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An Investigation into Waqf Company and its Place in Saudi Arabian Civil Law

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An Investigation into Waqf Company and its Place in Saudi Arabian Civil Law

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Declaration

‘I hereby declare that this thesis is the results of my own investigations, except where otherwise stated. All other sources are acknowledged by bibliographic references. This work has not previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree unless, as agreed by the University, for approved dual awards.
I confirm that I am submitting this work with the agreement of my Supervisor(s).’

‘Yr wyf drwy hyn yn datgan mai canlyniad fy ymchwil fy hun yw’r thesis hwn, ac eithrio lle nodir yn wahanol. Caiff ffynonellau eraill eu cydnabod gan droednodiadau yn rhoi cyfeiriadau eglur. Nid yw sylwedd y gwaith hwn wedi cael ei dderbyn o’r blaen ar gyfer unrhyw radd, ac nid yw’n cael ei gyflwyno ar yr un pryd mewn ymgeisiaeth am unrhyw radd oni bai ei fod, fel y cytunwyd gan y Brifysgol, am gymwysterau deuol cymeradwy.
Rwy'n cadarnhau fy mod yn cyflwyno'r gwaith hwn gyda chytundeb fy Ngoruchwyliwr (Goruchwylwyr)

Abstract

Waqf is a well-known institution in Islam. In Islamic law, charitable endowments are known as Waqf and are regulated by the Law of Waqf (Hoexter, 1998, p. 134). The institution of Waqf can be defined as an arrangement whereby a property which is privately owned by a Muslim is endowed for some charitable purposes (Al-Kubaiysī, 1977, vol.1, p.55). The Waqf is a financial instrument that is used solely for social needs, whether to combat poverty, improve the economic situation of the public or for social development in general. It is a long-standing financial instrument that is held in trust and plays a significant role in Muslim communities (Su Ye Che, 2015, p. 8).

The evolution of this institution has not been so dramatic as the change it has to adopt for the current modern age. The new so-called 'Waqf Company' has stirred up much controversy in current times mainly because immovables in Waqfs and establishing cash waqfs are being used which goes against the Ḥanbalī Jurisprudence which is the official School of Jurisprudence of Saudi Arabia. This modern form of Waqf is being hotly debated and is somewhat controversial among contemporary Islamic scholars and jurists (*fuqhā*) of Saudi Arabia.

The primary aim of this thesis is to present a clearer picture regarding the legitimacy of the Waqf company based on the analysis of classical Islamic jurisprudential literatures and wants to identify the gaps in legal framework for Waqf company in Saudi Arabia and present recommendations to remedy the situation. This thesis is an investigation into 'Waqf Company' and it functions within Saudi Arabian civil law. It takes a critical look at the controversial issues pertaining to this topic which presents great challenges in Islamic jurisprudence and reconciling it with modern times. These issues are related to the topics of lack of perpetuity, irrevocability and inalienability all of which are main features of Waqf in classical Islamic jurisprudence. This thesis challenges some of the archaic Islamic principles and presents tangible solutions which makes Waqf law function, practical and relevant for the modern age.

The methodological basis of this thesis is focused on qualitative research that is a broad analytical methodology that encompasses a variety of research approaches, the document analysis paradigm would be used as the conceptual framework and research approach for dealing with data, as the thesis is entirely focused on literature.

The conclusion of this thesis is that by the adaptation of the Waqf Company in the light of the Integral-Pillars (*Rukn*) of Waqf, the research findings show that the model of the Waqf company is compliant with the Waqf principles and rules imbedded within classical *fiqh* but it should be noted that not all type of company/ies models can be suit with the rulings and principles law of Waqf.

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Chapter One
INTRODUCTION

Societies flourish not only because of the welfare acts of government but through the contribution of prosperous and affluent people too. Non-profit organizations, Trusts [1], Societies and Charities are some of the manifestations of the generosity of benevolent people and philanthropists (Deguilhem, 2008, pp. 929-956). All these organizations were set-up to make the generosity of rich people more productive and contributive towards society. Therefore, charitable organizations are an important part of a society where wealthy people desire to improve the conditions of less fortunate segments by giving away some of their properties or wealth in the name of charity (Al-ʾAshqar, 2012, p. 9). These charitable organizations are governed by the legal system of that particular country to make the process smooth and to eradicate any malfeasance. For instance, in English law the "Charities Act 2011" regulates the charities in England (Abdullah, 2018, p. 120). In similar manner, in Islamic law, charitable endowments [2] are known as Waqf and are regulated by the Law of Waqf (Hoexter, 1998, p. 134). The Waqf (pl. *awqāf*) or *ḥabs* (plural *aḥbās*) is also known as an Islamic endowment or an inalienable [3] trust (Haji Abdullah, 2005, p. 20). It is a vital tool for assisting in financing public services for which state does not finance or it does finance but the Waqf donor wishes to further contribute (Othman, 1983, p. 23). Lev, in his book, summarizes Waqf as Islam's highest form of charity (Lev, 2005, cited by Abdul-Karim, 2010, p. 1). For Muslims, the purpose of Waqf is spiritual advancement and a stronger connection to Allah Almighty (Nyazee, 2016, p. 372) as well as providing a myriad of facilities that were significant for the society. These services were created, funded and sustained through Waqf for centuries and some even for millennium (Çizakça,

1 The term (Trusts) refers to "A relationship created at the direction of an individual, in which one or more persons hold the individual's property subject to certain duties to use and protect it for the benefit of others". see the official website of the free dictionary, available at: https://legal-dictionary.thefreedictionary.com .(Accessed: 13/4/2021).

2 The term(endowments)
"Funds or property donated to an institution, individual, or group as a source of income". see the official website of the free dictionary, available at: https://www.thefreedictionary.com/endowment, (Accessed: 13/4/2021).

3 **Inalienable**: "to be removed or unable to be taken away". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/inalienable?q=inalienable. (Accessed: 13/4/2021).

2000, pp. 43-70). Muslims built mosques, hospitals, educational centers, markets, Inns and many other institutions for the service of people through the system of Waqf (Maghbub, 2018, pp. 149-155). It has played a key role in the socio-economic development of Muslim societies, and also in the delivery of vital provisions to both Muslim and non-Muslim communities living within Muslim societies (Karim, 2011, p. 6). The institution of Waqf can be defined as an arrangement whereby a property which is privately owned by a Muslim is endowed for some charitable purposes (Al-Kubaiysī, 1977, vol.1, p.55). It is a particular type of philanthropic deed that has no defined time-limit, and it can be applied to any non-perishable intangible or tangible property through beneficiaries who are designated to benefit from the revenues or usufructs generated by the property (Abū Zayd, 1996, p. 12).

In other words, it is a one-of-a-kind model in which assets bequeathed and kept in perpetuity [4] while the income stream from the assets assures the beneficiaries a form of perpetual [5] income. The permanency [6] and perpetuity found in Waqf, as well as the eternal usufruct, make it a highly successful philanthropic[7] vehicle (Al-ʾAshqar, 2012, p. 15). It compliments other charitable instruments in Islam such as zakat (quasi-tax on wealth) and *ṣadaqah* (voluntary alms or anything given in charity). However, Khaf and Kuran assert that the features of permanency and perpetuity have slowed Waqf's development in so many countries worldwide (1998, p. 2; 2004, pp. 71-90). This is because Waqf is a perpetual property designated for the interest of the Muslim communities for all times with the aim of establishing the well-being of people and filling the gap between the rich and poor in the society. Its significance is no less than *infāq* (the act of spending)*, ṣadaqah jāriyah* (continuous, flowing and ongoing charity) *and hibah* (A deed of gift – transfer of property made immediately and without exchange)

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[4] Means: forever.

[5] **Perpetual**: "continuing forever in the same way". See the official website of the Cambridge dictionary, available at https://dictionary.cambridge.org/dictionary/english/perpetual?q=perpetual+. (Accessed: 13/4/2021).

[6] **Permanency**: "staying the same or continuing for a long time or the property of being perpetual ". See the official website of the Cambridge dictionary, available at https://dictionary.cambridge.org/dictionary/english/permanence?q=permanency+. (Accessed: 13/4/2021).

[7] **Philanthropic**: "giving money to help people who are poor or sick, or to pay for things such as museums or schools that are good for society". see the official website of the Cambridge dictionary, available at https://dictionary.cambridge.org/dictionary/english/philanthropic?q=philanthropic+, (Accessed: 13/4/2021).

(Hasbullah and others, 2014, p.323). However, the Waqf practiced today is different from the traditional one because it is adapted to the contemporary forms of financial entities and is an illustration of the flexibility of Sharīʿah rulings to adapt to modern situations.[8] One such innovations that attracts the Muslim world's attention is corporate Waqf or the Waqf company.[9] The Waqf company is a modern innovation for realizing the once inferential Waqf institution and taking benefit of its dynamism for adding value and bringing wealth by business and corporate efforts, for encouraging the economic growth (Ibrahim & Ibrahim, 2013, p. 7). Thus, it is regarded as more than philanthropic and charitable act committed by a business entity, which is an initiative for combining the Waqf concept, to be applied for achieving the objectives of the corporate and business (Saad et. al, 2017, p. 91). It aims at combining the corporate efforts with the concept of waqf to offer back to the society.

In other words, the Waqf company is privately creating business that worked according to business principles and aimed for profit, as any other business companies would, the only difference is that it is owned by Waqf charity; and so, all profits are transferred into charitable causes and outlets (Al-Khafyīf, 2009, p. 29). In this way, the Waqf company allows for business investment for charitable causes through an independent entity that functions according to pure economics, business, and investment fundamentals; the difference between them is Waqf as a non-profit charitable institution, and the business corporations that runs for profit only.

The State Economic Development Corporation of Johor came up with this novel idea (Hasbullah and others, 2014, p. 324). It is a new breakthrough aimed at revitalising the

[8] The twenty-first century was the era of globalization which revolutionized the concept of markets and contracts. Thus, the need of the hour led to re-analyzing many Islamic contracts and transactions that could meet the challenges of the modern era. So, the jurisprudence of Waqf needed to be revisited to bring innovation of this mode according to the modern times (Kahf, 2004, p. 11; Joseph, 2014, p. 427). In the beginning phase of the inception of Waqf it was a simple mode with limited structural setting, Waqf were mainly real estate, but gradually it evolved and took the shape of a formalized charitable institution in one and half century. Resultantly, Waqf in the modern-day form is a financial product that encapsulates microfinance, qarḍ ḥasan (interest free loan with an unstipulated due date), microcredit, cash, stocks, securities, intellectual property rights and many others (Ahmad, 2015, pp.63-74; Abdullah, 2017, p.61).

[9] This is because a Waqf is an essential part of the Islamic economic structure since it serves as a means of redistribution. Whereas zakat distributes monies from the wealthy to the needy on a yearly basis, waqf's purpose as a redistributive measure is based on transferring wealth from the wealthy to the poor in perpetuity (Kholid and others, 2005, p.3).

once strong Waqf institution and leveraging its dynamism to add value and create riches through commercial and corporate efforts to promote economic growth. This idea is materialized in the form Waqf corporations and have been practiced in a range of Muslim countries, including Turkey, Bangladesh, India, Pakistan and Malaysia (Su Ye Chew, 2015, p. 8).

In order to maximize the benefits of investment and financing in the Waqf, a complete legal framework is required to be formed and implemented including range of policies and procedures that makes the formation and implementation of Waqf company steady and attracts and reassures investors too. Among the most important of these policies is to build a legal framework governing the investments and assets of donors. Like other countries, Saudi Arabia tried its best to invest capital to the Waqf sector to foster the growing in the national economy's and increase its income.

It is because Saudi Arabia's Waqf is one of the most significant and important charitable model in the Islamic world, primarily because the significance of Mecca and Medina as the birthplace of Islam and the influence it has the broader Islamic world (Saad, 2016, p.3). It is estimated that the assets of the Waqf values in Saudi Arabia is approximately SAR 1trillion ($500 billion) including the two Sacred Prescient: the Masjid al-Ḥarām (Kaaba) in Mecca and the Prophet's Mosque in Medina (Al-ʿUmrī, 2014, p. 70). It thus representsa very significant sector and vital economic asset for Saudi Arabia's economy and a vital source of income.

The government introduced several rules and regulations to encourage investment. In doing so the Saudi Government tried to match the worldwide economic trends in the charitable work like non-profit corporation law. However, the current ambiance is still not very encouraging. It lags way behind the demand and urgency.

This reason is a lack of a competent authority for regulation of Waqf (Al-Ismāʿil, 2020, p.24). That is to say, an authority that can issue laws regarding the Waqf and manages the relationship between the endowment institutions and stakeholders. It is evident that this lack of legislative and managerial structure is a major stumbling block. Some other obstacles in realizing the full potential of Waqf includes inefficient management, inflexible

laws and a rigid interpretation of Sharīʿah framework, over-protection of the Waqf assets and dearth of innovative instruments in financing the development of the Waqf (Al-Salwūmi, 2013, p. 34).

