Chapter 3

Waqf: Essential Islamic Social Mobility Vehicle

Hassan Syed

https://orcid.org/0000-0003-2114-2473
BPP Law School, BPP University, UK

Sema Yılmaz Genç
Kocaeli University, Turkey

ABSTRACT

Modern Islamic Finance and Banking is competing with the conventional banking on many levels. There are tensions between the definitions of ‘Riba’ and ‘Hyal’ that continuously stress the need for Islamic Sharia Boards to update the Sharia Compliance for their products. The concept of ‘Waqf’ is the Islamic concept of an endowment Trust. The pious aim of the Waqf is to allow endowment for a specific purpose that must be ‘Halal’. The leading Islamic countries for the purposes of having vibrant Islamic Finance and Banking economies are predominantly past British colonies. These Islamic countries have rich Common Law heritage that guides their Constitutions as they exist today. The Common Law guidelines for Family Law, Inheritance, and Property Law also influence the Sharia compliance framework for contemporary Islamic Finance in those countries. This chapter examines the existing Islamic jurisprudence on Waqf and its influence on Common Law trust, and argues for its revival as the Islamic Trust Law.

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INTRODUCTION

The leading Islamic countries for the purposes of having vibrant Islamic Finance and Banking economies are predominantly past British colonies. These Islamic countries have rich Common Law heritage that guides their Constitutions as they exist today. The Common Law guidelines for Family Law, Inheritance and Property Law also influence the Sharia compliance framework for contemporary Islamic Finance in those countries. The Islamic Sharia scholars and Jurists sitting on the Islamic Finance Institution’s Sharia Boards draw inferences from the Common Law for the purposes of analyzing the Sharia compliance of the financial and legal problems presented to them. Iran’s Land Law is based on its Civil Law whereas the Land Trust is created under Islamic Law. The Malaysian Law is segregated by its constituent sub-states that have promulgated their individual laws for Waqf. While the Islamic laws are applied to the Waqf in Malaysia, no clear mechanism exists for the unified framework for the Waqf or Islamic Trust regulation and fiduciary duties of the Trustees. Also deficient in the contemporary Islamic Finance Laws for Waqf is a settled and common understanding of Waqf as a legal person amongst various Islamic Madhabs. A non-human legal entity created under statutory laws is a distinct Common Law construct. Pakistan has a Ministry of Auqaf that deals with the matters of Waqf but still relies on the Common Law definitions when it comes to the beneficiary and trustee duties and legal rights. It is also not settled law within the Islamic world that the Sharia Boards advising the Islamic Financial Institutions should be the legal bodies supervising legal matters of Waqf. It has been argued in Malaysia that separate Waqf Advisory Boards should be appointed to deal with all legal matters related to Waqf. The informal yet obligatory charitable doctrine in Islam of Zakat combined with the Waqf has tremendous opportunity to bring social uplifting of communities that are economically marginalized. This chapter proposes to examine the existing Islamic jurisprudence on Waqf, examine its influence on Common Law trust and argue for its revival as the Islamic Trust Law.

The fifteen hundred years history of Islam is a more recent event in recorded history. The Prophet of Islam Muhammad (PBUH) lived in the face of history. Since Prophet Muhammad’s birth in 570 AD Makkah till his death in 632 AD in Madinah, the religion of Islam received its primary and secondary sources of law, the Sharia (Armstrong, 2013). Almost fifteen centuries later Islam is the fastest-growing faith with over 1.8 billion Muslims around the globe (Lipka, 2017). The Glorious Quran, received by the Prophet Muhammad (PBUH) through divine revelations in Arabic retains its original text to the last alphabet to this day. The Quran is the primary source and undisputed code of Muslim life. The Sunnah or the life, actions, and words of the Prophet Muhammad (PBUH) is the secondary source of Islamic law. The documented source of the Prophet’s (PBUH) life is in the form of Hadith
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