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*by Haitam Suleiman**

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Abstract

For a millennium, the waqf (Islamic trust) has financed Islam as a society, although more recently it has been on the decline. This article examines the grounds for the success of the waqf; the primary one being its solid foundational structure, developed by jurists benefiting from the flexibility of ijtihad that praises the waqf to be compatible and adaptable to any substantial changes. This article also establishes that the decline cannot be attributable to its foundational basis, nor to the legal doctrine but rather to factors unrelated to its legal theory. The decline can strongly be linked to the absence of an entire Islamic legal system that can accommodate the waqf. Another crucial factor is the political impact; in Muslim countries the main reason was the control of its assets in order to strengthen their existence. In Palestine, the grounds are different; with the need to acquire land and constrain Palestinian political aspiration.

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I. Introduction

From the outset, the Islamic legal system has concerned itself with the basic requirements of the human being, asserting the supremacy of the value of justice and the principle of human dignity and in so doing has developed the principles that constitute the heart and the basis of that legal system. The right for property is regarded as one of the five essentials of life (*Daruryyat). The waaf,* which is an unincorporated charitable trust, is an influential institution which exists to satisfy this life essential by providing the Muslim community with extensive social, educational and economic services. In Arabic, *waqf* is defined as hold, confinement or prohibition. Under Islamic *shari'a* law, *waqf* is established by a living man or woman, known as the *waqif* (founder/ settlor), who holds a certain property and makes the *asl* (principal) of a revenue-producing property inalienable in perpetuity. This has the effect of preserving it for the confined benefit of philanthropy, and prohibiting its use or disposition outside of those specific objectives. To achieve this, the property is placed under the possession of a fiduciary (*wali* or *mutawalli*) thereby assuring that the confined *waqf* reaches the intended *mustahiqeen* (beneficiaries), and is prohibited from sale, gift and inheritance. Sait and Lim[1] pointed out that the Islamic *waqf* is an important tool of institutionalized and sustainable giving, achieving its development and providing services to all sections of society and in almost every aspect of life, without relying on governmental or foreign funds. Baskan found through the great variety of recipients and players, the *waqf* system "succeeded for centuries in Islamic lands in redistribution of wealth, as a product of state-individual cooperation".[2] As the *awqaf* supported numerous economic sectors, the evolution of Islamic civilisation is incomprehensible without taking account of them. Hodgson comments that the *waqf* system eventually became the primary "vehicle for financing Islam as a society"[3], with Fyzee claiming that *waqf* is the most important branch of *Muhammadan* law because it is interwoven with the entire religious life and social economy of Muslims.[4] Similarly to the modern corporation, the *waqf* was acknowledged in Islamic law as a 'juristic person', referred to as *thema.* The concept of *waqf* points towards an Islamic system that recognizes the significance of the non-profit sector in social and economic development. The *fiqih* of *waqf,* through *shari'a* law, also offers the required legal and institutional protection to allow this sector the freedom to function separately from self-interest motives and the power of government.[5]

The *waqf* system failed to meet the objectives for which it was originally intended, and has declined to the extent that it has failed to provide the minimal services that it offered in the past.[6] Researchers have explored the possibility of revival, for example by examining the social and historical perspectives of *waqf, and* this paper sought to investigate the possibilities for revival of the *waqf* system and explores whether the legal process permits adaptation in response to inevitably changing conditions and needs.

[1] SAIT SIRAJ/LIM HILARY, Land, Law & Islam: Property and Human Rights in the Muslim World, London 2006, at 147. See also, AL-ZARKA MUSTAFA, Ahkam Al Awqaf, [Awqaf Rulings], Dar Ammar, Jordan [in Arabic] 1998, at 17.

[2] BASKAN BIROL, Waqf System as a Redistribution Mechanism in Ottoman Empire, paper presented at 17th Middle East History And Theory Conference, (May 10-11), Centre for Middle Eastern Studies, University of Chicago 2002, at 23.

[3] HODGSON MARSHALL, The Venture of Islam: Conscience and History in a World Civilisation, Vol. 2, Chicago 1974, at 124.

[4] FYZEE ASAF, Outlines of Muhammedan Law, New Delhi 1974, at 274.

[5] SULEIMAN HAITAM/HOME ROBERT, God is an Absentee, too: The Treatment of Waqf (Islamic Trust) Land in Israel/Palestine, Journal of Legal Pluralism and Unofficial Law, Vol. 41 (2009), at 49-65.

[6] SAIT/LIM, *supra* n. 1, at 161.

This paper has examined the impact upon the *waqf* of applying secular law in Islamic countries and has used Palestine/Israel as a case study. In Palestine, the *waqf* experienced a decline similar to elsewhere in the Islamic world, although has faced different challenges and fate. In the Muslim world, the availability of English publications relating to the *waqf* is limited and, similarly, court rulings and relevant legislation are either unpublished or not available in English. This article has been written on the basis of field research undertaken by a Palestinian Arab living in Israel (Haitam Suleiman). It discusses the revival of the Islamic *waqf* drawing upon Arabic, Hebrew and English language competence, and sensitivity to nuances of language, including body language, and cultural background. Interviewees may have sought to mislead, where questions dealt with controversial and sensitive issues, and officials may withhold information, while the field-study carried risk and was interrupted by the current conflict.

II. The legal context of *waqf* in Islamic law

1. The origins of the Doctrine of *waqf*

As set out below, the law of the *waqf* encompasses "religious" elements. Due to the divine *Qur'an* being its primary source, Islamic law is often perceived as a 'religious law', and thus described as rigid. However, this is not accurate for several reasons: - Islamic law has two primary sources, namely, the *Qur'an* which was revealed by God to the prophet (Mohammad), and the *Sunnah*, which is the sayings, acts and the conducts of the prophet, and which also constitute a practical application of the *Qur'anic* principles. This divine feature is a distinctive one and a significant feature of Islamic law. God is the only lawmaker, and the foundations and principles (*Nusus*) that were revealed by God, as being the basic needs for humans, should never be abolished or reformed. As stated by Vogel, the foundation of the Islamic legal system on religious beliefs means that "the Law is perfect but humans are not".[7] In addition the primary sources of Islamic law throughout Islamic jurisprudence *(Usul Al Fiqih),* offered scope for jurists to interpret the primary sources by creating instruments and methods such as *Ijtihad* (interpreting a text in such a way as its legal implications became apparent) and comparative *Qiyas* (which is concerned with deriving a particular ruling from general statements), or adopting a specific interpretation. These methods were eventually adopted as the secondary sources of Islamic law, and are applied to new areas of law where there is no applicable text in the *Qur'an* or the *Sunnah* concerning the area in question. These secondary sources have added the feature of flexibility that characterises s*hari'a* law to be adaptable to every new social development, and one that governs every aspect of life, as well as being applicable to all periods of time.

