

Mohamed El Bachir Berroho

Lawyer, Tangier, Morocco

Doctorate candidate

L.L.M

Waqf and Trust

Introduction

Waqf and Trust devices hasn't been approached but briefly by different legal studies especially in Islamic law jurisdictions. This short paper is an attempt to touch a little bit, in a comparative way, on a big subject like that where a further endeavor remains eminent and contemporary issue.

1 Historical fact

The origin of the English trust, or the use, has been a subject of debate among legal scholars. Some of the theories suggested it was the Roman Fideicommissum; others talked about the German Salmannus, the hybrid Romano-Germanic; while others have mentioned the Islamic Waqf . However, “if an outside paradigm for the English use is to be located, the Islamic Waqf's parallel structure and historical proximity indicate that it was the Waqf which most prominently influenced the development of the use. This comment demonstrates how the two devices are so parallel in purpose, theory, and structure that it can hardly be accidental that the Waqf did not inspire the trust”¹.

The practices attributed to the prophet Muhammad, have promoted the institution of Waqf from the earliest part of Islamic history at the 7th century, and it's more obviously imported by the Franciscan Friars returning from the Crusades in the 13th century². I would suggest that the adoption of such a device may have been coupled even further from closer place being Andalusia (Spain) when capitals like (Cordoba, Granada and the like of them were the Mecca of students from all over Europe. The Waqf device was very known in Andalusia (Spain today); and it is obvious that Europe must have came across such a legal creature as they adopted and assimilated many philosophical, legal ideas and

¹ *Avini, Avisheh*, Origins of the Modern English Trust Revisited, 70 Tul. L. Rev. 1139 (1995-1996)

² http://webcourses.lexisnexis.com/bbcswebdav/courses/ITX_663_WI12/Image%20Common_law_world.png.htm

institutions³.

II. The Waqf : Definition and comparison

The term Waqf literally means detention. According to Abu Hanifa⁴, it is the detention of specific thing in the ownership of Waqif and the bestowing of its profit or products "in charity of the poor or other good objects".

There is no direct injunction of the Quran regarding Waqf, but there is a hadith (sayings of prophet Mohammad) which states that "Ibn Umar reported, Umar-Ibn-Al- Khatab got a land in khyber, so he came to the prophet Muhammad and asked him to advice him about it. The Prophet said, if you like, make the property inalienable, and give the profit from it to charity." Waqf means the permanent dedication of any property for any purpose recognized by the Islamic law as religious, pious or charitable.

Perpetuity is not required by the Maliki school, which means that the Waqf can be established for a limited period of time. Let us see what the pillars of Waqf are:

1. Founder:

The founder (called al-wāqif or al-muḥabbis) in Arabic) must be of capacity to produce a contract:

- An adult
- Sound of mind
- Capable of handling financial affairs.
- Not under interdiction for bankruptcy.

Despite the Waqf is an Islamic institution, being Muslim is not essential to establish a waqf, so a Dhimmi (Non Muslims) may also found a waqf.

2. Property:

The property (al-mawqūf or al-muḥabbas) used for a Waqf establishment must be objects of a valid contract. The object must be legal and under the control and ownership of the founder. For example, fish in the sea would not suffice as such. The objects should not be illegal in Islam. Both immovable property, such as estate and all movable goods can also form a subject matter of a waqf according to most Islamic jurists. The Hanafis, however, allow most movable goods to be dedicated to a Waqf with some restrictions. Some jurists have argued that even gold and silver (or other currency) can be designated

³ http://www.schillerinstitute.org/fid_97-01/013_andalusia.html-
<http://topdocumentaryfilms.com/when-moors-ruled-europe/>

⁴ <http://en.wikipedia.org/wiki/Hanafi>

as waqf.

3. Beneficiaries

The beneficiaries of the Waqf can be persons and public utilities. This the case to which some scholars attribute a legal entity to Waqf because the utility being the beneficiary becomes a legal person acting, contracting, and accepting mortgages as separate legal person. It is worth mentioning here that this what may have triggered the establishment of companies and corporations as legal persons in Europe later on. The Islamic law divides the waqf as "charitable causes"; in which the beneficiaries are the public benefits, the poor, and "family" Waqf in which the founder makes the beneficiaries his relatives. There can also be multiple beneficiaries. For instance, the founder may specify that some of the proceeds would go for his family, while other part goes to the poor.

