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WAQF IN ISLAMIC LAW AS A CONTEMPORARY BUSINESS VEHICLE
ВАКФ В ІСЛАМСЬКОМУ ПРАВІ ЯК СУЧАСНИЙ БІЗНЕСОВИЙ ІНСТРУМЕНТ

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Abstract. *The purpose of this research is to analyse the concept of waqfs, special religious endowments, under Islamic law through a comparison with traditional English common law trusts. We would explore the doctrinal peculiarities of both instruments, such as the purpose of endowment, the status of trustees and mutawallis, inalienability of property and the perpetuity rule. In particular, this research focuses on the role the waqfs can play as investment vehicles, and the structural and doctrinal challenges they face. This paper posits that a cash waqf can be organized in a way similar to private equity funds and play essentially the same role while being compliant with the letter of Islamic law. In the age of periodic economic crises, waqfs, at least conceptually, can be a very powerful instrument of social justice and an ethically compliant way of investing and doing business.*

Key words: *waqf, trust, Islamic law, English common law, Islamic finance.*

Анотація. *Метою дослідження є аналіз концепції вакфів, спеціальних релігійних фондів, які діють згідно з ісламським правом, через порівняння з традиційними трастами в англійському загальному праві. Проаналізовано доктринальні особливості обох інструментів, такі як мета фонду, статус довірених осіб і мутаваллі, невідчужуваність власності та правило безстроковості. Зосереджено увагу на ролі, яку вакфи можуть відігравати як механізми інвестування, а також на структурних і доктринальних проблемах, з якими вони стикаються. Встановлено, що грошовий вакф може бути організований подібно до фондів приватного капіталу та відігравати, по суті, ту саму роль, дотримуючись букви ісламського права. В епоху періодичних економічних криз вакфи, принаймні концептуально, можуть бути дуже потужним інструментом соціальної справедливості та етичним способом інвестування та ведення бізнесу.*

Ключові слова: *вакф, траст, ісламське право, англійське загальне право, ісламське фінансування.*

Introduction. A waqf refers to a religious endowment, a voluntary and generally irrevocable dedication of one's wealth or a portion of it to Islamically-compliant projects and pious purposes. (*Abbasi*, 2012). The system of waqfs is one of the pillars of Islamic civilization, combining features of a philanthropy and a social service agency (*Sait*, 2005). Landowners were incentivized to create waqfs, which were administered according to a set of juristic rules outside of the official state bureaucracy and, sometimes, were even competitors of secular rulers and state authorities.

Waqfs played a key role in the development of Islamic jurisprudence and theology by supporting jurists, who relied on them to finance their institutions (*Van Leeuwen*, 1999). From an economic perspective, waqf can be regarded as a type of savings-investment mechanism where funds are diverted from consumption and invested in productive assets that provide revenue. In the absence of a contemporary centralized state, waqfs were used to finance education, healthcare and social services, effectively performing the functions attributed to the contemporary welfare state. The waqf system can contribute significantly towards that ultimate goal of some modern economists: achieving massive reduction in government expenditures. Waqfs also contributed to better distribution of income in the economy, preventing the rich from accumulating too much wealth and excluding it from economic cycles. The waqf system provided jobs for a significant portion of the population. For instance, in Turkey 8.23% of the population was employed in the waqf system at the turn of the twentieth century and 12.68% in 1931. However, this figure fell to 0.76% by the 1990s, whereas at the same time the Western equivalents of waqfs – trusts and foundations – accounted for 13% of newly added jobs in France, Germany and the United States (*Çizakça*, 2000). This dramatic decline in the role of the waqf in Islamic societies can be explained by massive nationalizations of waqfs in the twentieth century by state authorities, who challenged their legal validity, and system's increasing inefficiency and inability to adjust to modern economic reality.

Western acquaintance with the waqfs dates back to the Middle Ages. Arguably, they may have even influenced the emergence of trusts in England. During the colonial era, Western countries had to deal with the legal status of waqfs created by their Muslim subjects. For instance, British colonial administration in India promulgated the Mussulman Wakf Validating Act, referring to a waqf as "*the permanent dedication by a person professing the Mussulman faith of any property for any purpose recognized by the Mussulman law as religious, pious, or charitable*" (*Harasani*, 2015). Although the decline of waqfs in the twentieth century was a painful blow, the interest in Islamically-compliant financial instruments is sharply increasing. Muslim investors would like to pursue investment opportunities in Western countries using wealth-planning structures that are complaint with Islamic law. This segment of the market becomes increasingly important as more banks provide Shari'a friendly instruments.