Bowen comments: "Far from being an immutable set of rules, Islamic jurisprudence (*Fiqih*) is best characterised as a human effort to resolve disputes by drawing on scripture, logic, the public interest, local custom, and the consensus of the community".[8] In other words, it is imbricated with social and cultural life, similarly to Anglo-American law. Moreover, Sait and Lim observe, "the distinguishing

[7] VOGEL FRANK, Islamic Law and Legal System: Studies of Saudi Arabia, Boston 2000, at 3-4.
[8] BOWEN JOHN, Islam, Law and Equality in Indonesia, Cambridge 2003, at 9.

feature of Islamic law is that it was not born in a vacuum or constructed out of current needs and priorities. Rather it is the product of centuries of legal thought and experiences".[9]

Islamic law therefore represents an extreme case of a 'jurist's law', which was created and further developed by private specialists. It represents a critical difference between Western philosophical beliefs that are based primarily on common law, and the separation, and/or reduced role of religion within the legal system. This foundational understanding is a critical component in understanding the Islamic legal system, and its implications with respect to the *waqf*.

The majority of Muslims are of the Sunni branch of Islam, following one of the four Sunni traditional law schools (*Hanbali*, *Shafi*, *Maliki*, and *Hanfi).* Each school has a different *Mathhab* view and differs in interpretation of the law. The four schools of law are still in existence and are known as personal schools, that is, groups designated as followers of a leading jurisconsult. The schools are considered equally orthodox, and each has benefited from the flexibility of Islamic law, using the *Ijtihad* and other Islamic instruments, to develop their own view and thoughts on debated issues in law. The law of *waqf* was quite similar among the schools, although there are some noted differences.

Islamic law may be divided into three categories: *Ibadat*, obligations regarding worship; *Mu'amalat*, civil/legal obligations; and *Ouqubat*, punishments. The jurisprudence that governs Islamic *waqf* is called *fiqih al muamalat*. Under such category, references to the basic law (*Nusus*) represent a little compared to the other categories. Therefore, the law developed due to the availability of a large space for *Ijtihad*.

The *waqf* was not specifically referred to in the *Qur'an*, although it contains verses that contain repeated urgency to believers to be charitable and donate to the alms *(zakat).* The main foundational aspects of *waqf* emerged from *Sunnah*; the first *waqf* originated from the *Sunnah* of the prophet Mohammad.[10] The juridical form of the *waqf* initially took shape around the year 755, during the 2nd and 3rd Islamic centuries.[11] Yediyildiz suggests that the reason why the *waqf* expanded as an institution in the 8th century but played no formal role in the original Islamic economic system, in the first Islamic community of Western Arabia, was because the state could provide public goods; at the time, the community was relatively small and homogeneous enough to make basic needs apparent and a centralized delivery system efficient.[12] The expansion of *waqf* came with a bigger and more compound society. Yediyildiz indicates that the proliferation of *awqaf* accompanied the establishment and development of successive Muslim-ruled states.[13] After the initial three centuries, a complex body of law emerged to oversee the creation and administration of these trusts.[14] Through the Islamic jurisprudence *(Usul Al Fiqih),* the jurists developed the *waqf* as a legal doctrine. As an institution, the *waqf* evolved more systematically from the 7th to 8th centuries[15], and became key

[9] SAIT/LIM, *supra* n. 1, at 35.

[10] AL-ZARKA, at 11.

[11] HENNIGAN PETER, The Birth of a Legal Institution: The Formation of the Waqf in Third-Century A.H. Hanafi Legal Discourse, London 2004.

[12] YEDIYLLDLZ BAHAEDDIN, Institution du vaqfau XVIIIe siècle en Turquie: Etude sociohistorique, Ankara, Turkey 1990, at 35-39.

[13] YEDILLDLZ, *supra* n. 12, at 5.

[14] GAUDIOSI MONICA M., The influence of the Islamic Law of Waqf on the Development of the Trust in England: the Case of Merton College, University of Pennsylvania Law Review, Vol. 136 (1988), at 1231-1261.

[15] CIZAKCA MURAT, A History of Philanthropic Foundations: The Islamic World from the Seventh Century to the Present, Istanbul 2000, at 6.

element in the Ottoman city, providing the main services: the imaret (soup kitchen), *madrassa* (school), Friday mosque, orphanages, shelters, and hospitals.[16]

2. The legal components of *waqf*

A *waqf* could be regarded as valid if it were irrevocable, made in perpetuity, and initiated the legal precedent that allowed the foundation of the *ahli* (family *waqf*) in addition to the *waqf khayri* (pious *waqf*). The distinction between the two is that the pious *waqf* immediately benefits religious institutions, or such pious causes as providing food to orphans, whereas a family *waqf* allows the donor to receive the income of the endowment during his lifetime and that of his heirs after his death[17]. The three basic principles governing the *waqf*, namely the trust being irrevocable, perpetual, and inalienable, are overlapping to some extent. Therefore, once an owner declared that his property was *waqf*, the subsequently created trust was 'irrevocable'. The owner, known as the *waqf* founder, could retain certain rights as to its administration, but the endowment itself was invalid unless irrevocable, and the *waqf* was bound by the terms of the *waqf* document.

Similarly, the formation of the *waqf* could not be dependent on the actions of any third party, nor was a conventional choice clause permissible. The *waqf* is 'perpetual', although the specific object of the trust is not required to be permanent. To a certain extent, the requirement of perpetuity referred to 'the dedication of the income' of the *waqf* to charitable purposes. Where the particular rationale for which the trust was created ceases to exist, the *waqf* income will be applied to a similar charitable purpose.[18] The *Maliki* School of law permitted the creation of a *waqf* limited as to time or as to a life or series of lives, and at the termination full ownership of the property reverted to the founder or the founder's heirs. This, however, was the exception to the generally accepted rule of perpetuity. Moreover, the w*aqf* is inalienable, regardless of the grounds, and could not be subject to any sale, disposition, mortgage, gift, inheritance, attachment, or alienation. However, under certain circumstances Islamic jurists have shown some flexibility in this regard, and the property could be exchanged for equivalent property if the *waqf* reserved the right to do so, or if the original *waqf* property is in danger of ruin and ceased to produce income, the property could be sold, provided that the price received was reinvested in another property.[19] Where new property is acquired in an exchange or in the course of investment through the proceeds of the sale of the original property, all the elements of *waqf* should be attached to the new property, which will be subject to the same conditions as the original property.