Oddly, the Kingdom alongside the private individuals has acknowledged the importance of Waqf. Individuals who wish to establish their endowments have been approaching the Ministry of Commerce and Industry rather than the Ministry of Islamic Affairs (Al-Rāshid, 2019, p. 48). Realizing the inability of the Ministry of Islamic Affairs, the Ministry of Commerce and Industry has allowed individuals to register Waqfs as regular companies with them (Ibid). The Ministry even established some endowment boards within the Chambers of Commerce of the Kingdom (Al-Ismāʿil, 2020, p.50). These boards advised and supported businessmen to establish their endowments with their Ministry instead of the Ministry of Islamic Affairs (Alomair, 2018, p. 25) .

Individuals like Ibn Manīʿ, who holds a position in the Council of Senior Scholars in the Kingdom, has also voiced his opinion in the same lines. He opined that one of the key issues that have contributed in delaying the conceptualization of Waqf companies is the lack of a single regulatory system and the accompanying legislations (Al-Rājḥi, 2016, p. 67). The disparity in the legislative framework can be imagined by the fact that some donors in the Kingdom choose to establish their endowment company with the Ministry of Labour and Social Affairs as a non-profit organization, while others choose to register with the Ministry of Commerce as a regular company. [10]

Dissatisfied with the performance of the Ministry of Islamic Affairs regarding Waqf, [11] in 2015, the Saudi Cabinet decided to establish an authority independent of the Ministry of

[10] Middle East Newspaper on the 13 Feb. 2018, Riyadh, issue: 2928.

[11] The Ministry of Islamic Affairs, Dawah and Guidance has the primary responsibility for the Waqfs in the Kingdom, as the head of the Higher Council of Awqāf later on was assigned to the Minister of Islamic Affairs (Al-Salwūmi, 2013, p.167; Al-ʿAbdu al-minʿim, 2019, p. 204). The Ministry has come under heavy security for its administration of Waqfs affairs. One reason being, despite its premier status regarding Waqfs affairs, the officially kept records is deficient (Al-Rāshid, 2019, p.69). There has been no general survey commissioned by the Ministry to assess the number of Waqfs assets, the size of Waqfs investments, or even whether or not the assets that are said to belong to a specific Waqf are actually in the ownership of that Waqf. Theft of Waqf assets has occurred since the creation of the Waqf which has not been accounted for (Ibid). One reason for the sluggish and inefficient supervision of Waqfs is the centralised format of the Ministry of Islamic Affairs (Al-Ismāʿil, 2020, p.39). The Ministry is a hierarchical bureaucracy with the relative importance of tasks being delegated to the correspondingly important Member all the way up to the

Islamic Affairs to manage the Waqf. On 24th June 2015, the Ministry of Islamic Affairs itself declared the establishment an independent authority at a speech within the Chamber of Commerce in Mecca (Al-Rāshid, 2019, p. 98). It recognized the importance of having an independent authority for the endowment sector. The organization has its own governing board who holds the rank of a Minister. Till now that body is locked in a review stage and is not fully functional (Alomair, 2018, p. 28). It indicates that both Ministries have been paying much attention to Waqf than ever before. Scrutiny of their maneuvers reveals their focus regarding adopting different strategies to make Waqf assets more productive by espousing innovative financial instruments (Ibid).

In 2016 the KSA has published the bill of nonprofit corporation.[12] This bill addresses Waqf as well. The aim of this bill was to try to fill the gaps of regulatory framework. It was referred to the Ministry of Commerce for review and in 2016 the Ministry made the draft available on their official website and requested a general call for feedback (Alomair, 2018, p. 28). According to the researcher, the bill provided very limited clarity with regards to the concept, types and establishment of Waqf company. All these matters are addressed in just one article and that too in just 170 words.[13] These words are way too scanty for guiding the founder of Waqf regarding establishing, management and regulations of the Waqf company. This is because this bill has disregarded the problems latent in the Saudi Arabian Waqf framework. These include, but are not limited to, managerial issues, encroachments on Waqf properties due to lax supervision, confusion in legal decisions owing to contradictory opinions from judges, as well as issues related to the documentation process. Thus, even if this bill is passed and endorsed as an "Act", there still would be several

highest levels (Ibid). This method of administration and management is a real barrier to the efficient supervision of Waqfs affairs in the Kingdom as it limits the complete regulation of the awqāf to the Higher Council of Awqāf. Subsequently, the continued revision of Waqfs administration is solely dependent on the Higher Council's capability to deal with bureaucratic stumbling blocks. The current situation of the endowment sector in Saudi Arabia carries a proportion of uncertainty with it. The current rules and regulations for awqāf were first issued in 1966 and were followed up by the Council's executive regulations in 1973 by the Higher Council of Awqāf (Alomair, 2018, p. 40). Thus, we find that the regulations and higher directives of the Higher Council concerning the endowment sector in Saudi Arabia have not been updated or revised for more than 50 years. A small number of sections have been tweaked since, but no larger scale overhaul of the management and regulation principles have been carried out. In the challenging business environment that Waqfs operate in today, the current outdated set of directives do not allow the sector to grow to its full potential.

[12] For the nonprofit corporation bill. See the official website of the Saudi Ministry of Commerce, available at: https://mc.gov.sa/ar/mediacenter/news/pages/10-04-16-01.aspx, accessed: 29/4/2021.

[13] Articles 7 ,9 and 12 of the Saudi nonprofit corporation bills.

lacunae in the legislative framework. Therefore, although this bill is a ray of hope in the right direction, yet the proposed legal framework is extremely deficient. Al-Jabr observes that there is a consensus among Saudi legal experts that the Waqf or non-profit organisation fall under the classification of civil law (Al-Jabr, 1996, p. 201). Obviously, as we will see the provisions of the Saudi Civil Law did not address the Waqf company in detail, and therefore the rules of Islamic law will be resorted to. This is based on the general principle among Saudi legal experts asserts that in the light of absence of civil law provisions on any cases, it would need to resort to use the rules and principles of Islamic law to fill this gap (Al-Marzwūqi, 2014, p165; Al-Jabr, 1996, p. 120).

On the other hand, the idea of a Waqf company has been hotly debated and is somewhat controversial among Islamic scholars and contemporary jurists (*fuqhā)* of Saudi Arabia. Innovative instruments of financing of Waqf are bone of contention among them (Al-Muhanā,2015, p.190). Using immovables[14] in Waqf and establishing cash Waqf is the main apple of discord as it goes against the *Ḥanbalī* Jurisprudence (Al-Mymān, 2009, p.34). Moreover, there is no clear guidance in this regard and there is a huge disparity and conflict of Sharīʿah opinions (*fatwa*) issued by the Sharīʿah boards of different the Islamic financial services boards on the same issue (Al-Rājḥi, 2016, p. 89). This adds to the confusion even more.[15] Some researchers like Ibrahim argue that the mechanism of

[14] **Immovable property**: "fixed and impossible to move or property such as land or buildings, not a person's possessions". See the official website of the Cambridge dictionary, available at https://dictionary.cambridge.org/dictionary/english/immovable-property, (Accessed: 13/4/2021).

[15] There are some of contemporary Saudi jurists who prevent the modern form of Waqf company such as: al-Fawzān, al-Shinqṭī, Ibn Jibrīn, al-Ahmad and others (Al-Ismāʿil, 2020, p.180). This is because a model of the Waqf will be faced many issues that is non-compliant with the principles that have been stated by the majority of classical jurists in the past. Al-Zāmil identified that many issues that will be faced the Waqf company such as:

1- One of the major challenges of modern times is understanding how subject of the Waqf could be adapted to a more modern friendly object. What is a more popular way of making donations is cash, but this comes with challenges and marred with juristic dissention. Cash, according to the view of most classical jurists cannot be Waqf because money does not represent permanent property. The argument that cash Waqf is not allowed because the nature of the assets or property must be permanent and the consumption of cash Waqf would diminish that.

2- As a Waqf company, the company must be empowered to receive Waqfs in the form of cash, shares. However, they believe that the Waqf of shares is invalid. This is because the share is document that is deemed evidence of ownership of the shareholder for his undivided share in the assets of the company. Due

cash Waqf should be accepted to generate income for a greater cross section of society in the form of cash, shares and other assets (Ibrahim and others, 2013, p. 20), but many of the contemporary scholars such as: Muḥammad Nāṣir al-Dīn al-Albānī, ʿAbd Allāh Ibn

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to there is a lack of agreement among jurists about whether a Waqf can be made of jointly owned or undivided property due to the principle that the *nāẓir* must take possession of the property, once the Waqf is made.

3-One challenge is related to legal entity of the Waqf company. They refuse to be the juristic personality be the subject for the Waqf.

4- As a Waqf company, the company will face some the financial challenges. Which can be led to need some of liquid funds and collateral for loan by using its shares as a guarantee. This is conflict with the notions of inalienability and perpetuity prevent Waqf property from being placed as collateral for loan financing and joint ventures. Also, lending the shares of the company are banned due to the Waqf is an indispensable deal, it cannot be revoked, and the capital cannot be spent. In addition, the Waqf company could be used its shares as a mortgage. This is known mortgage shares that is an agreement that allow a company to borrow money from a bank or other financial institution by using its shares as a guarantee (Al-Faziʿī, 2016, p. 68). According to the classical jurists were rigid in this regard and did not allow giving Waqf asset as a security for payment of debt because mortgaging entails withholding of Waqf assets against loan which should be of equal price and value to the Waqf (Al-Kubaiysī, 1977, vol. 1, p.289). The main contention is that the Waqf is to be a trust with the borrower and is out of anyone's possession. Therefore, it cannot be mortgaged (Abū Zahra, 1959, p. 98). Moreover, this is against the general principle in which the majority of jurists are in agreement, that the consequent effect of a Waqf is that it is an absolute contract (*ʿaqd lāzim*) which cannot be revoked, and the object of Waqf cannot be mortgaged, sold, given away or inherited (Ibn-ʿĀbidīn, 1994, Vol. 4, p. 456; Al-Māwardī, 1999, Vol.7, p123).

5- The concept of the juridical personality of the modern corporation is affiliated with the idea of limited liability, in which, it separates the company's liabilities from that of its owners (the co-owners). This cannot be imagined it in the Waqf. This is based on the fundamental principle that the ownership of the Waqf belongs to Allah. According to the view of most classical jurists.

6- There are some rules of companies that is contrast with the Waqf law. For example, there are some types of companies that allowed to do trading its shares in stock markets.
This is against the general principle in which the majority of jurists are in agreement, that the ownership of the Waqf belongs to Allah and its usufruct is devoted to charity. Thus, the consequent effect of a Waqf is that it is an absolute contract (*ʿaqd lāzim*) which cannot be revoked, and the object of Waqf cannot be sold, given away or inherited. According to this principle, it is not permissible to undertake the trading in the shares of the company by sale and purchase in the Waqf company because it is conflicting with this principle. Furthermore, because the reality of the stock markets is great risk and may have elements of *gharar*, therefore we should keep the assets of the Waqf company away from this type of transactions such as trading in the stock markets. In addition, the fundamental principle in law companies that companies get terminated if one of the personal elements defaulted from one of the shareholders such as death, bankruptcy or loss of eligibility. This is against with unanimous agreement among jurists that the Waqf is not revocable when any of the causes regarding the personal elements happened, irrespective of the fact that it is from the wāqif or *nāẓir* or beneficiaries (Al-Zarqā, 2004, Vol. 1, p.340). Thus, there is no impact on the Waqf in term of causes regarding to the personal elements. (Al-Zāmil in his a paper that has been submitted in "the second conference for regulating and development Waqfs" that was held on 14/02/2017. in Intercontinental Hotel in Riyadh).

Jibrīn, ʿAbd al-ʿAzīz ibn ʿAbd Allāh ibn Bāz, Muḥammad Ṣāliḥ al-ʿUthaymīn and others still think that perpetuity, irrevocability [16] and inalienability [17] ensures permanence of Waqf which is the main feature which corporate Waqf fails to meet this criterion (Ab Rahman, 2009, p. 113; Al-Mymān, 2009, p.34). This chaotic situation of deficient legal framework and controversial status of permissibility of corporate Waqf further hinder the way of shifting to the new corporate mechanism of Waqf and cause the lack of conceptualization of Waqf company in academic literature.

In the light of aforementioned discussion, it is evident that the Waqf sector is in dire need of attention of scholars (Alomair, 2019, pp.1-2). In the first place, a thorough investigation is required from the perspective of Sharīʿah. Does corporate Waqf resonate with the spirit of Sharīʿah and is it consistent or contrary to it? For instance, how does such a mechanism fit into existing legal and cultural ambiance of Saudi Arabia? Does the institution of Waqf allow *Ijtihād* (juristic discretion) and does it have such flexibility to accept the new modes of investment? This inquiry is very vital to win the confidence of the investor. Secondly, it is much needed that legal framework is studied thoroughly and gaps are identified, and recommendations are presented to remedy the situation. Although there have been some researches in the past, but they mostly covered the accounting, governance, accountability and management of Waqf. Therefore, there is a dearth of academic critique of the Waqf company in the light of Sharīʿah. This is very crucial for the Muslims to be sure that the Waqf is according to the rulings of Sharīʿah. This is because the purpose of Waqf for them is spiritual advancement and a stronger connection to Allah Almighty. They would never invest if their trust is shaken in the validity of Waqf company and its compliance to Sharīʿah.