The purpose of research is to analyse the concept of waqfs in Islamic law, its doctrinal limitations and challenges and prospects of becoming a contemporary financial vehicle.

Literature review. In outlining the doctrinal peculiarities and limitations of waqfs and trusts it is worth mentioning the contributions of Murat Çizakça on the history of philanthropic foundations in the Islamic world and, in particular, in the Ottoman empire (*Çizakça*, 2000). The book by Haider Ala Hamoudi & Mark Cammack, Islamic Law in Modern Courts, was particularly useful to explore various issues of Islamic law and analyse the relevant court practice from many Islamic jurisdictions (*Hamoudi & Cammack*, 2018). We would also mention the works of Timur Kuran, Hamid Harasani and Henry Cattan, which explore the limitations of the waqf system and attempts to reform private waqfs (*Kuran*, 2001; *Harasani*, 2015; *Cattan*, 1955). The works of Simon Gardner, Jeffrey Schoenblum and Monica Gaudiosi were very useful to guide us on key features of trusts and identify the key points of comparison with waqfs (*Gardner*, 2011; *Schoenblum*, 1999; *Gaudiosi*, 1988). We also focused on extensive case law of the English courts dedicated to various trust issues.

Main results of the research.

The Concept of Waqf under Classical Islamic Law

a. Origin and Nature

The English words "trust" or "endowment" do not fully reflect the meaning of a waqf. The name "waqf" derives from an Arabic verb "waqafa", which means "to cause a thing to stop" and "to stand still". The word "habs" is also used as a synonym for a waqf, primarily in North Africa. It derives from the verb "to prevent" or "to imprison." According to a hadith, the close companion of the Prophet and eventual second caliph, Umar ibn Al-Khattab, was granted land in an oasis town 180 kilometres north of Madinah and asked Prophet Muhammed what he should do with it. The Prophet responded: "If you wish, you can imprison its capital and designate its benefit to charity". The linguistics emphasizes that by creating a waqf the owner ends all legal ownership rights in the endowed property.

Waqfs are not specifically mentioned in the Qur'an. However, they are implicit in the verse: "by no means shall you attain to righteousness until you spend (benevolently) out of what you love; and whatever thing you spend, Allah surely knows it." (*Shakir*, 2011) The concept of wealth re-distribution is strongly emphasized in Qur'an (2:215, 2:264, 2:270, 2:280): "Abu Hurairah reported Allah's messenger as saying: When a man dies, all his acts come to an end, but three: recurring charity, or knowledge (by which people benefit), or a pious offspring, who prays for him." (*Muslim*, 1992). There is evidence that Umar endowed his land in Khaibar and allocated its usufruct to his offspring under the Prophet's advice. Imam Shafi'i also endowed his house in Fustat to his offspring. (*Gil*, 1998).

While these are the origins of the waqf and their justification in Islamic law, it is very probable that the formation of classical waqfs and the elaborate rules surrounding them were influenced by pre-Islamic Arabic customary law, as well as Roman, Byzantine and Mesopotamian traditions. Sasanid law influence is also named as one of the most likely sources (*Arjomand*, 1998).

Interestingly, the institution of waqf was initially objected to by Islamic jurists as entrustment of the endowed property to one's offspring could violate the basic principles of the Qur'anic inheritance law, which promulgates a fixed distribution of property among all the inheritors. French orientalists have thus argued that the family waqfs originated in the reaction of the Arabs to the Islamic law of inheritance, which aimed at improving the position of women in the society. Another explanation is that waqfs were used to protect the family property from arbitrary confiscations by the rulers because in legal terms the property is immune form sale and seizure.

One way or another, the importance of waqfs for the Muslim community over time has been enormous. It grew to a staggering size, amounting to about one third of the land of the Islamic Ottoman Empire and a substantial part of Muslim lands elsewhere. Wherever there was an established Muslim community, one was likely to find a waqf.