III. *Waqf* influence on socio-economic issues

The characteristics of *waqf* led to the creation and development of a third sector, separate from the profit-based private sector and the official public sector. The concept of *waqf* points towards an Islamic system that recognizes the importance of the non-profit sector in social and economic development, and offers the required legal and institutional protection for this sector to function

[16] STILLMAN NORMAN, Charity and Social Service in Medieval Islam, Societas, Vol. 5 (1975), at 105-115.
[17] ZARKA, *supra* n. 10, at 14-15.
[18] ZARKA, *supra* n. 10, at 38
[19] ZARKA, *supra* n. 10, at 35.

isolated from both motives of self-interest and the power of government. Moreover, this sector is supported with resources thereby making it a main actor in the social and economic life of Muslims. From the outset the *waqf* embraced significant issues within Islamic society, for instance in education, health, social welfare and environmental welfare. Subsequently, Muslim society relied profoundly on the *waqf* for the provision of education at all levels, as well as cultural services, such as libraries and lecturing, scientific research in all material and religious sciences and health care, including the provision of services of a physician, hospital services and medicines. The evidence points to the substantial economic significance of the *waqf* system, and lies in the variety of services provided by the *waqf*. Therefore, because the *waqf* supported many economic sectors the evolution of Islamic civilisation is incomprehensible without taking account of them.[20] In the Ottoman period Yediyildiz wrote:

"thanks to the prodigious development of the waqf institution, a person could be born in a house belonging to a waqf, sleep in a cradle of that waqf and fill up on its food, receive instruction through waqf-owned books, become a teacher in a waqf school, draw a waqf-financed salary, and, at his death, be placed in a waqf provided coffin for burial in a waqf cemetery, in short, it was possible to meet all one's needs through goods and services immobilised as waqf."[21]

At its creation in 1923, three-quarters of the arable land in the Republic of Turkey belonged to *awqaf*. Also, one-eighth of all cultivated soil in Egypt and one-seventh of that in Iran were known to be *waqf* property. In the middle of the 19th century, one-half of the agricultural land in Algeria, and in 1883 one-third of that in Tunisia, was owned by *awqaf*.

Kuran comments, "not only did the *waqf* turn into a defining feature of Islamic civilization; it went on to become a source of cross-civilization emulation".[22] Consequently, there is an indication that the *waqf* influenced the development of unincorporated trusts in other regions including Western Europe, where the institution of the trust emerged only in the 13th century which was 500 years after it struck roots in the Islamic Middle East.[23] Legal historians established that the origins of the Western trust might be traceable to an Islamic legal foundation of the *waqf*.[24] Gaudiosi indicates that the Crusaders brought the *waqf* back to England, possibly affecting the development of the English trust. Similarly as to the Western legal system, that same inclination exists in Islamic societies to manage family wealth over time. Cattan found general similarities and differences between the *waqf* and the early English trust or use.[25] Therefore, the *waqf* differs from trusts and foundations found in Western legal systems because it has the perpetuity element; it is this what distinguishes the *waqf* from the trusts and foundations found in Western legal systems, but which apparently influenced the early English trusts during the time of the crusades when there was much population movement between Europe and the Holy Lands, including the Franciscan Friars. In its early years, Oxford

[20] SIAT/LIM, *supra* n. 1, at 155-156.
[21] YEDIYLLDLZ, *supra* n. 12, at 5.
[22] KURAN TIMUR, The Provision of Public Goods under Islamic Law: Origins, Contributions, and Limitation of the Waqf System, Law and Society Review, Vol. 35 (2001), at 848.
[23] GAUDIOSI, *supra* n. 14, at 1244-1245.
[24] SCHOENBLUM JEFFREY, 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), at 1191-1227.
[25] CATTAN HENRY, The Law of Waqf, Herbert Law in the Middle East, Vol. 1, Washington 1955, at 212-218.

University might have been influenced by the *waqf,* with the 1264 Statutes of Merton College (significant in the founding of the college system) showing Islamic influences.[26] As the only form of perpetuity in Islam, founders have used the *waqf* for a variety of unprofessed, non-religious purposes, such as avoidance of confiscation of property by rulers, tax avoidance, and control over an heir's excesses.[27]

IV. The 'decline' of *waqf*

While the trust is performing well, the *waqf* faced a decline. It is questionable whether such a decline can be attributable to the foundational characteristic of the *waqf* or whether it is related to the legal doctrine itself?

The remaining traces of *waqf* have become distorted as a result of several practices that occurred in the last century. The culture of *waqf* almost vanished to the extent that the majority of Muslims do not possess a basic knowledge of it. Both economic and political factors led to the decline of *waqf*, and during the colonial era, the *waqf* was reconstructed to mirror the Western trust.[28] The 19th century involved steps toward centralization[29], although the legal framework for founding and administering *awqaf* remained the same. Therefore, in the following decades, huge new *awqaf* were founded, with the obvious effects on state revenues. During the 20th century most Muslim countries have nationalized the *waqf,* and this has involved massive confiscations of *waqf* properties. Persistently, due to a shortage of funds, governments of the region approached the *waqf* system as a potential source of new revenue.[30] In the process of reforming the *waqf*, the stipulations of *waqf* founders ceased to be treated as 'sacred and inviolable', denying the fact that it violates Islamic *shari'a* principle. The 'reformers' contributed to this radical conversion they based their opinion on range of Westernizers; to whom the *waqf* system seemed to be declining purely because of its identification with Islam. According to Kuran:

"European policymakers fanned the reforms for reasons of their own… They hoped to transform the world in the image of their own societies. They thought that stronger states would find it easier to pursue Westernization… they wanted to facilitate foreign investment in the Islamic world. They sought to curb the losses that their subjects incurred in trying to have property seized for repayment of debt, only to learn that it was inalienable."[31]

Furthermore, European leaders wished to enable central governments to repay their Western creditors.[32] Kuran proceeds further stating, "Whether interested in reforming the *waqf* system or in destroying it, all these groups exaggerated its inefficiencies".[33]

[26] GAUDIOSI, *supra* n. 15, at 1247-1250.
[27] CIZAKCA, *supra* n. 15, at 79-86.
[28] LIM HILARY, The Waqf in Trust, in SCOTT-HUNT SUSAN/LIM HILARY (eds), Feminist Perspectives on Equity and Trusts, London 2000, at 47-64.
[29] CIZAKCA, *supra* n. 15, at 110-168.
[30] KURAN, *supra* n. 22, at 888.
[31] KURAN, *supra* n. 22, at 889.
[32] DAVISON RODERIC, Reform in the Ottoman Empire, 1856-1876, New York 1973, at 258.
[33] KURAN, *supra* n. 22, at 889.

