Understanding the waqf in the world of the trust

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Abstract

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Overview

Parallel to the development of the trust in common law countries, a remarkably similar structure developed in the Islamic world—the waqf (pl. *awqaf*)—developed, thrived, and then declined. More recently, the emergence of great wealth in Islamic countries, and the Islamic tradition of philanthropy, has resulted in the revival of interest in the structure of the waqf, and increased resources being held on terms that seek to comply with the requirements of Islamic law.

In this article we seek to provide an introduction to the Islamic jurisprudence underlying the waqf, to review what are, at the least, interesting parallels between the Islamic waqf and the statutes of one of the most venerable institutions of English academia, to trace the rise and fall of the waqf in the principal jurisdictions in which it operated, and finally to offer some suggestions as to the likely private international law and revenue consequences of *awqaf* operating within common law and civil law jurisdictions.

The Islamic jurisprudence

In establishing jurisprudence (*fiqh*) for the basis of *awqaf*, Muslim scholars place much weight on the early Islamic period in the seventh century. The first religious waqf was believed to be the Mosque of Quba in Medina created during the Prophet's lifetime for religious purposes. Soon after this, a philanthropic waqf was created of seven orchards in Medina for the benefit of the Prophet. The Prophet settled these orchards on a charitable waqf for the benefit of the poor and needy. This practice was followed by the second Caliph Umar who, on the advice of the Prophet, settled a palm orchard, with the usufruct of its fruits held on separate terms to its long-term ownership. Some of Umar's companions took this principle further some years later by putting a condition that the fruits and revenue of their waqf should first be given to their own children and descendants. Only the surplus would be given to the poor.

A *hadith* (Muslim 1992, *bab 3, hadith 14*) narrated by Abu Huraira reported the Prophet as saying:

> When a man dies, all his acts come to an end, but three; recurring charity (sadaka gariya) or knowledge

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> (by which people benefit), or a pious offspring who prays for him.

The classic Islamic sources typically took into account each of these good deeds separately.[1] Nevertheless, Muslim scholars increasingly perceived the importance of seeking, by appropriate means, to perform all three of these good deeds. Muslims give voluntarily to simple charity (*sadaka*). Endowing a waqf[2] enables ordinary *sadaka* to be repeated in perpetuity so that a single act of giving becomes *sadaka gariya* (recurring charity).

Abu Hanifa's school of law defined a Waqf[3] as:

> The detention of the corpus from the ownership of any person, and the gift of its property or usufruct either presently or in the future to some charitable purpose.

In legal terms, the ownership of the property by the waqf was no longer held by the founder, nor was it acquired beneficially by any other person. This is similar to the trust concept of separating legal and beneficial title in that the property is held for the purposes of the waqf. Whilst for the trust, the legal owner of the trust property is the trustee, for Muslim classical scholars, the true owner of the waqf property is Allah.

Settling a waqf is voluntary charitable giving unlike *zakat* which is obligatory and one of the five pillars of Islam. *Zakat* can only be given to Muslims whereas waqf and other charity can be given to both Muslims and non-Muslims.[4] Waqf is a narrower concept than 'charity', which in islamic law encompasses alms, grant, inheritance, loan, and waqf. The consensus of Islamic scholars is that *zakat* cannot be used to fund a waqf.[5]

During the first 300 years of Islam, Muslim scholars developed jurisprudence with respect to the creation, management, and administration of *awqaf* progressively.

Waqf as charity

One of the primary differences between the concept of charity in the common law trust and Islamic law is provision for the family. Common law charity fundamentally excludes provision for persons related to the settlor,[6] whereas Islamic theology gives priority to providing for family. The Prophet is recorded as saying:

> A pious offering to one's family, to provide against their getting into want, is more pious than giving alms

1. It is reasonable to compare *sadaqa* with the 'relief of poverty' and knowledge with the 'advancement of education' and pious with the 'advancement of religion', being the three named heads of charity set out in the leading charity law case *The Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531.

2. '*Role of waqf in improving ummah welfare*' by Monzer Kahf presented at International Seminar on '*Waqf as a Private Legal Body*' at Islamic University of North Sumatra, Indonesia, January 2003 <www.kantakji.com/fiqh/Files/Wakf/b104.pdf>.

3. Charitable foundations were known in the Muslim world as *Awqaf*. The word waqf and its plural form *awqaf* derive for the Arabic route verb *waqafa*. Literally, this means making a thing stop and stand still. Its second meaning became pious/charitable foundations.

4. Fatwa No 18148 (31 May 2011) *General Authority of Islamic Affairs and Endowment*:
The concept of charity in Islam encompasses *zakat* (obligatory alms) *al-fitr zakat* and all kinds of charitable work. There is scholarly consensus that *Zakat* must only be given to Muslims. Other charity may be given to both Muslims and non-Muslims. <http://www.awqaf.ae/Fatwa.aspx?Lang=EN&SectionID=18&RefID=18148>.

5. This relies upon Verse 60 of Chapter 9:

> The As-Sadaqat (here it means Zakat) are only for the Fuqara' (poor), and Al-Masakin (the needy) and those employed to collect (the funds of Zakah - to compensate for their time); and to those who are inclined (towards Islam); and to free the captives; and for those in debt; and for Allah's Cause (i.e. for Mujahidun - those fighting in Jihad), and for the wayfarer (a traveller who is cut off from everything); a duty imposed by Allah. And Allah is All-Knowing, All-Wise.

6. The charitable trust must be for for an appreciably important section of the public. In the case of *In re Compton* [1945] ch 123, the Court of Appeal formulated the principle that a gift for scholarships for the education of the descendants of named individuals cannot on principle be a charitable trust because it lacks the necessary public character. This principle was approved by the House of Lords in *Oppenheim v Tobacco Securities Trust Co LD and Others* [1951] AC 297, which held a gift to provide for the education of the children of employees or former employees of a specific company did not have the necessary public character to be a charitable trust.

However, in *Dingle v Turner* [1972] AC 601 the House of Lords upheld that the Compton principle did not apply to poverty cases and allowed the 'poor relations' line of cases to stand; although Lord Cross suggested the 'poor relations' cases are all 'anomalous'. However, s 3(2) of the *Charities Act, 2006* removed the presumption of public benefit and the Charity Commission is exploring whether the 'poor relations' cases remain good law after this statutory change.

> to beggars. The most excellent of sadaka (charity) was that which a man bestowed upon his family.[7]

The waqf for religious, charitable, or pious purposes (*Waqf Khairi*) is in many ways comparable to the common law charitable trust. It is beyond the purview of this article to explore the differences between the common law and Islamic concepts of charity. However, the differences are significant:

> A reference to any book on Mahomedan religion or law will show that the words 'charitable purposes' are not used in Mussalman Law in the restricted sense in which it has been attempted to use them in the English Courts of Justice.[8]

This article will focus on a waqf primarily for family purposes (*Waqf Ahli*) which is 'charitable' under Islamic law. The most exhaustive review of the jurisprudence of the validity of a *Waqf Ahli* is in the dissenting judgment of Ameer Ali J in the Calcutta High Court.[9] However, the most authoritative cases come out of the Privy Council, being the highest court of common law for the British Empire. It is important to note that the Privy Council was not applying the English common law when judging the validity of the waqf[10] in India and other parts of the empire. As it held in the leading decision of *Abu Fata v Russomoy*[11]:

> Clearly the Mohamedan law ought to govern a purely Mohamedan disposition of property.

*The waqf for religious, charitable, or pious purposes (*Waqf Khairi*) is in many ways comparable to the common law charitable trust*

The founders of the waqf in the *Abu Fata* case were two brothers of the Hanafi sect of Sunni Muslims in India.[12] The litigants were more than half a dozen creditors pursuing them for non-payment of debts and seeking to execute against properties transferred into the waqf. The only question being argued before the court was the nature and validity of the entity itself. The objects were as follows:

> For the benefit of our children, the children of our children and the members and relatives of our family and their descendants in male and female lines and in their absence for the benefit of the poor and beggars and widows and orphans of Sylhet on valid conditions and true declarations herein set forth. We, two brothers have for our lifetimes taken upon ourselves the management and supervision of the same in the capacity of *mutawallis* and taken out the waqf properties from our ownership and enjoyment in a private capacity and we have put them in our possession and under our control and in our capacity as mutawallis.

The motives stated were regard for the family name and preservation of the property in the family. There was a gift to the poor and to widows and orphans, but these charitable beneficiaries were to take nothing, not even surplus income, until the total extinction of the bloodline of the settlors, whether lineal or collateral.

Five years earlier in a decision also delivered by Lord Hobhouse,[13] the Privy Council held that they could not find:

> any authority shewing that, according to Mahomedan law, a gift is good as a wakf unless there is a substantial

7. Lord Hobhouse cited this 'precept of the Prophet Mohamet himself' in the Privy Council decision in *Abu Fata Mahomed Ishak v. Russomoy Dhur Chowdhry* (1894) Law Rep 22 Ind Ap 76 (PC), but held that the 'extravagant application of abstract precepts taken from the mouth of the Prophet' could not justify legalizing a family waqf without a significant charitable component.

8. Ameer Ali J in *Shuk Lai Poddar v Bikani Mia* (1893) ILR 20 Cal 116 (Calcutta High Court).

9. *Shuk Lai Poddar v Bikani Mia* (1893) ILR 20 Cal 116 in which Ali J reviewed approximately 70 fatwas and court cases.

10. In India the term used was *wakf*, although the Wakf (Amendment) Bill 2010 proposes to change the word to *waqf*.

11. Privy Council 15 December 1894 (1894) LR171A28PC.

12. Most of the cases apply Sunni Hanafi law. Shi'a law is stricter in its requirement that the ultimate unfailing charitable purpose must be clearly stated in a family wakf: *Murtazai Bibi v Jumna Bibi*, ILR 13 All 261.