A traditional waqf functions as follows: a founder (grantor) who has accumulated wealth endows it for a specific pious purpose (*Ziadeh*, 1985). The amount of wealth endowed (corpus), the purpose of the endowment and the structure of management are clearly laid out in a deed of endowment. The deed is registered with the relevant state authorities. By and large, waqf is considered to be irrevocable and the deed of waqf renders the property inalienable.

As stated before, there are two principal types of waqfs: a charitable waqf (waqf khayri), created for a specific charitable purpose and a family waqf (waqf thurri or ahli). This idea stems from the hadith, where Prophet said, "*Giving money to the poor is charity, and giving money to your relatives counts as two acts of charity*". In addition, a combined waqf (*waqf mushtarak*) was designed to simultaneously act both as a charitable and private waqf. It was not uncommon that income generating and resource consuming waqfs were combined, such that the grantor might create a waqf of a date farm and a mosque, with the revenues generated from the date farm used to fund the expenses of maintaining the mosque. The management of the waqf is vested in a trustee (*mutawallis*), who may be the founders themselves during their lifetime.

b. Formalities

A valid waqf must satisfy five conditions. First, the object of the waqf must be a quantifiable property capable of being sold. The object must be able to generate profit and exist in perpetuity. There may be an exception from this rule permitting a waqf of extinguishable objects of value, such

as books, jewellery, arms and even shares of joint-stock companies. The Indian Waqf Validating Act of 1913 expressly permitted to endow "*any property, including beneficial interests, promissory notes and securities*". The Allahabad High Court in India ruled that a moveable property can be independently dedicated in a waqf (*Abu Sayid Khan v. Bakar Ali, 24 All. 190*). On the contrary, wife's dower and right of claims against borrowers are regarded as future property and cannot be endowed in a waqf. Moreover, undivided share in joint property (*musha*) can be endowed without separating it from the rest of the property. Second, a waqf must be established for a pious purpose *('Ala birr*), meaning anything that is good and pleases God. As noted above, giving to your family is considered a charitable act. Third, the objects of a waqf must be certain. Thus, creating a waqf with respect to a future object is not permissible. For instance, this requirement prevents founders from creating a waqf for the benefit of their unborn children. However, the perpetuity of the waqf will permit the unborn grandchildren of the settlor to enjoy its benefits. Fourth, a valid waqf is immediate unconditional, perpetual, inalienable, and irrevocable. The only condition that may be permitted is that the waqf may be created upon the waqif's (settlor's) death (*Kuran,* 2001). In that case, the waqf shall not exceed one third of the deceased person's estate and shall not be created for the benefit of Qur'anic heirs, in accordance with Islamic inheritance laws. Fifth, to create a valid waqf founders must have legal capacity to dispose of their property, namely they must be of sound age and mind (*mukallaf*), and of sound management of their property (*rashid*).

The deed of a waqf can be in oral or written form. Certain actions can also constitute a deed of a waqf. For example, the designation of land as a graveyard may be evidence of the existence of a waqf. The wealth endowed in a waqf conceptually becomes God's property. The revenue from the waqf (usufruct) may be spent for a charitable purpose (*waqf khayri*) or to support founder's family (*waqf ahli*) as the founder may decide. Part of the proceedings may be added to the corpus and reinvested to accumulate more revenue next year. The founder may specify a beneficiary of a waqf or a group of beneficiaries. For instance, a waqf intended to feed the poor will need to specify what class of individuals qualify to receive funds. In the case of a family waqf, specific family members and their offsprings must be named together with the shares they are entitled to.

c. Founders and Administrators of Waqfs

Historically, the absolute majority of waqfs were created by private individuals; only around 2% were founded by sultans and princes. The data show that in the Ottoman Empire the number of waqfs established by women varies from 20% in Edirne to at least 40% in Istanbul and Aleppo. In terms of the social class of the founders, 43% were ordinary citizens and 57% were members of the elite. Both categories tended to establish medium size waqfs with large waqfs accounting for 1-5% of the total number.

Even though by establishing a waqf founders transferred their ownership to God, they could retain certain powers. The founders can expand or reduce the share of a beneficiary, if it is stipulated in the deed of a waqf. Under Hanafi rules, they can change the conditions of the waqf deed and convert the charity waqf into a family waqf and *vice versa*. They can also assign priorities to different beneficiaries and manage the operations of the waqf. The Hanafi rule gives the founder an absolute right to nominate additional beneficiaries and deprive existing beneficiaries of their privilege. On the other hand, Hanbali and Shafi'i are of the opinion that this right is a limited one. Finally, the founder may be permitted to sell or exchange the endowed property for cash under certain, limited conditions, that will be discussed in chapter two (*Anna & Mohamed,* 2015).