Consequently, rather than modernising the *waqf* institution the post-colonial Muslim states, under the impress of modernising 19th century reforms, abolished or nationalised the *waqf*. They also restricted the family *waqf* and some have totally forbidden the establishment of new ones. It has also been claimed that the *waqf* did not serve the purposes for which it was originally intended, and the state could administer them more efficiently. The transformation of *waqf* welfare into the public sphere has turned it into dead capital. Whatever the reason behind its decline, for Sait and Lim, "the eclipse of *waqf* has left a vacuum in the arena of public services,…students, health patient, the homeless, travellers, the poor, the needy and prisoners are only some of the vulnerable people who have lost the cover of the *waqf*".[34]

V. Doctrinal deficit versus maladministration?

An essential effective principle of *waqf* law is that, as a general rule, a *waqf* for a limited period of time is invalid on the basis that it must be perpetual (*mu'abbad*). This requirement arises out of the application of the fundamental principle that property in *waqf* is dedicated to Allah, and thus cannot easily be reclaimed.

Some commentators claimed that the consequences of this mandatory rule of perpetuity were disastrous from an economic standpoint. However, these commentators, particularly orientalists such as Schoenblum and Kuran, had mistakenly interpreted Islamic principles. Perpetuity does not mean tying up the land, yet prohibiting its use; it relates to tying up the asset in order to disallow the usage of the property and to preserve it to constantly produce revenue. Schoenblum also stated that a contradiction exists with respect to the family *waqf*. He stated "how can the underlying commitment of the property to Allah and, thereby, religious, pious, or charitable use for the Muslim community be squared with private benefit" and further stated, "Indeed, the Prophet Mohammed said (in *Hadith*), "one's family and descendants are fitting objects of charity, and that to bestow on them and to provide for their future subsistence is more pious and obtains greater 'reward' than to bestow on the indigent stranger".[35] Islamic law is clearly promoting the act of charity even to an individual's own family he is rewarded even to a greater degree. At the same time the *waqf* property, economically speaking, is producing revenue that can provide a profit for the community.

Subsequently, contrary to the interpretation by orientalists such as Kuran and Schoenblum, the earlier Muslim *fuqaha*, and the contemporary Western and Muslim researchers are impressed by its flexibility. The Islamic principle that requires perpetuity has had the affirmative effect of actually inflating value. The rationalization for this is that the law imposes, as a logical conclusion of the perpetuities mandate, a fundamental, though not absolute, outlawing against sale or other alienation of property held in *waqf*. Indeed, this prohibition is attributed directly to the Prophet, who is reported to have declared, "You must bestow the actual Land itself, in order that it may not remain to be either Sold or Bestowed, and that Inheritance may not hold in it". However, there are certain strict exceptions: in cases where *waqf* property has fallen 'into ruins or ceases to produce any benefit, so that the objects of the *waqf* cannot be fulfilled', the *mutawalli* can apply to the *qadi* for permission to sell. Nevertheless, the *mutawalli* is only allowed to sell the property and reinvest the proceeds in other property or exchange properties. Undeniably, a sale or exchange of properties is permitted,

[34] SIAT/LIM, *supra* n. 1, at 172.
[35] SCHOENBLUM, *supra* n. 24, at 1199.

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even if property is not in a ruinous or unproductive state, where the *waqif* had authorized the sale or exchange originally at the creation of the *waqf*. Some founders seem to have approved a power of sale for a diversity of reasons. When there is no express permission, the power to sell or exchange is very strictly exercised and *waqf* property may not, generally speaking, be sold in exchange for another property merely because the resulting increase of the corpus would be beneficial to the *waqf*. While some *fuqahaa* have recognized the right of sale purely for gain, most have not, and orthodox theory clearly disapproves of this practice. As for the new property acquired in an exchange or through investment of the proceeds of the sale of the original property, 'all the incidents of *waqf* would attach to the new property which will be subject to the same conditions as the original property'. Moreover, through inspired interpretation of the founder's directives, a *mutawalli* could make large transformations that the founder would narrowly have expected, let alone permitted. Where such changes are conducted they must be strictly supervised by the *shari'a* court *qadi*.[36] The operational obstacles attached to the *waqf* system were noticed early by the *fuqahaa*. Not only were these acknowledged, rules were taken to diminish them. The classic *waqfiya* contained a standard formulary, outlining operational alterations the *mutawalli* was entitled to exercise. This point additionally supports the observation that the *waqf* system offered operational flexibilities. Therefore, the *waqf* is equipped with standard flexibilities that refresh its adaptive capacity.[37] During the 15th century the Ottoman courts approved these endowments.[38] The *waqf* has also been used for other wealth preservation purposes, including the protection of property in times of insecurity from unprincipled rulers and the defeat of creditors. With respect to the latter objective, *fatwas*, as the general law, of (*fuqahaa*) jurisconsult, forbids this, though it still has been pursued.

Some students of *waqf* put forward another economic motive for establishing a *waqf*, describing it as a motive to circumvent the Islamic inheritance system.[39] However inheritance, as economic rules in the *Qur'an*, is the most detailed principles. Restricting the individual's testamentary power to one-third of his or her estate, the *Qur'an* assigns two-thirds to sons and daughters, spouses, parents and grandparents, brothers and sisters, grandchildren, and possibly even distant relatives. Also, in the *shari'a* interpretation, nobody who inherits automatically may be named in a will. The entire estate of a person who dies intestate is divided among all his legal heirs.

1. Autonomous *waqf* (Ottoman Case)

Cizakca argued that the Ottoman case should be interpreted cautiously as it can be traced to French colonialist and orientalist arguments about the autocracy of the Ottoman Empire.[40] *Awqaf* were founded in Ottoman cities as hospitals, shelters, public kitchens, orphanages, and most importantly, schools and mosques. Therefore, it can be considered as charitable endowments for the benefit of the civic. Isin and Lefebvre observe, by founding *awqaf*, appointing supervisors, managers, and trustees to manage and perpetually maintaining them, show the creation of an urban civic administration by

[36] ZARKA, *supra* n. 10, at 147.
[37] VAN LEEUWEN RICHARD, Waqfs and Urban Structures: The Case of Ottoman Damascus, Studies in Islamic Law and Society, Vol. 11 (1999), at 48-52.
[38] CIZAKCA, supra n. 15, at 313.
[39] POWERS DAVID S., The Islamic Family Endowment (*waqf*), Vanderbilt Journal of Transnational Law, Vol. 32 (1999), at 1167-1190.
[40] CIZAKCA, supra n. 15, at 5-24.

