates to of legal age. Secondly capacity i.e. the legal capability to perform such action. Thirdly, Freedom nonetheless after abolishing slavery it is just a formality to mention such condition. Fourthly, the Waqif should be of sound mind and must not be declared impertinent. Fifthly, the Waqif should be of a heavenly religion, not manmade religion, meaning that Islam is not a necessity. The Waqif should be free of debt and the Waqf must be formed as a result of free will, for under no circumstance duress is allowed.

Together with the aforementioned the Waqif must have full ownership of the subject matter. In term if the Waqif received a present, and he set it up for Waqf. The said Waqf is not permissible until full transfer of ownership of the subject matter. In light of the aforementioned the Conditions of the Subject Matter are determining the Subject Matter, the ability of usufruct, Halal or Mutakawam i.e. the opposite of Haram “not permissible”, no Garrar “uncertainty”, the Subject Matter should not be mortgaged. Some Islamic scholars “Fukahaa” suggest that if one is

to established an endowment on a commonly owned property one should specify who ones what to avoid ambiguity.

As far as the conditions of the beneficiaries according to Alshibani (1999) the beneficiaries may be public entities or even persons. The Waqif must specify who are the beneficiaries and must suggest an alternative for these beneficiaries if they cease to exist. In order for the beneficiaries to be valid in the eyes of Islamic courts they must be identifiable -they must exist- however the Maliki's suggest that the Waqf may not have a beneficiary for some time, which in term renders the proceeds to accumulate over time and once the beneficiaries come to existence the proceeds are given to them; an unborn child is an example of such. Furthermore in order for the beneficiaries to receive proceeds they must not be at war with other Muslims or use the Waqf in a non-sharia compliant manner.

2.2 Comparison of Waqf with conventional and Islamic institutions

2.2.1 The difference between Islamic Waqf and Conventional Trust

In the aforementioned Conference Proceedings (1322H) some researches 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 the majority of Islamic scholars agreed that it lack some of the main conditions of Waqf. Some scholars argued that because a Trustee does not have full ownership of the Trust so he acts as an Agent. Furthermore another reason that makes the Trust not a Waqf is that the beneficiaries of the Trust are already defined by the law thus the Endowers wishes are not fully respected. Even though they look very similar to the Islamic Waqf they are different.

- Investment Trust
- Charity Trust
- Investment Charity Trust

2.2.2 Islamic Jurisprudence and Waqf

The reason behind mentioning the Trust. Is because the trust is considered a legal entity that is accountable for its actions and held liable. Furthermore the law codifies the relationship of the Trustee, and gives him regulated authorities. Furthermore if the Trust loses money due to any cause other than the negligence or gross negligence the Trust may act as a separate entity without

the Trustee being liable for such. To emphasize even though the Trust is relatively new the accountability is somewhat structured. Even so according to Kahf (2007) the main characteristics of the Islamic Waqf as a special kind of benevolence perpetuity, and permanence of stipulations of the Waqf founder.

Meaning that once a property or Subject Matter is dedicated as a Waqf it remains a Waqf forever. To disregard the characteristic of perpetuity is a lengthy process that does not eliminate Waqf. However it only replaces the Subject Matter with another property that is equivalent in value with the former property. Upon approval of the local court and completion of the said exchange the new property must be dedicated for the same purpose and the beneficiaries must be those of the Endowers wishes as well. Kahf states that “theoretically at least, perpetuity implies that Waqf properties should not decrease”. The second important characteristic is permanence of Stipulations of the Waqf founder i.e. the Endowers wishes. Due to the fact that the Waqf is a voluntary benevolence act, conditions set forth by the Endower must be fulfilled to the letter. These conditions must not be changed nether by management or supervisory court as long as such is feasible and is not causing damages to the beneficiaries. In light of the aforementioned hereunder are the special conditions of the Waqf founder.

According to Imam (2011), and Kahf (2007) there are special conditions of the Waqf founder. The said conditions in the classic Fiqh or in other words the Islamic jurisprudence adopted a famous slogan that says: “the conditions of the Waqif are similar to the texted of the Legislator”. Consequently this indicates the value of the Conditions or the Endowers wishes. Nevertheless in some cases some Islamic Scholars deviate from the latter slogan and impose violations and disrespect of some of the conditions of the Waqif. Some examples of such disregard to the Endowers wishes is in the Hanbali and Maliki, it is not permissible for the Waqif to render himself the beneficiary of the Waqf because it is contradicting the essence of benevolence in the Waqf. Another example of such disregard is the Waqif’s right to terminate the Waqf and reverse the endowment.

The aforementioned right is rejected by all jurists except Abu Hanifa, as long as the Waqf did not gain perpetuity via judicial action. Kahf (2007) gave a third Example of such disregard where the objective of the Waqf comes to an end at a certain time and the Waqif establishes the Waqf in a way that its principle ceases to exist. The example Kahf (2007) used was supporting an orphan

until maturity. Waqf is one of the main providers of the current expenses in the non-profit sector in addition to Zakat¹⁸. Which brings us to the question is Waqf subject to Zakat.

2.2.3 Zakat and Waqf

According to the Fatwa¹⁹ that was published under the supervision of Shaik Mohammad Saleh Al Munjed regarding Waqf and Zakat. That the Waqf is generally not subject to Zakat, because it is not owned by anybody, whether it the Waqf was in an investment or not. The Fatwa further suggested that if the Waqf has invested some of its revenue the returns are distributed to the same beneficiaries set forth in the Endowers wishes i.e. Shart al Waqif. However if the beneficiary received the said revenue, fulfilled the conditions set forth under the Zakat, the money reached the minimum amount “nisab”, and was in the possession of the beneficiary for a complete lunar year “Hawl”. Then and only then he should give Zakat, because the money is his and is fully owned by him; so in this case he would be giving the Zakat from his money not as a revenue from the Waqf.

After discussing the Waqf in general, and looking at the Zakat aspect in Waqf. A question rises if Waqf is not subject to Zakat, then what is it subject to? Is the Waqf liable? Is the Waqf accountable? If so to what extent? In other words since Waqf was so integrated in the Islamic history as a practice that is applauded by people and accepted by society. One thinks to what extent does the Law accept such entity, or even is the Waqf a legal person that may have rights and obligations.