Some of these rights do not arise automatically and the best way for the founders to claim them is to specifically reserve such a right in the deed of a waqf. However, if the right to sell the waqf property or exchange it is not specifically provided for, the judge can grant such a right later if the party demonstrates that the waqf is not generating enough income or operates inefficiently.

Importantly, the founders must own the property they wish to endow (*mulk*). A waqf could not be created on 'amiri land, which belonged to the ruler where a private person only had a right to use the land. The presumption under Islamic law is that beneficiaries do not have proprietary rights unless specifically granted by the founder. On the contrary, in common law (*Saunders v. Vautier (1841) 4*

Beav 115), the presumption is different: the power to create a trust "*should not be used to allow owners to control their beneficiaries when they are fully competent*" (*Penner*, 2010).

The endowed property is administered by a trustee. Under Islamic law, the waqf administrator (*mutawalli*) and the judge (*qadi*) share the administrative powers. Mutawallis are tasked with the day-to-day management of a waqf. They do not own legal title in the endowed property. Qadi can have power to authorize the sale or exchange the property or settle disputes between beneficiaries. If the founder fails to select a trustee, the qadi may do that (*Hamoudi & Cammack*, 2018).

Common Law Trusts and Waqfs: Points of Comparison

Common law trusts, used by Medieval English crusaders to guarantee their families' inheritance rights, have many similarities with classical Islamic waqfs. In both systems, corpus is endowed, and the usufruct is appropriated for the benefits of specific individuals or for a general charitable purpose, perpetual estates can be created, and the law of inheritance can be disregarded by the will of the founder.

Gaudiosi even states that the Statute of the Merton College, Oxford, founded in 1264, "*could surely be accepted as a waqf instrument if written in Arabic*". She points that the idea of a trust was borrowed by Franciscan monks or Templars in the Middle East and transplanted to England, thus, rejecting the Roman and Salian Frankish theories of trust genesis. In particular, she claims that Roman *fideicommissum,* often alleged to be the source of trusts, was purely testamentary, while the English uses were not created by will (*Gaudiosi*, 1988). Cattan further argues that there is no evidence that appropriating the usufruct to varying and successive beneficiaries existed prior to Islam (*Cattan*, 1955).

Waqfs and trusts are, nevertheless, conceptually and practically different in some key areas, most importantly with respect to the concept of ownership and perpetuity requirements (table 1).

Table 1

Comparison of waqfs and trusts

Issue	**Waqf**	**Trust**
Purpose	Generally charitable and has religious motive	No religious motive needed
Beneficiaries	Founder may be the beneficiary (only under Hanafi law)	Founder may be the beneficiary
Objective	Benefit of mankind	Any lawful objective
Ownership of property	Property vests in God	Property vests in the trustee
Status of trustee	Mutawalli only a manager	Trustee has larger powers
Termination	Perpetual, cannot be terminated under any circumstances	Need not be permanent. Can be terminated a stipulated in the trust deed
Revocability	Irrevocable	Revocable
Corpus	Corpus is immobilised	Corpus is immobilised
Usufruct	Usufruct is used for the benefit of mankind	Usufruct is used for the objective stated in the deed

We will explore these differences in detail, in particular focusing on the purpose of the endowment, the status of the trustees, inalienability of property and perpetuity requirements.

a. Purpose of Endowment

Unlike trusts, waqfs can be created only for pious purposes, which encompass both charity and support of one's family. On the contrary, in English law, providing for one's family is not an act of charity (*Re Compton (1945) Ch 123; Oppenheim v. Tobacco Securities Trust Co Ltd (1951) AC 297*). The purpose of the waqf is strictly defined in the deed of waqf and usually there is no need to leave the determination to the courts. Trust law is based on the concept of *cy prés*, which permits judicial determination of a particular purpose to which the trust funds shall be applied. However, the tendency is that the purpose of the trust must be strictly defined as well (*Knight v. Knight (1840) 3 Beav 148*). The founders have the burden to demonstrate that they intended to create a trust as opposed to entering

into a contract or making a gift. The purpose cannot be conditional upon discrimination or limit of beneficiaries' right to dispose of their proprietary rights (the rule against inalienability) (*Re Tuck's ST (1978) Ch 49*).