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imperial authorities and refute the socio-political criticism the Ottoman Empire was charged with[41] Isin and Lefebvre argue that:

"in the occidental tradition from Montesquieu to Weber, the Ottoman Empire is interpreted as having inadequate mediation between imperial and provincial notables and authorities with the result that the development of a social and economic civic spirit was inhibited, which 'diminished the likelihood of an indigenous movement to amend Islamic provisions contrary to self-governing".[42]

To a certain extent, it should be argued that the state itself (in conjunction with privately endowed *awqaf*) integrated civic space, and organized Ottoman cities. By such performance, the state instituted its own rule by proceeding through this sacred object and gift-giving practices. The *waqf* and the state were mutually combining. As Van Leeuwen convincingly demonstrates, *waqf* was primarily an urban institution and shaped the civic space of Ottoman cities, acting as crossroads between "*urbs*, the city in its material form, and *civitas*, the idea of an urban community".[43] On the one hand, the *qadi* is the representative of the sultan and has to abide by the *sultanic* decrees; however, the sultan is subjected to the same general rules that apply to everyone else, such as the procedures for establishing the validity of evidence, the sacrosanct nature of the stipulations of the founder and the rules for the validity of *waqf*.[44] Therefore, it appears that the conversion of sacrilegious wealth into sacred endowment is a movement whereby a social gift produces legal subjects, which are sacrosanct and secure, and achieves a legal recognition. As states by Van Leeuwen, "by becoming a *waqf*, an object is subjected to a whole set of rules developed especially to protect its status and to enhance its exploitation to the general benefit to the community".[45] Therefore, more courageously, Islamic law, insofar as it pertains to guarantee property rights by alienation into the sacred, endows to the subject autonomy, right, and legal resort.[46]

2. Maladministration and enforcement versus revival

A further way of assessing the *waqf* performance is through the enforcement of law and maladministration. Diwan and Diwan write on the issue of *waqf* administration in India:

"all the world over mismanagement, maladministration of, and corruption in waqf have become legendary.... Yet, satisfactory solution of [sic] problem eluded us. Another and probably more effective effort has now been made by Parliament by replacing the 1954 Act with the Waqf Act 1995. It may be hopefully thought that India would succeed providing better management of awqaf and eradicate corruption." [47]

As mentioned earlier, the *waqif* can stipulate the line of sequence of *mutawallis*. He can even empower a *mutawalli* to appoint his successor. Moreover, according to all schools apart from the *Malakite* school of Islam, the *waqif* himself can serve as *mutawalli*. However, once a *mutawalli* is designated, he cannot be removed by the *waqif*, who cannot reserve a power to do so.

[41] KURAN, supra n. 22, at 882.
[42] ISIN ENGIN F./LEFEBVRE ALEXANDER, The Gift of Law: Greek Euergetism and Ottoman Waqf, European Journal of Social Theory, Vol. 8 (2005), at 17.
[43] VAN LEEUWEN, *supra* n. 37, at 203.
[44] VAN LEEUWEN, *supra* n. 37, at 54.
[45] VAN LEEUWEN, *supra* n. 37, at 66.
[46] ISIN/LEFEBVRE, *supra* n. 41, at 13.
[47] PARAS DIWAN/PEEYUSHI DIWAN, Muslim Law in Modern India, 7th ed., Faridabad 1997; SCHOENBLUM, *supra* n. 24, at 277-78.

In cases where the *waqif* has not retained the power to designate a successor, or is no longer able or alive, the board of *awqaf* or the *qadi* has the power to replace a *mutawalli* in addition to oversee the *mutawalli's* operation. The extent and limitation to the *mutawalli's* duty should undoubtedly be determined and defined. Indeed, the *mutawalli* is expected to do everything that is necessary and reasonable to protect and administer the *waqf* property according to all schools of Islam. His duty is viewed as a moral and religious duty. However, the *mutawalli* can be removed for misfeasance, insolvency, breach of trust, or adverse claims to the *waqf*. He can also be held accountable in a case of misappropriating his position. Apparently a *Waqif* can apply to remove *mutawalli* in cases of misappropriation. However, this does not apply to the *waqf* in Jerusalem where the *waqif* cannot enforce the judgment other than in the Israeli court, where he refuses to do so. Recent Indian legislation imposes a fine on the *mutawalli* for wrongdoing[48], and with regards to the *qadis* they are expected to exercise their power to create institutional deterrent to self-interest on the part of tempted *mutawallis*, particularly those of long-standing *awqaf* where the temptation would likely be furthermost. As Reiter has explained, with respect to the 20th century experience of enforcement in Jerusalem:

> *"One of the weaknesses of the waqf system is the absence of an efficient supervisory mechanism for the administrations of its properties.... procedures of governance ... do not vest the qadi with the means to discharge this duty. Neither have the authorities devised auditing rules to ensure control of sound management of awqaf by the qadi.... This weakness is exploited by the mutawalli ... to derive personal gain from waqf resources....".*[49]

The difficulties found with respect to 20th century Jerusalem also can be found in India. Thus, "The institution of family *waqf* also needs immediate attention of the government as well as of the public particularly Muslims. These *awqaf* are looked upon by *mutawallis* in management as though they were *awqaf* for their benefit only. They tend to ignore the rights and interests of other beneficiaries".[50] The current author noted the similar problems regarding *qadi* lack of ability to enforce judgments that is regularly experienced in Jerusalem at present.

Therefore, it may be strongly argued that the plans of the *waqif* were often not fulfilled due to the absence of a reliable enforcement regime, to the extent that there is no personal liability, or it is inadequately outlined, or is only occasionally imposed. The requirement that the *mutawalli* does all that is necessary and reasonable to protect and administer the *waqf* property has significant operational consequences. Yet, he cannot sell or lease the underlying property freely, except with the approval of the governing board or *qadi*. However in many cases in Israel, maladministration is noticed and the inability to enforce judgments led to the decline of the *waqf,* especially in Jerusalem. Therefore, an enforcement system must exist, to make accountable, a *mutawalli* or any other actor who has misappropriated his position.[51]

The main obstacles to the revival:

[48] HIDAYATULLAH MOHAMMED/HIDAYATULLAH ARSHAD, Mulla's Principles of Mahomedan Law [sections], 19th ed., Bombay 1990; SCHOENBLUM, *supra* n. 24, at 173.