As mentioned earlier, at present, Saudi government is very committed to improve the situation of Waqf institutions to amplify the impact of Waqf and is trying to promulgate a new authority for Waqf. Hence, it is most apt to critically analyze the concept of Waqf company in the light of Sharīʿah lest the attempts to bring Waqf laws compatible to modern times would be seen as too ‘modern’ and thus dismantle the precious institution from its

[16] **Irrevocability**: “Impossible to retract or revoke”. see the official website of the free dictionary, available at: https://www.thefreedictionary.com/irrevocability, (Accessed: 13/4/2021).

[17] **Inalienability**: “That cannot be transferred to another”. see the official website of the free dictionary, available at: https://www.thefreedictionary.com/Inalienability, (Accessed: 13/4/2021).

classical roots.[18] Classical law needs to be revisited in detail and legal theory of Waqf must be identified as developed by classical jurists. Mannā'al-Qaṭṭān observes, "The institution of Waqf has developed with Islam, and there is no doubt that credit must go to the jurists for developing the legal theory of Waqf" (1996, p. 205). The observation of Mustafā al-Zarqā also echoes with the same conclusion (Al-Zarqā, 1998, vol.1, p.456). Aforementioned discussion substantiates the significance of the topic and crystallizes the dearth of research in this regard. As per the knowledge of the researcher, there has not been a single study that addresses this issue in Saudi Arabia. Therefore, researcher wants this research to be catalyst in this regard. Consequently, it forms the basis of my motivation to embark on this journey. The research intends to revisit the stance of classical Sharīʿah rulings of Waqf as developed by the classical jurists and wants to identify the gaps in legal framework and present recommendations to remedy the situation. Saudi Arabia has been chosen as the case study for two primary reasons: firstly, because it has retained the Islamic legal system as the State law and secondly, because it is the native country of the researcher.

Research Questions

The Waqf company has raised several questions for scholars and researchers of Sharīʿah. The form of Waqf has been questioned for the first time in recent years and it will not end here with this research. It is certain that there would be many new forms of Waqf in the

[18] This is because understanding this law from its classical roots form as *fiqh* is difficult, many people turn to handbooks that have published on the particular topic in this subject matter for help as the easiest way, while advanced students prefer to consult the codified laws of waqf found in many Muslim countries, particularly in the Arab region, such as the Law of Waqf in Egypt, Iraq, Syria, Lebanon, and other countries. For them, current codified law is sufficient to meet their legal comprehension demands. However, they will never be able to do justice to this legislation in this method. This law, according to the solicitors, is part of a larger set of laws codified in contemporary Islamic jurisprudence. Solicitors are only focused with the code's chapters, phrases, and terminology, and how to apply them in their judicial job. They do not look for the origins of the law they are dealing with. Economists consider this law to be a form of Waqfs that benefits individuals. So, many people become supporters of the law, while others became critics. The supporters will create a number of suggestions for how to develop waqf properties so that it has financial benefits. Others who criticize the law believe that a waqf property is useless since it cannot be improved as they like. That would be the current stance of the Islamic Law of Waqf in present time.

Considering this approach, I aim to discover this law in its classical roots form, unaffected by present legislative codes or economists' viewpoints. This research is classical in design, or we may call it *fiqhi*. I will be attempted to trace back the law to its initial development as developed by classical jurists. This approach of studying can offer in a clearer knowledge of law of Waqf as formed by classic Muslim jurists in its original form.

future, because Waqf is an ever-evolving institution. This research seeks to answer the following questions:

1. Is Sharīʿah of the Waqf a rigid one to keep its original form to be valid or there is a flexibility in this regard? Is the form of waqf equally important than the core purpose of the waqf and can it adapt to different forms? Or the purpose must remain intact, and forms can be adapted to modern trends and still remain valid.

2. To what extent, Waqf company is following the classical pillars of Waqf and the Waqf principles and rules of the Sharīʿah and where is it violating it? If there is violation, is that violation detrimental to the validity of the Waqf?

3. Why is there disparity and conflict of Sharīʿah opinions by the Sharīʿah Boards of different the Islamic financial services boards on the same issue and how can uniformity be achieved?

4. What is the regulatory structure of Saudi Arabia for Waqf company? Has it sufficiently provided a good legal framework for governance and regulation of Waqf companies? Where are the gaps and how can they be filled?

The Research's Aims and Objectives

The primary aim of this research is to present a clearer picture regarding the legitimacy of the Waqf company based on the analysis of classical Islamic jurisprudential literatures. The researcher aims to explore Islamic law by studying classical and contemporary Islamic literature regarding waqf rulings and establish whether or not there is enough flexibility to include new concepts, techniques and structures or is it rigid and its original and traditional model should remain intact. The objective for this exploration is to identify if there is any contradiction of Sharīʿah in the model of Waqf company. This is very crucial to investigate because it is of paramount importance to adhere to the desires of the *wāqif* (the person who created the Waqf) whose primary aim to create Waqf is to gain the pleasure of Allah. He would not have invested in Waqf, had he not been satisfied with the validity of the Waqf

according to Islamic law. Apart from this, the researcher intends to explore the interpretations of different jurists (*fuqāha*), with the objective of finding a more flexible view to be applicable regarding Waqf assets, Waqf financing techniques and Waqf investments. This will be done by exploring full body of classical and contemporary *fiqh* literature related to Waqf. The researcher expects to provide solution to update the Waqf model, in line with mainstream classical *fiqh* principles. One of the objectives is to contribute towards helping the government sector in developing new laws pertaining to the Waqf companies.

The Significance of the Research

The Waqf is a financial instrument that is used solely for social needs, whether to combat poverty, improve the economic situation of the public or for social development in general. It is a long-standing financial instrument that is held in trust and plays a significant role in Muslim communities (Su Ye Che, 2015, p. 8). The discussion of the laws of Waqf from the perspective of Islamic classical and contemporary literature, will give the reader a clearer picture about the laws of the Waqf companies.

The importance of the Waqf system is reflected in the significance of this thesis. Overall, it will seek to uncover the best and most suitable mechanism for the management of Waqf assets and how we can yield the maximum benefits from them. Waqf's growth has been slowed by a lack of new instruments for funding and production, as well as a strict regulatory structure for generating higher yields from Waqf assets (Al-ʿAbd al-Munʿim, 2019, p. 106). So, it is hoped that this research will contribute to the discovery of new forms of funding Waqfs to ensure the achievement on the highest degree of capital adequacy [19] of Waqf assets, as well as an asset enhancement in order to maximize yields on the Waqf assets itself. This thesis will explore how the funding of Waqf through the

[19] **Capital adequacy:** "a measure of a bank's or other financial institution's ability to pay its debts if people or organizations are unable to pay back the money they have borrowed from the bank". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/capital-adequacy?q=capital+adequacy+, (Accessed: 13/4/2).

system of the concept “Company”, according to the theoretical framework on the concept of partnership in Islamic jurisprudence among the classical scholars and presented the contemporary scholars contribution in term to adapt the modern forms of companies on the Waqf and how can apply pillars of the Waqf on the Waqf company through *Ijtihād*.

The investment of Waqf through companies is particularly important in the contemporary era, where corporations increasingly influence ever greater aspects of daily life.[20] Understanding how they can be used to serve the interest of society is, therefore, key. The Waqf company itself is a recent innovation designed to add value and increase wealth in pursuit of economic growth. [21]What is more pertinent is the attempt to revitalize the Waqf institution itself. It is more than simply corporate charity; it involves initiatives by corporate entities to combine their everyday activity with the Waqf concept in order to benefit society as a whole but do so in line with its business and corporate objectives (Shiyuti, 2012, p. 12). Despite the growing attention being paid towards a ‘Sharīʿah compliant Waqf system’, the waqf company from a Sharīʿah perspective has not been covered well in the existing literature. Thus, this thesis attempts to discuss the main issues in an attempt to address this gap.

One of the central aims and contributions of this thesis is to examine the new Waqf company model and to what extent it adheres to principles and rules of Waqf in Sharīʿah. In order to do this, I will critically analyze the laws and regulations surrounding Waqf in general in Saudi Arabia as well as the Waqf companies. I will also examine the Waqf company applications in the KSA, in order to understand whether Sharīʿah principles are

[20] The wealth redistribution is one of the Islamic economic concepts. Waqf, in addition to zakat, has grown in importance, particularly in light of the current state of the Muslim ummah. It provides basic necessities assistance to many underprivileged individuals, orphans, and others. If the waqf had been properly administered, the waqf's function may have grown considerably. Therefore, Investments must be made in order for a waqf to be productive (Kholid and others, 2005, p.7). There are several ways to fund a Waqf projects such as the Waqf company. The Waqf company has an essential function as a monetary mechanism, and it may be used to raise funds for charitable in easy ways. This is because this new model has become a key factor for distribution measures by providing jobs for the needy. Moreover, investors find those business activities attractive where there is more income, less risk and high expectations of future development. Also, the company is characterized the ability to adapt to rapidly changing economic circumstances in these days.

[21] Islamic law does not prevent the creativity of developing different Waqf funds. However, whatever new mode is created it must conform to the indispensable principles of Waqf (integral pillars of Waqf). This is what I am saying when I want to see if any Waqfs are violating Sharīʿah principles.

being followed. A range of primary and secondary sources will also be used, primarily these are Arabic books that discuss Sharīʿah and Waqf. Careful attention is paid to translating many of the most important texts on the subject into English (this in itself is a significant contribution to the field, given the benefits it yields for future researchers).

Research Scope and Limitations

The development of institution of Waqf has many changes throughout the history until now many differences of opinion regarding many essential features. As urbanization grows, the realisation of its economic potential becomes more apparent. The historical and legal structures have been highly emphasised in most literature as well as management investments and assets enhancement program from different perspectives.[22] However, little research has been done on the Waqf investments through an innovative method of maintaining waqf in contemporary life. Most of the discussions do not include a comparative analysis of the Waqf company from the perspective of classical and contemporary *fiqh* literature espoused by different jurists (*fuqāha*) in the KSA about this new model of the Waqf. The scope of this research is limited to the model of Waqf company. As the area to be covered is vast, study will not focus in detail on the administrative and accountability problems of the Waqf company. However, it will discuss how to establish the Waqf company and examine various challenges affecting in this regard. Also, I will discuss the capital funding of the Waqf company in light of the primary and secondary sources of the Sharīʿah. This research will analyze whether the current legislation governing the regulation of the Waqf company in the KSA is sufficient or it needs more work to be well-organized. This thesis will critically assess the current legal regulation of Saudi nonprofit corporation system and propose changes, improvement or inadequacies in Saudi Waqf company system and provide recommendations and suggest improvements. The views of classical and contemporary scholars of Sharīʿah in principles

[22] The institution of Waqf did not remain stagnant throughout the history rather it evolved with the passage of time. Hennigan observes, "In their initial stages, the institution of Waqf and Sharīʿah evolved together" (Hennigan, 2004, p. 65). The simplified form of Waqf passed the test of time, fulfilled the need of the hour, and transformed into the modern-day company due to its adaptability. In the beginning phase of the inception of Waqf it was a simple mode with limited structural setting, but gradually it evolved and took the shape of a formalized charitable institution in one and half century. Mohammad Abdullah found out that centuries went by, and Muslim jurists kept on enriching the corpus of Waqf rules (Abdullah, 2017, p,60; Haji Abdullah, 2005, p.209)

and controls of investment Waqf and Waqf corporation issues in this work are limited to the Sunni sect or Schools of thought (*madhāhib*).[23]

Contribution of the Thesis

The legal and jurisprudential concept of a Waqf company, as well as its implementation in Saudi Arabia, is the subject of this thesis. It will analyze the new model of Waqf investment. It will unfold the Islamic theory, which is based on commercial transactions (*muʿāmalāt*), and complies to Saudi Arabian laws and regulations based on Sharīʿah, which was founded over 1442 years ago. As a result, the work's originality and contribution can be summarised as follows:

1- I had been interested in writing my research, but I discovered that dealing with two mentalities and two languages was not a simple task: that is (Arabic and English). Moreover, I found that using primary and secondary sources in Sharīʿah to pass knowledge from one individual to another was the most challenging challenge I faced, and it was relevant to this thesis. Hence, the study would be unique due to the large number of Arabic materials used.

2- This study contributes by filling a gap in the knowledge in regard to Waqf companies that dispersed in books, papers, and academic theses. I compiled them all into one work, complete with critical review and assessment based on Sharīʿah. They would, in my opinion, be a valuable addition to the Sharīʿah and Waqf library research.