13. *Ahsanulla Chowdhry v Amarchand Kundu*, Law Rep 17 Ind Ap at 37 1889 (PC).

> dedication of the property to charitable uses at some period of time or other.

The Privy Council held that there had been no '*bona fide* dedication of the property' and that the waqf language was:

> only a veil to cover arrangements for the aggrandisement of the family and to make their property inalienable.

In the *Abu Fata* case, the Privy Council could find no answer to the contradiction that in Indian general Islamic law a simple gift by a private person to remote unborn generations of descendants was forbidden but that same disposition was alleged to be legal

> if only the settlor says that they are made as a waqf, in the name of God, or for the sake of the poor

The Privy Council went on to disallow the family waqf before the Court on the basis that the gift to charity was illusory. A gift may be illusory, whether from its small amount or from its uncertainty and remoteness. It was equally illusory to make a provision for the poor under which they were not entitled to receive a rupee until after the total extinction of a family, possibly not for hundreds of years, possibly not until the property had vanished away under the wasting agencies of litigation or malfeasance or misfortune.

It is important to understand that these family waqfs did not fail because they did not meet the common law definition of charity. They failed because the Privy Council believed they did not meet the requirement of a legitimate charitable component in order to qualify as a waqf under Islamic law.[14] In the modern world, we would consider these primarily sham cases rather than charity cases. It was a fundamental tenet of Muslim law that the purpose of the waqf should be *qurba* (objects that will be pleasing to Allah). Thus, to be valid,

> the benefits given to the settlor's family [must come] after those primary [charitable] objects.[15]

Family Waqf

The waqf is created by the founder, known as *waqif*, who is comparable to the settlor in the common law trust. Typically for family *awqaf*, the *waqif* would appoint his family as primary beneficiaries. The income of such *awqaf* would be reserved for the family. Initially, public benefit would be of secondary importance, but would assume greater importance following the death of the founder and his family.

One advantage of the family waqf was that it was possible for the *waqif* to avoid Islamic inheritance rules, to bequeath benefits to specific members of the family in a manner not sanctioned by Islamic inheritance law. For example, the founder might decide to give everything to the oldest son or at the other extreme to give equal shares to all children regardless of their gender under the terms of the family waqf.

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In the absence of specific direction by the *waqif*, the following principles have been followed. Males and females may have the same share. *Agnates* (male line) and *cognates* (female line) may share in the same manner. This contrasts with the Sunni precedence given to inheritance to *agnates* on the basis of the nearest male relative on the male side having

14. The effects of this judgment were overruled in India by the *Mussalman Waqf Validating Act* 1913.
15. *Mughurool Huq v Puhraj Ditarey Mohapattur*, Calcutta High Court, 13 WR 235 (1870) approved by the Privy Council in *Ahsanulla Chowdhry v Amarchand Kundu*.

preferred rights over *cognate* relatives. Children of deceased beneficiaries under a waqf may represent their deceased parents, even during the lifetime of beneficiaries who are nearer in degree.

The merit of this is to exclude the strict rule that may bar orphaned grandchildren from inheriting whilst, for example, another son of the testator is still alive. As can be seen, this provides a measure of flexibility in adjusting shares to take into account of wider family circumstances.

Waqf management

Boards of supervision often evolved over time. Typically these consisted of representatives of the beneficiaries, staff working on waqf projects and other key individuals interested in such projects and properties. These were intended to establish appropriate procedures to achieve the requisite efficiency relevant for not for profit objectives.

Irrevocable

Under all Sunni sects, any transfer of property to a waqf had to be irrevocable. Any rights obtained by the *waqif* would need to be of a fiduciary nature and typically reserved in the foundation document itself. This contrasts with greater flexibility for settlors to reserve the right to revoke common law trusts.

Perpetual

It is a fundamental principle that the duration of the waqf should be unlimited. Only in the Malaki School of Law was it permissible to allow the creation of a Waqf for a time limited by reference to lives or a series of lives, following which the property might revert to the founder or his heirs.[16] This contrasts with the historic law against perpetuities in the common law trust that required trust property to vest in beneficiaries within a specified period.

Inalienability

Another major difference is the inalienability of waqf property, except where there is an exchange of property of equal value, or alternatively the transaction has been authorized by a judge (*qadi*) or otherwise is legally permissible.

According to Abu Hanifa:

> A Waqf signifies the appropriation of any particular thing in such a way that the appropriator's right in it shall continue, and the advantage of it shall go to some charitable objects; or it is the detention of a specific thing in the ownership of the Waqif or appropriator, and the devoting or appropriating of its profits or usufruct in charity, or the poor, or other good objects.

Abu Hanifa's disciples modified this to refer to the appropriation of a particular article in such a manner that it became subject to the rules of divine property. Hence the appropriator's right in it is extinguished transmuting into the property of God. Similarly, the Shia textbook *Sharaiul Islam* views the waqf as a contract, the practical effect of which is to tie up the original corpus, leaving the usufruct free.

Thus, a waqf was seen by Islamic jurists as an imperfect form of ownership, in which ownership and utility were never combined at the same time in the same person.

Parties to the waqf

The founder of the waqf would typically appoint himself or another the first administrator (*mutawalli*). Except in the case of certain religious charities, the *mutawalli* may be a female or even a non-Muslim. It is also permissible to have a committee giving powers in relation to the administration of the waqf. Similar to the position of trustees, no minor or incapacitated person may be appointed as a *mutawalli.* There is also no right of inheritance to the office of *mutawalli.* In

16. See Cattan, *The Law of Waqf, in Law in the Middle East* (1955) 207, note 5.

the event that there is no stipulation in the waqf documentation for the appointment of a successor to the office of *mutawalli*, and no other person has the power to do so, the power may fall to the *qadi*.

As to the formalities required for a valid waqf, under Sunni law, there must be a permanent dedication of the property. Although there are examples during the British Indian Colonial period of Hindus setting up *awqaf* for graves of Muslims, the more general view is that the donor of property to the waqf should be a person professing the Muslim faith. He must also have full right of ownership of the property to be transferred. A dedication must also be for a purpose recognized by Shari'a law as religious, pious, or charitable.

So far as the Shia were concerned, they also took the view that the *awqaf* should be perpetual, absolute, and unconditional, the position must be given to the item dedicated and that the *waqif* should not retain any interest. Under Shia law, the waqf was only completed once possession of the waqf property had been delivered to the first beneficiaries, or they had been authorized to administer it, or the waqf had been created for the benefit of a body of persons, a *mutawalli* appointed and possession delivered to him.

As to the formalities for creating a waqf, it is clear that there needs to be a divestment of ownership. A waqf may be either verbal or in writing. Similarly, it is not possible for a lifetime waqf to commence after death or be subject to any other similar contingency.

In so far as a waqf is made during the *waqif's* death illness (*mard al maut*), it is subject to the same restrictions as if executed at the time of his death. In practical terms, this means that any property transferred above the one-third freely disposable fraction available to be bequeathed to non-forced heirs may be clawed back into the testator's estate and devolve in accordance with the testator's estate.

Powers of the waqif

The *waqif* may have a wide degree of discretion when determining the succession of beneficiaries. Nevertheless, under some systems of law, such as that in Algeria, the *waqif* is not permitted to exclude his own son or his daughter in having a benefit in his estate.

In addition, the *waqif* may during his lifetime, appoint, remove, and control the *mutawalli*, define the amount of the *mutawalli's* remuneration, and appoint a new *mutawalli*.

The mutawalli

The *mutawalli* is the manager of the waqf. He deals with the administration. He is appointed by the *waqif*. Normally, he would receive a salary for his services. It is acceptable for the *waqif* to appoint himself as the first *mutawalli*. He also has power to remove any *mutawalli* he has appointed on any grounds. Even in the absence of a *mutawalli* appointed by the *waqif* to act after the death of the *waqif*, the *qadi* may appoint a *mutawalli*, who might typically be a descendant or relative of the *waqif* who has full capacity. In the event that two *mutawallis* have been appointed by the *waqif* to administer the waqf after his death, they should act jointly together.

As regards the management of the trust property, the first duty of the *mutawalli* is to preserve the waqf property. This is followed by a duty to maximize the revenue for the benefit of the beneficiaries. The waqf document should also set out how the *mutawalli* is to be compensated for his time. If the document does not mention remuneration for the *mutawalli*, he may, if appropriate, apply for an award from the *qadi*.

Comparison of beneficial objects between trusts and awqaf

As compared with a trust, which may be either for family or charitable purposes, a waqf requires a religious, pious, or charitable purpose. Although the settlor of a trust may be a beneficiary under a trust, with the exception of Hanafi law, the *waqif* may not reserve to himself any financial benefit from the waqf.

Similarly, although a trust may be set up for any lawful purpose, a waqf may only be created for a

purpose that is ultimately charitable, religious, or pious, even though its object may be to settle family assets whilst the family and its descendants remain in existence.

Whilst any transferrable property may be the subject of a trust, there are obvious restrictions on the property that can be owned by a waqf. To take a simple example, it would not be permissible for businesses dealing in alcohol or pork to be held as assets of the waqf.

There are plainly similarities between the use of the waqf and the use of the trust in estate planning and the adverse impact on a society of perpetually tying up land in ways that are similar to the fight against fee tail in medieval England. The history of the waqf also needs to be understood in light of the expansion of empires and the need to control institutions funding social welfare in colonial environments. The destruction of *Awqaf* in the Ottoman Empire and their exploitation by the British in colonial India have real parallels to the dissolution of the monasteries and chantry endowments by the Tudor monarchs in their struggle to win the allegiance of their people away from the Pope.

Advantages of creating awqaf *as asset protection vehicles*

One of the reasons advanced for setting up *awqaf* was to protect the family property from arbitrary confiscation by the rulers. Another motive in establishing the family waqf was to protect the property of an indebted person. Murat Cizakca in his article in *Islamic Economic Studies* entitled

> Aqwaf in history and its implications for modern Islamic economies

indicates that in Islamic lands, this practice was eventually prohibited by a *fatwa* during the 16th century.