[49] REITER YITZHAK, Islamic Endowments in Jerusalem under British Mandate, London/Portland 1996, at 181.

[50] QUERESHI MOHAMMED, Waqfs in India: A Study of Administrative and Statutory Control, New Delhi 1990, at 39.

[51] For more on the case of Jerusalem see, SULEIMAN HAITAM, Conflict over *Waqf* property in Jerusalem: Disputed jurisdictions between civil and Shari'a courts, Electronic Journal of Islamic and Middle Eastern Law (EJIMEL), Vol. 3 (2015), at 97-110, http://www.ejimel.uzh.ch.

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Although conditions differ dramatically from one Muslim country to another, the principle behind the doctrine of *waqf* is largely uniform and unvaried from one region to another, and *waqf* law could not have been differentiated geographically. Nonetheless, the *waqf* faced different practices from one country to another. Consideration is therefore given to Israel as a country with Islamic populations living under non-Islamic power. The field-study in Jerusalem has revealed that due to the absence of enforcement system, Israeli law has, on several occasions, facilitated the beneficiaries in owning *waqf* property, whereas such events were rarely found throughout the Islamic history. A central element that influenced the *waqf* is the modern practice with sovereign regulations in the Muslim countries. The family *waqf*, at least, has largely been regulated out of existence in a number of predominately Muslim countries, such as Egypt Law No. 180 of Sept 1952. Also, prior to the new military regime that took power in the early 1950s; a serious effort had been made to "reform" the *waqf* in Syria (Legislative Decree No. 762, May 16, 1949), with the *waqf-dhurri* no longer being permitted. Furthermore, in Syria, there was no grandfathering for pre-existing *awqaf*. Schoenblum presents conflicting statements, where he without any theoretical, let alone practical, evidence claimed, "the utilization of legislation to address *waqfs* in modern society is a direct response to resistance of many Islamic authorities to significant change in the traditional law. It is an outgrowth of the failure of that law to adapt naturally in prior periods to radically different social and economic realities".[52] Earlier, in the same article, he claimed otherwise adding the 'reforms' in Arab countries caused the prohibition and reining of the *waqf* through imperative stages "in the consolidation of power by new governing elites, such as the military, and the elimination of potentially alternative power centers of accumulated wealth and prestige that could challenge their hegemony". Schoenblum proceeds further, "the legislations have not served as a liberalizing influence with respect to *waqf* law but as a prohibitory or constraining, 'reformist' one".

One may question why the present *waqf* has suffered a different fate than the early *waqf*? The present regulations made by Muslim countries diminished the status of the *waqf,* claiming that it would not be able to adapt to current economic complexes, and therefore raised the question by Layish, asking what are the grounds and reasons that the institution of the *waqf* has survived, and even flourished, in East Jerusalem, when it has been on the decline in Israel and in some Arab countries?[53] Furthermore, Reiter notes, that making widespread use of the *waqf* in Jerusalem ran counter to its decline in other Islamic countries in the 20th century.[54] Indeed, the literature (practice) and the field-study have provided an answer to the question posed by the preceding scholars. Unfalteringly, the independence and autonomy attached to the *waqf* are vital components for the sustainable living of the *waqf*; the decline therefore may not be attributable to the character of the doctrinal *waqf* law. Even though there is inadequate and even uncertain empirical data respecting the *waqf*, at least in Israel, the argument here is that while it may have served an efficient purpose in its earlier development, such as the consolidation of land for agricultural use, it has been unable to accommodate the demands of a modern structural state. Once again, there were many reforms made to address these conditions that could not compensate for the absence of a systematic legal doctrine, in harmony with a modern structural state.

[52] SCHOENBLUM, *supra* n. 24, at 1197.

[53] LAYISH AHARON, The Muslim Waqf in Jerusalem after 1967: Beneficiaries and Management, Le Waqf dans le monde musulman contemporian (XIXe-Xxe siècles), ed. Faruk Bilici, Varia Turcica, Istanbul 1994, 26, at 145-68.

[54] REITER YITZHAK, Islamic Institutions in Jerusalem: Palestinian Muslim Administration under Jordanian and Israeli Rule, The Hague/London/Boston 1997, at 27-28.

The institution of *waqf* could play a crucial role in social and economic development. Several Muslim countries and organisations have noticed the potential for the development of the *waqf* properties and the revival of their functions and ability to provide those important services they used to carry out in the past. Therefore, the North American Islamic Trust was established to provide services to the Islamic Society of North America. The World *Waqf* Foundation has made a commitment to activate the role of the *waqf* to provide a contribution to the different charitable purposes and to help the poor and needy people. The 1990 Algerian Act of *Awqaf* stated that all the *awqaf* properties that were diverted to other usages must be returned to *Awqaf* and devoted to promoting the charitable objectives assigned for them by the founder.[55] The existing assets of *awqaf*,in most Muslim countries, represent a huge amount of social wealth that can be developed to provide the required services for the society. There are countries that have developed its *waqf* system such as Kuwait, and it is therefore possible to learn from their administrative processes and experience. As the endowment (*waqf*) is not a Qur'anic Nus, it is more easily subject to creative interpretation (*Ijtihad*) and change. This assertion is being debated amongst scholars and the classical rules relating to the *waqf* are under review.[56] However, modern reforms in several Muslim countries have abolished, nationalised or highly regulated endowments, although the *waqf* remains influential and there are signs of its reinvigoration. Islamic *Awqaf* properties occupy a considerable proportion of the societal wealth in several Muslim and non-Muslim countries, and the concept of *waqf* itself is also a principle that entails generous applications in the direction of developing the non-profit, non-governmental sector and increasing the quantity of welfare services that aim to improve the socio-economic welfare of a society. This provides a strong justification for a detailed study of the potentiality of the application of *awqaf* and the development of their properties in Muslim countries and communities. Further, it encourages studying the potentiality of the idea even in all non-Muslim economies.[57]

The revival of *awqaf* properties is an issue worthy of study, both from the point of view of the existing *awqaf* and from the point of view of encouraging the establishment of new *awqaf*. Kahf argues that if one attempts to reformulate the definition of *waqf* for expressing its economic content, the *waqf* could be deemed to be "diverting funds (and other resources) from consumption and investing them in productive assets that provide either usufruct or revenues for future consumption by individuals or groups of individuals".[58] Therefore, *Waqf* consists of the combination of the act of saving with the act of investment. It involves taking certain resources off consumption and simultaneously putting them in the form of productive assets that increase the accumulation of capital in the economy for the purpose of increasing future output of services and incomes. Services provided by *waqf* may take the form of a patient bed space in a hospital building, a prayer space in a mosque or a student space in a school building. By the same token, the *waqf* may produce output to be sold to the public in order to generate net income for the beneficiaries of the *waqf*. Kahf noted that the Islamic definition of *waqf* makes its assets cumulative, in application to the principle of perpetuity in *waqf*. He argues, as discussed earlier, that a *waqf* asset may not be sold or disposed of in any form, for instance, a *waqf* asset remains in the *waqf* domain perpetually and any new *waqf* will be added to that domain, implying that *Awqaf* assets are only liable to increase, and are not permitted to decline since it is illegal to consume the assets of *waqf* or to leave

[55] SIAT/LIM, *supra* n. 1, at 172.
[56] SIAT/LIM, *supra* n. 1, at 172.
[57] KAHF MONZER, Financing the Development of Awqaf Property, Seminar Paper, IRTI, Kuala Lumpur, Malaysia, March 2-4, 1998.
[58] KAHF, *supra* n. 57, at 3.