3- The KSA is a very important Muslim region, and all Muslims agree that the Saudi government follows Sharīʿah in all of its dealings. For this reason, emphasis is upon the rulings of the *Ḥanbalī* School promulgated in the Saudi legal and judicial systems. There has rarely been any critical analysis of Saudi laws of Waqf which is based on the *Ḥanbalī* School, from both a lawful and a financial standpoint. Thus, researching Saudi Arabia's Waqf legislation and investigating its regulations and conducting a critical analysis by studying different opinions expressed in literature of Sharīʿah and explain the opinions of the contemporary Muslim jurists is a critical study that will enrich the

[23] Sunni: "A term generally applied to the large sect of Muslims who acknowledge the first four *khalīfahs* to have been the rightful successors of prophet Muhammad, and who receive the six authentic books of tradition, and who follows one of these four Imāms (Abū Ḥanīfah, Mālik, al-Shāfiʿī and Aḥmad Ibn Ḥanbalī)" see (Dictionary of Islamic terms, Deeb Al-Khudrawi, 2012, p. 258).

academic world. Moreover, recommendations to formulate an appropriate legal framework will also help the government and will benefit the public at large.

4- This is the first Waqf academic study in the scope of Saudi Arabia focusing on the Waqf company with critical analysis by studying classical and contemporary Islamic literature, so the findings presented will make a big contribution to enriching the academic literature in Saudi scholarship in this field. Thus, it provides a sound ground for further research. In reality, economically, Saudi Arabia is one of the Middle East's most important countries. In addition, the Waqf in Saudi Arabia is recognized as one of the largest in the Muslim world.
5- This study provides the first comprehensive assessment of the practices of Waqf companies from a legal perspective in Saudi Arabia, and it offers useful insights to the related Waqf authorities in order to improve Waqf company practises in Saudi Arabia.

Methodology of Research

Research Style and Data Sources

For data collection in this study, both primary and secondary sources will be used. There are two kinds of primary sources: classic sources and contemporary sources. Classic mediaeval primary sources such as the Qur'an, Hadith literature and discussions, works of legal jurisprudence (*fiqh*), and history books will be included, keeping the study's goals in mind.

The main source, which in the context of this study constitutes the primary sources, is the study of Qur'an, Hadith corpus and their commentaries, as well as classical books of Islamic jurisprudence. While the secondary source in this context is the published volumes of works such as articles and *Fatwas*, online articles journals and books, also newspaper in Arabic and English. This means that for data relating to Islamic modern *fiqh* works written by key individuals and Bodies aforementioned will be accessed.

The thesis would be capable of identifying the differing views and make a conclusion regarding its methodological basis after looking at these works. This research would ultimately result in a comprehensive method to the subject area by using a variety of such

literature. Since the literature is in the form of documents (books, journal papers, files, etc.) that are readily accessible in libraries and online, this library-based study would not be subjected to any ethics regulations governing academic institutions and research.

Methodology for Data Collection and Analysis

The methodological basis of this thesis is focused on ontological and epistemological views that are directly related to the interpretivist model from contemporary social science models. In order to explain how and why things happen, an inductive (theory-building) approach is used. In light of the interpretivist model, the qualitative research approach based on critical theory is the best method for obtaining data, the kind of data sought, and the mode of data analysis in this thesis. The qualitative analysis approach was used as a method of investigation since it studies the why and how of an issue, that is fundamental to the research questions.

Given that qualitative research is a broad analytical methodology that encompasses a variety of research approaches, the document analysis paradigm would be used as the conceptual framework and research approach for dealing with data, as the thesis is entirely focused on literature. Finding, selecting, analysing, and synthesise data found in documents is part of data review, which is an analytic method for examining or evaluating documents. Following that, content analysis is used to organise the data into main topics and sections. The use of this approach can be explained by finding out that the only sources of information in this investigation are documents which for the purpose of this research I define as books, journal papers, files and the like. Furthermore, document analysis could significantly minimise the possible prejudices that could affect such a critical research. As a result, the justification for document analysis is based on the enormous importance of documents in this type of study within an interpretive research. In other fields of thesis, however, the researcher should be circumspect in over-reliance on documents alone.

Document analysis have both benefits and drawbacks as compared to other qualitative research approaches. To begin with, document analysis is a cost-effective method. Furthermore, if documents exist, they can be quickly found. Further to that, documents contain a wide range of topics; they cover a long period of time, many incidents, and a

number of different settings. Documents are also not affected by the research process; the absence of obtrusiveness and reactivity is beneficial in avoiding prejudices. Additionally, it is a practical approach. Instead of data collection, document analysis requests data selection. This approach, on the other hand, is not always without limits. Access to such documents, for example, can be challenging due to their sensitivity. Nevertheless, the documents in this thesis are available, but in limited quantities. Eventually, a possibility weakness may be a biased of data by preventing a complete collection. Regardless of this potential constraint, the aim of the current study is to critically analyse data.

Accessing, analysing and synthesising information in document analyses includes superficial examination, exhaustive methodical analysis, and interpretation. If required, elements of content analysis and thematic analysis will be combined to analyse the data in this research. A content analysis is the process of classifying data relating to the study's research questions and objectives. A thematic analysis is a method of data type recognition in which emerging themes are used to categorise the data for analysis.

This research is based on textual and content analysis techniques as the aim is to deeply investigate classical Waqf jurisprudence and its application upon Waqf companies. The researcher intends to explore classical books and discover the classical law. The original language of the classical Sharīʿah of Waqf is Arabic. Therefore, it requires thorough study of literature present in Arabic. However, a lot of contemporary jurisprudential literature is also present in English. Therefore, to unearth the rules of Waqf, it will be a mix of exploration of English and Arabic law books. Moreover, in order to ascertain promulgated and proposed legal framework, I will dig out legislations and official reports in Saudi Arabia. I will also take benefit from online databases. Websites, official documents and rest of the data of famous Saudi Waqf companies will be scrutinized too. Therefore, this extensive study is a mix of doctrinal and non-doctrinal research where it will be the endeavour of the researcher to identify the law first, highlight the deficiencies and suggest recommendations.
As this thesis is written in English and it is hoped that western readership will benefit from it, therefore the foundation of the research will be laid by introducing Sharīʿah. It will be

presented comprehensively to give a holistic understanding. History, Sources and principles of Sharīʿah will be discussed to make reader better understand the thesis. The Islamic legal terms will be explained and will be used subsequently in rest of the thesis write up. Material will be translated in English from Arabic because most of the original classical data is in Arabic that needs to be translated. Although there are some secondary sources in English, the researcher wants to remain as close to the original sources as possible. Therefore, I will translate materials. I will not restrict the interpretation of the Sharīʿah to any one specific School of Islamic jurisprudence. Rather, I will inspect all four Sunni Schools from their original sources and judge their arguments impartially.[24] Later on, I will traverse through the classical law and its compliance in contemporary model of Waqf. The Waqf company and suggest if it is violating the classical Sharīʿah of the Waqf.[25] In light of the aforementioned position, this study will only focus on Islamic law in its classical approach,[26] and it will not look at the influence of modern codes of legislations

[24]The concept of a Waqf company is something new to Islamic law. It is an idea developed by modern Muslim's scholars in the hope of restarting a once vital funding institution of an Islamic society. Like with all new ideas it faces challenges to conform to the Sharīʿah. Therefore, the approach modern scholars took to dealing with these challenges were to try and justify the opinions by proving its concordance with the opinions of the classical scholars. This meant that one single School of jurisprudence was not enough to solve the challenges of modern times. Rather, the opinion of multiple scholars and Schools were sometimes required to justify the opinion. There are some cases were all the schools had to be abandoned and independent *Ijtihād* had to be made in order to come to solution. Especially, as the rules of Waqf is mostly based on juristic reasoning (*Ijtihād*).

[25] **Terminologies that are used in this study:**

Certain terminology used in this research needs to be clarified.

1- Classical jurists or Scholars: - These words are referred to the founders of the four schools of law, as well as their contemporary jurists with established juristic qualifications among Muslim scholars and their direct disciples until the period on 1306 A.H./ 1888 A.D. (Al-Qaṭṭān, 1996, p. 10). In other words, the classical scholarship is understood to be a Muslim scholar who existed during the first 1306 years of Islam.
2- 2- Contemporary jurists or Scholars: - There is no exact definition of when was the classical scholarship end and what modern or contemporary scholarship is or when it was started. However, Zaydān concludes that there is an unwritten understanding that the modern jurists is understood to be Muslim scholars who existed after the death of Ibn-ʿĀbidīn death since 1306 A.H./ 1888 A.D. is regarded the end of classical scholarship and the beginning of contemporary scholarship (Zaydān, 1976, p. 5). As a result, the researcher utilised this as a standard for defining and distinguishing classical and current literatures. Also, this term is most commonly used to describe scholars who came after that period of time (1306 A.H./ 1888 A.D.) (Al-Qaṭṭān, 1996, p. 11).

[26] This means that this research is based on textual and content analysis techniques by explore classical books and discover the classical law for the Waqf. As well as for data relating to Islamic modern fiqh works written about the Waqf law by key individuals and Bodies will be accessed.

or current economic theories. Therefore, this study method here is classical to some extent. That is to say, it is *fiqhiyy* in nature and it is trying to return the law of Waqf to its original sources especially in the present.

This particular method of study will thus allow us an insight into how laws of Waqf were developed by classical Muslim jurists. In this study I will analyses the corpus of literature on Waqf across the four major Sunni Schools of Islamic jurisprudence and thus will be relying on the authoritative texts of said Schools.

As previously mentioned, this study is an endeavour to understand the classical method and thus will not be considering the effect of modern legislation on Waqf laws.[27] We believe that this process will allow us to understand the original thought patterns behind the Waqf laws as understood by the four Schools of Islamic jurisprudence, and not more recent additions to the field as some of the modern writers who like to refer to modern legislations in discussing the law of Waqf instead of back to the classical law of Waqf in its authentic sources as has been developed by the classical Muslim jurists.

In this study, only the major issues discussed in classical Islamic jurisprudence of Waqf will be considered as subject of analysis. Periphery issues not relevant to the discussion of this research or are considered to be specific or idiosyncratic to certain Schools of jurisprudence will be omitted, or when relevant, mentioned in a cursory manner. The underlying principles which all the schools utilize will be investigated and analyzed in order to present a more complete understanding of the motivations behind classical laws. Consequently, the researcher will have grasped the ideas behind Waqf laws that formed the basis for classical law. This understanding will then be used to critically interrogate the opinions of contemporary researchers. [28]Also, the researcher intends to discuss the legal

[27] This is because the classical scholars have laid the foundation of what the principles of Waqf are according to the Qur'an and Sunnah. So, for Muslims they must adhere to them.

[28] Last half century is the era of revival of the evolution of the realm of jurisprudence of Waqf (Abdullah, 2017, p.70). This pace can be attributed to the decolonization of Muslim world and contribution of the bodies of Islamic scholars (Kahf, 2004, p. 11). The later jurists of this period faced many new cases and issues that were unknown in previous times. Therefore, they needed to address it. They took up the matters and further enriched the fiqh by responding to these queries (Kahf, 2003, p. 8). In addation, many innovative reforms have taken place and scholars of later era and contemporary times such as: al-Zuḥaylī, Abū Zahrah, al-Zarqā, al-Kubaisyī, Ibn Bayyah and others have extended the corpus of jurisprudence to many new shores and accommodated new trends and they analyzed the discourse of Waqf in the light of contemporary needs (Al-ʿAbdu al-minʿim, 2019, p.235). The contemporary scholars have really made a good understanding how Waqf was interpreted and defining it so that it be relevant in modern time by

terms related to the Waqf company with Islamic Sharīʿah rulings in Waqf in order to make sure if the Waqf company complies with the Waqf principles and rules in the Sharīʿah law. I will mention resources that include legal opinions (*fatāwā*) of jurists (*ʿUlamāʾ*) (interpreters of religious knowledge in Islam). These legal perspectives on Waqf companies and partnerships in Sharīʿah are extremely useful. In addition, they enable the researcher to understand both the classical definition of Waqf and Company as well as to resources that was written by contemporary Muslim commentators. We should note that the opinion of classical Schools is very important, given that they are often regarded as being more reliable than modern day commentators.

The research is conducted in the context of the Kingdom of Saudi Arabia, and the traditional interpretation of Sharīʿah is the heart of it. The government has the power to issue laws, international treaties and agreement and pass amendments by Royal Decree, as long as they are not contrary to Islamic injunctions. Therefore, the focus will be on Saudi Arabia's legal structure and the Waqf regulation. I will evaluate the existing laws and regulations governing Waqf practices in Saudi Arabia in order to identify the challenges, restrictions and roadblocks with respect to the establishment and operations of Waqf company in Saudi Arabia. In addition, the critical analysis will cover many government's organization as the responsibility of supervision of Waqf activities is dispersed among various authorities in Saudi Arabia and not concentrated in one central authority.

Literature Review

The goal of the literature reviews is to show several related studies that has previously been performed in this area, to highlight any shortcomings or gaps in any of the previous studies and to give a review and contribution to the written works. There are many works on Waqf law from differing views and contexts, however, the researcher has identified nothing that would specifically address the topic at hand.

relying on the same tools as did the classical jurists. So, it becomes very important to mention their effort in Waqf law.