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Doctrine similar to cy pres

It is also interesting to note the development of a doctrine similar to the trust doctrine of *cy pres*. This provided that if the charitable objects of a waqf became infeasible, the revenue of the waqf should be given to the poor and needy.

The Waqf as a possible influence in the development of an English academic institution

In a remarkable paper entitled 'The influence of the Islamic law of waqf on the development of the trust in England: the case of Merton College', Monica Gaudiosi[17] (the author) investigates the incorporation of Merton College, Oxford in 1274. This was generally considered a remarkable constitution for its time and typically was followed as the ideal collegiate structure by other Colleges at Oxford and Cambridge Universities. The key part of the analysis involved the background of the founder of Merton College, Walter de Merton. He was a very powerful English clergyman and senior government official. He had been Chancellor in 1258, 1260, and 1272. At the time of his death, he was serving as Bishop of Rochester.

One of the key features in his early life was de Merton's involvement with the New Temple, where

17. M Gaudiosi, 'The influence of the Islamic law of Waqf on the development of the Trust in England: the case of Merton College' (1987–1988) 136 University of Pennsylvania Law Review 1231–61.

he held his wealth, and from where he conducted his business transactions. The New Temple was the English centre of operations of the Knights Templar. Although the Knights Templar were founded in Jerusalem as a military religious order in around 1120, by the 13th century they had evolved into a complex multinational trading empire with major centres of operation in the Middle East and Mediterranean regions.

De Merton was also extensively involved in negotiations with the Pope's Legate with respect to the Kingdom of Sicily, a Norman monarchy under Frederick II. Ms Gaudiosi described this as:

> A significant conduit for Islamic culture to England due to the constant exchange of administrative personnel between Norman England and Norman Sicily.

De Merton was concerned to provide education for his nephews. By 1262, he had obtained a licence from the feudal overlord to vest properties for the support of university students. He reserved himself the right to modify the terms embodied in an *ordinatio* (a prescription ordaining what should be done). He then modified the terms in the 1264 statutes of Merton College. These were effectively reissued in 1270 and finalized in 1274. That latter document was generally credited with establishing the modern college system.[18] After 1274, Merton became an incorporated college, the first such educational institution to be so founded.

Ms Gaudiosi highlights the following features of the foundation documentation:

1. *Settlement of property followed waqf principles*: In the opening sentences, de Merton set out the charitable purpose of his trust and assigned properties for its support. This followed waqf principles in that a waqf would be invalid without a charitable cause.
2. *Assignment of the property was in perpetuity:* The House of Scholars of Merton was to be established 'for the support in perpetuity' of students at the University of Oxford or elsewhere along with a number of clergymen.
3. *Reservation of benefit to founder's family*: The first condition of the trust that:

   > the aforementioned students be of our kin, so long as they are found to be honest and able, willing to advance in such studies.

   Any member of de Merton's family 'lacking what is needed for survival' was to be supported by the trust in return for appropriate service.
   This also followed Islamic practice in that the trust not only provided for the support of his family, but also set out long-term charitable objectives. The designation of certain family members as beneficiaries was entirely acceptable within the framework of a waqf.
4. *Ultimate charitable benefit*: There was also an ultimate charitable purpose, that when 20 eligible family members could not be found 'other honest and able students may fill the vacant places'. Again, this followed Islamic precedent in that a founder could empower the *mutawalli* to accept or reject applications based on express criteria, rather than being solely at the trustee's discretion.
5. *Stipulations as to college uniforms*: The students were required to

   > live together hospitably dressed in a similar way as a sign of unity and mutual affection.

   This also followed similar provisions with respect to clothing which were current in relevant waqf documents at the time. Arguably, it also set a template for school uniforms.

18. G Broderick, *Memorials of Merton College* (1885) 6, note 160.

6. *Provision for forfeiture for bad behaviour etc.*: There was also provision for forfeiture in certain circumstances such as

> if any one of them should give up ... or transfer allegiance to others or come upon richer benefices

his award was to be withdrawn. This followed similar precedents in waqf documents concerning educational institutions, such as those that required that beneficiaries were not to benefit from other *awqaf*. De Merton particularly stipulated that a beneficiary could be dismissed and replaced if he should:

> withdraw from study, or be unwilling to apply himself to the best of his ability or become publicly known for bad behaviour.

7. *Clauses providing for beneficiary involvement in decisions:* Interestingly, the statutes left dismissal of a beneficiary and selection of his replacement to the scholars themselves, and in the case of disagreement, the chancellor of the university or warden of the house was to elect a new beneficiary based on the recommendation of 'six or seven of the older and wiser students'. This again followed Islamic principles where beneficiaries of *awqaf* were potentially involved in waqf administration. This point was further emphasized in that de Merton urged students to enquire diligently whether the warden had conducted himself well, honestly and prudently in the administration of the college, and if not, to report any shortcomings to those responsible for correcting such errors.
8. *Provision for removal of unfit trustee:* De Merton also provided that an unfit trustee was to be relieved of his post. Again, this followed similar principles to that in Islamic law that allowed beneficiaries named in the waqf to examine the accounts provided by the *mutawalli*, and if necessary, to refer the matter to a *qadi*.
9. *Power for founder to make subsequent changes:* De Merton also made provision for an increase in the number of scholars to be supported by the trust. This followed similar principles found in waqf instruments. These expressly reserved power to the founder to make alterations and amendments to the waqf. The statutes provided that the number of beneficiaries might be increased

> as often as the possessions and goods of the house increased through the Lord's goodness.

Again, there is a similar reflection upon the Deity as there would have been in waqf documentation.
10. *Provisions for selection of successor wardens:* Finally, the statutes prescribed a method of selection of subsequent wardens. The 12 eldest scholars of Merton were to nominate a candidate who was then to be approved by the Bishop of Winchester. The Bishop seems to have been given the ultimate responsibility for correcting problems in the administration of the trust. He was the one to whom the scholars were instructed to appeal, so giving the Bishop similar powers to that enjoyed by the *qadi* concerning waqf administration and management.

As the author makes clear, nowhere in the de Merton's statutes was there any intention expressed to imitate the waqf. Such silence is not surprising. Merton College was established during the Crusades. As Ms Gaudiosi states:

> it would not have been wise for a prominent clergyman and government servant to announce his adoption of an Islamic institution. Moreover, de Merton need not have been conscious of Islamic influence upon the trust. Rather he could have adopted the Islamic system indirectly, via [the New Temple], for example.[19]

19. Gaudiosi (n 17) 1255.

This most interesting piece of research does certainly give strong hints that waqf instruments, which had been used for decades previously in relation to the funding and administration of educational establishments in the Middle East (which was then highly developed in terms of health, education, and scientific advancement), may very likely have had a critical impact not only on the templates used by successor colleges at both Oxford and Cambridge. By separating legal and beneficial ownership for the benefit of family members, it may furthermore have had a critical role to play in the evolution of the common law trust. It was also interesting that Murat Cizakca, in his paper 'Aqwaf in history and its implications for modern Islamic economies', highlights Monica Gaudiosi's research in the following terms:

> Indeed at least in the case of England, it has been definitely established that the famous Oxford University was built upon the Islamic waqf model.[20]

This most interesting piece of research does certainly give strong hints that waqf instruments, which had been used for decades previously in relation to the funding and administration of educational establishments in the Middle East, (which was then highly developed in terms of health, education, and scientific advancement), may very likely have had a critical impact not only on the templates used by successor colleges at both Oxford and Cambridge

Nevertheless, although religious aims were the major focus of *awqaf*, education in general was the second recipient of waqf revenues. Indeed, there are examples of this from the late 12th century onwards. This waqf financing of education covered libraries, books, salaries of teachers and other staff, and stipends for students. In addition to freedom of education, this approach to financing helped create a well-educated class not derived from the rich and ruling classes. At various periods in Islamic history, the majority of Muslim scholars came from poor or slave sections of society.

The evolution of the waqf became central to funding orthodox colleges (*Madrassas*). Bernard Lewis in his book *The Middle East*[21] highlighted that the *Madrassa* system was certainly in place in early 11th century for orthodox mission schools in Cairo and elsewhere. This *Madrassa* system was extended by Saladin and his successors in the 12th century. The *Madrassa* was typically attached to a mosque. Sometimes it was independent, with its own small place of worship, attached to it for the convenience of its professors and students. Later it became more like an organized college with a syllabus, a timetable of study, a permanent faculty in receipt of stipends, and funds and facilities for student support.

Bernard Lewis also comments that, like the cathedral schools that arose in Medieval Europe, the *Madrassa* was concerned primarily with instruction in religion and law, the two topics being in Islam different aspects of the same whole.

The third class of beneficiaries of *awqaf* were the poor, needy, orphans, persons in prison, etc. Other uses of *awqaf* included health services. This covered the construction of hospitals and spending on physicians, medical students, and patients. There were also *awqaf* for the benefit of animals. For example, there was a waqf for cats and a waqf for unwanted riding animals in Damascus (*al Sibai*).[22] In addition, there were *awqaf* for helping pilgrims go to Mecca and for helping girls getting married. This makes clear that the breadth of Islamic philanthropy sometimes had wider objectives than those normally found in common law charitable trusts.

20. M Cizakca, *A History of Philanthropic Foundations: The Islamic World from the Seventh Century to the Present* (Bogazici University Press 2000) 50.
21. B Lewis, *The Middle East* (Simon & Schuster, 1995) 94–5, 190–91.
22. M Kahf, *Waqf and Its Socio-political Aspects* 11 (extract from 'English Articles & Encyclopedia Entries', Jeddah, Saudi Arabia: IRTI, 1992).