2.3 Accountability of Waqf in Islamic Jurisprudence, and the Saudi Companies' Law

2.3.1 The legal personality of the Waqf

After establishing the importance of Waqf in the Islamic system and looking at the pillars, conditions, and role of Waqf in the society and Islam. Consequently the concern regarding Waqf as a legal entity, or accountable entity arises. Given the fact that the modern day secular companies regard their entities as legal entities and such entities suffer liabilities, resulting in further liabilities by the Board of Directors. Hereunder this chapter shall discuss liability,

¹⁸ Payment made annually under Islamic jurisprudence on certain kinds of property and used for charitable as well as religious causes. It is one of the five pillars of Islam.

¹⁹ Fatwa is an Islamic legal pronouncement, issued by an expert in religious law i.e. a Mufti, pertaining to a specific issue usually at the request of an individual or judge. It may be compared to the legal ruling of a supreme court.

accountability, and the Board of Directors in the joint stock company in accordance with the Saudi Companies Law as well as the Liabilities of the Waqf and its Majlis Nethara.

In order to understand the following chapter the term liability must be defined. Liability is the state of legal responsibility. According to the Conference Proceeding (1422H) that was mentioned in the previous chapter the Waqf Liability in Islamic Jurisprudence is the ability of Waqf to offer and accept. In other words it means that the Waqf has a legal personality. However according to Sanusi in the conventional companies enjoy distinct legal personalities separate than that of the Shareholders. The aforementioned applies irrespective of the companies' type, be it private or public. Sanusi further explains that even though the Fuqaha or the Islamic scholars did not mention the term legal personality or juristic person, they recognized the concept based upon their practices rather than definitions.

Almost all 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 them in form and substance from the individuals and shareholders who manage them. To grasp the concept of liability and accountability in Islam and in the Waqf legal capacity must be defined. Legal Capacity (al Ahlia) as defined by al Zarqa (1959) is "a description presumed in a person rendering such a person a possible candidate to receive a legislative injunction". However Al-Sabuni defines it as "the ability of a person to oblige, be obliged and conduct one's affairs by one's self".

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. According to Sanusi the hereunder characteristics are essential to the juristic person:

- The juristic person perpetuates its legal status independently
- The juristic person has rights and can own property
- The juristic person has obligations and enjoys the power of borrowing or taking a loan

The latter characteristics are exhibited in the Shariaa mechanisms in the State Treasury "bait al mal" and Waqf. Islamic Jurists unanimously regard the fact that Waqf is an institution with a separate legal personality separate from the Nather with separate financial rights and obligations.

Sanusi stresses that Fuqahastate that if a property is purchased by the revenue of Waqf then it is owned by the Waqf. It means that the Waqf is a legal entity. Nevertheless according to the aforementioned Conference Proceeding (1422H) some scholars argue that when the ownership of Waqf is transferred from the original owner and does not enter the ownership of the beneficiary whether he is specified or not. Which render the liability of the Waqf is not with the Waqif, or the beneficiary. Consequently the majority of the scholars sanctioned “borrowing under the Waqf legal personality”. However the Hanfi School of thought refused with the exception of the “benefit of the Waqf” under two rules

- The permission of the judge
- That the capital of such is difficult to facilitate from renting the subject matter, and generating such capital from the rental fees

Even so the Hanafits’ also stated that according to Ibn Abdeen Waqf does not have liability. However many scholars nowadays confirm that the Hanafit School confirm that the Waqf liability according to Shaikh Ali Khafif in his book “AlhakkwalThima” and Shakh Mustafa Zarka in his book “Nathariat al Iltizam”.

Even though most of the scholars sanctioned the “Legal personality for the Waqf” it is not necessary that such sanction is sufficient for treating it as such. According to Salama (2010) the “Nakheel Sukuk of the 2008 Dubai Financial Crises” proved to be precedent. That sometimes even though the structural aspect of a certain Islamic product is 100% Sharia Complaint it is not necessary that the product will be accepted by the law. The mentioned case was the first recorded case that looked at the structure of the Islamic product as well as the laws of the countries that were involved.

The aforementioned is relevant, because even if ALL the Islamic scholars agree on something we live in a time that is also governed by legislation. That being said after looking into the Saudi High Council of Waqf Laws there is no clear definition as to what Waqf is and whether Waqf is a legal entity. Nevertheless Saudi Arabia’s source of law is Quran and Sunna so Waqf is considered a legal entity, because of the already existing Awqaf that are treated as such in Saudi Arabia. Hereunder this chapter will discuss the key aspect of the paper accountability of the Waqf the legal entity.

2.4 Waqf Accountability

According to Osman the notion of accountability is not alien in Islam, because the religion is based on humans being accountable to the creator Allah. In other words the concept of unity of god implies that everything is owned by almighty and humans act as Trustees and are liable and accountable for their actions. Furthermore Osman suggests that since humans are accountable in Islam they are also accountable to the society and to fellow beings. He further stated that there are types for Waqf accountability that fall under accountability to fellow beings. Under the Waqf accountability he set forth up-ward accountability and down-ward accountability.

In simple terms the up-ward accountability is the accountability towards the fund providers which is similar to corporate accountability. This type of accountability is more of a controlling and monitoring mechanism, which is vital in the realm of any corporate setting, because it minimizes the agency²⁰ problems. Osman further stated “one can expect to find higher levels of institutional accountability in an externally financed agency, if only because it will probably be a condition for external support. Heightened accountability will often include a systematic accounting procedure (if not an actual project accountant) and annual external audits of all project expenses. In addition, there are likely to be pre-established mechanisms for project monitoring.” To link it with the current situation in Saudi Arabia set forth hereunder is the Saudi Companies Law that governs some sector of the Board of Directors Accountability.

2.5 Is Waqf considered as a Company

For the purposes of this paper one must clarify the difference between the initial establishment of the Waqf and the initial establishment of the Company's.