The notion of Waqf company attracted the interest and attention of scholars once again when a Malaysian corporation, Johor Corporation (JCorp) created a Waqf by dedicating its shares worth RM 200 million in 2006 (Ramli and others, 2013, p. 23). These practices of Waqf company have yet to be endorsed widely in Islamic world at global level (Al-ʿAbd al-Munʿim, 2019, p. 99). For example, in Saudi Arabia the Waqf company started appearing since 2014.[29] Whereas the contemporary Islamic jurists did not reach a consensus about the permissibility of Waqf company (Ibid). In my point of view, the reason behind that is because the Waqf company practice has evolved rapidly without a valid adaptation and conception to its juristic basis in Islamic law. Therefore, academic literature dealing with the position of Sharīʿah regarding Waqf company in Saudi Arabia is scarce. The issue that has usually been addressed by authors is whether it is permissible, according to Sharīʿah, to regulate Waqf company within the legal systems of Islamic countries.

On the other hand, the new bill 2016 has recently been published. Critical analysis of this bill are also very few in number, and there is not a single book that addresses this bill. Some literature does exist on methods of the investment in Waqf in Saudi Arabia. However, only a few researchers have addressed the specifications, and there is no modern monograph. In other words, further study is needed on the topic that includes a critical analysis of the current legal system and identifies its flaws and weaknesses. Consequently, the thesis' key feature is that it offers a special, systematic, and distinct careful analysis of the Saudi Waqf company method in general, as well as an important contribution to understanding the jurisprudential (*fiqh*) theoretical framework for the concept of the Waqf company.

This section summarises the most notable publications on Waqf law. As we shall show, there have been no published works dealing with the Waqf company in terms of demonstrating how closely it corresponds to the opinions of the classical scholars in particular.

[29] Al-Zāmil in his a paper that has been submitted in "the second conference for regulating and development Waqfs" that was held on 14/02/2017. in Intercontinental Hotel in Riyadh).

A significant number of publications have been contributed to the study of Waqf, both published and unpublished. As a result, the researcher's goal is not to explore all of those writings, but rather to focus on the most important ones that are closely connected to the method and topic of the current study.

From the classical period to the present day, there have been several publications on the law of Waqf. Traditional Muslim jurists' previous writings were usually classified into various schools of law, the most important of which were the four Sunni schools, which included the four significant Abū Hanīfa, Mālik, Shāfiʿī, Ahmād Schools. In general, contemporary literature makes full use of all of these Sunni Schools' codified law (Mahamood, 2000, p.2)

It should be highlighted that Sunni Schools provided a large number of discussions on lawful and theoretical framework of Waqf law. This may be observed in many publications for an instance: Al-Nawawī's in *Al-Majmūʿ*, Ibn ʿAbd al-Barr's in *Al-Tamhīd*, Ibn Qudāmah al-Maqdasī in *Al-Mughnī* and such as. However, Abū Bakr Aḥmad bin ʿAmrū Al-Khaṣṣaf and Hilāl ibn Yaḥyā ibn Muslim al-Baṣrī both wrote *Kitāb Aḥkām al-Awqāf* in the fourteenth century, attempting to systemize the regulation concerning of waqf law. In terms of subsequent literature, Ibrāhīm ibn Mūsā al-Ṭarābulusī, *Kitāb al-isʿāf fī aḥkām al-awqāf* deserves particular mention. They sought to elucidate every legal problem involving Waqf in these works in a more methodical manner. A first two books are structured in a question-and-answer style, while the third seeks to summarise the fundamentals of waqf law as outlined in the first two. All three works are written from the perspective of the *Ḥanafī* school opinion, and they provide a substantial contribute to that school's interpretation of Waqf law.

Likewise, there is a significant amount of contemporary literature dedicated to Waqf. Books, thesis, periodical articles, and monographs are among the publications available. Only the best works are mentioned below, which have focused on Waqf through the Waqf

classical and contemporary *fiqh* literature or on Waqfs in Saudi Arab and addressing its legal problems.

Several books have been written about Waqf in recent years. *Muḥaḍarāt fī al-Waqf*, written by Muḥammad Abū Zahrah, was published in 1959. The law of waqf in Egypt is covered in this book, which combines classical *fiqh* and contemporary law. This book, on the other hand, does not go into detail into this law. Many issues of Waqf property movable were overlooked.

Muḥammad Al-Kubaysī, in his book *Ahkām al-Waqf fī al-Sharīʿah al-Islāmiyyah* published in 1977, is another work that has become a reference in the law of Waqf. The law of waqf in the four Sunni schools, as well as the *Shīʿah* school [30] has been collected in this book. However, the book lacks a critical analysis, substantive analysis, or commentary, and it does not address contemporary legal issues.

Besides this, Muṣtafā Al-Zarqā wrote *ʾAḥkām al-Awqāf* in 1997, which is a book about Waqf. The book covers many elements of waqf from both a classical and modern perspective, however many significant problems regarding waqf are not addressed such as exchange of the Waqf assets, cash Waqf and so on. In addition, the book employed a descriptive and explanatory approach without any analysis, therefore there is little critical analysis in it.

On the level of academic literature, there are several works that have been presented at various institutions.

In PhD thesis by Muhammad Zain bin Haji Othman (1970) aimed at studying: The Theory, Practice and Administration of Waqf with Special Reference to the Malayan State of Kedah. Islamic Law with particular regard to the institution of Waqf is the title of a section

[30] **Shīʿah**: "one of the two main branches of Islam (the other being the Sunni), making up a tenth or more of the entire Muslim population, and forming the majority in Iran and Iraq, which regards Mohammed's cousin Ali and his successors as the true imams". See the official website of Collins dictionary, available at: https://www.collinsdictionary.com/dictionary/english/shia, accessed: 15/7/2021.

of his thesis that has been published. The Ḥanafī Law has received a significant interest in this work and in the theoretical section of his thesis. Comparatively, nothing has been mentioned about the other schools. This is reasonable since, when we look at the classic writings of jurists, we discover that the Ḥanafī school is the most advanced in terms of discussing Waqf law (Harasani, 2015, p.7). As a result, many contemporary writers prefer to concentrate on this school rather than others (Ibid). However, in my research I made a comparative approach among the four schools and with taken consideration about what has been written by contemporary jurists or decisions from different Islamic institutions on Waqf law.

A study by Mohammad Abdullah in his thesis (Analysing the Jurisprudence of Waqf and its Socio- economic Implications vis-à-vis English Trust, 2017). This study contributes to the waqf literature by contrasting the jurisprudential principles of Waqf with those of English trusts, and then critically analysing the socio-economic elements of the two institutions in comparison. This thesis may be described as well-written, as it provides a thorough descriptive and analytical examination of classic Waqf schools, following by a critical analysis of the theoretical framework of waqf jurisprudence from an Islamic law viewpoint, all while demonstrating a high level of academic research. Despite the fact that the thesis is new, having been submitted in 2017, the issue of Waqf company was not covered in this thesis.

On considering the role of Governance and Accountability in Corporate Waqf Institutions in Saudi Arabia, Mohammed Alomair in his thesis (2018) provided an empirical study using qualitative research methodologies to assess and compare the existing practice of governance and accountability of three waqf organisations from diverse sectors (i.e., private, public, and third sector) in Saudi Arabia. Furthermore, the goal of this research is to implement and test the stakeholder salience theory in Waqf institutions. Semi-structured interviews and document analysis were among the research methodologies used in this thesis. This thesis is regarded as one of the greatest works that explains in full the stages of the Waqf system's historical development in Saudi Arabia. In terms of Sharīʿah, however, his research did not focus on the classic works of known Muslim jurists in order

to fully grasp their perspectives on the Waqf institution in Sharīʿah. Nor did he take into consideration books written by modern Muslim commentators, or decisions from different Islamic institutions. This is significant since classic writings are considered to be more trustworthy. Furthermore, it did not consider the opinions of opponents and proponents in contemporary jurists on Sharīʿah about the Waqf company.

Hamid Harasani has done a more ambitious research study. Harasani presented a PhD thesis in 2015 that included a comparison between Islamic Waqfs (endowments) and English trusts. Harasani's research was to give a comparative study in the areas of private trust and Waqf law, and this work has demonstrated that English and Islamic law may reconcile. Though that is not to suggest they are reconciled right now; they plainly are not, but the possibility exists. Two major points of contention between trusts and Waqfs have been addressed in this book: their opposing views on perpetuities and their differing ownership structures. Within the Ḥanbalī school, Harasani offered a thorough examination of the theoretical framework for regulating Waqf ownership concepts. Comparatively, the other schools of thought have received very less attention. The primary criticism of his research is that the topic of Waqf company is not covered in this book. Despite the fact that this is an in-depth research, it does not cover the legal issues of Waqfs legislation in Saudi Arabia. It is more of a descriptive study with comparisons than anything else.

Al-Dawood (2015) studied the legal setup of a Waqf Corporation in the Saudi System; this study discusses the Waqf Corporation's rules from a legal perspective, alongside a discussion on the company system in the Kingdom of Saudi Arabia. The main critique of this research is its failure to produce a doctrinal legal analysis of the waqf company in Islamic Sharīʿah and highlight the Sharīʿah considerations on this new form through the waqf classical and contemporary *fiqh* literature. What is more, although the study focuses on Saudi Arabia, it was published in 2015, before the introduction of the new bill of non-profit corporation in 2016. Nonetheless, the author suggested that the Saudi government establish a new Waqf company regulation structure.

A comparative study by Tahir (2015) aimed to compare the areas of similarities and differences in relation to the Sharīʿah and the legal framework in Malaysia and Saudi Arabia, where the Sharīʿah and the legal criteria applied to the Waqf was compared in both countries. This study is based on a qualitative approach. The researcher has studied several different legal elements related to Waqf in Malaysia and Saudi Arabia as well. The study found that the Islamic rulings pertaining to Waqf are very much essential for both the individual and institutional authorities managing the Waqf, and that there are significant similarities and differences between the two legal frameworks. The study is an attempt to contribute positive to the field of Waqf from an academic stand of views as well as practical reality. It can be said that this research is a well-written one which offers a good comparative and analytical study involving a high standard of academic research. However, although this thesis is new, but the subject of the Waqf company was not studied in this research or addressed.

In sum, the research planned, designed and discussed in this thesis is unique in its approach to study the Islamic Waqf company, as the above-mentioned studies do not analyze the waqf company by proving to what extent can be correspond with the opinions of the classical scholars in the four Sunni Schools. This meant that one single School of jurisprudence was not enough to solve the challenges of modern times. Rather, the opinion of multiple scholars and Schools were sometimes required to justify the opinion. There are some cases were all the schools had to be abandoned and independent *Ijtihād* had to be made in order to come to solution. Another critique with previous studies that they did not take into consideration books written by modern Muslim commentators, or decisions from different Islamic institutions or the opinions of opponents and proponents in contemporary jurists on Sharīʿah about the permissibility of Waqf company. Furthermore, it assesses if the current practices surrounding Waqf are in accordance with Sharīʿah. It also provides a critical review of the opinions of Islamic jurists on the Waqf Company. Therefore, one of the main concerns of this study is to examine whether the current practices of Waqf investment, including the current uses of Waqf company that operate in Saudi Arabia, to what extent it adheres to principles and rules of Waqf in Sharīʿah, and to assess whether legal regulations surrounding Waqf in Saudi Arabia have enough flexibility to include new

concepts, techniques and structures or is it rigid and its original and traditional model should remain intact. Moreover, the latest bill of non-profit corporation system in Saudi Arabia, which the Waqf company is a part of, has just been issued. That is to say, this research would be the first, or at least one of the first, to study and analyse the Waqf company concept and its application in the Kingdom of Saudi Arabia in light of the new bill nonprofit corporations.

Outline of Chapters

This thesis will be comprised of seven chapters. The introduction to the overarching components of the thesis. It is here that the significance of and motivation for the research is spelled out, as well as the research problem, aims and questions. These are derived from a literature review, which also forms part of the chapter. Once these components have been laid out the chapter outlines the methodology used in the thesis.

The second chapter provides the necessary background information to the legal structure underpinning the waqf in Sharīʿah. The chapter will provide a brief summary of the concept of Sharīʿah and its legislative sources, and also a discussion of the four major Sunni Schools. The third chapter will go in depth further into the meaning of Waqf, its legal and Sharīʿah interpretations and its characteristic from the different *madhāhib*. It will also review the literature of Waqf, its essentials and types as well as some Qur'anic injunctions and a very brief history of Waqf in order to correctly understand it. Views from different scholars will be discussed based on a Sharīʿah interpretation.

