

THE RELATIONSHIP BETWEEN THE *WAQF* INSTITUTION IN ISLAMIC LAW AND THE RULE OF LAW IN THE MIDDLE EAST

Dr Hossein Esmaeili
Senior Lecturer, Flinders Law School
Flinders University, Adelaide, Australia

I. INTRODUCTION

Establishing a society based on the rule of law where the law is supreme and protects people against arbitrary powers is not exclusive to the West and is valued in other parts of the world including in Muslim countries. In most Muslim countries and many non-Muslim countries an effective system based on the rule of law is, as yet, unavailable. There are many reasons, including political, cultural, economic and legal realities, for the failure of the rule of law in Muslim societies.

The legal nature of the *waqf* institution and the system of land ownership in Islamic law has distinct differences to the institution of ‘trust’ and real property law in common law countries. These differences can be considered relevant in the failure to establish a rule of law system in Muslim countries. *Waqf*, which was established as an innovative institution from the early stages of development of Islamic law has frozen in time and arguably failed to be an effective institution in addressing wealth management in the Muslim world. It is argued that *waqf*, which locked wealth and resources into unproductive institutions, has contributed to the weakening of civil society in the Muslim world.¹ There is a reasonable literature available on this topic in both English and Middle Eastern languages (Arabic, Persian and Turkish).

This paper briefly reviews the historical background of trust in the common law system, and in Islamic law, and considers basic principles of *waqf* law under Islamic law. Then the paper investigates the *waqf* institution as an economic instrument in the history of the Middle East, and examines the relationship between *waqf* and the rule of law in Middle Eastern legal systems.

II. HISTORICAL BACKGROUND OF *WAQF* IN ISLAM, COMPARED TO TRUST IN THE COMMON LAW SYSTEM

A. Development of trust in common law system

The trust, which is the major part of the Equity system, is an important area of common law legal systems. According to Frederic Maitland, “the greatest and the most distinctive achievement performed by Englishmen in the field of jurisprudence

¹ Timur Kuran, “The Provision of Public Goods under Islamic Law: Origins, Impact, and Limitations of the Waqf System” *Law & Society Review* vol. 35, no. 4, 2001, 841, 844.

... [is] the development from century to century of the trust idea.”² The origin of trust in the common law system goes back to medieval England.³

After the Normans conquered England in 1066, most of the land in England became the property of the King. In order to effectively administer the land, the King granted land to noblemen, in exchange for the rendering of military services. These noblemen, in turn, granted smaller parcels of land to other noblemen. These grants of land formed the basis for the feudal system of land ownership in England.⁴ By 1086 (Domesday Book), the feudal system was well-established in England, and the land surveyed in the Domesday Book was held by the King (one fifth), the Church (one quarter), and by the King’s followers (one half).⁵ The King’s followers, numbering about 1500, known as ‘tenants in chief’, provided services to the King.⁶ However, the King remained the paramount land-lord, and granting land on behalf of the King was the basis of all landholding in England. This doctrine of absolute land-holding by the King, and granting to tenants in chief in return for military and other services, is known as the doctrine of tenure,⁷ and became the basis of land law in English common law.⁸

Over time, an intricate set of hierarchical relationships grew up through the tenurial system, with the King at the top, and various groups of landholders possessing rights to parcels of land. The complexity of the system resulted, by the 13th century, in the feudal system becoming both unwieldy and open to numerous claims to the same parcel of land.⁹

By the end of the 13th century, the common law system, originated at 1066 when the Normans conquered England, became bound by a rigid formalism in which remedies could only be obtained through existing forms of writs, and further there were only a limited numbers of writs in land law.¹⁰ Further, alienation of land by ordinary tenants was limited by the claims of the feudal overlord and the tenant’s own heirs (whether *inter vivos* or by will).¹¹

Land owners turned to a new innovative legal institution in order to avoid those obstacles in managing their land interests. The institution known as the ‘use’ is the basis of trust law and the Equity system in the common law systems. A trust exists in the case when the owner of a legal interest, for example, a land owner, transfers the legal title to another person, to be used for the benefit of other person or persons, or

² Frederic William Maitland, “The Unincorporate Body” in H. A. L. Fisher (ed.), *The Collected Papers of Frederic William Maitland*, vol. 3 (1911), 271, 272.