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them inactive by any action of neglect or abandonment. Not only is the *waqf* an investment, it is a cumulative and ever increasing investment. This argument is supported by the historical development in Muslim lands that eventually made a considerable proportion of cultivable lands and metropolitan real estates in the domain of *waqf,* to the extent that *Awqaf* properties were estimated at over one third of the agricultural land in countries including Turkey, Morocco, Egypt and Syria.

The premise of this study was that the doctrine matters. While reforms and adjustments can sustain the system for some time, it must ultimately abate if it is not systemised. This is not the case, however, where the legal process itself permits adaptation in response to inevitably changing conditions and needs. Efforts have been made to accommodate the differences among the various schools. Thus, legal forms have been written to satisfy the requirements of them all. In addition, Muslims can apparently assign as governing law in agreements, including (the creating instrument), the rules of one school or another. In recent times, for example, Arab states have unreservedly accepted principles from schools predominant in other countries and incorporated them in statutes. The literature on *waqf* has referred to some difficulties and declines regarding foundational and operational issues, and these critics have dealt disjointedly with each situation, failing to link each decline to the whole surrounding atmosphere, and neither did it examine the entire legal system of the time.

VI. *Waqf* in Palestine/Israel: special status

Palestine is regarded as a special case, with a different status at all levels. The legal position in Palestine is, simultaneously, one of the most complicated and rare situations, emerging in unsteady circumstances due to the several powers that ruled Palestine through history.
The partition of Palestine led to the creation of complex and different legal systems in the West Bank, Gaza Strip and Jerusalem as well as in the parts of the country that were occupied in 1948. Until the end of the Ottoman rule in 1917, the Palestinian legal system was based on the principles of Islamic *shari'a* law, following which there was a British Mandate and a remodelling of the legal system. Along with the Ottoman law making, the British introduced the principles of the Anglo-Saxon system, which is based on common law. While the West Bank, inclusive of eastern Jerusalem, was under the rule of the Hashemite Kingdom of Jordan in 1948, and the Jordanian legal system, which is influenced by many other systems, prevailed, the Gaza Strip was under the Egyptian administration where the joint legal system of the former British Mandate prevailed. Later, the Israeli occupation imposed its military law on the West Bank and the Gaza Strip after the 1967 war and made eastern Jerusalem subject to the local law of the Israeli occupier after annexing it in 1980. After the Oslo Accord, the Palestinian Authority was founded and the jurisdiction of the new authority was agreed upon. The Palestinian legislators then started unifying and harmonizing the diverse legal systems prevailing in the Palestinian territories. Since 1994, unifying legislation has been enacted for both the West Bank and Gaza Strip.[59]
In Israel, most *waqf* property was expropriated under the *Absentee Property Law 1950*, and it is one of the most sensitive and complicated issues in the Palestinian-Israeli conflict. Israel claims 93 per cent of its territory as public domain for the Jewish faith, and the process has isolated and contained the surviving Arab communities within Israel, while the rest of the Palestinian people

[59] SULEIMAN/HOME, *supra* n. 5, at 52-56.

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have been displaced to peripheral locations (such as Gaza and the West Bank), which Israel has held under military occupation since 1967 and where it also has control of most of the land.
In 1948, *waqf* land was estimated to comprise a sixth of the country, but estimates are unreliable, and the Israeli Government does not disclose (and may not hold) data on the extent of *waqf*. In 1980, the Custodian of Absentee Property estimated that about 70 per cent of the land of the state of Israel might potentially have two claimants - an Arab and a Jew holding respectively a British Mandate and an Israeli deed to the same property.[60]
Another important law is the so-called 1965 amendment, ironically described by Israeli scholars as a "reform" of the *waqf* in Israel: the Absentees' Property (Amendment No. 3) (Release and Use of Endowment Property) Law 1965. The amendment represented a further stage in the confiscation of any remaining Muslim *awqaf,* authorising the transfer of *waqf* property to the custodian, denying the conditions that were attached when the property was endowed, and ensuring that property confiscated from the *waqf* would not be returned, regardless of whether the m*utawalli* or the beneficiary is 'absentee'. The law empowered the custodian to pass the property to the Development Authority or to the board of trustees, ostensibly to prevent its neglect, but in practice to sell it for development, contradicting the fundamental perpetual characteristic of *waqf* land. The law freed the remaining *waqf* from restrictions under *shari'a* law, and restricted the political use of funds generated from those *awqaf*.
The situation with *waqf* property is particularly complicated in Jerusalem, because of its special status under international law. *Waqf* represents some 90 per cent of property within the Old City (both Islamic and Christian).[61] During the mandate, the Palestinians used *waqf* properties as a buffer against the sale of land to the Jews. Jordan continues to exercise its sovereignty and law over *waqf* institutions in Jerusalem, through the Ministry of *Waqf* in Amman, and while Jordanian law became obsolete with the establishment of the Palestinian Authority (PA) in the West Bank and Gaza, it still forms the legal basis for some institutions in Jerusalem where the PA is not allowed to function. Jordanian control allowed the decline of *waqf* until 1967: only 16 new *awqf* were founded in Jerusalem during the 19 years of Jordanian rule, compared with 90 under the first 23 years of Israeli occupation (1967-1990), giving the *waqf* a central position in Palestinian society.[62]