The fourth chapter looks at formation of the Waqf Company from the perspective of Sharīʿah. This chapter aims at analyzing the process and progress of the development of classical Waqf to Modern Waqf Company. This chapter will also reveal general structure of the Waqf based companies. This chapter will discuss and give a critical analysis of the concept of company or sharing/partnership in Sharīʿah. To examine and analyze the relationship between all parties involved in the Waqf company, it is essential to understand the Sharīʿah point of view relating to *sharikah* (partnership). This chapter digs into critical

discussion on how the adaptation of the Waqf company function in the light of the integral-pillars (*rukn*) of Waqf. Doing so will allow us to fully understand whether the fundamental principles of *fiqh* al-*awqāf* has the ability to adopt and successfully absorb new concepts such as the waqf company.

The fifth chapter will examine some issues and challenges that may be faced by the industry of Waqf company. From a Sharīʿah perspective, I will make suggestions for overcoming these obstacles. This chapter will also reveal into critical discussion list of financial, legal and management challenges that can be faced by the Waqf company. Views from different scholars who do not agree in the modern form of Waqf company. I will discuss and analyze their arguments keeping in view the rulings of Waqf in Sharīʿah and modern structure of waqf company based on a Sharīʿah interpretation

The sixth chapter is where we will find a discussion and overview of the regulative frameworks that underpin the Waqf company in Saudi Arabia. The various authorities are also discussed. These issues are important, because they directly affect the operation of the Waqf (and are even more so in light of recent reforms, as we will see). We will see that the Waqf system is heavily influenced in Saudi Arabia by Sharīʿah, and that the authorities play a very important role in their operation. This chapter will provide a brief overview about the timeline of regulatory framework of Waqf until the establishment of the General Authority for Waqf in Saudi Arabia. This chapter will include a critical analysis of Saudi Arabia's regulatory frame, highlighting the gaps and obstacles that the Waqf company faces, as well as guidelines for overcoming these challenges. The most important law in this regard is the Saudi Nonprofit Corporation bill of 2016.

Chapter seven offers up the conclusions that have been reached and, in so doing, summarizes the thesis as a whole. Towards the end of the chapter a number of recommendations are provided that can be used to improve the Waqf company system in Saudi Arabia. It will provide suggestions for future research and further work in this regard.

Chapter Two

A Brief Background for the Theoretical Framework in Islamic Law

Introduction

In Islam, society has a right over the rich and the rich have a duty to serve society. This precept can be understood from the multiple verses of the Qur'an which talk about charity and looking after the less fortunate people. Wealth given to people is a gift from Allah and thusly Allah has made them responsible to spend their money to improve the society they live in, for example: Allah says: "O you who have believed, spend from that which We have provided for you before there comes a Day in which there is no exchange and no friendship and no intercession"(Qur'an, 2:254) . Also, Allah says: "whatever good you spend (in charity and other good causes) is to your own benefit, and (as believers) you do not spend but in search of Allah "Face" (seeking to be worthy of His favor). Whatever good you spend will be repaid to you in full, and you will not be wronged" (Qur'an, 2:272). One such way the wealthy desire to improve the conditions of less fortunate segments of society is by giving away some of their properties in the name of charity (Harasani, 2015, p. 30). Therefore, charitable organizations are an important part of a society. These charitable organizations are governed by the legal system of that particular country, and they have to run according to the laws that regulate Trusts and charitable organizations. For instance, in the United Kingdom the "Charities Act 2011" regulates the charities in England, and this means that any organization which have charitable aims and objects must conform to those laws (Abdullah, 2018, p. 120). This is no different in Islamic law. In Islam, the concept of charity is vast and not limited to financial bestowments.[31] However, the common understanding of charity involves giving money. There are many forms of this and one such form is charitable endowments known as Waqf in Islamic law. Islamic law has stipulated strict guidelines to be observed when setting up a Waqf fund (Al-Jazīrī , 2000, p.112).

[31] For example, the Prophet Muhammad said that "smiling at another person is an act of charity". (see: Al-Tirimidhi, Hadith no. 1956)

Since charitable acts are a voluntary part of life it requires a level of flexibility to cater for different situations as well as the change of time and eras. In English law, for example, the law of charitable organizations reached to maturity through the historical experiences of centuries, in the same way Islamic law of Waqf has passed through the test of time and emerged in the present form (Harasani, 2015, p. 69). Islamic law is the axiom [32] that regulates the administration of Waqf. Muslims believe that Islamic law is a sacred law (Mahmood, 1988, p.9). Joseph Schacht rightly commented about Islamic law that it is "comprising on an equal footing ordinance regarding worship and ritual, as well as political and (in the narrow sense) legal rules". Thus, "each institution, transaction, or obligation is measured by the standards of religious and moral rules". (Schacht, 1966, p.201). Thus, Waqf has to be administered according to the standards prescribed by Islamic law. Therefore, before going into detail about the law of Waqf in Islamic law, it seems apt to give an overview of what Islamic law is and what its sources and where from were derived. This synopsis will also set the boundaries as to how much the law of Waqf is unchangeable and where the flexibilities of adaptation in Islamic law to recent principles are. This will help to provide a better understanding of the operational framework of Waqf company and whence it draws its legitimacy. In doing so, the basis of the Waqf company and why it was included into Islamic jurisprudence will be better understood as well as the function of this model.

Islamic Law, Islamic Jurisprudence and Islamic Sharīʿah

Regarding the legal dimension of Muslim law, there are three concepts which are at times conflated and confused. The centre of this is the word Sharīʿah and the other two terms are a result of the former. The meaning of Sharīʿah was not something that classical scholars exhausted their time to define. Perhaps this was due to the fact the term was known and so common that it did not require an exhaustive discussion. Al-Shawkānī claims that the definition of Sharīʿah is not controversial, from a Muslim theological perspective, and scholars are in general agreement regarding both its technical definition as well as the

[32] **Axiom**: "a statement or principle that is generally accepted to be true". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/axiom?q=axiom+, (Accessed: 13/4/2021).

objective (*Maqāṣid*) of the Sharīʿah (Al-Shawkānī, 2000, p.123). The literal meaning of Sharīʿah is 'the clear way' or 'path'. Its origin is an Arabic word for the place where people and animals can drink water (Al-Zuḥaylī,1997, p. 23).

Abū Zahrah attempts to describe the development of the term Sharīʿah from the classical period of Islam to the contemporary. He maintains that the Qur'anic use of the word Sharīʿah denotes *dīn* or religion, hence that is its primary use and meaning during the classical period (Abū Zahrah, 2006, p. 7). His justification for this is that Sharīʿah denotes the essentials of Islam, which was the term was employed by the Prophet Muhammad in response to a Bedouin [33] who requested the Prophet Muhammad to depute someone to teach them the Sharīʿah, that is to say, the essentials of Islam. There are two major problems with Abū Zahrah view. Firstly, there is no indication that Sharīʿah meant the 'essentials' of Islam either in the Qur'an or in the prophetic Tradition (Al-Qaṭṭān, 1996, p. 78). Al-Qarḍāwī remarks, 'The Qur'an uses the word Sharīʿah to refer to Islamic rules' (Al-Qarḍāwī, 1997, p. 7) "Then We put you, [O Muhammad], on an ordained way (Sharīʿah) concerning the matter [of religion]; so, follow it and do not follow the inclinations of those who do not know." (Qur'an 45:18).

The request by the Bedouin to send an instructor was in no way a request to send a teacher to teach only the bare essentials. Rather, it was a request to the Prophet to send someone who can instruct others about the teachings of Islam in general and not restricted to the essentials. Secondly, Hassan (1994, p. 25) attempted to confine the meaning of Sharīʿah to one particular aspect and make it the primary meaning, when the fact is that Sharīʿah does not have a confined meaning, to wit, the essentials of Islam. Moreover, the use of Sharīʿah to denote the essentials of Islam was not adopted by the classical scholars of Islam.

The word 'Sharīʿah' is therefore used in Islam to describe the path that people should take, following the rules of Islam, as this will guide them to finding the truth about what is best for mankind, both in life here on Earth and in the hereafter (Al-Qaṭṭān, 1996, p. 82).

Generally, the common understanding of the word for lay person who is not expert in Islamic Sharīʿah is that it is a body of rules scattered in Qur'an and Sunnah as interpreted

[33] B**edouin**: "a member of an Arab people living in or near the desert". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/bedouin?q=+Bedouin+, (Accessed: 13/4/2021).

by Jurists (Al-Khurashī, 2000, p. 27). However, Muslim scholars employ the term 'Islamic Sharīʿah' when referring to the dogmatic and practical rules (Al-Zarqā', 1998, p. 48) found in both main sources (Qur'an and Sunnah) and the secondary sources.[34] Muslim Scholars agree that the scope of Islamic Sharīʿah covers a wide field of issues, for example devotional acts of worship (*ʿibādāt*), family matters, civil transactions, unlawful behaviour and both internal and external affairs of the state (Al-Zuḥaylī, 1998, Vol. 3 p. 438).

Literature in the English language related to Islam uses the term 'Islamic Sharīʿah' interchangeably when referring to the rules of Islam in widespread (Kamali, 1991, p. 11). However, in Islamic Arabic literature, the term 'law' is only employed to refer to rules that have been set by man, not those that originate from the primary sources of Islamic Sharīʿah (Al-Qaṭṭān, 1996, p. 109). Therefore, scholars in the field of Islamic jurisprudence do not tend to utilise the both terms interchangeably i.e. the term '*al-Qanūn al-Islami*' which is supposed to be a loose translation of Islamic Law and Islamic Sharīʿah (Ballantyne, 1986, p.49). 'Law' is defined by dictionaries as an 'enforceable body of rules that govern any society'[35] and it is implemented for criminal and civil liability by an appropriate body. The reason for this lies in the notion of 'law' as understood in western jurisprudence. Law as defined by the Salmond is "the body of principles recognized and applied by the state in the administration of justice. Or, more shortly: The law consists of the rules recognized and acted on in the courts of justice." (Salmond, 1945, p. 9). Wael Hallaq (Hallaq, 2009, p. 7) does not believe that the same is true regarding Islamic law. He argues that legal experts were not subject to the authority of the state in Islamic history as the concept of state that the world knows today did not exist back then. So, the role of state was limited with regard to the development and application of Islamic law. Thus, this concept of law is not the synonym for what was found in Muslim lands. Moreover, the scope and areas of "law" as in western sense was and is limited as compared to the Islamic Law as the former does not include the rituals or religious obligations (Ibid). While Islamic Sharīʿah goes further, as it sets out the consequences of not abiding by the rules – both material consequences and the religious consequence of punishment in the Hereafter (Al-Zarqā', 1998, p. 51). For example, the Qur'an requires that contracts be honoured, and anyone

[34] These sources will be explained later. See page 37.
[35] Oxford Dictionary of Law.

breaching this injunction, “O ye who believe, fulfil your undertakings.” (Qur’an, 5:01), must pay compensation to the other party. The person would also then be regarded as having sinned, as they have not adhered to the teachings of the Qur’an.

In accordance with the Qur’anic connotation of classical meaning of Sharīʿah, and in line with how it has been understood in both ancient and modern Islamic literature, the rules contained within or taken from the Qur’an or Sunnah shall be referred to as Islamic Sharīʿah or Islamic Law, in this study. The terms are interchangeable. It is also common to see the terms Islamic Sharīʿah and Islamic jurisprudence (*al-fiqh al-islamī*) being used interchangeably. *Fiqh* is defined as knowledge and it is often employed in the context of the knowledge of the rules and principles associated with Islam (Ibn al-Mundhir,1994, p. 345). *Fiqh* may be defined as the understanding of the practical rules of Islamic law extracted from the specific evidences of various sources of Sharīʿah. This definition is widely agreed (Al-Ghazālī, 2001, p. 27).

Fiqh, therefore, is not really a series of rules that must be obeyed, but rather an intellectual activity. Instead of dealing with devotional issues only, it is also concerned with the practical, legal rules of Sharīʿah. Islamic Sharīʿah, on the other hand, does constitute a body of rules and it encompasses all of the regulatory framework of the religion of Islam (Al-Qarḍāwī, 1997, p. 16). The rules of Islamic Sharīʿah are deduced through the knowledge provided by Islamic *fiqh*. Muhammad Abū Zahra points out that the strong link between the two can also be seen in the fact that the jurists have classified the secondary sources as a part of Islamic law (Abū Zahra, 2006, p.46). For Instance, *Qiyās* (analogical reasoning) and *maṣlaha mursalah* (public interest). Islamic jurists have closely observed the sources and confirmed them from the Qur’an and Sunnah (Abū Zahra, 2006, p.46). Therefore, Islamic Sharīʿah and Islamic *fiqh* are closely connected, despite that fact that they are separate concepts. [36] However, as Islamic law is a part of Sharīʿah and is used generally for law associated with the religion of Islam. Moreover, because of many authors interchangeably use the words Islamic law, Sharīʿah, or Islamic jurisprudence (*fiqh*) which has created confusing definitions. Readers who are trying to determine the meaning of each concept may led to make distraction. Hence, for the purpose of this study the researcher

[36] For more details about that, see Kamali P in his book (principles of Islamic jurisprudence), 1991, pp.40-60.

will use the term Islamic law or Sharīʿah interchangeably when referring to the Islamic legal rules. The reason is the Sharīʿah has a wide scope, so translation into a single term in English will not be a justified (Kamali, 1991, p. 40).