³ William Fratcher, “Uses of Uses” *Missouri Law Review* vol. 34, 1969, 39, 39.

⁴ The origins of feudalism in Europe can be traced to well before 1066, to the collapse of the Roman empire: Plunkett, *A Concise History* p. 509-515. See also R. A. Brown, *Origins of English Feudalism* Allen and Unwin (1973), 29.

⁵ R. Lennard, *Rural England 1086 – 1135* (1959) Clarendon Press, 25-26.

⁶ Peter Butt, *Land Law* (5th ed., 2006), Thomson, p. 67.

⁷ E. John, *Land Tenure in Early England* (1960), chapters 1 – 3.

⁸ Peter Butt, *Land Law* (5th ed., 2006), Thomson, 73.

⁹ Brendon Edgeworth et al *Sackville and Neave Australian Property Law* (8th ed., 2008), Butterworths, 196-198.

¹⁰ Theodore Plunkett, *A Concise History of the Common Law*, (5th ed., 2001) Lawbook Exchange, 675; Patrick Parkinson, *Tradition and Change in Australian Law* (3rd ed., 2005), 72 and Peter Butt, *Land Law* (5th ed., 2006), 96.

¹¹ A Simpson, *A History of Land Law* (1984) Clarendon Press, pp. 53-54 [check later]

for some other purposes.¹² In other words, through a trust, equitable obligations will be created to deal with a property in a particular way.¹³ Indeed, by the creation of a trust, the legal title (in law), the equitable title (in Equity) and the beneficial title are separated in three elements, which are the trustee (title holder), trust property and the beneficiary or object of the trust. Initially, the courts of common law in England did not recognise the ‘use’ (*feoffees to uses*),¹⁴ but the practice was widespread and impacted on royal revenues to the extent that Henry VIII, in 1530, enacted legislation (the *Statute of Uses 1535* (27 Hen VIII c 10)) to abolish uses. However, land owners and lawyers developed the device of a ‘use upon a use’ which was accepted by 1635,¹⁵ by which people created an extra ‘use’ to bypass the Statute of Uses. Following the passing of the Statute of Uses, and under pressure from the landholders, in 1540, the *Statute of Wills* (32 Hen VIII c 1) was passed, in which a statutory right was created to enable landholders to make conditional testamentary gifts of land.¹⁶ In addition, in 1645, the feudal tenure was abolished and the modern trust emerged.¹⁷ The law of trusts, in common law countries, has been consistently amended and has acted to counter state intervention in wealth transmission and management by eliminating or reducing taxes, and limiting the government’s regulation of individuals’ wealth and property.¹⁸ According to Austin W. Scott:

It was chiefly by means of uses and trusts that the feudal system was undermined in England, that the law of conveyancing was revolutionized, that the economic position of married women was ameliorated, that family settlements have been effected, whereby daughters and younger sons of landed proprietors have been enabled modestly to participate in the family wealth, that unincorporated associations have found a measure of protection, that business enterprises of many kinds have been enabled to accomplish their purposes, that great sums of money have been devoted to charitable enterprises; and by employing the analogy of a trust, by the invention of the so-called constructive trust, the courts have been enabled to give relief against all sorts of fraudulent schemes whereby scoundrels have sought to enrich themselves at the expense of other persons.¹⁹

Therefore, in contemporary common law systems, trust is acting as an important economic institution for management of properties, particularly for future purposes, as well as a legal mechanism in Equity to provide a cushion against instances of rigidity in common law principles. Indeed, the success and effectiveness of common law systems in the contemporary world can, to a great extent, be attributed to the development of a flexible equitable system within the English common law system.

¹² Michael Evans, *Equity and Trusts* (2nd ed., 2009), 355.

¹³ *Re Williams* [1897] 2 Ch 12 at 18, cited by Isaacs J in *Glenn v Federal Commissioner of Land Tax* (1915) 20 CLR 490 at 503.