Waqf Definition	Company Definition
Permanent dedication from the endower of any movable or immovable property for any of aforementioned purposes set forth in section 2.1 of this paper	Is a legal personality that consists of an association of individuals who have the common goal of increasing their wealth. Moreover Companies have birth certificates, death certificates , and are governed by the law.

²⁰ When the manager or the board are focused on increasing their wealth rather than increasing the shareholders wealth

With reference to the latter table one concludes that the initial structure of the Waqf entity and the Company are different. In other words legally a Waqf is not considered a Company, because the Company has a birth certificate, death certificate, and is governed by conventional man made laws. However the Waqf is an Endowment made by the humans to the divine and the purpose behind such Endowment is to enrich the relationship with god not the increase the accounts of the shareholders.

With reference to the above section of this paper and knowing the deference between the two entities one comes to the conclusion that within the management of the structure of the two entities the Waqf has a better methodology in governing the accountability of the Board of directors, and the Waqf in these current times could implement such methodology if not conflicting with the Sharia requirements.

2.6 Accountability of the Board of Directors in the Joint Stock Company

2.6.1 Legislation

With reference to the aforementioned statement of Osman under Saudi Royal Decree No.(M/6)Dated 22/3/1385H (corresponding to 22/7/1965AD) Companies' Law Chapter Three Management of Joint-Stock Corporation Section One The Board of Directors Article(66)²¹- Article (82) the Board of Directors authorities are stated clearly in the law and governed in a strict manner that does not conflict the interest of the Stock holder. The relevant laws are set forth in Appendix A. These laws show that even though the accountability is very high in the corporate sect, people still register and create companies.

2.6.1 Miscellaneous accountability

The aforementioned accountability notion is a controlling and monitoring mechanism that is vastly used in the corporate setting. Another form that Osman suggested to use is the performance evaluation mechanism when the board has to disclose its quarterly yearly financial statements according to Osman Jepson (2005) aptly summed up the upward accountability by saying “the key to accountability regime is not the adoption of a structural process such as audit trails or the reporting of performance measurement, but in the engagement of public constituencies in informed discussion on values, issues and strategy”. This notion on engagement with beneficiaries is discussed hereunder.

²¹ Articles (66-82) will be set forth in the Appendix A

Downward accountability or in other words accountability to peers i.e. partners, beneficiaries, staff and supporters. According to Osman downward accountability is “more comfortably placed since beneficiaries are given authority by virtue of rights”. However the said author discussed the holistic accountability after the downward accountability and it merged both types of accountability. However holistic accountability augments short-term monitoring aspects and focuses on the isolated campaign favored under hierarchical accountability. With reference to the aforementioned arguments and the Companies’ Law the paper will shift to the accountability framework of the Waqf management.

Since accountability is an embedded feature in the Islamic teachings which de facto includes the notion of downward accountability to society and the less fortunate groups, Osman suggest that such accountability is further strengthen by adding the holistic accountability if theoretically added to the Waqf accountability framework.

Osman’s attempt at modeling Waqf accountability: beneficiaries’ engagement. As mentioned earlier in this chapter Waqf accountability is with Allah, since operationalizing accountability to Allah is intangible, to show that Waqf management is indeed accountable to Allah they must be accountable to the beneficiaries. Osman suggested a framework that hierarchical in its nature in which the focal point of accountability is to higher principle.

2.7 Conclusion

With reference to the aforementioned chapter, one realizes that theory suggests punitive accountability for all Muslims in the sense that they are punitively accountable for all their actions by Allah if they misconduct, but there is no codified law that suggests otherwise. Nevertheless the curiosity of finding out how accountable the Waqf board is in Saudi Arabia led to conducting interviews and finding out the opinions of the experts as well as the practice of courts. The third chapter will discuss Waqf in general and accountability from the experts points of view.

Chapter Three

Methodology

3.0 Introduction

This chapter explains the methodology adopted by the present study to achieve the research objectives identified in chapter one. Hereunder this chapter will describe the research design, discuss the sample selection, present the interview schedule, and explain the content analyses.

3.1 Research Design

This thesis looked at the already existing literature and discussed the already existing whole in the materials that were examined in the previous chapter, then took the opinions of the interviewees and integrated it with reality.

3.2 Sample Selection

There are four interviewees that have been selected via consulting with bankers, business men, and academics as to who are the best interviewees that fit the criteria of having sufficient knowledge and experience in the Waqf. Interviewee profiles were conducted as well as a thorough personality test was conducted. Nevertheless, when the interviews were conducted permission to record was obtained and all four participants accepted. Data collection started on March 8, 2015 and finished at May 25th, 2015 due to the fact that one must go back to the interviewees for justification sometimes.

3.2.1 Types of interviews

There are three fundamental types of research interviews: structured, semi-structured, and unstructured. For the purposes of this thesis the semi-structured method was used. 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 in order to pursue an idea or response in more detail. Nevertheless, in the case of this thesis the aforementioned method provides a deeper understanding of the social phenomena of Waqf as opposed to gathering the information via a purely quantitative method such as questioners.

3.2.2 Qualitative Data Management

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

3.3 Interview Schedule

The interviews were divided into five main themes. Theme one was consisted of a historical brief overview as per the interviewee's opinion. Theme two discussed the reasons behind non development of Waqfs in the current Islamic world. Theme three debated the legal personality of Waqf. Theme four discussed some legalities. Theme five was about the lope whole in the Saudi system.

3.4 Content Analyses

For the purposes of this theses a brief explanation of the content analyses method in the qualitative research shall be provided. Content analyses can be used either in an inductive or deductive way, however both follow the same process (preparation, organization, and reporting).This thesis used the deductive approach, because all four interviewees are of different sects in the field.

3.5 Conclusion

Due to the fact that this is a qualitative study. This chapter is relatively short and provides key terms and key points that have been used to briefly explain the methodology, sample selection, interview schedule, as well as content analyses. Nevertheless, because the majority of the Islamic world still treats Waqf as a secret one must rely on expert's opinions as well as jurisprudence and law. Moreover,the following chapter shall provide the aforementioned data analyses.