Islamic law develops three categories of permissiveness, as opposed to pious acts that are either recommended or obligatory. These are permissible purposes (*mubah*), repugnant purposes (*makruh*) and prohibited (*haram*) purposes. All schools would not allow waqfs for *makruh* and *haram* purposes, just as the Hanbali school would not also permit creating waqfs for all *mubah* purposes. For example, teaching poetry is permissible, but it is not a pious purpose.

b. Mutawallis and Trustees

Trustees' duties and responsibilities are defined in the trust agreement, which confers upon them the power to sell and reinvest the object of the trust. They have a positive statutory duty to "use the assets of the trust to generate revenue" (*Wragg (1919) 2 Ch 58*). Depending on the type of the trust, certain kinds of investments may be prohibited. For instance, the English courts upheld the provision of the trust deed that the trust's assets may not be invested in weapons, gambling, tobacco and newspapers (*Harris v. Church Commissioners of England (1992) 1 WLR 1241*).

A trustee acts as an agent of the trust and has fiduciary duties of honesty and good faith to act in the best interests of the trust and its beneficiaries. The standard of care means that a trustee must act as "*an ordinary prudent man of business*" (*Speight v. Gaunt (1883) 22 Ch D 727*). Trustees cannot buy the trusted assets or use them or any confidential information to maximize their own profits (self-dealing rule) (*Holder v. Holder (1968) Ch 353*). The remedy of a beneficiary is a constructive trust over all assets earned in violation of the self-dealing rule.

There is a presumption that trustees act in good faith (*A.G. V. Earl of Stamford (1843) 1 Ph.*) (*Picarda*, 1977). Trustees will be liable if the damage is caused by their own fraudulent actions, failure to follow the requirements of the trust agreement or prohibited investments (*Armitage v. Nurse (1998) Ch 241*). A trustee possesses legal title in the trusted property, whereas the beneficiaries enjoy an equitable title, which gives them the right to benefits conferred by the founder. Although it was traditionally considered that trustees of common law trusts do not receive compensation for their work, this is no longer the case (*Robinson v. Pett (1734) 3 P. Wms 249*). Professional trustees, like investment banks, receive a fee for their services. The compensation can be defined in the trust agreement, paid at the decision of the beneficiaries, awarded by the court or provided for in the statute.

In comparison to waqfs, trusts are managed better, and the role of a trustee is more strictly regulated. There is an agency problem for founders of waqfs when dealing with mutawallis as corruption concerns are high. In India, for instance, some data suggest that up to 70% of the waqf property is being misused and encroached upon (*Ahmed*, 2007). The reason for that may be that mutawallis are not paid. Both trusts and waqfs originally embraced the idea that trustees (mutawallis) were not paid. Islamic law places more focus on the spiritual value of the work, meaning mutawallis should receive reward from God for their services. However, it is naïve to assume that the mere fact that mutawallis are paid for their services is enough to eradicate corruption among them.

Another concern is that, since the mutawallis do not own the property in any sense and do not have any fiduciary duties, they cannot deal with it, except in very particular ways permitted by religious law (*Schoenblum*, 1999). Mutawallis are generally unqualified and lack specific financial education to efficiently receive high profits. In addition, multiplying of beneficiaries across generations and inflation can render a waqf unprofitable. For waqfs, one usually needs to get permission from a qadi to sell or reinvest the assets.

c. Perpetuity

In trust law, the perpetuity period refers to the length of time during which the future ownership of property can be dictated by the founder of the trust. The rule against perpetuities is a cornerstone of trust law (even though initially trusts could exist "in perpetuity") (*Gardner*, 2011). Under the rule, trusts created for an unlimited period can be declared invalid (*Sheddon*, 2002). The common law perpetuity period in England is life duration plus 21 years (*Cadell v. Palmer (1833) 6 ER 956; Re Wilmer's Trusts (1903) 2 Ch 411*). The Perpetuities and Accumulations Act of 2009 states that the

perpetuity period is 125 years (*Perpetuities and Accumulations Act, 2009 c 18, Sec. 5(1)*). However, charitable trusts are exempt from the rule of perpetuities and, therefore, may be inalienable.