Conditions for valid beneficiaries:

- . At least some of the beneficiaries must be identifiable and also exist at the time of the founding of the waqf. The Mālikis school of law, however, holds that a waqf may exist without beneficiaries for some time, like in the case of unborn child, when the proceeds collected are given to beneficiaries once they come into existence.
- . Non-Muslim citizens of the Islamic state (dhimmi) can definitely be beneficiaries.
- . The beneficiaries may not use the waqf for a purpose in contradiction of Islamic principles.

There is dispute over whether the founder himself can reserve exclusive rights to use Waqf. Most scholars agree that once the waqf is founded, it can't be taken back, but it's a possibility according the practice of prophet Mohammad where himself founded a Waqf on a land while he enjoyed its usufruct till he passed away where it was dedicated to charity for the poor by his will.

4. Declaration of founding

Most scholars don't require any written declaration to found a waqf though it is usually done through a written document accompanied by a verbal declaration. In some cases, a waqf can be founded even by committing actions that imply the intention to establish a waqf. A comparison can be made in here with express trust and constructive trust that shows similarities between the two legal creatures; or it is rather a clear parenthood that related the Waqf to the trust. For example; if a person builds a mosque and allows other to pray in it regularly, or if someone builds a graveyard and allows others to bury their deads there in; then these actions are regarded equivalent to founding a Waqf.

5. Administration

Typically a waqf has a range of beneficiaries. The founder and administrator (called nāzir or mutawallī or kayyim) would arrange for assigning successive administrators. In his lifetime, the founder can himself administer the waqf. Where, the number of beneficiaries are limited the beneficiaries themselves can administer the waqf (they are considered the virtual owners).

The administrators' requirements are capacity to act and contract, trustworthiness, and

administration skills. Here the Waqf as in the trust put an emphasize of the basic of trust between the trustee(wakif) and the beneficiary(mawkufalih) whereas in civil law this is understood a relationship arises.

Some scholars require that the administrator of this Islamic institution be a Muslim, nevertheless the Hanafi school drops this condition accepting a non Muslim to assume such a position.

From what we have seen above the waqf in Islamic law bears a significant resemblance to the English trust law. Waqf must have, a waqif (founder), mutawillis (trustee), Qadi (judge) like the equity court in common law system, and beneficiaries. The property in both Waqf and trust is reserved and its usufruct is appropriated for the benefit of individuals, or for charitable purpose. The corpus becomes inalienable irrespective of the law of inheritance or the rights of the heirs. The successive appointment of trustees or mutawillis secures the continuity of both devices.

The only difference between the Islamic Waqf and English trust was the express or implicit return of the waqf to charitable purposes when its specific object has ceased to exist, but this difference only exist in the waqf ahli (Islamic family trust) which doesn't include the waqf khairi (charitable purpose).

III. Trust and Waqf: Legal and Tax issues

The trust vests "legal estate" over the trust property in the trustee while he is still compelled to administer that property for the benefit of the beneficiaries. In this regard. The role of the English trustee is notably similar to that of the mutawalli in Waqf.

1. Waqf and trust: legal statute.

Some of the objectives of this comparative discussion are to discuss some legal and economical issue facts about both Waqf and trust in these islamic-civil law jurisdictions. We know that every waqf needs to have a waqif (founder), mutawillis (trustee), Qadi (judge) and beneficiaries. We also acknowledge the fact that under both Waqf and a trust, "property is reserved while its usufruct is appropriated for the benefit of specific individuals or for a general charitable purpose. The corpus becomes inalienable estates for life in favor of beneficiaries without regard to the law of inheritance and continuity is secured by the successive appointment of trustees or mutawillis.

While the Trust device keep flourishing in todays legal and economical arenas, the situation of Waqf is conversely grim. It is limited in both goals and practices in these Islamic countries, and it is more restricted to the social field for charitable purposes. The Waqf in Islamic societies did not continue to be private institution as was, initially and purposely, created. Due to many uncooperative historical facts these "Islamic" states, successfully, to put Waqf institutions under their governmental control and have designated Waqf for their own purposes instead.

Some of the factors sharing the blame for such an awkward situation lay in the codification of law in these countries. Between 1839 and 1876, a series of reforms known as “Tanzimat” in Ottoman Empire codification of law. That process had resulted in borrowing mainly from civil law system as in France and/or other European countries. That process has led up to a kind of fuse between Islamic law with civil law. The Islamic law in some aspects looks more like the common law for being not codified body of legal doctrines, principals, values, opinions of the scholars, and case law precedence. It is in 1798 when Napoleon Bonaparte invaded Egypt that the adoption of French Napoleon code system has taken place steadfastly.