The rise and fall of the waqf

The history of the *awqaf* is replete with government moving to centralize waqf administration that effectively confiscated the assets of the *awqaf* and destroyed the waqf system. The state wanted control of the land that was perpetually tied up and not available for the most efficient form of agriculture or real estate development. This is much like the concern in the middle ages when land was tied up in trust for generations. Consequently English law had the curbing of land being held in fee tail and brought in the rule against perpetuities.

The primary concern about *awqaf* from a public policy concern was that their land was usually devoted to cash crops that provided the greatest return whereas the state wanted more land devoted to the production of grains and basic foods that would help prevent social unrest due to lack of supply of staple foods. The state wanted to control the crop allocation and this was problematic when the land was owned semi-privately by *awqaf*. In some Muslim countries, one-third of cultivatable land was held by *awqaf*. Three quarters of the land and buildings in some Turkish towns were owned by *awqaf*.

The challenge for the state was to determine how to appropriate land that was held on trust for Allah. The solution adopted was consistent with Islamic law. There were three basic elements to the ownership of land and each was treated separately under Islamic law. The first was *rakaba* or ownership; the second was *tasarruf* or possession and the third was *istiglal* or usufruct. When land was purchased, the state retained *rakaba* and the ordinary citizen received only possession and usufruct. Consequently, the rulers argued the inalienability of the state's ownership so that it could deny the original settlement of the land into the waqf because it was not possible for the founder to transfer ownership to the waqf. The founder had therefore created an unsound waqf because all it was entitled to was the proceeds from the land. The history of *awqaf* in the Ottoman Empire was that there was a cycle repeated many times of land put into a waqf and then centralized or appropriated by the state.

The destruction of the waqf system became much more permanent in the 19th and 20th centuries as the state became more powerful and less tolerant of competing institutions such as *awqaf*. This was especially true because *awqaf* usually reinforced national and religious divisions in the Ottoman Empire because these were founded to support local groups. Consequently, as the Ottomans began to give greater priority to Empire rather than local concerns, they began to centralize *awqaf* to gain access to their revenues.

In addition to domestic and Empire rationales for curbing the waqf systems, there was significant influence introduced by the hostility of the French Revolution to private resources interfering with the agenda of the state. The Europeans seeking more influence in the Ottoman territories found that the *awqaf* stood in the way of colonials acquiring land. The British Empire began to attack or co-opt the waqf system throughout its colonies in countries such as India, Singapore, and Malaya as well as in Ottoman territories.

Registration of awqaf

Starting from about 1400, judges in Egypt started to establish a special register and office to record and supervise *awqaf* in their area. This culminated in the establishment of an *awqaf* office for registration of control.

The second major change came in the mid-19th century, when the Ottoman Empire established a Ministry of Awqaf. This enabled it to put virtually all *awqaf* properties under supervision, and very often under government management. In practical terms, *awqaf* and their property became part of the public sector, with the progressive erosion of family *awqaf* in the Ottoman Empire and annexing other *awqaf* to Government properties in many Muslim countries.

Some idea of the extent to which property so held can accumulate can be gained from the fact that at the

founding of the Republic of Turkey in 1923 three quarters of the country's arable land belonged to *awqaf*[23] and it is said that at one time 70 per cent of land in Delhi was owned by *awqaf*—now lost due to questionable management.[24]

Historians indicate that more than one-third of agricultural land, and often up to half buildings in major cities in Syria, Turkey, Egypt, Morocco, Algeria, Iraq, and Palestine were *awqaf* properties prior to those changes.

This large share of the economy has been reduced to a relatively nominal amount. By way of example, during the French occupation of Algeria in 1831, the Colonial authority took control of the *awqaf* properties in order to suppress religious leaders who fought against French occupation.[25]

Centralization of waqf in Ottoman Empire

The ratio of family to charitable *awqaf* in the Ottoman Empire was not very high during the 16th century. By the 18th and 19th centuries, under 20 per cent of *awqaf* revenue was reserved for family members of the founders.[26] In Aleppo, the ratio was higher, with about half of the income for charities, 40 per cent for family and 10 per cent for mixed purposes.[27]

In the Ottoman Empire only 1–2 per cent of *awqaf* set up by sultans with the rest being endowed by private individuals. Of these, 43 per cent were ordinary citizens and 57 per cent were members of the elite. Forty per cent of the *awqaf* in Istanbul were set up by women.

The majority of changes in *awqaf* regulations were aimed at controlling trustees who were corrupt or incompetent. This has parallels to the primary legislation in English charity law being the Statute of Elizabeth, 1601,[28] which dealt with abuses in the charitable sector. The introduction of the Charity Commission in 19th century was also to deal with abuses.

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In the Ottoman Empire, the real attack on the awqaf took place during mid-19th century. In ways that remind us of the Statute of Elizabeth, 1601, Abdulhamid I established Ministry of Awqaf, Nezaret to review dubious *mutawallis*.[29] However, the Ottoman agenda was centralization and appropriation not reform. This new bureaucracy had to be funded from the *awqaf*; but the *waqif* would never have contemplated funding state supervision. This administrative cost was added to the costs of the *mutawallis* and greatly reduced the amount of revenues available for the original purposes. The state officials also embezzled a great amount of the *awqaf*'s resources. This embezzlement was greatly enhanced in the 1830s when the government said taxes and revenues due to *awqaf* from peasants should be collected by treasury officials rather than the *mutawallis*. By 1847 this rule was extended to apply to every waqf in the empire without exception.

In 1863 the government intervened to make establishing a waqf much more difficult. Previously, it was only necessary for a *waqif* to go to a judge and register his waqf with the court. This resulted in the devout adding funds to existing *awqaf* rather than forming their own new waqf.

The Ottoman campaign against *awqaf* was carried on with even more vigour by the new Turkish

23. H Marwah and AK Bolz, 'Awqaf and Trusts – A Comparative Study' (2009) 15 Trusts and Trustees 811.
24. FB Ahmed, 'In the Name of Allah: Waqf Corruption in India' (2012) *Deccan Herald* <www.deccanherald.com/content/31093/in-name-allah-waqf-corruption.html>.
25. Kahf (n 2) 9.
26. Cizakca (n 20) 24.
27. Cizakca (n 24) 52.
28. H3 Elizabeth I, c.4.
29. ibid, 82.

Republic in the 20th century. However, the rationale became increasingly anti-Islamic as the republicans were wanting to create a secular state and did not want the Islamic brotherhood receiving the revenues. Again, the parallels to the Tudor dissolution of the monasteries seem very apt as the English monarchs wanted to deprive resources to those whose allegiance remained with the Pope.

In 1937 'Committee for the Abolishment of the Awqaf' was established within Central Waqf Administration. Consequently, the government agency originally set up to 'protect' awqaf now became the bureaucracy responsible for abolishing them. Educational *awqaf* were taken over by Ministry of Education. Rather than continue to operate these *awqaf*, their assets increasingly were sold and the revenues simply transferred into general education revenues. Initially, religious *awqaf* were excluded from this takeover on the grounds that their purposes were religious rather than educational. However, *madrassas* were soon included in this takeover and their assets also were sold. Frequently, the state simply confiscated the properties and then required the waqf to lease them back at market rates or to repurchase their property back from the state for full fair market value.

The waqf movement received its most crushing blow in 1954 when all cash *awqaf* were abolished and their capital put in Bank of Awqaf. The hostility of the republicans to *awqaf* was such that neither the Turkish Civil Code nor the Code of Commerce even used the Turkish word for waqf, which is *vakif*. Instead, they used the term *tesis*, which means establishment.

This continued until 1967 when new legislation[30] allowed establishment of secular waqf with Islamic principles. It amended the Turkish Civil Code to replace the word *tesis* with *vakif*. It authorized the Civil Tribunal to register a *vakif* and give it a judicial personality.[31] It also re-introduced the concept of *istibdal* without bringing back any of the historical theological disputes as to whether this was a valid Islamic concept. The 1967 legislation said that tax exemption was possible upon consent of the Council of Ministers.

Egypt

The history of the waqf in Egypt has many parallels to the Ottoman Empire. Historically, the Arabs considered themselves more pious than the Ottomans and had more doctrinal issues. In Ottoman Egypt the supervision of *awqaf* was removed from the Shafi'i and put under Hanafi judges. Much of the land in Egypt was under the control of *awqaf*. However, the Ottomans collected taxes on pious waqf. In the late Ottoman period the centralization of waqf assets practiced in Turkey extended into Egypt.

During the British occupation of Egypt, the power of *mutawallis* was reduced with the Regulation of Waqf Administration of 1895.[32] There was a political struggle in Egypt when it became clear that Britain had begun to use the waqf system for political benefit. During the Constitutional Monarchy (1923–1952), the King sought to retain the traditional power of overseeing awqaf. However, the reforms in Turkey and the opposition to *awqaf* in Europe had an impact in Egypt. The first step was to limit family waqf to a duration of 60 years and allowed only religious waqf to be perpetual. In 1952 Egyptian *awqaf* were effectively nationalized and in 1957 waqf lands were transferred to the Land Reform Committee.

Iran

The history of waqf in Iran is of interest because it is a Shia rather than a Sunni country. The Shah controlled *awqaf* and they had great political significance and were the source of much power in the country. They were also a source of much corruption.

30. 13 July 1967 Law (number 903).

31. However, in modern Turkey the term *vakif* is most commonly used to apply to any non-government organization or civil society organization and does not usually mean a *waqf* in the historic sense.

32. Cizakca (n 24) 119.

The Civil Code of 1928[33] set out a legal framework for *awqaf* that allowed both family and charitable *awqaf*. Consistent with Islamic law, it permits a property to be endowed only where it can produce economic benefit without consuming the capital. The sale of property was only permitted under the strict wording of the Code if it became impossible to earn an economic return. However, in practice it is possible to sell property if it is to replace the original property with better property. It allowed movable property, including joint properties held in undivided shares as well as land.