Chapter Four
Data Analyses

4.0 Introduction

This chapter presents the analyses of the interviews data collected from the seven respondents. This chapter is further divided into the interviewee's profile, the themes to be discussed, content analyses, as well as the discussion.

Looking at the previous chapters and the Quran, Sunna, and Laws gives curiosity regarding the legal precedents in the Waqf world. However since Saudi Arabia does not consider precedent as a source of Law. Hence the courts do not publish its rulings, one conducted interviews with the following:

4.1 Interviewees' Profiles

- A financier who founded an Islamic Trust in Labuan for the will be referred to as X hereunder.
- A finance lawyer who has some expertise in accountability and enforcing punitive damages will be referred to as Y hereunder
- A practicing lawyer who is an expert in litigation will be referred to as Z hereunder
- A CEO in a financial consulting firm with expertise in the field as well will be referred to as T hereunder
- A Sharia compliance consultant in the research department in the Islamic Development Bank "IDB" with a rich background in the Waqf structure will be referred to hereunder as A
- Also another Sharia Compliance researcher in the IDB shall be referred to hereunder as B
- The manager of the World Waqf Organization in the IDB shall be referred to hereunder as C

4.2 Themes to be discussed

The method this paper will use to set forth the information gathered in the interviews shall be according to topic as set forth hereunder. All the interviewees will answer the following questions around the main themes:

- Overview of Waqf
- Reasons behind non development of Waqf in the current Islamic world
- Legal personality of Waqf

- Legalities
- Lope whole in the Waqf system in Saudi Arabia

4.3 Content Analyses

The hereunder table contains a brief comparison between the interviewees' opinions regarding the aforementioned main themes.

Theme to be discussed	Interviewee X	Interviewee Y	Interviewee Z	Interviewee T	Interviewee A	Interviewee B	Interviewee C
Overview of Waqf	All of the interviewee had very similar views as per the history of Waqf						
Reasons behind non development of Waqf in the Current Islamic world	All agree that the collapse of the Ottoman Empire was a major reason. i.e. the political status of the Islamic world.						
	However X's opinion is that another major reason behind such is the non-ability of an alien to own property in Makkah and Medina	Y shares the opinion of Z, & T	Z adds to that the non-accountability of Majlis Nethara	T further adds because Waqf entities are embedded under the courts and are not treated as separate entities like corporations they are not developing as fast.	A further adds that the lapse of corporate governance within the structure of Waqf He also suggests that the current methof of governing the "Majlis Nethara" is no longer sufficient	B's views are different in the sense where he thinks that the major reason behind non-development of Waqf is the lapse of corporate governance accountability within the structure of the Waqf. He further suggests that the current method of governing the Majlis Nethara is no longer sufficient	C was more practical he suggested that we take what we currently have and work around it . He further looks at Waqf as an investment and already established many government Awqaf that have exceptions to the law
Legal Personality	In X's opinion Saudi Arabia does not treat Waqf as a separate legal personality.	Considers Waqf a legal personality due to practice			A suggests that because Waqf is subject to liability ,and because Waqf is accountable	B considered Waqf as a legal personality, but explained it as follows: In the	Has the same view point as Y,Z, and T

	For the mere technicality that it is not defined as a legal personality via regulation				for its debt it is considered a legal personality	prophet's era: It was a separate entity that has no relationship with the sultan. Later on in the Islamic Empire: In the abbasid era it was under the judge and in Egypt it was under the deewan <i>However after the colonization period Waqf was cancelled and falls under the government</i>	
Lope whole in the saudi system	Did not discuss the legal lope whole that the lawyers discussed	The SPV discussed under hereunder. Suggests that the accountability mechanism is almost not existent.	View X's opinion	View Y's opinion	A suggested that the lack of codification is the Saudi system is the reason behind the non popularity in the Waqf	B stated that every case needs a lawyer	C suggested that I see a lawyer that is specialized in Waqf

4.4 Discussions

4.4.1 Brief overview of Waqf according to the experts X suggested that Waqf was one of the most important bricks of the Islamic Financial system, however, the political changes in the last century affected the development of Waqf. Nevertheless some Waqfs are still standing from the prophet Mohammad PBUH's an example of such is Waqf Othman Bin Affan. Another

phenomena that 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 non-regulation is affecting establishing new Waqfs. Y suggested that Waqf is an Entity that is essential to Islamic finance unlike the Trust which is a shield not an entity per say. One of the main differences between the Waqf and the Trust according to Y is that the Trust deed appoints beneficiaries, and the Waqf does not appoint them exactly. Z gave a brief history of the Waqf similar to the one mentioned in chapter one then talked about the awareness of people regarding the Waqf subject matter. He stated that the perception of Waqf Khairi “Charitable Endowment” and Waqf Thari “Family Endowment” overlap, because the source of money is not clear. T stated that the Waqf is Sunna, he further stated that some of the conventional laws crippled the development of Waqfs.

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 they all agreed that in the case of - Charitable Waqf- People are not enthusiastic about it, because the banking system focuses on risk and return and neglects the afterlife as well as the concept of freezing your assets for Allah.

However in the case of the – Family Endowment- A,B, & C suggest that due to lack of codification people have lost interest in creating Waqf.

4.4.2 Reasons behind non development of Waqfs in the current Islamic World

X, Y, Z, T, A, B, & C agreed on the political factor after the Ottoman Empire collapse. They further agreed that lack of knowledge and development of codifying laws in Saudi Arabia. However X established an Islamic Trust in Labuan Malaysia and lobbied for the Islamic Trust Law in Malaysia, because they are passionate about Islamic finance there. Nevertheless X thinks that one major obstacle in development of Waqfs in Saudi is the non-ability of a foreigner –alien- to own property in Makkah and Madinah. X further views the regulations in the Islamic countries not very affective, because it falls under the Ministry of Waqf or Awqaf. As mentioned earlier he adopted another method and abstained from calling it Waqf, to avoid potential conflict. Z on the other hand thinks that non development is because the lack of accountability or lack of regulation under the accountability of the Majlis Nethara. In other words Z thinks that the Nather has too much jurisdiction in some cases and minimum to non in other cases. T’s opinion in the matter is

that the lack of development is for administration, perception of the population, and legislative reasons. Furthermore T states that because the Waqf entities are embedded under the courts and are not treated as separate entities like the corporations Waqfs are not developing in the expected manner. Moreover Y shares the opinion of T and Z as well, but A,B, & C share the opinion of X, because they have a financial background.