¹⁴ Originally, trusts were developed when the land holders (the *feoffors*) conveyed their lands to certain trusted agents (the *feoffees to uses*). The latter were obliged to hold land for the benefit of (*to the use of*) those designated by the landholders (the *feoffors*). In practice, the landholders (*feoffors*) would instruct the *feoffees* to hold the land for the benefit of themselves for life, and to those nominated by them by deed or will after their death. This would give greater power to landholders to manage their real property during their life and after. Further, they could avoid certain legal implications by creating the ‘uses’. For a good overview of the development of uses, see R. H. Helmholz, “The Early Enforcement of Uses” *Columbia Law Review* vol. 79, 1979, 1503.

¹⁵ *Sambach v Daston* (1635) 21 ER 165

¹⁶ Michael Evans, *Equity and Trusts* (2nd ed., 2009), 357.

¹⁷ Michael Evans, *Equity and Trusts* (2nd ed., 2009), 357.

¹⁸ Jeffrey Schoenblum, “The Role of Legal Doctrine in the Decline of the Islamic *Waqf*: A Comparison with the Trust” *Vanderbilt Journal of Transnational Law* vol. 32, 1999, 1191, 1203.

¹⁹ Austin W. Scott, “The Trust as an Instrument of Law Reform” *Yale Law Journal*, vol. 31, no. 5, 1922, 457, 457.

Furthermore, most of the principles of Equity have been developed through trust law. Therefore, trust is both an important economic institution, which enhances flexible economic activities, and a legal mechanism which provides more effective justice.

B. Historical background of *waqf* in Islam

Under Islamic law, *waqf* (plural: *awqaf*) is an Islamic law institution originated in the sayings of the Prophet Muhammad (*Sunna*) which have had important impacts on the social and economic life of Muslim societies for centuries. According to Islamic jurisprudence texts, *waqf* did not exist in *jahiliya* (pre-Islamic Arabia – before 610 CE) and was inferred by the Prophet Muhammad.²⁰ In early sayings of the Prophet (*hadiths*) what is now known as *waqf* is referred to as the ‘*sadaqato jariyeh* [continuous charity]’.²¹ During the time of the Prophet, properties such as mosques, water bores, land and horses were made *waqf* for charitable purposes.²² According to Islamic jurisprudence texts, and leading *hadith* scholars,²³ real property was the first incident of *waqf* in Islam, made by the second Caliph on the order of the Prophet.²⁴

III. BASIC PRINCIPLES OF *WAQF* LAW IN ISLAM

The institution has numerous potentials for a reconstruction of social, economic, and legal affairs of Muslim societies in the future. *Waqf* is an Arabic word and literally means *habs* (‘detention’) and in Islamic Shar’ia law means ‘keeping the property (surrendering the title) for separate use for a particular purpose’.²⁵ *Waqf* under Islamic law is classified in two categories, which are *waqf* for children and the family (*waqf al-ahli*); and charitable *waqf* (*waqf al-khayri*).²⁶

According to the Shafei school of jurisprudence, when a property is made *waqf*, the ownership of the property is transferred to God, and hence there is no legal title for

²⁰ Sheikh Sayyed Sahbeq, *Fiqh al-Sunna* [Sunni Jurisprudence] vol. 3, Dar al-Fiker, Beirut, 2nd ed., 1998, p. 268.

²¹ It is narrated from the Prophet Muhammad (by Moslem, Abu Daoud, Al-Termadhi and Al-Nisai) that ‘When a person dies, they are survived by three things: *sadaqato jariyeh* [continuous charity], knowledge that benefits society, and their children of good character.’ It has been said that *sadaqato jariyeh* means *al-waqf*. See Sheikh Sayyed Sahbeq, *Fiqh al-Sunna* [Sunni Jurisprudence] vol. 3, Dar al-Fiker, Beirut, 2nd ed., 1998, 268

²² Sheikh Sayyed Sahbeq, *Fiqh al-Sunna* [Sunni Jurisprudence] vol. 3, Dar al-Fiker, Beirut, 2nd ed., 1998, 268-269.

²³ Termadhi says that this *hadith* has been narrated from many scholars and companions of the Prophet, and he knows no one who has raised doubt about this *hadith* and that this was the first incident of *waqf* in Islam. Sheikh Sayyed Sahbeq, *Fiqh al-Sunna* [Sunni Jurisprudence] vol. 3, Dar al-Fiker, Beirut, 2nd ed., 1998, 270.