As in Turkey, in the 1930s, educational *awqaf* in Iran came under the control of the Ministry of Education. A Department of Endowments was created under the Ministry of Education and in 1934 a law was made formalizing the powers given to the Department of Endowments to supervise *awqaf*. This provided centralization and remedies against corruption. However, like in Turkey and Egypt, most religious educational *awqaf* were effectively appropriated and their revenues, at best, went to secular education. However, much of the money was lost to embezzlement and distribution for private benefit of corrupt officials.

Iran was unique in that in 1951 the Shah ordered that all the crown land he had inherited from his father was to be distributed among the peasants. Since much of this land had been put in *awqaf* this distribution was likely illegal under the Civil Code as well as Islamic law.[34] This was the situation for the remainder of the monarchy of Shah Mohammad Reza Pahlavi's reign.

After the Iranian Revolution in 1979, Ayatollah Ruhollah Khomeini declared Iran to be an Islamic republic. Subsequently, the Iranian Parliament, Majlis, nullified all the 'illegal' sales of waqf property during the Shah's rein and regained about 80 per cent of the properties. The Islamic Republic became active in establishing new *awqaf*. One of the largest was created to commemorate the 1963 uprising against the Shah's regime led by Ayatollah Khomeini. This waqf is the one that offered a $2 million bounty to anyone who succeeded in assassinating Salmon Rushdie pursuant to a fatwa of Ayatollah Khomeini issued on 14 February 1989 because of the 'blasphemies against Islam' in his book, *Satanic Verses*.

In 1984 a new Iranian law was passed that said all Iranian *awqaf* were to be administered by the Pilgrimage, Endowment and Charity Affairs Organization. Each waqf was declared a legal entity so escaped the fate of Ottoman cash *awqaf* which lost their legal personality in 1954. The law also guaranteed that the trustee was the legal representative of the waqf. This is much better than the situation in Malaysia today where the government is the *mutawalli* rather than a *mutawalli* appointed by the *waqif*.

India

India is the country with most *awqaf*,[35] which is interesting as it is a common law country and is not today an Islamic country. However, Muslim rulers had controlled northern India since the 13th century and the first awqaf can be traced back to the end of the 12th century. The Islamic Mughal Empire began to disintegrate in the early 18th century. After the East India Company won the Battle of Plassey in 1757 India increasingly became a British colony. The British were accepting of shari'a law for the Muslim population as this policy avoided confrontation when Britain's primary interest in India was commercial. However, Britain also gave the East India Company power to make its own laws in India. These policies came into conflict in 1772 when the East India Company chose to extend its sovereign rights and jurisdiction outside

33. s 2, ch 2.
34. Cizakca (n 24) 155.
35. A recent survey suggested there are 375,000 *awqaf*. SK Rashid, *Certain Legal and Administrative Measures for the Revival and Better Management of Awqaf* (Islamic Research and Training Institute, 13 July 2011).

its 'factories' to the general population.[36] The first impact was in the differences between English and Islamic laws of inheritance. The English influence was extended as British judges replaced the Islamic jurists. Also, the ultimate court of appeal became the Privy Council. Known as Anglo-Muhammadan Law,[37] it applied in British colonial courts in India. It included criminal and civil law and was based on an interpretation of Islamic texts and practices. A comprehensive penal code (1860) ended its criminal application, but it continued to be applied in personal status law until the Muslim Personal Law Application Act (1937).

Whereas in the Ottoman Empire, *awqaf* were destroyed by centralization and transferring the properties to government agencies, in India the *awqaf* were destroyed by transferring the management of pious *awqaf* from government agencies to private *mutawallis*.[38] This effectively deprived Muslim educational institutions of this money because the officials of the East India Company diverted the funds to an English style of education. The Indian Trusts Act, 1882 was enacted with the express provision that:

> nothing herein contained affects the rules of Muhammadan law as to *waqf*, ... or applies to public or private religious or charitable endowments.[39]

While it may have increased the autonomy of the waqf from an Islamic law perspective, it would also have removed the opportunity to rely upon British trust law principals to protect the waqf from abuse by *mutawallis* or attack from those seeking to expropriate its assets.

The British also began to enforce Islamic inheritance law because it mandated an egalitarian distribution to the next generation. This had the effect of fragmenting the size of land holdings and making it easier for land titles to turn over. Muslims turned to the family waqf as the estate planning mechanism to hold land together for a family with title being held by the waqf rather than the individual. However, in 1889 the Privy Council held that:

> a waqf for the benefit of the settlor's family, children and descendants and for charity will only be valid if there is a substantial dedication of the property to charitable uses at some period of time or other.[40]

It is a tribute to the sensitivity of the British Empire that India subsequently passed legislation[41] to overcome this Privy Council decision and legitimize family *awqaf*. The Mussalman Waqf Validating Act of 1913 made it possible for Muslims to endow a waqf consistent with Hanafi Muslim law to benefit family and descendants prior to an ultimate gift over to charitable purposes.[42] This provided Muslims with an effective legal environment. However, it could not anticipate that the predominantly Muslim territories in the eastern and north-western regions of India would separate to form Pakistan in 1947. This left many Indian *awqaf* without either *mutawallis* or beneficiaries because the Muslim population had fled to Pakistan. There was a simultaneous flood of non-Muslims into Indian Territory from what was now Pakistan.

Prime Minister Nehru responded by having the Central Government enact the Wakf Act, 1954[43] that applied to all *awqaf* throughout India. Thus, India came to experience the centralization of waqf administration that had previously occurred in the Ottoman Empire and other jurisdictions. However, in India this legislation provided sound and effective administration for *awqaf*. Pursuant to this legislation the Government of India established the Central Waqf Council as a Statutory Body in 1964. Its

36. Cizakca (n 24) 172.
37. *Oxford Dictionary of Islam*.
38. Religious Endowment Act, 1863 <http://indiankanoon.org/doc/377820>.
39. Indian Trusts Act, 1882, art 1, ch 1, s 1.
40. *Sheik Mahomed Ahsanulla Chowdhry v Amarchand Kundu* (1889) LR 17 IA 28 (PC).
41. <http://www.vakilno1.com/bareacts/Laws/The-Mussalman-Wakf-Validating-Act-1913.htm>.
42. The 1913 legislation was not originally retroactive but was made so in 1930.
43. <http://www.indiankanoon.org/doc/631210>.

purpose was to advise the Central Government on matters pertaining to working of the State Waqf Boards and proper administration of the *awqaf* in the country.

The situation in India is again in turmoil because of the Waqf (Amendment) Bill 2010,[44] which seeks to improve the administration of *awqaf* and to obtain a better financial return. It includes strong powers to remove people and institutions that have encroached on waqf properties. However, it has raised concerns because it removes from waqf lists all the registered properties donated by Rajas and Maharajas in the past. Furthermore, it will remove from the control of Wakf Boards nearly 600,000 unregistered properties.[45] Consequently, India is currently in the process of having waqf properties becoming vulnerable to being sold out with ease, given on lease, or allotted for developmental purposes as has been the experience of other countries in the past.

Malaysia

The British in Malaya had the benefit of their experience in India in suppressing *awqaf*. Muslims were using family *awqaf* to circumvent Islamic inheritance law and prevent land fragmentation.[46] This made it more difficult for the British commercial interests to acquire land. They knew from the 1889 *Chowdhry v Kundu* and 1894 *Abu Fata* Privy Council cases that family *awqaf* were not to be used for primarily estate planning purposes. This was legislated in the *Waqf Prohibition Enactment, 1911.*

It is interesting that the Federal Court of Malaysia[47] rejected a *fatwa* issued by the Mufti of Trengganu upholding the validity of a *wakaf* made in favour of the settlor's family and relatives with ultimate gifts for religious purposes as being binding upon the court. Instead, it applied the Privy Council decision in *Abu Fata.*[48] The court felt it was bound by the decisions of their Lordships of the Privy Council that they:

> cannot accept the theory .... that the interpretation of the Mohammadan law given by this Board in a series of cases is confined to the law as applied or administered in India[49].

Consequently, the old cases on the *wakaf* out of India were still binding in Malaysia in 1969.

In 1972 the Trengganu[50] State Assembly passed the *Islamic Wakaf Validating Enactment 1972* to overcome the *Tengku Mariam* decision just as the *Mussalman Waqf Validating Acts* of 1913 and 1930 nullified the Abu Fata decision in India.[51] However, in 1979 the Malaysian Federal Court[52] again reverted to applying the Privy Council decisions in *Chowdhry v Kundu* and *Abu Fata* because those cases did not deal with a *wakaf* in favour of strangers. Relying upon the differences between the provisions in the *Islamic Wakaf Validating Enactment 1972* and the *Mussalman Wakf Validating Act* the Federal Court of Malaysia held that a *wakaf* for strangers was valid.

Today in Malaysia it is necessary to appoint the Council of Islamic Religion (*Majlis*) the sole *mutawalli* of all waqf properties. The Council must transfer title to all waqf properties to itself and keep all the documentation. Also all money received from the waqf properties must be kept in the general fund of the *Majlis.* It is somewhat surprising that Malaysia has adopted this restrictive approach because it is recognized as a global innovator and leader in Islamic finance. The result is that people wanting to create a family waqf usually choose to set up a common law trust with family members as trustees. However, they refer to it as a waqf even though it is at law a trust.

44. <http://www.prsindia.org/billtrack/the-wakf-amendment-bill-2010-1130/>.
45. <http://www.siasat.com/english/news/wakf-amendment-bill-threat-wakf-properties>.
46. Cizakca (n 24) 212.
47. *Commissioner for Religious Affairs v Tengku Mariam* [1969] 1 MLJ 110; [1970] 1 MLJ 222.
48. In Malaysia and Singapore, the term wakaf is used instead of waqf or wakf.
49. *Fatumah v Mohamed bin Salim* [1952] AC 1 (PC) which was an appeal arising out of the East African Court of Appeal.
50. Trengganu is a state within Malaysia.
51. However, family *wakaf* (*wakaf khas*) became very difficult to establish because it required the royal ruler in the state expressly validated it.
52. *Embong Ibrahim v Tengku Nik Maimunah* [1980] 1 MLI 286.