4.4.3 Legal personality of Waqf

Furthermore according to X the Waqf in Saudi Arabia does not have a Legal personality, however, the Trust he established in Labuan has a separate legal entity and is governed by a different set of laws that gives the Trustee and initiator of the Trust much more flexibility which renders the Trust as an investment and treats it as a company. On the other hand Y discusses that since the Waqf has financial liability -thimamalia- and can borrow and lend as a company. Which renders it a legal entity with a legal personality even though Waqf is not defined as a legal personality in the Saudi Law in practice it is considered. Z on the other hand gave another reason in establishing it as a legal entity. Due to the fact due to the fact that it has a birth certificate it is considered a legal personality. Hence when the Waqif Endows the Waqf it becomes separate from his financial liability hence the legal personality, because of the ability to borrow and lend. T suggested that in his experience the Law and the financial corporations always treated Waqf as a legal personality so that was not an issue for him at all. Nevertheless A,B, & C agree that the Waqf is a legal personality in Saudi and in all of the world, due to practice

4.4.4 Legalities

Both Y and Z linked between the companies Board of Directors and the Waqf Majlis Nethara. Y suggested that since the companies are responsible for the Board of Directors actions that are within the scope of their published authorities in the official gazette, however, the company is not liable for any actions outside the said capacity. Then he stated that Majles al Nethara is subject to preliminary and subsequent control. The courts control the real estate aspect. An example of the aforementioned is if the Real Estate was confiscated the Ministry of Waqf will receive the payment, and Majlis and Nethara cannot act without the courts orders which then cripples the development of the said Waqf. For the mere reason of preliminary and subsequent control that is almost in all or many businesses dissisions of the Waqf or within the Waqf accountability. It is true that such form of supervision is very important. However when it is over

used in a form which cripples development rather than hold the Majles Nethara accountable one may call it a form of over using power. Z on the other hand suggested that the rules be codified regarding the accountability of the Majlis Nethara and that the Nethara not be under one person, and it rather be under a committee. Agreeing with Y he said that control and transparency need not be under a certain court or entity, but rather a committee, and it should be developed in such a sense that measures to the same accountability standards of the Board of Directors set forth in the Saudi Companies Law.

Due to the fact the A, B, & C are working in the IDB, and have exposure all around the world makes them more flexible in the sense that they consider that no problem does not have a solution. They further have many government and quasigovernment government Waqfs around the world.

4.4.5 Lope whole in the Waqf system in Saudi Arabia

According to Z& Y the Waqif has the ability to establish a Special Purpose Vehicle -SPV- with shares that are owned by the Waqf, furthermore this SPV is not subject to the same control by Nather al Nuthar i.e. the judge. The aforementioned is an excellent example of the people stepping forward and trying to maximize the profit of the Waqf. According to Z& Y the Waqf's essence is to generate benefits. Another unfortunate practice that ALL the experts referred is that when the Nather is negligent the reaction of the Judges in the court is usually to recues the Nather. Hence, leniency with accountability.

4.5 Conclusion

Even though the experts had some differences in their opinion they ALL agreed that the codification in the law and the non-regulation regarding the accountability of the Majlis Nethara is crippling the development of the Waqf. However they ALL agree that if there was a template or a law that codifies the accountability of the Majlis al Nethara similar to the one mentioned in chapter two of the paper. It would be a good step towards development of the Waqf. In other words if some amendments were made to the law or even if a template was set than Waqf will be revived and regain popularity and the Trust of the population.

If Waqf is mobilized in the correct manner and not manipulated through the system it would flourish. In other words if Islamic jurisprudence was correctly implemented and the corporate governance as set forth in the Saudi Companies Law of Joint Stock Companies was implemented

as the essence of the Majlis Nethara Management or even set forth as the Endowers' wishes – Shart al Waqif- than so much dividends could be generated. Hence sustainability for the Waqf. Furthermore there is no law that forces the Waqf to provide its quarterly or even annual financial statements, in many cases it is based on hearsay. Which in term also cripples the development, on one hand there are strong control and accountability methods as mentioned in chapter two of the paper, but these accountability methods are limited to the subject matter –property, Mawkoof- on the other hand the accountability of the Nather is not addressed properly in the Law. So a solution to such is to implement the already existing laws that govern the Board of Directors as set forth earlier. Lastly after the efforts set forth in the aforementioned chapters of this paper the fourth chapter shall be a suggested template that governs the upward liability that was mentioned in chapter two.

Chapter Five

Majles Nethara Governance Template “Agreement”

5.0 Introduction

Waqf is an important factor in the socio economic development of the Islamic Umma. Nevertheless in 2015 Muslims are also governed by the Law not just Islamic Jurisprudence. Furthermore since Saudi Arabia considers the Quran and Sunna a source of law. This chapter adopted the Fiqh slogan that was mentioned in chapter Two “the conditions of the Waqif –Shart al Waqif- are similar to the text of the legislator”. Consequently hereunder this chapter depends on the Saudi Royal Decree No. (M/6) Dated 22/3/1385H (corresponding to 22/7/1967AD) Companies’ Law Chapter Four under the topic Management of Joint-Stock Companies Section One from Articles 66 through 82.

Set forth hereunder are the suggested guidelines that the Waqif or Endower set forth in his –Shart al Waqif- document. In other words this paper suggests that the Endowers Wishes are documented and authenticated at the notary public²² in a manner adopting ALL of the hereunder upward accountability methods are derived from the aforementioned law. More or less treat the Agency problems in Majlis Nethara as if it was a Board of Directors.

This chapter shall set forth the Definitions of the terminology set forth in the suggested – Agreement- Template, explain the aforementioned, and conclude.