²⁴ It is narrated from Abdullah Ibn Omar that the second Caliph (Omar) had a piece of land in Khaybar, in the outskirts of Medina. He came to the Prophet stating that he had never obtained such a valuable property and sought advice of the Prophet Muhammad to deal with the highly valuable land. The Prophet said, “If you like, make the property inalienable and give the benefits for charity [*Habasat aslaha wa tasaddaqat beha*]”. Sheikh Sayyed Sahbeq, *Fiqh al-Sunna* [Sunni Jurisprudence] vol. 3, Dar al-Fiker, Beirut, 2nd ed., 1998, 269.

²⁵ *Habs al-asl wa tasbil al-samarehi* [keeping the principle and using the benefit (for the way of Allah)]: Sheikh Sayyed Sahbeq, *Fiqh al-Sunna* [Sunni Jurisprudence] vol. 3, Dar al-Fiker, Beirut, 2nd ed., 1998, 267.

²⁶ Sheikh Sayyed Sahbeq, *Fiqh al-Sunna* [Sunni Jurisprudence] vol. 3, Dar al-Fiker, Beirut, 2nd ed., 1998, 267.

the endower or the beneficiary (*mawqouf alayh*).²⁷ However, according to the Maliki and Hanbali schools of jurisprudence, by endowing a property as *waqf*, the endower transfers the ownership to the beneficiary.²⁸ According to the Hanafi school, the *waqf* property may be sold.²⁹

The land subject to *waqf* was not alienable, not to be gifted, not to be inherited, and its benefits should be used for poor people, relatives of the endower, slaves, itinerant travellers, and guests.³⁰ The trustee (*mutawalli*) may eat from the benefit and may use the benefit to feed the needy (but not the wealthy).³¹

Both real property and chattels, including animals, can be subject of *waqf*. However, according to the Hanafi school, animals cannot be subject of *waqf*.³² *Waqf* for non-Muslims who are people of the Book (Christianity and Judaism) is allowed.³³ Saphia, one of the Prophet's wives, made certain properties *waqf* for her brother who was Jewish.³⁴ According to some scholars, and according to the Hanafi school, a person may make *waqf* for himself or herself, and for their children and grandchildren.³⁵

According to some, a person may not make their property *waqf* if that is intended to harm their heirs.³⁶ However, this proposition may make most *waqf* incidents impossible according to Shari'a, given that most *waqfs* potentially may harm the interests of the endower's heirs.

IV. DEVELOPMENT OF *WAQF* INSTITUTION AS AN ECONOMIC INSTRUMENT IN THE MIDDLE EAST

Waqf law was not developed until the second century of Islam when Islamic schools of law took shape. Given that there is no provision in the Quran on the nature of *waqf*, and it was not commonly practiced during the time of the Prophet Muhammad and the Righteous Caliphs, there was much uncertainty about the law of *waqf*, and different legal principles developed according to the various schools of law.

²⁷ Sheikh Sayyed Sahbeq, *Fiqh al-Sunna* [Sunni Jurisprudence] vol. 3, Dar al-Fiker, Beirut, 2nd ed., 1998, 270.

²⁸ Sheikh Sayyed Sahbeq, *Fiqh al-Sunna* [Sunni Jurisprudence] vol. 3, Dar al-Fiker, Beirut, 2nd ed., 1998, 270.

²⁹ Sheikh Sayyed Sahbeq, *Fiqh al-Sunna* [Sunni Jurisprudence] vol. 3, Dar al-Fiker, Beirut, 2nd ed., 1998, 270.

³⁰ Sheikh Sayyed Sahbeq, *Fiqh al-Sunna* [Sunni Jurisprudence] vol. 3, Dar al-Fiker, Beirut, 2nd ed., 1998, 269.

³¹ Sheikh Sayyed Sahbeq, *Fiqh al-Sunna* [Sunni Jurisprudence] vol. 3, Dar al-Fiker, Beirut, 2nd ed., 1998, 269.

³² Sheikh Sayyed Sahbeq, *Fiqh al-Sunna* [Sunni Jurisprudence] vol. 3, Dar al-Fiker, Beirut, 2nd ed., 1998, 271.