Sources of Islamic law

Sources are the means to find rules (Salmond, 1945, p. 137). In any legal system, legal rules are extracted from these foundations. Every legal system has its own sources from where laws are derived. Salmond classified legal sources into constitution [37], legislations, Precedents [38], Customs [39] and expert witness [40] (Salmond, 1945, p. 149). As Islamic law is religious law, the source of all laws is divine in this system. That means that it should be based on Qur'an and Sunnah (Prophet's divinely guided lifestyle). Allah instructs Muslims in the Qur'an, "And if you disagree over anything, refer it to Allah (God) and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and best in result", (Qur'an, 4:59). The great Ḥanbalī polymath[41] Ibn al-Qayyim states that the habit of referring disputed legal matters to the rule of Islamic law is a precondition for believing in Islam (Ibn al-Qayyim, 1993, vol. 1, p.292).

This does not mean that the ambit of law is curtailed to the apparent meaning and strict translation of these texts. Rather, it is discovered, expounded and applied through other evidence as well and enrich the realm of *fiqh* and these evidences become sources of

[37] **Constitution**: "the set of political principles by which a state or organization is governed, especially in relation to the rights of the people it governs". see the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/constitution, (Accessed: 14/4/2021).
[38] **Precedents**: "a decision about a particular legal case that makes it likely that other similar cases will be decided in the same way". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/precedent?q=Precedents, (Accessed: 13/4/2021).
[39] **Customs:** "A common tradition or usage so long established that it has the force or validity of law". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/Customs (Accessed: 14/4/2021).
[40] **Expert witness:** "a person who is asked to give their opinion on a particular subject in a law court because of their knowledge or practical experience of that subject". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/expert-witness, (Accessed: 14/4/2021).
[41] **Polymath** : "a person who knows a lot about many different subjects
". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/polymath?q=polymath, (Accessed: 21/4/2021).

Islamic law. Patricia Crone rightly argues that Islamic law is a divine law elaborated and transmitted by private scholars. In the early era, it was somewhat in control of Caliphs but in later era like in late Umayyad [42] times and it became pure scholarship (Crone, 2002, p.18)

The Qur'an and the Sunnah constitute the primary sources of Islamic law. Their status as primary sources cannot be contested. They are considered to the most legitimate and trustworthy sources of information. Muslim scholars of all ages agreed that the Qur'an and the Sunnah are the primary sources of Islamic law, although they may differ in interpretation, application and details, as well as they may differ regarding which Hadith they find acceptable to use as an evidence for law (Ibn al-Qayyim, 1993, vol. 1, p.285). [43]

Primary Sources:

The Qur'an

Patricia Crone (2008) observes, "Sources dating from the mid-8th century onwards preserve a document drawn up between Mohammed and the inhabitants of *Yathrib* (The old name for Madinah city), which there are good reasons to accept as broadly authentic; Mohammed is also mentioned by name, and identified as a messenger of God, four times

[42] **Umayyad**: "The first dynasty of Arab caliphs (661-750). Its capital was Damascus, and it is known for its encouragement of the arts and architecture". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/Umayyad, (Accessed: 21/4/2021).

[43] Waqf, like all other supererogatory charitable actions sanctioned by Islamic law, is governed by a set of well-defined jurisprudential rules. The practice's of Waqf targeted aims can only be achieved if certain principles (known as Waqf *fiqh*) are followed (Ibn Qudāmah 1994, vol. 6, p. 190). So, the legal basis of rulings and concepts of Waqf law, which were formed and refined by classic Islamic jurists using *Ijtihād* (analogical reasoning) to deal with the challenges of their time, can be classified into two categories of legal sources that were openly used by the classic Muslim scholars in order to derive important rules in the classical Waqf law (Abdullah, 2017, p. 58).

Firstly, on the primary sources that composed from *naṣṣ* or scriptural text. In terms of the jurisprudential basis of Waqf, the *naṣṣ* is primarily consists of prophetic deeds and utterances, followed by companions' practises and statements. Secondly, on secondary sources and this included, Ijmāʿ (scholarly consensus), *Qiyās* (Analogy), *ʿUrf* (local custom), *sadd al-dhrāʾīʿ (*prohibition of evasive legal devices), *maṣlaḥah* (public interest) and *Istiḥsān* (juristic preference) (Ibid; Al-ʿAbdu al-minʿim, 2019, p.390). These sources formed as the foundation and grounds upon which classic Muslim scholars built the Waqf law framework. In contrast to the secondary sources in particular *Qiyās* and Istiḥsān, the amount of accessible *naṣṣ* on the primary sources in the framework of Waqf law is narrowly restricted (Ibn Bayyah, 2005, p.36).

in the Qur'an". (Crone, 2008, p.2). Qur'an is like the constitution for Muslims. All other laws should be in compliance to the commandments given in this Holy Book. Al-Āmidī, described the Qur'an as a divinely revealed text from God, revealed to the Prophet Muhammed, it was passed on through joint witnesses and testimony, otherwise known as *tawātur* [44] (Al-Āmidī, 2003, p. 215). The Qur'an is a sacred book to Muslims and the texts within it cannot be amended. The Qur'an is not the biography of Prophet's life. Rather, it throws glances on his life through the speech of God to him, instructing him about preaching, reacting to people ridiculing him, and how to console his supporters, and so on (Crone, 2008, p.3). The Qur'an is the first and foremost of the sources of Islamic Law. It entails that every obligation and command is binding on Muslims. No other source is higher than the Qur'an, as all other sources draws its legitimacy from its texts (Zaydān, 1976, p. 148). It is regarded as the most legitimate source of all, and all other sources must derive their rulings from the Qur'an. However, it must be noted here that Qur'an is not only a book of law or a book that overwhelmingly contain legal precepts. Rather, there are six thousand two hundred and twenty-six Qur'anic verses out of which approximately six hundred verses are related to legal rules of Islamic law (Al-Zuḥaylī, 1998, p. 438). Out of these six hundred verses, four hundred are related to rituals [45] (Ibid). Around two hundred out of more than six thousand verses are related to law i.e. crimes, personal law and other legal matters (Nyazee, 2005, p. 161). These legal verses can be definitive (*qaṭ'ī*) and can be probable (*ẓannī*) (Al-Zuḥaylī, 1998, p. 440). The former implies that the instruction is perspicuous therefore they cannot be subject to any alternative interpretation. This means that meanings are clear and authentic and can be easily understood by plain reading and there is no room for alternative interpretation other than what plain reading is giving. This type of verses is few, such the law of inheritance. That is to say, the Qur'an specifies the type of people who may claim inheritance and how much is their share of inheritance. Therefore, no form of scholarly interpretation is permitted to define half or third or quarter. On the other hand, the probable (*ẓannī*) verses are broad and can have more than one

[44] "it means a report by an indefinite number of people related in such a way as to preclude the possibility of their agreement to perpetuate a lie". (Muhammed Kamali, 1991, p,69).
[45] **Rituals:** "a set of actions or words performed in a regular way, often as part of a religious ceremony". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/ritual?q=rituals, (Accessed: 21/4/2021).

meaning. Consequently, they are interpreted differently by different schools of law. In constitutional matters, for example, the Qur'an founded the *Shūrā* system (governing by consultations), denoting Muslims as people 'whose affair is [determined by] consultation among themselves' (Qur'an, 42:38). The verses do not define the processes through which consultation might be achieved though.

Although the Qur'an is the original and primary source of Islamic law, this cannot be taken to mean that the Qur'an offers definitive precepts for all subjects, nor is every minute detail given for each case. Instead, the Qur'an offers wide guidance that seeks to cover all issues generally (Abū Zahra, 2006, p.35). Thus, some areas of life do not feature in the Qur'an; instead, justice is served by general rules, and people are exhorted to seek the truth (Zaydān, 1976, p. 189). We can therefore imply from this that if the various judges, lawmakers and jurists of Islam cannot find something in Islamic law that is specifically applicable, they can adapt another country's law if it is commensurate with principles of Islamic Law, therefore, the Qur'an requires other laws to be promulgated if they are inherently just (Al-Zarqā', 1998, p.109). This is very important in helping Islamic law to adapt to modern issues and situations.

The Sunnah

The literal meaning of Sunnah in Arabic is the path, or the road, but it can also be taken to mean a standard type of behaviour (Ibn Ḥazm, 1999, p. 67). The Islamic understanding of Sunnah is everything that the Prophet said - including the things he said to any or all of his companions - his deeds, or any of his companions' deeds or sayings that he approved of (Al-Juwaynī, 1980, p. 59). Such a sweeping definition covers even the Prophet's human actions, which are not classed as a source of Islamic legal rulings (Al-Ghazālī, 2001, p. 43).

A number of Qur'anic verses affirm that the Sunnah is a source of Islamic Sharīʿah. For example, Allah says in the Qur'an, "It is not for a believing man or a believing woman, when Allah and His Messenger have decided a matter, that they should [thereafter] have any choice about their affair. And whoever disobeys Allah and His Messenger has certainly strayed into clear error" (Qur'an, 33:36), "O you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer

it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and best in result" (Qur'an, 4:59).

Further to clear Qur'anic verses stipulating the obligation of adhering to the prophetic code and his instructions there is consensus among scholars that the Sunnah is the second source of law to the Qur'an (Ibn Ḥazm, 1999, p. 79; Al-Ghazālī, 2001, p. 50; Al-Juwaynī, 1980, p. 67). The importance of the Sunnah can be highlighted by pointing out that the function of Qur'anic legislation is to layout the precept and declare its observation. The Qur'an does not is almost all cases provide a detailed discussion of 'how' and 'what' of different scenarios. It was left to the Prophet Muhammad to demonstrate the practical application of these commandments. Al-Zuḥaylī mentions another reason for the Sunnah's second position which lays primarily in the manner the prophetic Traditions were recorded (Al-Zuḥaylī, 1998, p. 398). While the recording of the Qur'an underwent a rigorous system and multiple venues of preserving it, the documentation of the Sunnah did not receive the same level of attention. Rather, the documentation of prophetic Tradition was discouraged during the time of the Prophet Muhammad due to the fear of it being mixed up with the Qur'an and cause confusion (Abū Zahra, 2006, p.67). It is related that the Prophet Muhammad said, 'Do not write anything from me, whosoever has written something from me should erase it.' (Saḥīḥ Muslim, Hadith no: 3004). Attempts to record the Sunnah took place almost a century after the Prophet's demise. While the Qur'an existed in written form during the time of the Prophet and complied into one volume within two years of the Prophet's death the Sunnah was largely transmitted orally until it was recorded in the second century of Islam (Al-Zuḥaylī, 1989, p. 460).

The two fundamental sources are therefore very much interlinked, and judges will often, when consulting the Qur'an, additionally explore the appropriate Hadith to try and achieve a better understanding of whatever interpretation is relevant. These two primary sources are the foundation of law (Khallāf, 2002, p. 59).

It is also noteworthy that unlike the Qur'an the prophetic Traditions are subject to gradation. That is to say, because the Tradition was orally transmitted, the quality of this transmission is not the same. Therefore, Tradition was graded in terms of the quality of the narrators as well as the channel of this communication. The quality of the Tradition resulted in scholarly debate. For example, if a Tradition suffered in authenticity could that Tradition

still be accepted or not? Although most jurists maintained it should be used, they differed whether juristic reasoning was better than that a weak Tradition. For some jurists a weak Tradition was better than juristic reasoning while others maintained the opposite (Ibn Ḥazm, 1999, p. 102).

Secondary Sources

The role of the secondary sources is significant in Sharīʿah. Their ranking as secondary sources is due to the fact that unlike the Qur'an and Sunnah the secondary sources are a result of human endeavour. The purpose and reason for the existence of the secondary sources is to engage with issues that the primary sources did not deal with it. Therefore, although they are labelled as secondary sources to the Qur'an and the Sunnah, they still possess great significance. It is noteworthy that the application of these two institutions of Sharīʿah is subject to scholarly dissension.[46]

***Ijmāʿ* (scholarly consensus)**

Ijmāʿ has been described by al-Āmidī as a source of Sharīʿah, and it means the unanimous agreement of learned experts (*mujtahidūn*) in the study of Islam amongst the community of Muslims (*Ummah*) concerning legal issues (Al-Āmidī, 2003, p. 264). The Prophet's companions were the first to develop this source after the Prophet died in 632 CE. As Islamic territories grew and absorbed other peoples and cultures it created a new set of problems. The absorption of other cultures meant that scholars were confronted with issues and scenarios for which neither the Qur'an nor the Sunnah had directly answered. This forced the Caliphs (*Khulafā al-Rashidūn*) [47] to gather the jurists amongst the Companions and debate the issue in order to arrive at a conclusion and solution (Al-Zuḥaylī, 1998, p.