²² A person authorized to perform certain legal formalities, especially to draw up or certify, deeds, and other documents for use in the same or other jurisdictions. i.e. a person legally empowered to witness and authenticate documents

5.1 Corporate Governance Majlis Nethara Template Agreement

5.1.1 Definitions

Nather or Nathers:

For the purposes of this Agreement, the Nather shall be referred to as Trustee with a capital T and the Nathers as Trustees as set forth in the hereunder template.

Bankruptcy trustee

With a small t. shall mean a person appointed by the government, an officer of the department of justice, to represent the debtor's estate in a bankruptcy proceeding.

5.1.3 Suggested Template “Agreement”

Article One Management:

- a) The Waqf shall be managed by a Majlis Nethara whose number shall be specified - herewith in this said document- provided that it is not less than three Trustees.
- b) The Beneficiaries shall appoint the Trustees for a term –also specified herewith-, which shall not exceed three years.
- c) The Trustees shall always be eligible for re-appointment, unless they are become negligent or incompetent.
- d) This document shall specify the manner of terminating²³ the term of the Trustees, however, the beneficiaries may at, any time, remove the Trustees.
- e) The Trustee may resign provided that such resignation is made at a proper time via three months written notice; otherwise he shall be accountable and liable before the Waqf

The aforementioned Para a) suggests 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 Para b) and c) suggests that the term of the Trustees appointment shall not exceed three years, however the Trustee is always eligible for re-appointment unless he was negligent or incompetent.

Para d) and c) are the termination clause of the said Agreement. They give the beneficiary the right to terminate at any time, and the Trustee the right to resign via written notice. Note that the suggested timeframe may be adjusted in accordance with the will of the beneficiaries

²³ This Article is subject to the Free will of the Endower

Article Two Guarantees set forth by the Trustee:

- f)** The Trustee must set aside a guarantee for the Waqfs' liability within three months of appointing him, such guarantee shall remain nonnegotiable until the lapse of the period specified herewith.²⁴ Example: 3-5 years. Or until a decision is made by the court on the action the Trustee is accountable for.
- g)** If the Trustee fails to provide such guarantee he shall forfeit his duties as a Trustee.

As mentioned in chapter four should the Trustee be negligent he will only be recused from his duties as a Trustee, and no punitive damages will be implemented.

The aforementioned Para is optional. Nevertheless it is suggested, because it will give the Endower, and the beneficiaries' tangible guarantee that the Trustee will act their best interest.

Article Three Conflict of interest

- h)** A Trustee should not have any interest whether directly or indirectly, in the transactions made for the account of the Trust.
- i)** The Trustee must inform the Beneficiaries of any interest he may have in the Transaction.

The aforementioned Para clearly governs the conflict of interest.

Article Three Loans

The Waqf should not grant loan or open credit on behalf of the Waqf for the Beneficiaries benefit or guarantee loans contracted by them to third parties. Any violations of this provision of this Article shall be covered by the Trustee.

The aforementioned Para governs 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.

²⁴ Since there is no lapse of period for hearing a case in the Waqf law, the Waqif must improvise and set forth a minimum time to keep the guarantee. In other words the law usually puts 3 years as a lapse period. If any accountability suit is brought in front of the court after the lapse period the courts reject it.

Article Four Powers of Trustee

The Trustee shall enjoy full powers of the management of the Waqf. Nevertheless the Trustees should not contract loans for terms exceeding 3 years, or sell or mortgage the Real Estate of the Waqf, unless authorized by the Judge and the Beneficiaries. The Trustee cannot under any circumstance release the debtors of the Waqf from their liabilities unless the ALL Beneficiaries sanctioned such.

The aforementioned Para is also derived from the Joint Stock Company to govern the financial liabilities of the Waqf via corporate governance.

Article Five Revenue

- a) The -herewith document- shall specify the manner of remunerating the Trustee. Such remuneration may consist of a specified salary, or benefits, or a percentage of the profits. However such remuneration represents a certain percentage of the Waqfs profits, it must not exceed 10% of the net profits after deduction of expenses, deprecations, and reserves –reinvested in the development of the said Waqf- with a percentage determined by this template. An Example: 5% set a side yearly to reinvest.²⁵
- b) The Trustees report to the Beneficiaries via reports including a comprehensive statement of all of the amounts received by the Trustees during the financial year in the way of salaries, shares in profit.

The aforementioned Para governs the benefits of the trustee in the same manner used in the Joint Stock Company.

Article Six Waqf Accountability

The Waqf shall be bound by all the acts performed by the Trustees within the limits of their competence, and shall also be responsible for damages arising from the unlawful acts committed by the Waqfs management.

The aforementioned Para is the core of accountability, it makes the Trustee liable for punitive damages.

²⁵ The aforementioned Para promotes sustainability

Article Seven Trustees Accountability

Trustees shall be jointly responsible for damages sustained by the Waqf, the Beneficiaries, or Third Parties due to their maladministration of the affairs of the Waqf, or their violation of the provisions of this Template. Any condition contrary to this provision shall be considered as non-existent. Liability shall be assumed by all Trustees if a wrongful act arising from a resolution issued and adopted by them ALL. However with respect to resolutions adopted by a majority vote, dissenting Trustees shall not be liable if they have expressly recorded the minutes of their resolutions. Absence from a meeting in which a resolution is adopted shall not constitute cause for relief from liability, unless it is established that the absent was not aware of the said resolution, or unable to object after becoming aware of it.

After mentioning accountability, one must mention liability. The aforementioned Para discusses the case when the majority votes on a failed decision, the dissenting Trustee shall be exempted from such liability. In other words the person who does not accept the decision is not liable.

Article Eight Meetings

With reference to Article seven the Trustees must make their financial decisions for the Waqf through recorded meetings.

This Para is a method of documentation. The Endower and the Trustee may suggest any method.

Article Nine Claims against the Trustees

The Waqf may file a liability claim against the Trustees for wrongful acts that cause prejudice to ALL Beneficiaries. The resolution to file such a claim must be made unanimously, and the Beneficiaries shall appoint a person to pursue the claim. In case of Bankruptcy the right to file the claim shall be transferred to the “bankruptcy trustee”, and upon termination of the Waqf, the liquidator shall pursue the claim after obtaining approval from the Beneficiaries.