³³ Mohaqeq Helli, Sharayeh al-Islam [Farsi translation by Abol Qasim Ibn Ahmad Yazdi] University of Tehran Press, Tehran, 1995, 347. Zaynodeen bin Ali (Shaheed Thani), *Al-Rodha al-Bahiya fi Sharha al-Loma al-Demeshqiya* [Collection of Legal Sections by Asadollah Lotfi] Majd Press, Tehran, 2009, 38.

³⁴ Sheikh Sayyed Sahbeq, *Fiqh al-Sunna* [Sunni Jurisprudence] vol. 3, Dar al-Fiker, Beirut, 2nd ed., 1998, 271.

³⁵ Sheikh Sayyed Sahbeq, *Fiqh al-Sunna* [Sunni Jurisprudence] vol. 3, Dar al-Fiker, Beirut, 2nd ed., 1998, 271-272.

³⁶ Sheikh Sayyed Sahbeq, *Fiqh al-Sunna* [Sunni Jurisprudence] vol. 3, Dar al-Fiker, Beirut, 2nd ed., 1998, 274-275.

Generally, *waqf* originated as a charitable institution in Islam. Later, during the Omayyad and Abbasid dynasties, when new territories, particularly from the Roman Empire, were conquered by Muslims, they encountered the considerable pre-existing endowments for churches, orphanages, monasteries and poorhouses in the conquered lands.³⁷ Inspired by charitable impulses and by the endowments they had observed in the conquered lands, Muslims extended the *waqf* institution to a wide variety of property.³⁸

During the Ottoman Empire (1299-1923), and the Safavid Persian Empire (1501-1726), the institution of *waqf* became an important part of the economic system of those two Islamic empires. In 1826, through certain law reform initiatives in the Ottoman Empire, the *waqf* properties and administration were placed under the control of an Imperial ministry and the income from major *waqf* properties were seized by the state.³⁹ As a result, the Empire brought under its control major private investments and properties, including public water supply (largely constituted as *waqf*). It is estimated that more than half of the real property in the Empire, which at the time included most of the current Middle Eastern countries, was under *waqf* endowment.⁴⁰ Similarly, another major Muslim empire, Iran, now under Qajar dynasty (1779-1924), created a Ministry for *Waqf* in 1854, which is still a government department but comes under the authority of the Supreme Leader today.

The growth of *waqf* in the Muslim world can be attributed to a number of factors. Firstly, the strong religious and charitable impulses of many in the Muslim world have led many people to make at least part of their property *waqf*. As was mentioned above, *waqf* originally was named by the Prophet as '*sadaqato al-jariyeh*' (continuous charity). There are also extensive literature including Quranic verses and the *hadith* recommending Muslims to spend money and property in the way of Allah [*fi sabil Allah*]. Indeed, the *waqf* system acted as what the social security system does in a modern state like Australia, and Muslims contributed to the charitable system by making their properties *waqf*. Secondly, *waqf* was a means of safeguarding property against the risk of expropriation by the state or other powerful individuals and nobles who were able to confiscate weaker parties' properties, as all groups would respect *waqf* property. The endower of *waqf* property was still able to control and maintain the property by making themselves and their heirs the *mutawali* (trustee). The only power that an endower of *waqf* property would forfeit would be the right of alienation of the property. Thirdly, *waqf* has been used as a method to evade taxation. Finally, occasionally, major land holders have made part of their properties *waqf* to avoid the claims of other potential interest holders to the property.⁴¹

³⁷ Asaf A. A. Fyzee, *Outline of Muhammadan Law* (4th ed., 1974) Oxford University Press, p. 276. [5th ed. To be used for final draft]

³⁸ Asaf A. A. Fyzee, *Outline of Muhammadan Law* (4th ed., 1974) Oxford University Press, p. 276. [5th ed. To be used for final draft]

³⁹ Wael Hallaq, *An Introduction to Islamic Law* (2009) Cambridge University Press, p. 96.

⁴⁰ Wael Hallaq, *An Introduction to Islamic Law* (2009) Cambridge University Press, p. 96.

⁴¹ For an overview of the varying objectives of *waqifs* (endowers of *waqf*) see Robert McChesney, "Waqf and Public Policy: The *Waqfs* of Shah Abbas 1011-1023/1602-1614" *Asian and African Studies* vol. 15, no. 2, 1981, p. 165-190, and Gabriel Baer, "The Waqf as a Prop for the Social System (Sixteenth-Twentieth Centuries)" *Islamic Law and Society*, vol. 4, no. 3, 1997, 264-297.