Singapore

Singapore is a common law country with some shared colonial history with Malaysia and India as to the role of the British Empire in setting its policies with *awqaf*. The Administration of Muslim Law Act governs the application of Islamic principals. This law vests the property of all *awqaf*, including family *awqaf*, in the Islamic Religious Council of Singapore or *Majlis Ugama Islam Singapore* (MUIS). Every wakaf is required to register with MUIS and its Fatwa Committee shall determine whether the waaf is valid. MUIS is mandated to administer all *awqaf*, but can leave the *mutawallis* or trustees appointed by the founder in place. However, MUIS is given explicit powers to appoint and remove *mutawallis*. In Singapore you must be a Muslim to found a waqf but the beneficiaries need not be Muslims.

Under the Charities Act in Singapore, any organization set up for exclusively charitable purposes must register as a charity with the Office of the Commissioner of Charities. As advancement of religion is considered as a charitable object, *awqaf* may be registered as charities, if they also meet other registration criteria. Taking into account the regulatory powers given to MUIS, the Office of the Charity Commission does not enforce the requirement for waqf charities to register with it. However, a few *awqaf* do register as charities. There are about 100 *awqaf* registered with MUIS and they have cumulative assets of about half a billion dollars.

Singapore does not provide tax deductions to charities unless those charities also qualify as Institution of Public Character (IPC). *Awqaf* and other religious charities are not able to attain IPC status as IPCs are required to benefit the Singapore community as a whole, without sectional interests based on religion, beliefs, or race. This is a major consideration in Singapore because normally they receive a tax deduction twice as much as the tax on the donated amount. For 2009 through 2015 that deduction has been increased to 2.5 times the amount of the tax payable.[53]

Modern revival of awqaf *legislation*

Whilst the trend has been against *awqaf* over the past 100 years, some countries, such as Lebanon, Turkey, Jordan, Sudan, Kuwait, and Algeria have taken certain steps to revive and develop waqf properties, enacting new laws to assist in recovering, preserving, and developing them. In Kuwait, new laws have been enacted that provide a framework to encourage people to create new waqf properties.

The late Abu Zaharah mentions that many rulers and rich persons used to make *awqaf* in order to have their wealth escape potential persecution and confiscation by newcomers to power. With greater economic and political turbulence in parts of the Middle East now in prospect it would not be surprising if its former use as an asset protection vehicle did not again come back into sharper focus.

The waqf outside the Islamic world

It is against this background that one needs to consider how a waqf will be treated for legal purposes in non-Islamic jurisdictions.

Within Islamic jurisdictions, a waqf is considered a separate legal entity[54] and matters of administration are dealt with by the religious authorities or state controlled boards,[55] whose conduct of their affairs is the subject of some controversy. Thus, Kahf observes that by 1863 *awqaf* had effectively become part of the government structure within the Ottoman empire and were so poorly managed that their essential tasks were often made possible by government subvention. In India, the role of the Waqf boards has

53. <https://www.charities.gov.sg/charity/index.do>.
54. Marwah and Bolz (n 23) 815.
55. Kahf (n 2).

been characterized by allegations of nepotism and corruption.[56] In Malaysia things seem to be somewhat better[57] although the need for state intervention is clearly recognized.

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And in non-Islamic jurisdictions, one can find exclusions of the jurisdiction of the activities of property held in waqf from the jurisdiction of the civil courts[58] and special procedural rules where jurisdiction is not excluded.

There are, however, no such provisions in the laws of most Western countries, so the prospect of the ordinary courts needing to deal with issues associated with the holding of property in waqf is far from remote.

In the absence of specific statutory provision, in a civil law jurisdiction it seems likely that the same principles as apply to trusts will apply in relation to *awqaf*—the *mutawalli* will be treated as the absolute owner and any rights that would be recognized under Islamic law will not be enforced by the Courts.

The position in common law countries is more complicated, not the least because aspects of private international law in relation to trusts are unclear.

An attempt to establish a waqf in a common law country will raise a number of issues: Can it be a charitable trust, recognized as such? If not, will the law against perpetuities apply in those jurisdictions in which it remains in effect?

Validity of awqaf for religious purposes

There seems no reason in principle why a waqf whose aims are exclusively charitable according to the relevant common law and in a form acceptable to the relevant Charity Commission cannot be established as a charitable trust in compliant investments. One such is The UK Islamic Education Waqf (UKIEW), which seeks donations to help pay for community-based education projects in Britain. According to its website,[59] since its establishment in 1991, the UKIEW has raised and distributed almost £1.8 million to weekend schools, *madrassas*, and full-time Muslim schools around the country. It is stated to be registered as a charity[60] and to have a Board of Trustees who ensure that its objects are in compliance with shari'a law.

Certainly, as is argued by Waters,[61] there is no place in modern multicultural society for treating faiths other than Christian as non-religious. The English courts have recognized non-Christian religions as falling within the religion head of charity since at least 1837,[62] whereas the Australian High Court has recognized Scientology as a religion.[63] Perhaps the most explicit affirmation of the principle is to be found in the reasons for judgment of Murphy J[64]:

> Religious freedom is a fundamental theme of our society. That freedom has been asserted by men and women throughout history by resisting the attempts of government, through its legislative, executive or judicial branches, to define or impose beliefs or practices of religion. Whenever the legislature prescribes what religion is, or permits or requires the executive or the judiciary to determine what religion is, this

56. Ahmed (n 24); 'Should the Waqf Boards be disbanded in India?' 31 August 2009<www.anindianmuslim.com>; R Upadhyay, *Waqf (Charitable Islamic Trust) - Under Sustained Controversy in India?* (2004) <www.southasiaanalysis.org/%5Cpapers12%5Cpaper1136.html>.
57. ZM Isa, N Ali and R Harun, *A Comparative Study of Waqf Management in Malaysia* (2011) <www.ipedr.com/vol10/105-S10085.pdf>.
58. For example, in India, the *Wakf Act* 1954 (s 6).
59. <www.ukiew.org>.
60. Charity Reg No 1034122.
61. D Waters QC, 'The Advancement of Religion in a Pluralist Society' 17 (Pt 1) (2011) Trusts and Trustees 652, 660–62.
62. *Sytraus v Goldsmid* (1837) 8 Sim 614, 59 ER 249 (a legacy for the purchase of meat and wine for Passover).
63. *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* [1983] HCA 40; (1983) 154 CLR 120.
64. At 150.

> poses a threat to religious freedom. Religious discrimination by officials or by courts is unacceptable in a free society. The truth or falsity of religions is not the business of officials or the courts. If each purported religion had to show that its doctrines were true, then all might fail. Administrators and judges must resist the temptation to hold that groups or institutions are not religious because claimed religious beliefs or practices seem absurd, fraudulent, evil or novel; or because the group or institution is new, the number of adherents small, the leaders hypocrites, or because they seek to obtain the financial and other privileges which come with religious status. In the eyes of the law, religions are equal. There is no religious club with a monopoly of State privileges for its members. The policy of the law is 'one in, all in'.

So a waqf for religious purposes whose objects are exclusively charitable may potentially be valid in the common law countries, even if it is perpetual. The difficulty will be to ensure that the religious (or other charitable) elements satisfy the requirements of both Islamic jurisprudence and the concept of acceptable religious or charitable activity being exclusively charitable under the law of the jurisdiction concerned.

Validity of awqaf for family purposes

In principle, instinctively a waqf for purposes that are not wholly charitable would be required to satisfy the perpetuity requirements of the jurisdiction in which it is established, or perhaps where the trust property is at the date of establishment.

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The issue arose for consideration in *Augustus v Permanent Trustee Co (Canberra) Ltd*[65]. The facts concerned a trust settled in the Australian Capital Territory on terms that would have infringed the rule against perpetuities in that jurisdiction, but not that of New South Wales, to whose law the Court held the parties intended the trust to be subject. That, it was held, was sufficient to save the gift from invalidity:

> 22. It is necessary to consider two further submissions made by Mr. Meagher, upon the assumption that his arguments as to the construction of cl. 5 were not accepted. By those submissions he sought to show that the gift under consideration could not be saved by the operation of s. 36. The first of these submissions took as its starting point that a limitation must be placed upon s. 36 so as to give it a sufficient territorial connexion with the State of New South Wales to bring it within the legislative competence of the Parliament of that State. Then it was submitted that s. 36 should be construed as applying only to instruments executed in New South Wales or alternatively as applying only when the property to which a disposition relates is situated in New South Wales. Since neither of those conditions was fulfilled in this case the result is, according to the argument, that s. 36 cannot operate to render valid any of the dispositions made by the deed. In my opinion, there are two answers that may be made to these submissions. The first is that the provision that the rights etc. shall be regulated in the same manner as they would be under the laws of New South Wales, should be read as a direction that those laws should be applied as they would be upon the hypothesis or assumption that all conditions existed that were required to allow them to take effect in determining the rights etc. to which the clause refers. In other words, the provision renders the laws of New South Wales applicable not directly and by way of legislative command addressed to the parties, but referentially and by force of the declaration of

65. [1971] HCA 25; (1971) 124 CLR 245.

the parties themselves as to how the rights etc. are to be determined. Upon that view of the clause, there is no need to read down the general words of s. 36, in order to keep the provision within legislative power. The second answer to the submissions is that I do not accept the view that the necessary territorial nexus must be found either in the location of the property or in the place of the execution of the deed. In my opinion s. 36 may operate upon an instrument which is intended to be governed in the relevant respect by the law of New South Wales. This view accords with the principle stated in Wanganui-Rangitikei Electric Power Board v. Australian Mutual Provident Society [1934] HCA 3; (1934) 50 CLR 581, at p 601, to which Fox J. referred. I think that that principle is applicable to the operation of s. 36, at least in so far as it affects dispositions of personal property. (at p259)