After that, a wide adoption of Civil Law system has occurred by different jurisprudences who were under the Ottoman control in the region. The process will be furthered even more with the fall of North Africa and some other Middle East countries under the France colonization later on.

Subsequently, the destiny of Waqf and Islamic law in general, got diminished and restricted by the codification policy. That was the destiny of the Waqf to be depressed by the influence of civil law paradigms. It is very common in these Islamic-civil law jurisprudence courts when faced with the issue of trust to resort to the civil law philosophy rather than the Islamic law pertaining to waqf . The court of Qadi (Judge) specialized in the Waqf matters is separated from the civil court whose doctrine breast feeds from civil law philosophy, which can't deal with the waqf as it is struggling with the trust concept as well. One may well find this duality in courts doctrines and system very awkward and deterring rather than efficient and effective. Straying away from the solution existing right there in the waqf court (Qadi) system; accentuates the problematic structure of such Legal welter in those systems, ironically, contradicting constitutional provisions of most, if not all of these countries, where Islamic law is stated as a source of legislation.

Therefore and despite that constitutional provision; in practice the civil courts are still not capable, legally, to adopt an ample idea about the trust instrument even though it carries the same legal aspects of the Waqf. The fuse of Civil law with Islamic Law has decapitates and hinders, in this sense at least, the adoption of trust within those hodgepodge legal systems. This legal impasse continues to deter, on the other hand, a proper development of Waqf throughout expanding its use to encompass economical field rather than being stagnant in the charitable field and limited family purposes.

The trust device remains a problem to the civil law scholars for the idea being inherited in that legal school, which allocate one property for one proprietor; it will remain a rigid obstacle toward accepting the trust therein.

The solutions offered so far to assimilate such an instrument in a civil law system has been either to capitulate to the common law like in the case of Louisiana state⁵, or adopt

⁵ Kthryn Venturatos Lorio, Louisiana Trust: The experience of a civil law jurisdiction with the trust

some legal creatures with close features to the trust like in the case of France with no substantial success.

The trust in Islamic-civil law jurisdiction must be logically comprehended and analyzed according to non-other but to Waqf analogy within Islamic law principals rather than Civil law dogma. Such is the solution to the issue of waqf and trust together. The benefits of such an endeavor are numerous as it will open the door to the common law jurisdictions also to know the Waqf, which will create some interactions between the two devices for further legal and tax understandings.

2. Tax planning opportunities in Waqf

Most of Islamic-civil law jurisdictions occupying a large geographical space stretching from North Africa, middle east, and passing through a large portion of Asia; have entered into many Double taxation conventions (DTC) with many common law jurisdiction like USA, UK and others based on the OECD model convention or other Models as well (USA, UN).

Article 2 of these DTCs model conventions includes the trust as a “person” for definition purposes among other entities that are eligible for benefits of such provisions. Despite That fact, none of these jurisdictions has yet assimilated the trust into their legal system nor did they allow the Waqf to widen its use other than its charitable purposes. Thus, depriving themselves from economical benefits, which deems to be crucial to any development that their societies are craving for.

It is noteworthy, from a tax planning purposes, to mention herein that “Waqf has not been characterized by the Internal Revenue Service (IRS) for United States tax purposes; but an appropriate presentation of facts would likely be determined to be charitable trusts”⁶. The waqf is also considered in the Islamic-civil law jurisdiction as charitable for tax law purposes. It will be long time before a real attempt can be made to apply the same tax law procedures for the trust in common law jurisdictions to the waqf. Jurisdictions like Qatar and others has emerged as international financial centers with others that will follow in the very seen future making these jurisdictions, from an estate planning perspective, places of a great opportunity and benefit to an international person to consider the Waqf device.

IV. Conclusion

It is of great importance for These Islamic-civil law jurisdictions to understand that they have in their Islamic legal legacy enough concepts pertaining to that of waqf, which they

⁶ COMMENT: *Avini, Avisheh: THE ORIGINS OF THE MODERN ENGLISH TRUST REVISITED*

can extend it to assimilate the Trust as it became an international efficient legal and economical devise for their own legal and economical endeavors for development and prosperity without resorting to the civil law dichotomy.

Mohamed El Bachir Berroho

mohamedberroho@gmail.com

Bashir67@yahoo.com

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