V. WAQF AND THE RULE OF LAW

There is intense debate among Muslim and non-Muslim legal scholars and economists about the role and performance of *waqf* in Muslim societies. Although *waqf* as a social institution has significantly contributed to the social welfare of Muslim communities for centuries,⁴² there are some arguments that the institution has locked considerable properties and investments into an unprofitable system.⁴³

Establishing societies based on a ‘rule of law’ system where the ‘law’ is supreme and protects people against the arbitrary power of the state and individuals,⁴⁴ is a tradition of Western legal systems but cherished in other parts of the world including in Muslim countries. In most Muslim countries an effective ‘rule of law’⁴⁵ system to protect both individuals and the community against the powerful state is as yet unavailable.

Many reasons are cited for the lack of a rule of law system in the Muslim world. There are historical, cultural, religious, political and economic reasons for the lack of effective legal systems based on the ‘rule of law’ in most Muslim countries. Colonialism, a lack of water resources and the discovery of huge oil reserves in the early 19th century are further factors contributing to the failure of civil society and the rule of law.

Waqf is an economic institution, so by linking its operation to civil society, the role of the economy and the establishment of the rule of law system is emphasised. There is no doubt that the economy and its institutions play an important role in the social, political, and legal affairs of every society. Historically, feudalism in Europe, land and water ownership, the establishment of corporations, revival of commerce and banking, and agricultural productivity made states weaker and corporations stronger. The equivalent to corporations and social association in the Muslim world, particularly in the Middle East, was tribalism. While tribe structure played an important role in the power structure of Islamic empires such as the Ottoman, Mughal and Safavid Empires, the system was more family and socially based than economically oriented. In the West, on the other hand, by the 16th century, the feudal system was replaced by a capitalist system, where big corporations and individual workers and farmers were able to influence weak states in the West.

⁴² Andrew White, “The Role of the Islamic Waqf in Strengthening South Asian Civil Society: Pakistan as Case Study” *International Journal of Civil Society Law* vol. 7, 2006, 7-36.

⁴³ Amy Singer, “A Note on Land and Identity: From Ze’amet to Waqf” in Roger Owen and Martin P. Bunton (eds) *New perspectives on property and land in the Middle East* Harvard CMES, 2001, 161-173, 161; Jack Goldstone, “Islam, Development, and the Middle East: A Comment on Timur Kuran’s Analysis” *Papers from Forum 7: Institutional Barriers to Economic Change: Cases Considered* Mercatus Center (2003), 6-7; Timur Kuran, “Why the Middle East is Economically Underdeveloped: Historical Mechanisms of Institutional Stagnation” *The Journal of Economic Perspectives*, vol 18, no. 3, 2004, 71-90, 81.

⁴⁴ Albert V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed., 1965), 202.

⁴⁵ While support for the rule of law is worldwide (in both Western and non-Western societies), the definition and the scope of the notion is not clear. There are political and legal theories on the concept and nature of the rule of law. The concept of the ‘rule of law’ is essentially contested. On the rule of law see Brian Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge University Press, New York, 2004; Ronald Dworkin, *Law’s Empire* Harvard University Press, Massachusetts, 1986; Lon L. Fuller, *The Morality of Law* Yale University Press, New Haven, (2nd ed., 1969); Joseph Raz, “The Rule of Law and Its Virtue” in *The Authority of Law* Clarendon Press, Oxford, 1979.

A. *Waqf* as a factor in the lack of the rule of law

According to some scholars, the institution of *waqf* played an important role in economic underdevelopment of the Middle East and therefore is an important factor for the lack of rule of law in the Middle East and Islamic world. In the view of these scholars, economy and economic institutions are the main reason behind the establishment of cultural and legal systems in the Muslim societies. Beside the *waqf* institution, Islamic contract law and Islamic inheritance law are cited as important factors in the underdevelopment of Islamic economic systems, and the lack of an effective rule of law based legal system.⁴⁶