23. The remaining submission in relation to s. 36 was that, as a matter of public policy, the Courts of the Territory would not give effect to an attempt, by the parties to a settlement executed and intended to be administered in the Territory, to evade the operation of the rule against perpetuities by selecting some law other than that of the Territory as the governing law. It is true that the rule that, in general, the parties are free to choose the law by which a transaction is to be governed, has been stated to be subject to a qualification that there must be no reason for avoiding the choice on the ground of public policy: see Vita Food Products Inc. v. Unus Shipping Co. Ltd. (1939) AC 277, at p 290. But, in my opinion, there is no reason, based upon public policy, requiring a court in the Territory to refuse to give effect to the provisions of s. 36, if it appears that the intention was expressed in the deed that the laws of New South Wales should be applied in deciding whether the gifts infringed the rule against perpetuities. We need not in this case decide the question, to which reference was made in Merwin Pastoral Co. Pty. Ltd. v. Moolpa Pastoral Co. Pty. Ltd. [1933] HCA 31; (1933) 48 CLR 565, at pp 577 and 587, namely, the question whether it is permissible for a court in one part of the Commonwealth of Australia to refuse, upon the ground of public policy, to give effect to a law of another part of the Commonwealth, which would otherwise be applicable. Such a question could have arisen if the law of New South Wales permitted the making of dispositions by which the absolute vesting of the interest given or the ascertainment of the beneficiaries was postponed beyond the period allowed by the rule against perpetuities. But s. 36 does not do that. On the contrary, it ensures that, in the cases to which it applies, such absolute vesting or ascertainment of the beneficiaries will take place within that period. There can be no collision between such a law and the public policy upon which the rule against perpetuities is supposed to be based. (at p260)

24. In dealing with the foregoing submission I have assumed that it is open to the parties to a contract and to the parties to a voluntary settlement to choose and to specify the law by which the validity of the contract or the validity of the dispositions made by the settlement is to be determined and that such qualifications as may restrict in some cases their freedom to do so are not relevant here. I think that that assumption is warranted. I think that the dictum of Denning L.J. in Boissevain v. Weil (1949) 1 KB 482, at p 491, denying that parties are free to stipulate by what law the validity of their contract is to be determined, with which Kitto J. expressed agreement in Kay's Leasing Corporation Pty. Ltd. v. Fletcher [1964] HCA 79; (1964) 116 CLR 124, at p 143, ought not to be regarded as a pronouncement that, in every case in which the question to be determined is a question of validity, a choice made by the parties of the law to be applied is irrelevant or at any rate is not decisive. In each of the cases just mentioned, a law which made a transaction illegal was held to be applicable according to its terms and it was held that effect must be given to the law enacted by the Parliament in relation to the transaction, whether or not its governing law according to the intention expressed by or imputed to the parties was the law of some other place. In such cases the parties are not free to prevent the operation of an Act which makes a transaction illegal and, therefore, void. But the present case is not such a case and there is no obstacle to the selection by the parties of the law by which questions of validity are to be determined. (at 261)

If the logic of this Australian case be accepted, it would be possible, subject to the qualification referred to in paragraph 23, to create an enforceable waqf by reference to the law of a jurisdiction which permits an indefinite perpetuity period. One does not need to refer to the law of Islamic jurisdictions to find examples of such cases[66] and they are becoming increasingly common, as are extensions of the customary 80-year alternative to a Royal lives clause. In those circumstances it may be thought increasingly unlikely that a public policy objection would be taken so far as movable property is concerned, at least where there is no element of jurisdiction shopping. At the very least the question of validity would be tested at the end of the perpetuity period rather than at the outset, having regard to the application of the wait and see rule since some part of the trust property or income almost certainly will vest within that period, even if the majority will not.

There is a second question—assuming that the trust is validly established in its home jurisdiction, what is the consequence of trustee investments being made in a jurisdiction that has a perpetuity period? It seems inconceivable that the trustee would be treated as beneficially entitled to them, and there is an element of unreality in treating them as beneficially the property of the settlor, particularly as the end of the perpetuity period approaches. It will probably be sufficient for most purposes that the trust assets are not treated as beneficially those of the trustee.

The US position may be different: according to the *Restatement (Second) of Conflict of Laws*,[67] whilst a settlor may specify the law by which the validity of a trust of movables is to be determined,[68] the validity of a trust of land is determined under the *lex situs*.[69] The Restatement does not deal with the situation that would arise if funds validly held on a trust established elsewhere are used to acquire land within a state in which the trust would not be valid. It does, however, deal with the converse position in the following terms:

> *d.* Direction to sell the land and remit the proceeds to another state. When a trust of land is created, either by will or inter vivos, and the trustee is directed to sell the land and remit the proceeds to another state to be there held in trust, the trust is valid if valid at the place of administration even though it would be invalid under the local law of the situs, provided that it does not violate a strong policy of the state of the situs. No such strong policy is involved in the case of the rule against perpetuities or a rule against accumulations. The principle is the same as that which is applicable to a trust of movables to be administered in a state other than that of the testator's domicile (see § 269, Comment *i*).

which suggests that if the only issue is a perpetuity one, the trust might be recognized.

Under the Uniform Trust Code (UTC—now adopted in 23 states) issues regarding 'whether a trust has been validly created' are determined by UTC Section 403 and the authority of a settlor to designate a trust's principal place of administration is governed by UTC Section 108(a). UTC Section 403 provides that:

> [a] trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which at the time of creation: (1) the settlor was domiciled, had a place of abode, or was a national; (2) a trustee was domiciled or had a place of business; or (3) any trust property was located.

Thus, a settlor of an *inter-vivos* trust can effectively choose any law the settlor wishes to govern questions

66. In Australia, South Australia.
67. (1972) American Law Institute.
68. s 270.
69. s 278.

about the validity of the trust by making sure the settlor executes the trust instrument in the jurisdiction whose law is to govern.

In so far as legislation in similar terms to the UTC applies, it may potentially follow, that in principle and subject to perpetuity issues where the waqf is not exclusively charitable there should be no difficulty establishing a waqf in a common law jurisdiction that complies with Islamic principles and is wholly enforceable within the jurisdiction.

Awqaf administration and Shari'a compliant investments

As we have already noted, common law jurisdiction Courts have dealt with cases involving *awqaf*—the Privy Council Reports note some 28 decisions. They have tended not to concern themselves with administration, but rather whether a waqf was validly established, and there applied Islamic law after statute provided for their validity if valid according to Islamic law. Thus, in *Chaudhri Mahbub Singh and others v Haji Abdul Aziz Khan,*[70] the Privy Council was prepared to make a finding as to whether the deceased had converted to Islam, this being a necessity to the validity of a waqf. But, as in *Dajani and others v Mustafa El Khaldi since deceased and another*[71] the question as to validity of the waqf itself was either left to the Shari'a Court or agreed as between the parties.

The desire of a Muslim settlor to have issues of administration (including Shari'a compliant investment strategies) settled in accordance with Islamic law can readily be addressed by allowing the trustee to act on the advice of a suitably qualified authority in that area, with a discharge if the trustee does so. Protective clauses to ensure that occurs could also be included, although the exclusion of the jurisdiction of ordinary courts will not be possible.

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It remains to be seen whether the principles in *Cowan v Scargill*[72] (which did not involve any relevant direction in the trust instrument) would be breached by requiring Shari'a compliant investments. That case makes it clear that unless the consequence is a reduction in fund income, there is no breach even in the context of a pension fund whose only objective is to maximize members' returns.

It seems highly unlikely that a trust for a church which provided that the trustees could not conduct an otherwise lawful prostitution business, even if more profitable than other possible investments, would be held invalid or not charitable on that account. Other possibilities that come to mind include a Roman Catholic charity being precluded from operating a profitable abortion clinic. *Harries v The Church Commissioners for England*[73] suggests that there is no problem in principle, although the literature notes that there are some limits on the trustee's discretion in this regard.[74] That having been said, if registration as a charity is desired, the approval of the relevant Charities regulator will be required and experience suggests that in England and Wales at least limitations of investments to those that are Shari'a compliant are potentially problematic.

70. [1938] UKPC 66.
71. [1946] UKPC 21.
72. [1985] ch 270.
73. [1992] 1 WLR 1241.
74. See eg JH Langbein and RA Posner: 'Social Investing and the Law of Trusts' (1980–1981) 79 Michigan Law Review 72, 88 and Lord Nicholls: 'Trustees and Their Broader Community: Where Duty, Morality and Ethics Converge' (1995) 9 Trusts Law International 71.

That being the case, there seems no basis in principle for the holder of waqf property in one jurisdiction acquired with funds from a waqf established elsewhere not to be held to the terms of the trust. Indeed, it would be unconscionable for it to be otherwise, even if the waqf be not exclusively charitable and not comply with the law in relation to perpetuities so far as movables are concerned in the first jurisdiction

Awqaf *and the Hague Convention*

The Hague Convention seems readily adapted to support the recognition of *awqaf*. It provides, in Chapter 1:

Chapter i - scope

Article 1

This Convention specifies the law applicable to trusts and governs their recognition.

Article 2

For the purposes of this Convention, the term 'trust' refers to the legal relationships created - inter vivos or on death - by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.

A trust has the following characteristics -

(a) the assets constitute a separate fund and are not a part of the trustee's own estate; (b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee; (c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.

Article 3

The Convention applies only to trusts created voluntarily and evidenced in writing.

Article 4

The Convention does not apply to preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee.

Other potentially relevant provisions are Articles 6, 8, 11, 13 and 18, which respectively provide:

Chapter ii - applicable law

Article 6

A trust shall be governed by the law chosen by the settlor. The choice must be express or be implied in the terms of the instrument creating or the writing evidencing the trust, interpreted, if necessary, in the light of the circumstances of the case.

Where the law chosen under the previous paragraph does not provide for trusts or the category of trust involved, the choice shall not be effective and the law specified in Article 7 shall apply.