The said Para governs the right of the Waqf to sue the Trustee. Note that the timeframe is always adjustable.

Article Ten Confidentiality

The Trustee shall maintain strict confidence in all matters related to the Waqf, including all documents, data and information, whether in writing or otherwise, except of any disclosure thereof necessary to perform his duties

Article Eleven Termination

Both Parties may terminate their relationship whenever the first of the following events occur

1) Written notice

Three months written notice by the Trustee

One month written notice by the Beneficiaries

2) The expiry of the term set forth in Article One

The aforementioned Para govern confidentiality and termination which are standard in any contract.

5.2 Conclusion

With reference to the slogan set forth earlier in this chapter. One may govern the accountability of the Majlis al Nethara via the Endowers wishes without change in legislation. Nevertheless Waqf is a major stone in the Islamic economic history that will thrive in the next couple of years if the accountability was governed in the correct manner. Furthermore, there is no right or wrong in the Endowers wishes -Shart al Waqif- it depends on whether the Endower-Waqif- is confident and happy about establishing his Waqf that is why Islam treated the -Shart al Waqif- as legislation, because of the importance of Waqf. Last but not least, if Muslims became more aware and started to be innovative in the Waqf, it will become as popular as it once was. Moreover the following chapter shall be the main conclusion.

Chapter Six
Conclusions and Discussion

6.1 conclusion

This thesis discussed the accountability of Waqf via Corporate Governance Analyses. It further investigated the following objectives. The first objective was set forth an adequate Majlis Nethara accountability method, and the second one was link the Joint Stock Companies' Board of Directors regulations with the Endower's wishes. After setting forth the introduction, objectives, and objectives. The literature review helped view the current situation, look at the accountability from a theoretical perfectionist point of view which viewed Muslims as god fearing people who are 100% governed by the upward accountability that was discussed in detail in chapter two. When looking at literature review one comes to the conclusions that the scholars set forth a methodology and ideology as to what should be, but they did not codify it. To link between the Majlis Nethara and the Board of Directors one used the Joint Stock Company as the bridge between the Board and the Majlis. Nevertheless, Saudi Arabia codified the Board of Directors accountability methodology via regulation.

After finishing the literature review collecting data was required via interviews, because Saudi Arabia does not take precedents as a source of law. So the process of interviewing began and the findings were that the accountability of the Majlis Nethara is managed purely for many reasons that fall under mismanagement and lack of supervising the accountability. All four agreed that after the collapse of the Ottoman Empire the Waqf financial institution stopped developing as it once used to. Now it has been many years since the end of the Ottoman rein so there is room for development.

All of the interviewees were optimistic towards developing the Waqf institute in the sense that they see it is a core puzzle in the Islamic financial system if governed correctly. However they also all agree that the current Waqf is vastly mismanaged. Another interesting finding is that the Majlis Nethara is not required to publish their financial statement which leave room for manipulation or in other words cooking the books.

6.2 Limitations

Firstly the interviews were four, secondly the ministry of Waqf website does not publish the number of Waqfs it has. Waqf in Saudi Arabia is treated as a secret, even though the people and the government do not say it. However they consider it a donation if it was a donation and they consider that anything that happens under that entity is not the publics' business; this mentality

makes it easy for the Nather to take action without being held accountable. Many limitations will be found under any topic that falls under Waqf for the mere reason that it is being neglected.

6.3 Recommendation

Islam considers the Endowers wishes -Shart al Waqif-legislation, and since Saudi Arabia treats Sharia as a source of law. For the current time establishing a good Shart al Waqif Agreement is sufficient in terms of accountability of the Trustee. Furthermore the Endower should make everything clear before he establishes the Waqf. That being said this paper recommends that each person who want to establish a Waqf govern the Majlis Nethara via the set for Template in chapter five or something similar.

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18. Saudi Royal Decree No. (M/6) Dated 22/3/1385H (corresponding to 22/7/1967AD) Companies' Law Chapter Three under the topic Management of Joint-Stock Companies Section One from Articles 66 through 82.

Appendix A

Hereunder are some of the relevant laws that serve the interest of this study as well as govern the accountability of the board of directors as stated in chapter two the literature review.

Article (66) of the aforementioned law states:

“The Joint- Stock Corporation shall be managed by a board of directors whose number shall be specified by the bylaws of the company, provided that it is not less than three directors.

The Ordinary General Assembly shall appoint the members of the board of directors for the term specified in the company bylaws, which shall not exceed 3 years.

The Council of Ministers may determine the number of the boards of directors on which a member may be appointed.

The members, however, shall always be eligible for re-appointment, unless the company bylaws provide otherwise.

The company bylaws shall specify the manner of membership termination of the Board of Directors; but the General Assembly, may at any time, remove all or some of the members even if the company’s bylaws provide otherwise, without prejudice to the right of a removed member to hold the company liable if the removal is made without acceptable justification or at an improper time.

A member may resign, provided that such resignation is made at a proper time; otherwise he shall be responsible before the company.”

Article (67) of the Saudi Companies’ Law:

“Unless the company bylaws provide otherwise, if the position of a member becomes vacant, the board of directors may appoint a temporary member to fill the vacancy, provided that such appointment shall be laid before the first meeting of the Ordinary General Assembly. The new member shall complete the unexpired term of his predecessor. If the number of members falls below the minimum number prescribed in this Law or in the company’s bylaws, the Ordinary General Assembly must be convened as soon as possible to appoint the required number of directors.”

Article (68) of the Saudi Companies’ Law:

“A member of the board of directors must own a number of shares whose value shall not be less than SR 10 thousand. The company’s shares shall, within 30 days from the date of appointment of a member, be deposited in one of the banks designated by the Minister of Commerce. They shall be set aside as a guarantee for members’ liability, and shall remain non-negotiable until the lapse of the period specified for hearing the action in liability provided for in Article (77), or until a decision has been rendered on such action. If the member fails to submit such guarantee shares within the specified period, he shall forfeit his membership. The auditor must ascertain compliance with the provisions of this Article, and must mention in his report submitted to the General Assembly any violation in this respect”

Article (69) of the Saudi Companies’ Law:

“A member of the board of directors should not have any interest whether directly or indirectly, in the transactions or contracts made for the account of the company. Except with an authorization from the Ordinary General Assembly, to be renewed annually. Transactions made by way public bidding shall, however, be excluded from this restraint if the member has submitted the best offer.