The policy consideration behind the rule against perpetuities is to prevent withdrawal of property from commerce. Another consideration is that living owners cannot exercise eternal dominion over it (*Hobhouse*, 1880). There is also a religious justification against allowing perpetuities: land was given to human beings by God and by keeping it forever in trust the human beings are denying the Providence of God (*Pells v. Browne (1620) Cro Jac 590, 221*). There is no uniform consensus among all Islamic interpretations that waqfs must be perpetual. Hanafi, Shafi'i and Hanbali schools generally require perpetuity. They stress the perpetual nature of waqfs by requiring that the property be dedicated to some pious purpose, such as the establishment of a mosque or religious school (*Hamoudi & Cammack,* 2018). On the contrary, Malikis permit temporary revocable waqfs, provided that founder's intent is clear (*Harasani*, 2015). Shi'i and Maliki jurists also permit to terminate family waqfs only if founder's direct line of descendants is extinguished (*Al-Sistani*, 2008).

Islamic law never adopted a position that perpetuities deny the Providence of God. On the contrary, the endowed property conceptually belongs to God and must always serve the original purpose of the endowment. Islamic jurists were most concerned with the situation when a class of beneficiaries could one day become extinct, which would threaten the perpetual nature of the waqf. Some courts tried to solve this by permitting changes to the purpose of the waqf, but only as an exceptional step. For instance, the waqf may function "*for the benefit of the poor and beggars and widows and orphans*" in the absence of the founder's family (*Abdul Fata v. Rosamaya, (1891) ILR 18 Cal 399*).

The requirement of perpetuity in a waqf is considered by some as "increasingly injurious" and "catastrophic form an economic standpoint" (*Cattan*, 1955). As beneficial shares decrease over time, the beneficiaries in future generations lose motivation to exercise control over the mutawalli, which in this turn, leads to the decline of the waqf. The perpetuity constraint prevents a founder from liquidating a waqf if it is not managed properly. Secular authorities in Egypt and Syria even made an argument that perpetuities can threaten democracy and state authority. In 1946, Egypt enacted a law placing a time limit of two generations on the family waqf.

d. Inalienability of Property

The inalienability of trust property would be contrary to the rule against perpetuities and such trust would be void (*Wilson*, 2011). On the contrary, the requirement of inalienability for waqfs means that the waqf property cannot be subject to any sale, disposition, mortgage, gift, inheritance, attachment or any alienation whatsoever (*Cattan*, 1955). This prohibition stems from the perpetuity requirement. However, since there is no consensus on perpetuities among all juristic schools, they are not consistent in prohibiting alienation of waqf property, except in cases when a mosque is endowed. In such cases the requirement of inalienability is absolute.

Since strict observance of the inalienability rule raises economic problems, Hoexter points out that Muslim jurists "*were not insensitive to social and economic requirements*" (*Hoexter*, 1995). Thus, sale and subsequent exchange of waqf property for other property of equal value may be permitted. Hanafi jurists, although generally prohibiting such exchange unless expressly permitted by the founder and only if the property has become incapable of generating sufficient income to satisfy the purpose of the waqf, tend to be more flexible in practice (*Hoexter*, 1997). If that happens a qadi can authorize the trustee to make such an exchange (*Van Leeuwen*, 1999). Shi'i jurists require that the property provide no income at all before the sale and exchange becomes possible (*Al-Sistani*, 2008). Under Maliki interpretation, beneficiaries may even have the right to collapse the waqf and dispose of its property.

Possible Solutions to Doctrinal and Practical Limitations of Waqfs

We have discovered that trusts are quite flexible in some key respects as compared to waqfs, which makes them popular investment and business vehicles (*Noor, Shariff & Rusli*, 2016). We will further explore the possible solutions to the doctrinal limitations of waqfs previously identified.