Article 8

The law specified by Article 6 or 7 shall govern the validity of the trust, its construction, its effects, and the administration of the trust.

....

Chapter iii - recognition

Article 11

A trust created in accordance with the law specified by the preceding Chapter shall be recognised as a trust. Such recognition shall imply, as a minimum, that the trust property constitutes a separate fund, that the trustee may sue and be sued in his capacity as trustee, and that he may appear or act in this capacity before a notary or any person acting in an official capacity.

...

Article 13

No State shall be bound to recognise a trust the significant elements of which, except for the choice of the applicable law, the place of administration and the habitual residence of the trustee, are more closely connected with States which do not have the institution of the trust or the category of trust involved.

> Article 18
>
> The provisions of the Convention may be disregarded when their application would be manifestly incompatible with public policy (ordre public).

A waqf would seem to be a trust within the meaning of Article 2, and, as reciprocity is not required under the Hague Convention, in Convention countries their status should not be in serious doubt if the Convention has been adopted without qualification. Such is the case in (for example) Australia where the adopting legislation simply provides[75]:

> **Provisions of Convention to have force of law**
>
> Subject to this Act, the provisions of the Convention have the force of law in Australia.

The position in the UK is different because its application legislation[76] does not include Article 13 of the Convention as part of the law of the UK. In Canada, the Convention is not adopted in Ontario and Quebec, but it is in most other provinces.

One highly relevant question for present purposes is whether the Hague Convention, where it applies, enables through specification of the applicable law for the perpetuity rules to be either ameliorated or entirely circumvented. The preponderant view is that it does have that effect. One particularly instructive analysis is that of Mr Justice Hayton.[77] Other useful discussions of the issue, in the context of the application of the Hague Convention to the UK, can be found in Graziadei *et al.*[78] and Harris[79].

One highly relevant question for present purposes is whether the Hague Convention, where it applies, enables through specification of the applicable law for the perpetuity rules to be either ameliorated or entirely circumvented

The reasoning is that a choice of law by the settlor of a place that does not have a perpetuity rule will solve the problem unless the absence of a perpetuity rule would be regarded as manifestly contrary to public policy under Article 18 (or, in Australia, apart from South Australia, result in a type of trust not recognized for the purposes of Article 13).

The reasoning is that a waqf established in a rationally defensible jurisdiction comes closest to Hayton's scenario 2 of cases, and his view appears to be that the trust would be enforced. But even in the context of scenario 1 (which is clearly jurisdiction shopping at its most opportunistic), which is most likely to attract the operation of Article 18, one learned author (Harris) is of the view that it would not.

While one might agree with Harris in the modern context of many jurisdictions not having perpetuity periods and the need to give recognition to other countries' legal systems, the safest course would be to establish the waqf/trust in an appropriate jurisdiction. If one wanted to be ultra-cautious, its investments in non-Convention countries and (if it be not charitable) jurisdictions with perpetuity periods could be held through a corporate vehicle.

Awqaf *and the revenue*

The tax status of a waqf will depend upon the tax law of the jurisdiction in question, which can be quite severe in relation to trusts, as the recent French announcements indicate.[80] The specific application of local tax rules is beyond the scope of this article, but the approach of Miller J to the types of question likely to arise in such a case were considered in a

75. *Trusts (Hague Convention) Act* 1991, s 6.
76. *Recognition of Trusts Act* (1987).
77. D Hayton, 'A Review of Current Trust Law Issues' at 15–20.
78. M Graziadei, U Mattei and LD Smith, *Commercial Trusts In European Private Law* (Cambridge UP 2005) 410–12.
79. J Harris, *The Hague Trusts Convention* (Hart Publishing 2002) 343.
80. See Bochatay, Moreau and Abineau, 'The New French Rules of Taxation for Trusts' (2012) 18 Trusts and Trustees 116.

Canadian case, *Sommerer v The Queen*,[81] which involved a Foundation (an entity not known to Canadian law).

> [46]
> (2) Can the arrangement whereby Mr. Herbert Sommerer endowed the SPF with funds for the purpose set forth in the SPF Deeds be viewed as a trust for purposes of the application of the *Income Tax Act*? I note both parties framed this issue as whether the SPF was a corporation or a trust. I suggest this is an inappropriate way of framing it. The SPF is a separate legal entity: a trust under Canadian law is not; it is a relationship describing how property is held. The SPF could be a trustee. The question is simply whether a trust existed, not whether the SPF is a trust or a corporation. Further, notwithstanding argument as to the characterization of the SPF as a corporation, this is not an issue. If I find there is a trust, it is immaterial to determine whether the SPF is a corporation. If I find there is no trust, the parties are agreed the SPF can be viewed as a corporation, although they disagree on the application of the Foreign Accrual Property Income (*FAPI*) regime.
> ....
> [59] What needs to be analyzed, however, is not what the SPF is, but what relationship exists amongst the SPF (a separate legal person), Mr. Herbert Sommerer, and Mr. Peter Sommerer and the Sommerer family. Is there a trust relationship? Can Mr. Herbert Sommerer be seen as a settlor? Can the SPF be seen as a trustee, perhaps a corporate trustee? Can Mr. Sommerer be seen as a beneficiary? Do the three certainties, certainty of intention, certainty of subject matter, and certainty of objects exist? Are there any other characteristics of the Canadian trust that are missing in the Sommerer arrangement?
> [60] I agree with the Appellant's suggestion that, in characterizing a foreign arrangement, I rely on the Supreme Court of Canada's comments in *Backman v. The Queen* to look at the private law in Canada to determine the essential elements of a trust, and then compare the elements of the foreign arrangement to determine if it can be treated as its correlate under Canadian law. So, what are the essential elements of a trust under Canada law? I note, with some concern, Professor Waters' opening comments in this regard in his article '*The Concept Called 'the Trust'*:
>
> > It is agreed among text writers of the common law tradition – an opinion adopted by the Courts – that 'the trust' cannot be defined. It can only be described. That means you can point to its characteristics or elements, but you cannot put into a sentence what it is.

If one adopts this approach, the likely outcome (if charitable status is not recognized in the particular case) will focus on the entitlement of the persons associated with the waqf, and analogies to the position of trustee and beneficiary applied.

The assimilation of *awqaf* into the existing jurisprudence and tax laws of both civil law and common law jurisdictions is, in the circumstances, unlikely to present too many difficulties.

Conclusion

The Islamic world is working hard to increase charitable funding in all forms. They refer to the golden age of Caliphate of Umar bin Abdul—Aziz who ruled from 717 to 720. During his rule the collection of *zakat* was so compliant and the distribution so effective that when the devout went through the markets calling out for people who were in need of *zakat*, there were no needy people. They are increasingly concerned about the level of poverty in Islamic countries and that the level of giving seems to be much higher in Christian countries such as the United States.

They are increasingly seeking to revive the waqf and cite the historical role *awqaf* have played in extending social services and improving overall welfare in Muslim societies. They are trying to promote the

81. (2010) Tax Court of Canada (Miller J).

waqf as an Islamic model of a sustainable social enterprise.[82] There has been particular attention paid to the potential for the cash waqf as a new Islamic financial model.[83] They are careful to obtain confirmation that the proposals are Shari'a compliant and conform with guidelines such as Resolution No 140 (15/6) of the Islamic Fiqh Academy.[84]

There is a general recognition that many *awqaf* institutions have stagnated and are not performing their designated social functions. However, there seems to be much less willingness to recognize the historical problems of the *awqaf* being taken over by governments and appropriating the assets and that those problems continue in India today. There is more willingness to recognize the historic problems with corruption among the trustees and mismanagement but there do not seem to be any major innovative solutions.

There is a general recognition that many awqaf institutions have stagnated and are not performing their designated social functions

One remembers that waqf, in the Arabic language, means to stop, contain, or preserve. The danger is that the theological dictates and constraints of the waqf will stop innovation as the theological imperative is to preserve the religious purity of the institution. The history of the trust suggests that it has been much more successful in dealing with corruption and fighting off the marauding intrusions of governments to take over their assets. Possibly one has to go back to Tudor England to find massive examples of governments effectively appropriating charitable assets held in trusts. One of the solutions may be for trust law experts to assist Islamic authorities to learn from the trust and determine what characteristics are exportable.

The great attraction of the waqf to devout Muslims is the theological basis of the instrument. However, modern Malaysia is demonstrating that the trust as a secular instrument is a more effective means of achieving the aims of individual devout Muslims who do not want to attract the intrusive regulation of the state that a waqf necessitates. This is a lesson which is likely to have wider application.

The great attraction of the waqf to devout Muslims is the theological basis of the instrument

Appendix: Glossary of terms

Agnate:	Male line
Cognate:	Female line
Fiqh:	Islamic jurisprudence
Istiglal:	Usufruct
Madrassa:	Religious school
Mard al Maut:	Death sickness
Mutawalli:	Administrator / trustee
Qadi:	Judge
Rakaba:	Ownership
Sadaqa:	Charity
Sadaka gariya:	Recurring charity
Tesis:	Turkish establishment
Urf:	Custom, usage
Vakif:	Turkish waqf
Tasarraf:	Possession
Waqf/wakf/wakaf:	Islamic foundation
Waqf Ahli:	Family foundation
Waqf Khairi:	Charitable foundation
Waqif:	Founder
Zakah:	Obligatory alms

82. H Ahmed, 'Waqf as a Sustainable Social Enterprise: Organisational Architecture and Prospects', Global Islamic Finance (2011) 32–39.
83. A Lahsasna, *The Role of Cash Waqf in Financing Micro and Medium Sized Enterprises (MMES)* (INCEIF University) (2012).
84. Islamic Fiqh Academy is an Academy for advanced study of Islam based in Jeddah, Saudi Arabia. It was created at the decision of the second summit of the Organisation of the Islamic Conference 1974 and inaugurated in February 1988.