The member must inform the board of directors of any interests he may have in the transactions or contacts made for the account of the company. Such declaration must be recorded in the minutes of the board meeting, and the interested member shall not participate in voting on the resolution to be adopted in this respect.

The chairman of the board of directors shall inform the Ordinary General Assembly, when it convenes, of the transactions and contracts in which any member has a personal interest. Such communication shall be accompanied by a special report from the auditor.”

Article (70) of the aforementioned Law:

“A member should not, without authorization renewed annually from the Ordinary General Assembly, to participate in any business competitive with that of the company, or engage in any of the commercial activities carried on by the company; otherwise, the company shall have the

right either to claim damages from him or to consider the operations he has conducted for his own account as having been conducted for the account of the company.”

Article (71) of the aforementioned Law:

“A Joint-Stock corporation should not grant any cash loan whatsoever to any of its board of directors` members; nor to guarantee any loan contracted by a member with a third party. Banks and other credit companies shall be exempted from this provision, as they may, within the limits of their activities and under the same terms and conditions followed in their transactions with the public, grant loans or open credits for their members of the board of directors or guarantee loans contracted by them with third parties. Any contract concluded in violation of the provisions of this Article shall be considered null and void.”

Article (73) of the said Law:

“With due regard to the competence of the General Assembly, the board of directors shall enjoy full powers in the management of the company. It shall be entitled, within the scope of its competence, to authorize one or more of its members or others to perform an act or certain acts. Nevertheless, the board of directors should not contract loans for terms exceeding 3 years, or sell or mortgage the real estate property or the place of business of the company, or release the debtors of the company from their liabilities, unless so authorized in the bylaws of the company and be subject to the terms set forth therein. If the company’s bylaws do not contain any provisions in this regard, the board of directors should not perform the above acts without an authorization from the Ordinary General Assembly, unless such acts fall by virtue of their nature within the scope of the company’s activities.”

Article (74) of the said Law:

“The company’s bylaws shall specify the manner of remunerating the members of the board of directors. Such remunerations may consist of a specified salary, a fee for attending the meetings, in take benefits, a certain percentage of the profits, or a combination of two or more of these benefits. If, however, such remuneration represents a certain percentage of the company’s profits, it must not exceed 10% of the net profits after deduction of expenses, deprecations, and

such reserves determined by the general assembly pursuant to the provisions of this Law or the company's bylaws, and after distribution of dividend of not less than 5% of the company's capital to the stock holders. Any determination of remuneration made in violation of this provision shall be null and void.

The board of directors' report to the Ordinary General Assembly must include a comprehensive statement of all the amounts received by members of the board of directors during the financial year in the way of salaries, share in the profits, attendance, fees, expenses, and other benefits, as well as the amount received by the members in their capacity as employees or as executives in the company, or in consideration of technical, administrative, or advisory services."

Article (75) of the said Law:

"The company shall be bound by all the acts performed by the board of directors within the limits of its competence, and shall also be responsible for damages arising from the unlawful acts committed by the members in the management of the company."

Article (76) of the said Law:

"Members of the Board of Directors shall be jointly responsible for damages sustained by the company, the stockholders, or third parties due to their maladministration of the affairs of the company, or their violation of the provisions of this Law or the company's bylaws. Any condition contrary to this provision shall be considered nonexistent. Liability shall be assumed by all members if a wrongful act arises from a resolution issued and adopted by them all. But with respect to resolutions adopted by majority vote, dissenting members shall not be liable if they have expressly recorded their objection in the minutes of the meeting. Absence from the meeting at which such resolution is adopted shall not constitute cause for relief from liability, unless it is established that the absentee was not aware of the resolution, or unable to object after becoming aware of it. The approval of the Ordinary General Assembly to exonerate the members from liability shall not be required when filing a liability claim. Such a claim shall not be heard after the lapse of 3 years from the date of disclosure of the harmful act."

Article (77) of the said Law:

“The Company may file a liability claim against the members of the board of directors for wrongful acts that cause prejudice to all the stockholders. The resolution to file this claim shall be made by the Ordinary General Assembly, which shall appoint a person to pursue the claim on behalf of the company. If the company is adjudged bankrupt, the right to file the claim shall transfer to the bankruptcy trustee, and upon the termination of the company, the liquidator shall pursue the claim after obtaining the approval of the Ordinary General Assembly.”

Article (78) of the said Law:

“Every stockholder shall have the right to file a liability claim against the members of the board of directors on behalf of the company if the wrongful act committed by them is of a nature to cause him personal prejudice. However, the stockholder may file such claim only if the company’s right to file such claim is still valid and after notifying the company of his intention to do so. If a stockholder files such claim, he shall be adjudged compensation only to the extent of the prejudice caused to him.”

Article (79) of the said Law:

“With due regard to the provisions of the company’s bylaws, the board of directors shall appoint from among its members a chairman and a delegated member. A single member may hold the positions of a chairman and a delegated member. The company’s bylaws shall specify the duties and competences of the chairman and the delegated member as well as the special emoluments to be received by each of them in addition to the remuneration prescribed for the board members. In the absence of any provisions in this respect in the company’s bylaws, the board of directors shall divide duties and powers and specify their special emoluments. The board of directors shall also appoint a secretary from among its members or others, and shall determine his duties and remuneration, if the company’s bylaws do not contain any provisions in this respect. The term of the chairman, the delegated member, and the secretary who is a member of the board of directors shall not exceed the term of their respective membership in the board of directors, and they may be re-appointed unless the company’s bylaws stipulate otherwise.

The board may, at all times, remove all of them, without prejudice to their right to damages if the removal is made without acceptable justification or at an improper time.”