Some ideas of reforms suggest that external concepts from common law trusts may be transplanted to soften or abandon the requirement of perpetuity or charitable purpose. However, these proposals may be inconsistent with Islamic nature of waqf that is "governed by the law considered sacred" (*Kuran*, 2001). Such attempts will need to gain validation from Islamic law, as they were traditionally developed outside of the state enforcement mechanisms. Therefore, the concept of "ijtihad" may be the most suited source to develop and modernize waqf laws (*Van Leeuwen*, 1999). Ijtihad is an approach taken by Islamic jurists to analyse, interpret and analogize every unsettled doctrinal question in the light of the principles laid down by the Qur'an and Sunna as well as in the light of the standard set by earlier jurists (*Usmani*, 2002). For instance, limited liability of corporate bodies can be recognized in Sharia by analogizing it to a natural person, who can sue, enter into contracts and become bankrupt. The doctrinal views of the permissiveness of cash waqfs, ownership theory and perpetuity have significantly evolved over the centuries and are products of ijtihad. In the absence of a uniform doctrinal position among all schools, it may be open to re-interpretations.

Ibn Bayyah suggested that the notion of public interest (*maslahah*) can operate in reforming waqf laws – following the general provisions and spirit of Islamic law, even without any specific provision on a particular issue. The proposed reforms can be validated by fatwas on the permissibility of new types of waqfs.

Even though it may be possible to justify the need of waqf reforms, it is not obvious whether these "new waqfs" will be true waqfs as they will have legal personalities and are governed by concepts derived from modern company law. Despite overcoming the economic constraints, such reforms will fall short of achieving the principal goal – to make these "new waqfs" Islamically-compliant. As Usmani puts it, Islamic obligations of worship, as well as ethical norms, must be prominent in the whole atmosphere of an institution which claims to be Islamic. Modern trust or company law cannot achieve that purpose, although its certain features play very similar role and achieve similar purposes. Therefore, all reform proposals must anticipate both corporate efficiency and compliance with Islamic norms.

An Islamically-compliant corporate waqf is a creative and innovative way of using the waqf concepts by applying modern corporation mechanism to ensure that the waqf is managed professionally (*Ahmad*, 2015). A professional waqf administrator (mutawalli) will have better accountability and transparency, will receive contractual compensation for the services rendered and may be required to have specialized financial or legal education (*Ramli & Jalil*, 2014). The administrators will have contractual duties towards the waqf and its beneficiaries and may be jointly and severally liable for their actions. Supervisory boards or management committees may be created instead of one mutawalli, which will check compliance with Islamic law principles of investment (*Rashid & Husain*, 1979). Supervisory and oversight responsibilities over Shari'a compliance may also be exercised by specialized governmental bodies.

Waqfs structured as investment funds (*mudaraba*) must achieve a balance between profitability and capital protection by not investing in highly volatile asset classes. In the event capital deterioration has occurred in previous years, the returns generated in the succeeding years must be used to restore the initial corpus.

In addition to structural corporate changes, a possible solution to the inefficiency of waqfs over time may be the concept of "hikr", a long-term lease of waqf property in exchange for a lump sum of money, paid on a monthly or annual basis. The idea behind hikr is to give lessees an incentive to develop the waqf lands and increase their profitability by giving them freedom to use the waqf property. Historically, the idea of hikr was frowned upon because corrupt mutawallis could take advantage of it to make more profits themselves instead of properly managing waqfs for the benefit of the beneficiaries (*Hoexter*, 1995). However, today the idea of hikr can be used to structure an ijarah transaction, whereby assets are leased to the lessee for a rental fee, and the latter agrees to maintain the assets. Another solution may be to allow the dissolution of family waqfs in case they operate inefficiently at the request of the heirs, who are entitled to receive income generated by them. For instance, in Iraq, the court can dissolve the family or mixed waqf upon a request from one of those

entitled to income or one of their heirs. However, under Law 41 of 2016, Shi'i family waqfs can no longer be dissolved (*Hamoudi & Cammack*, 2018).

Cash Waqf as a Model of an Islamic Investment Fund

Real estate waqfs were commonly considered the best to ensure the perpetuity requirement is met. However, late into the classical period, the Ottoman courts approved cash waqfs as early as the beginning of the fifteenth century. In India and Pakistan, they have been considered to be legal since 1913. In Iraq and Iran, they were permitted by means of a fatwa issued by the celebrated Mujtahid of Karbala. Here is one example of such a waqf: "*the accounts of the revenue and expenditure of the Muslim endowments for the purpose of assisting with the avariz and nuzul taxes for the residents of the Orhan Gazi district of the city of Bursa*" (*Çizakça*, 2000).