Historically, *awqaf* played important roles in the social and economic order of Islamic states, particularly in the Ottoman empire (1299-1923), Mughal empire (1526-1825) and Safavid Persian empire (1501-1726). Generally, *awqaf* properties were charitable institutions in the agricultural economies, holding thousands of farms, villages, and urban lands.⁴⁷ The *waqf* institutions are described as “redistributive institutions and poor relief agents”.⁴⁸ They were not designed as special ventures for profit maximisation, or for establishing large corporation-style institutions.⁴⁹

According to Timur Kuran, *waqf*, as an unincorporated trust established under Islamic law, had an important role in the shortcomings of economic development in the Middle East.⁵⁰ *Waqf* had to be fixed in perpetuity in order to establish a balanced arrangement between the Islamic state and the founder of the *waqf*, which made the *waqf* properties unproductive and inflexible.⁵¹ As a result, modern institutions such as modern schools, corporations, and universities, were developed outside of *waqf*.⁵² While in the 19th century, corporations with freedom of association and organizational autonomy were developed in the West, *waqf* institutions in the Muslim world, though

⁴⁶ See Timur Kuran, “Institutional Causes of Economic Underdevelopment in the Middle East: a Historical Perspective” in Janus Kornai, Lazlo Matyas and Gerard Roland (eds.) *Institutional Change and Economic Behaviour*, Palgrave-Macmillan, 2008, pp. 64-76; Timur Kuran, “The Provision of Public Goods under Islamic Law: Origins, Impact and Limitations of the Waqf System” *Law & Society Review* vol. 35, no. 4, 2001, 841; Timur Kuran, “The Absence of the Corporation in Islamic Law: Origins and Persistence” *American Journal of Comparative Law*, vol. 53, 2005, 785.

⁴⁷ Kayhan Orbay, “The Economic Efficiency of Imperial Waqfs in the Ottoman Empire”, *Papers from the XIV International Economic History Congress*, Helsinki, 2006, located at http://www.helsinki.fi/iehc2006/sessions81_124.html (2 October 2009), p. 4.

⁴⁸ Kayhan Orbay, “The Economic Efficiency of Imperial Waqfs in the Ottoman Empire”, *Papers from the XIV International Economic History Congress*, Helsinki, 2006, located at http://www.helsinki.fi/iehc2006/sessions81_124.html (2 October 2009), p. 14.

⁴⁹ Kayhan Orbay, “The Economic Efficiency of Imperial Waqfs in the Ottoman Empire”, *Papers from the XIV International Economic History Congress*, Helsinki, 2006, located at http://www.helsinki.fi/iehc2006/sessions81_124.html (2 October 2009), p. 14.

⁵⁰ Timur Kuran, “Institutional Causes of Economic Underdevelopment in the Middle East: a Historical Perspective” in Janus Kornai, Lazlo Matyas and Gerard Roland (eds.) *Institutional Change and Economic Behaviour*, Palgrave-Macmillan, 2008, pp. 64-76, p. 70.

⁵¹ Timur Kuran, “Institutional Causes of Economic Underdevelopment in the Middle East: a Historical Perspective” in Janus Kornai, Lazlo Matyas and Gerard Roland (eds.) *Institutional Change and Economic Behaviour*, Palgrave-Macmillan, 2008, pp. 64-76, p. 72.

⁵² Timur Kuran, “Institutional Causes of Economic Underdevelopment in the Middle East: a Historical Perspective” in Janus Kornai, Lazlo Matyas and Gerard Roland (eds.) *Institutional Change and Economic Behaviour*, Palgrave-Macmillan, 2008, pp. 64-76, p. 72.

providing a kind of associational freedom, restricted self-governance and the evolution of big corporations with significant economic power against the state.⁵³

In addition, *waqf* in Islamic societies did not remain as private institutions, struggling for autonomy and recognition by the state. Rather, Islamic states, by establishing *awqaf* state controlled institutions, co-opted *waqf* for their own purposes. For example, in Iran, the *awqaf* organization (*sazman awqaf*), which is a department of the Ministry of Culture and Islamic Guidance, manages most *waqf* properties which do not have a specific trustee (*mutawali*).⁵⁴ Similarly, in many other Muslim countries, government departments have taken over the administration of *awqaf* properties.⁵⁵