VII. Conclusion

The *waqf* has succeeded for a millennium to finance Islam as a society; this was proved by historical practices during the Muslim empire. The literature and the field-study emphasised that the grounds for the success of the *waqf* are numerous. The primary one is its solid foundational structure that is based on the development of jurists benefiting from the flexibility of *Ijtihad* that praises the *waqf* to be compatible and adaptable to any substantial economic changes. In contrast, the field-study indicated that the decline of the *waqf* cannot be attributable to its foundational basis, nor to the legal doctrine, but rather to factors unrelated to its legal theory. The decline can strongly be linked to other issues, the principal one is the absence of an entire Islamic legal system that can accommodate the *waqf* and supports its sustainable living. Another crucial factor is the political impacts, which are different in terms of methods and objectives. Political incentives can be varied,

[60] DUMPER MICHAEL, Islam and Israel: Muslim Religious Endowments and the Jewish State, Washington DC 1994, at 28.
[61] BAGAEEN SAMER, Evaluating the Effects of Ownership and Use on the Condition of Property in the Old City of Jerusalem, University of Strathclyde, Glasgow 2006, at 135-150.
[62] REITER, *supra* n. 49, at 27-28.

for instance, in Muslim countries the main reason was to control the assets in order to strengthen their existence. Whereas in Israel the grounds are different- the need to acquire land and constrain Palestinian political aspiration overrode the need to address Muslim demands that the *waqf* system be given some form of representative role.[63]
The main reasons behind the decline of the *waqf* in Palestine/Israel are of political grounding, undertaken through the influence of control and land acquisition exerted by the continuous Israeli governments. Recent cases, such as '*Maamanollah*' (in Jerusalem), are practical evidence of implementing the policy of continuous expropriation of the Muslim *waqf* to Jewish hands. More recently, in 2009-2015, three Muslim cemeteries *(MaamanoAllah, Ijzim & Alberwa, in the north)* were confiscated to reach into the hands of Jews and these were legalised by the Israeli Supreme Court.[64]
The *waqf* should have expanded its province in the modern state, whereas it has experienced an unreasonable decline throughout the Islamic world. To a number of Muslim and western writers, this has been attributable to factors that are not related to inefficiencies with respect to the *waqf* legal doctrine itself, but to impacts of political powers tending to control its capitals. It is therefore meaningless to link such decline to the legal doctrine associated with the *waqf*. As a legal regime, *waqf* law has been largely responsive, particularly in light of changing classifications of wealth, socio-economic conditions and state structure. There are several factors and explanations to the success of the legal doctrine to respond and adapt itself with the changing economic situations. A principal of these is the character or foundational grounding of *waqf* law, making it simple for the law to evolve in a responsive and uncontroversial manner. Moreover, another affirmative cause is the related religious principles observed by inhabitants of Islamic societies that have deterred individuals from insistently planning in ways that contradict "divine" precepts of *waqf* law. These customs have advanced a culture of not taking seriously alternatives to the rules of *shari'a* law.
The paper therefore revealed that a substantial cause of the *waqf's* decline is the inappropriate statutory response. Legislative 'reforms' in countries with substantial Muslim populations (Muslim and non-Muslim) were remarkably different from one region to other, and in the main it has affected the performance of *waqf*. *Waqf* legislation should have gradually eliminated many of the significant impediments that hindered the efficiency of the *waqf*. However, legislation addressing the *waqf* has tended more to its overregulation or absolute prohibition, and in several occasions accompanied by confiscation of property currently held in existing *awqaf*, as the case of the Palestinian *waqf*. The contemporary Islamic states governed by overstretched and authoritarian regimes, where serious corruption existed, are on an extensive scale. An unplanned consequence of rules modified through means of questionable legality caused the decline to the law of *waqf*, and these rules legitimized the prevalence of secular law over *shari'a* principles. During the Islamic authority (for instance, the Ottoman era) the *waqf* was treated as sacred and was regulated by Islamic *shari'a* law, indeed during these times one can notice several attempts to control or confiscate *waqf* properties but this was greatly resisted, and such practices can be regarded as violating *shari'a* rules. Whereas practices of nationalization, by contemporary Muslim states, of the entire *waqf* system are without doubt denying *shari'a* law and therefore substitute it with secular law to regulate the *waqf*, the result is it has greatly affected the performance of *waqf*. The facts invalidate the assertion that inflexibilities of the *waqf* system caused its decline and therefore reforms were made to revive it. Muslim *fuqhaa* recognized the flexibility characteristic of *waqf* system regarding the foundational and operational issues,

[63] DUMPER, *supra* n. 60, at 2.
[64] SULEIMAN, *supra* n. 52, at 105-107.

whereas the literature indicates that a few orientalists, still with no legal or practical substances, insist that perpetuity is 'static' and cannot be challenged. One can clearly distinguish that the *waqf* system, throughout Islamic history, served many imperative functions. It is imprecise to assert the claim that the *waqf* is inflexible without disregarding the barriers and obstacles to its achievement of economic efficiency. There were many practical opportunities for transforming the operations and objectives of *awqaf,* however the traditional *waqf* system was flexible enough to remain the principal basis for social services.

The question was raised whether the present *waqf* is capable of being adaptive and compatible to the increasingly complex and fast-changing economy. The field-study and the literature essentially provided theoretical and practical answers, as well as identifying adaptations of approaches and instruments proposed by the *waqf* system to avoid economic inefficiencies throughout Islamic history. In view of these patterns, one might suspect the fact that the Islamic states regimes of the time might have been able to restructure the *waqf* system. The present article argues that the *waqf* has played an essential role in preventing expropriations by the state, and forced the recognition of unchallengeable property by placing it into a sacred legal code. The *waqf* has been examined in an anachronistic and inappropriate approach, where this strongly represents an outright orientalism. In contrast, being codified by *shari'a* jurisprudence, the *waqf* provided a symbolic and legal guard against encroachment by the state of such endowment. The *waqf* and the state in the past were mutually combining, for example during the long period of the Ottoman era. The *waqf* has managed to restructure its operational role through legal flexibility, and has, in practice, reoriented its mission through various means, being able to generate a dynamic 'civil society'. While the modern *waqf* has become mainly a stagnant institution, the earlier *waqf* has proven to be remarkably flexible and responsive to changing conditions affecting public endowments and management of family wealth and its preservation. Indeed, contemporary *waqf* has continued to lose position, a victim of political influences leaves it unable to adapt to modern conditions, due to the absence of adequate legal system and adjudicatory mechanism. While the *waqf* has successfully functioned for long periods under different conditions, its modern decline seems predictable. The legal system (in Israel and Muslim states) as a fundamental component and its exceedingly overregulated rules, alongside obstacles of enforcement procedures, made any different outcome unfeasible to achieve without retaining *waqf's* autonomy and independence. Beyond doubt, the decline is due to absence of *shari'a* law that can embrace the success, development and reform of the *waqf* system.