A cash waqf operates as follows: the endowed capital is transferred to borrowers, who after a certain period, usually a year, return to the waqf the principal amount plus a profit share or loss share. These ventures do not violate the interest prohibition because the borrowers do not guarantee a return to the waqf, and instead only a profit share. The prohibition against interest does not mean a prohibition against profit sharing. Usmani points out that "*if the creditor is advancing money to share the profits earned by the other party, he can claim a stipulated proportion of profit actually earned by him*" (*Usmani*, 2002). The idea is that capital has an intrinsic element of entrepreneurship, and the profits generated by the commercial activities in the society are equitably distributed to all those persons who have contributed to the enterprise. In other words, there is always a risk of loss, though low risk investments mean the loss is less likely (*Ibrahim, Amir & Masron*, 2013). The financial assets endowed may represent a claim on ownership of an entity or contractual rights to future, shares, sukuk (a financial certificate, similar to bond, that can be traded on a secondary market) and unit trusts (*Van Leeuwen*, 1999).

The absence of a hadith permitting the endowment of a specific moveable asset was a doctrinal challenge to cash waqfs. Instead, the ta'amul – local customary practice – was used to justify such endowment. Shafi'i jurists ruled that endowment of any moveable asset is valid subject to the preservation and non-consummation of the corpus. Maliki jurists have ruled that the annual return generated by the cash waqf should be subject to the payment of zakah, while they have exempted simple donation from this obligation. The Shi'i position regarding the cash waqfs is revealed by a fatwa given by Sheikh 'Abd Allah al-Mazandarani, the Celebrated Mujtahid of Karbala in 1907: "*the validity of such a waqf on account of its being owned by a joint-stock company cannot be questioned*" (*Hamoudi & Cammack*, 2018). The opinion analogizes a cash waqf to a joint stock company where the *corpus* is divided among multiple beneficiaries.

There are three important aspects that need to be addressed when managing a cash waqf. First, the waqf capital should not be diminished; therefore, the reservation of the corpus is the priority. Second, the corpus should be invested in stable low-risks endeavours, which are able to produce consistent income and not be speculative (comply with the prohibition against gharar or certain forms of speculation). Third, all the investments must be for Shari'a-compliant purposes (*Ahmed & Salleh*, 2016).

The capital of the cash waqf can be invested in three ways: mudaraba, istiglal and istirbah. In istiglal, the borrowers provide a collateral in the form of the house, for the period when they retain the title, and are supposed to pay a month's rent to the creditor as long as they use the borrowed money. A different vehicle, istirbah, means that the borrowers are required to return the premium and a share of profit or loss at the end of the period. In mudaraba partnership, which operates similarly to a private equity fund, profit should be spent for the pious purpose stated in its charter. If the return exceeds the amount needed for the purposes, the remainder was then added to the original capital of the endowment. A different way to increase the original capital of the waqf was to create a different waqf assigning part of its revenues to the first waqf. Economically, this second approach could be seen as a *sine qua non* to ensure the perpetuity of the original waqf. It is also possible to establish cash waqfs in the form of bank accounts (*Nuraini*, 1991). Such models of cash waqfs are now widely used in Malaysia, Singapore, Indonesia, India and the Gulf countries.

Conclusions. The waqf is an instrument that can bring tremendous benefits to the Muslim majority countries and Muslim communities worldwide by realizing their business and investment potential. While there are some doctrinal impediments owing to a historic preference for waqfs of real property, our research has shown that there is no express prohibition against cash waqfs or corporate waqfs in the Qur'an or Sunnah. Other doctrinal impediments – the pious purpose of waqfs, their perpetual nature and status of the mutawallis – can be overcome by using traditional juristic instruments of ijtihad or maslahah or borrowed approaches from common law trusts. As a result, modern states, such as Malaysia, Singapore, and the states of the Gulf have used these instruments to create more flexible waqf regulations, thanks to which waqfs are playing an increasingly bigger role in their economies. The re-emergence of improved waqfs can revitalize important social functions they once performed – promotion of education, religion and alleviation of poverty. Finally, waqfs can be pivotal in restoring ethical standards of the global financial markets, avoiding gambling, speculation and shady practices.

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