B. *Waqf* as a social institution and a welfare mechanism

Both in historical terms and in contemporary Muslim societies, *waqf* has acted as a social institution. It has been a mechanism for the elimination of poverty; supporting families, low socio-economic groups and professional groups. Historically, Islamic states and caliphates did not have special departments to support low socio-economic groups or to provide for public works, such as roads, bridges, mosques, inns and hospitals.⁵⁶ One important function of the Islamic *waqf* was to support social units and to provide for public institutions such as schools and mosques. For example, the health, education and welfare systems of the Ottoman Empire were financed to a great extent by *waqf*.⁵⁷

It is also argued that *waqf* and the administration of *waqf* properties in Muslim countries has an important role in the alleviation of poverty in Muslim societies.⁵⁸ *Waqf* in Muslim states provides educational institutions, including universities, colleges and schools; orphanages that shelter poor orphans; mosques which provide religious and cultural activity centres; charitable clinics; and shopping complexes and commercial centres where the income is used for social and charitable purposes.⁵⁹

⁵³ Timur Kuran, "Institutional Causes of Economic Underdevelopment in the Middle East: a Historical Perspective" in Janus Kornai, Lazlo Matyas and Gerard Roland (eds.) *Institutional Change and Economic Behaviour*, Palgrave-Macmillan, 2008, pp. 64-76, p. 74.

⁵⁴ See the website of the *sazman awqaf* at: <http://www.iranculture.org/nahad/oghaf.php> (located on 2 October 2009).

⁵⁵ For the United Arab Emirates, General Authority of Islamic Affairs and Endowments, <http://www.awqaf.ae/> (located on 9 October 2009). For Jordan, the Ministry of Awqaf and Islamic Holiness, <http://www.awqaf.gov.jo/index.php> (located on 9 October 2009). For Turkish Department of Awqaf, <http://www.vgm.gov.tr/> (located on 9 October 2009). For Syria, Ministry of Awqaf, <http://www.syrianawkkaf.org/> (located on 9 October 2009). For Saudi Arabia, Ministry of Islamic Authority, Awqaf, Preaching and Guidance, <http://www.al-islam.com/arb/> (located on 9 October 2009). For Oman, the Ministry of Awqaf and Religious Authorities, <http://www.maraoman.net/> (located on 9 October 2009). For Qatar, Ministry of Awqaf and Islamic Authorities, <http://www.islam.gov.qa/> (located on 9 October 2009). For Kuwait, Ministry of Awqaf and Islamic Authorities, <http://www.islam.gov.kw/site/> (located on 9 October 2009).

⁵⁶ Abul Hasan M. Sadeq, "Waqf, perpetual charity and poverty alleviation" *International Journal of Social Economics* 2002, 29, vol. 1/2, 135-151, 140.

⁵⁷ Siraj Sait and Hilary Lim, *Land, Law & Islam: Property & Human Rights in the Muslim World* Zed Books, London, 2006, 149.

⁵⁸ Abul Hasan M. Sadeq, "Waqf, perpetual charity and poverty alleviation" *International Journal of Social Economics* 2002, 29, vol. 1/2, 135-151, 140.

⁵⁹ Abul Hasan M. Sadeq, "Waqf, perpetual charity and poverty alleviation" *International Journal of Social Economics* 2002, 29, vol. 1/2, 135-151, 140-141.

In the contemporary world, it is argued that the existing *waqf* institutions could be better managed and used in establishing an effective welfare system, assisting in resource mobilisation and redistribution, and strengthening civil society.⁶⁰

VI. CONCLUSIONS

The institutions of trust in common law systems and *waqf* in Islamic law systems, with certain similarities and differences, are two important legal and economic mechanisms. Under common law, trust, as the major part of the Equity system of the English common law system, has been a very effective economic and legal instrument in facilitating economic activity, as well as positively making rigid legal systems more flexible and just. Under Islamic law, *waqf* has acted as more of a social welfare mechanism and arguably has not contributed to the development of large economic institutions and corporations. The lack of major economic associations may be cited as a reason for the lack of rule of law systems in many Middle Eastern countries. While *waqf* is cited as a reason for the failure of Islamic economic systems to develop major corporations, it may still be managed in a way to enhance support for social institutions and civil society organisations.

⁶⁰ Siraj Sait and Hilary Lim, *Land, Law & Islam: Property & Human Rights in the Muslim World* Zed Books, London, 2006, 171.