[46] The legislative framework for Waqf law is mostly based on secondary sources of Islamic law in general and analogous principles in specifically (Abdullah, 2017, p. 61). Therefore, the necessity for analogical reasoning and juristic interpretations of some important evidence emerged among the classical jurists as a result of the shortage scriptural text (*naṣṣ*) of Waqf law in the primary sources on Islamic law (Ibid). The fact that both the primary sources on Islamic law, the Qur'an and the sunnah, are mute on the term waqf can be used to illustrate this issue. They did not use the term "Waqf" and did not identify its theoretical framework aspects in detail (Al-Zarqā, 1998, p. 23).

[47] Rightly Guided Caliphs are those who led the Muslims after the death of the Prophet. Abū Bakr was the first one to lead, followed by ʿUmar, ʿUthman and ʿAli respectively.

487). Muṣtafā al-Zarqā, a famous contemporary jurist, provided illustrations of *Ijmāʿ* formed by the prophetic Companions. The question of inheritance being bequeathed by the grandfather to his grandson were his son to die prematurely, or the *Istisnāʿ* contract, which deals with detailed business contracts such as making allowances for staggered delivery, or manufacturing business deals (Al-Zarqā, 1998, p. 78).

Ijmāʿ is not considered divine in itself, so it is not applicable to matters which bear conclusive connotation in the Qur'an or in the Sunnah. However, it is contended by jurists that *Ijmāʿ* foundation is in the Qur'an and the Sunnah, and it has therefore acquired its authority from these texts (Al-Zuḥaylī, 1998, p. 539). The Qur'anic verse which alludes to supporting *Ijmāʿ* is, "And anyone who splits off from the Messenger after the guidance has become clear to him and follows a way other than that of the believers, we shall leave him in the path he has chosen, and land him in Hell. What an evil refuge" (Qur'an ,4:115). Kamali asserts that the commentators of the Qur'an observe that 'the way of the believers' in this verse refers to their 'agreement and the way that they have chosen', in other words, to their consensus. Adherence to the way of the community is thus binding, while departure from it is forbidden, and departing from the believers' way has been approximated to disobeying the Prophet, both of which are forbidden' (Kamali, 1991, p.169).

In like manner, the prophetic saying that is held to indicate *Ijmāʿs* authority is, 'My followers (or community) shall never agree upon an error' (Sunan Ibn Majah, Hadith no. 3950). Whilst this saying cannot be said to prove consensus to be a source in the law, it nevertheless establishes that when Muslims collectively agree, untruths cannot result, therefore consensus amongst Muslims must be regarded with great weight. A particular point to note is that *Ijmāʿ* is regarded as being a foremost secondary source because additional secondary sources emanate from it (Al-Zuḥaylī, 1998, p. 633).

***Qiyās* (Analogy)**

Analogical deduction or *Qiyās*, ranks fourth in the Sharīʿah sources' hierarchy and is positioned after *Ijmāʿ* (Kamali, 1991, p. 245). *Qiyās*, which is different to *Ijmāʿ*, has been extensively employed by jurists to try and figure out what the Sharīʿah-based injunctions would be (Al-Zarqā, 1998, p. 79; Ibn ʿĀshūr, 2001, p. 176). It is not considered as a primary

source as it is not truly independent, perhaps it is better explained as an extension to the primary sources.

Linguistically, *Qiyās* is employed to mean measure weight or length (Ibn ʿĀshūr, 2001, p. 234). As an Islamic Sharīʿah source, it describes the connection of an injunction of an existing case to a new case because of their potential cohesion in resolving an issue (Al-Shawkānī, 2000, p. 824). For example, if a situation arises for which neither the Qur'an, Sunnah nor *Ijmāʿ* contains a ruling, *Qiyās* will be used by the jurist, who will investigate the primary sources in search of the following answers:

Do the primary sources contain cases that resemble the new case?

- If so, what was the resultant ruling?
- Does the case from the primary source that resembles the new case contain an effective cause (*ʿillah*)?

Should the finding of the jurist be that the new case resembles a case that is found in the Qur'an, and that the subsequent rulings contain factors that are applicable in the new case, then the case's injunction will be broadened to include the new case. The instance that is most quoted on the *Qiyās* concerns alcohol and drugs (Zaydān, 1976, p. 196). There is prohibition in the Qur'an concerning the imbibing of alcohol, but it is silent on the subject of drugs. Alcohol is not allowed because of its ability to intoxicate, and because the Qur'an holds it to be a potential for evil and community difficulties. The same consequences are believed to result from drugs hence, the analogy is that there should also be prohibition on drugs, according to Islamic Sharīʿah (Al-Zarqā, 1998, p. 82).

On the other hand, Abū Ḥanīfa strove to relate new rulings by analogies when there is inadequate clarification in the Qur'an or other textual sources. These analogies were used as references to answer issues and arrive at a conclusion. Abū Ḥanīfa and Mālik have resorted increasingly to analogies in arriving at judgements (Al-Shawakānī, 2000, p. 829; Al-Shāṭibī, 2002, Vol. 2, p. 123). Zaydan claims that al-Shafiʿī and Aḥmad Ibn Ḥanbal have rejected this process as an invalid authority within the law (Zaydān, 1976, p. 202). Instead, they have chosen certain general texts to validate their views, although their opinions have had little bearing on the general overall acceptance of analogies (Kamali, 1991, p. 250). This is not entirely accurate. To claim that al-Shafiʿī and Aḥmad Ibn Ḥanbal have rejected *Qiyās* contradicts the manifest existence of it in their books and in their views.

Rather, what is correct to say is that they were reluctant to use *Qiyās* and they resorted to it less frequently than their counterparts Abū Ḥanīfa and Mālik.

Maṣlaḥah Mursalah (Consideration of Public Interest)

Under Islamic law, the community's betterment and best interest are of paramount importance in Islamic law, as illustrated by the Qur'anic text, 'and we have not sent you, [O Muhammad], except as a mercy to the worlds' (Qur'an, 21:107). *Maṣlaḥah* in Arabic means interest or benefit, while the literal meaning of *mursalah* is absolute, or without restriction (Al-Ghazālī, 2002, vol. 1, p. 478; Al-Qarāfī, 1994, vol. 1, p. 209). Thus, it means seeking benefit and repelling harm. This concept of Islamic law is somewhat similar to the concept of maximum human happiness as posited by Jeremy Bentham (2013, p. 4). But the real difference is that in Islamic law it is the Lawgiver who will give directions about what is benefit and what is harm. This will be determined according to the purposes of Islamic law (*maqāṣid al-sharīʿah*) [48]. They hold a definitive place because they are realized through the method of induction and not deduction from the texts. A thorough scrutiny of the entire texts of Qur'an and Sunnah revealed that all the laws basically establish, safeguard or maintain these interests. Some of the main objectives are to preserve life (*nafs*) and religion (*Dīn*), sanctity of lineage (*nasl*) perseverance of intellect (*ʿaql*) and protection of wealth (*māl*) (Al-Shāṭibī, 2002, Vol. 2, p. 390).

There are three levels of these purposes. Necessities *(ḍarūrāt*) holds the top position. These are those requirements that are mandatory to maintain the social structure of the society. Supporting needs (*ḥājāt)* are the next level of purpose of Islamic law. Lastly are the complementary norms (*taḥsīnaāt).* The notion of *maṣlaḥah* entails that whenever any new law is to be discovered, or derived, the purposes of Islamic law will be the test stone to check the validity of that law (Al-Qarāfī, 1994, vol. 1, p. 400).

[48] *Maqāṣid al-sharīʿah* refers to objective, intention or purposes behind legal rulings of *sharīʿah*. ʿAbd al-Malik al-Juwaynī, Al-Ghazālī, al-Rāzī, al-Qarāfi are the first few legal theorists who worked on discovering the *maqāṣid al-sharīʿah* from Qur'an and Sunnah. Through the method of induction, wisdom behind the legal rulings of Sharīʿah was unveiled. See for detail: Auda, J. (2008). Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach. International Institute of Islamic Thought (IIIT), pp. 1-6.

Maṣlaḥah mursalah constitutes one of Islamic law's secondary sources and is generally referred to in cases that do not contain any sort of injunction that might be located in either the primary sources or *qiyās*. The technical meaning of *maṣlaḥah mursalah* is the provision for taking public interest into account when expressing Islamic law-based judgements. Therefore, whatever act or initiative that either enhances the community or stops any damage, providing there is no particular text to question its validity, shall be regarded as *maṣlaḥah mursalah* (Al-Būṭī, 1965, p. 375).

The renowned scholar Al-ʿIzz Ibn ʿAbd al-Salām is recorded to have said: 'Islamic law is all about an interest in preventing harm or bringing about benefits' (Ibn ʿAbd as-Salām, 1999, p. 14).

Therefore, any new matter confronting Muslims may be debated in the spirit of *maṣlaḥah mursalah*, providing that such matters assist in maintaining any or all of the aims of Islamic law. An example of this is the area of medical or healthcare progress, which would be looked at under *maṣlaḥah mursalah* if such progress helped to retain the mental or physical faculties of any of Allah's creations - human or animal (Ibn ʿĀshūr, 2001, p. 345).

ʿAbd al-Wahhāb Khallāf remarks that if something is to be regarded as *maṣlaḥah mursalah*, and therefore an Islamic law source, particular considerations have to be fulfilled (Khallāf, 2002, p. 86). For instance, there must be no doubt, which must be certified after an evaluation is made to decide if real and certain benefits will result for the community. Moreover, the application of such an issue must be wide: it has to be in the interests of all the community, or certainly the vast majority of the community members, not just a small section. Such a principle is akin to the Western political maxim of 'the greatest good for the greatest number'. For the new ruling to pass as a suitable Islamic ruling it has to be in accordance to the teachings of primary sources and must not contravene or contradict definitive Qur'an, Sunnah or *Ijmāʿ* principles.

Al-Būṭī points out that *maṣlaḥah mursalah* has existed and been deployed from the time of the Prophet's successors (632 to 661CE); a number of cases can describe its function (Al-Būṭī, 1965, p. 353). Al-Shāṭibī, in his *magnum opus* [49], *Al-Muwāfaqāt*, offers a legal

[49] **Magnum opus:** "the most important piece of work done by a writer or artist". See the official website of the Cambridge dictionary, available at https://dictionary.cambridge.org/dictionary/english/magnum-opus, (Accessed: 21/4/2021).

example concerning the accountability of craftsmen. The Prophet's successors are reported to have declared that a craftsman should shoulder responsibility for any items entrusted to his/her care (Al-Shāṭibī, 2002, vol. 2, p. 319). The Qur'an and the Sunnah were silent on this, but a declaration was made in line with *maṣlaḥah mursalah* by the Prophet's successors. The principle involved that affects the public interest is the exhortation to craftsmen to look after others' possessions properly. *Maṣlaḥah mursalah* can be adapted to meet contemporary issues and challenges in today's world, such as an injunction from ban selling weapons during a civil conflict, as this might exacerbate the situation (Ibn Taymiyyah, 1997, vol.9, p.104).

Al-Qarāfī notes there are some jurists who have rejected the principle of *maṣlaḥah mursalah*. This is because they observed that the Sunnah does not encompass *maṣlaḥah mursalah* (Al-Qarāfī, 2010, vol. 2, p. 160; Al-Būṭī, 1965, p. 360). But this can be objected by pointing out that the practice of the Companions, their Successors and the leading Muslim jurists indicates that they based legal judgments and decrees on *maṣlaḥah mursalah* and took action to support it. For example, Abū Bakr, the first Caliph, gathered the dispersed records of the Qur'an and complied it into a single volume. He also went to battle with those who would not pay the zakat and he also nominated 'Umar as his successor (Al-Shāṭibī, 2010, vol.3, p. 329). All of this, Abū Bakr did based on the principles of *maṣlaḥah mursalah* rather than instruction from the Qur'an or Hadith. Moreover, it is noted that all jurists are in agreement over the concept and justifiability of *maṣlaḥah mursalah*, according to Shihāb al-Din al-Qarafi and other *Maliki* jurists, differing only on certain points of procedure. Some would accept it directly, whereas others would do so by bringing the *maṣlaḥah* in under the rule of *Qiyās* (Al-Qarāfī, 2010, vol. 2, p. 188; Abū Zahrah, 2006, p. 255).

This area is very crucial for this thesis. It ensures the flexibility of Islamic law to adapt itself according to the given circumstances within the limits of the ambit of Islamic law. It is particularly very important for the Waqf. This will be used later sections of the thesis to discuss and decide whether certain clauses of Waqf can be molded according to the needs or not. Whether any *maṣlaḥah* is strong enough and in alignment to the objectives of Islamic law as to cater it and change certain aspect of Waqf, all these aspects will be discussed in the light of this section.

***Istiḥsān* (Juristic Preference)**

The literal meaning of *Istiḥsān* is the preference of one item over another (Al-Āmidī, 2003, vol. 2, p. 290). Although there is dispute as to whether *Istiḥsān* is an Islamic Sharīʿah secondary source, a variety of definitions have emerged that seem to indicate the opportunity for the jurist to eschew the constant rule that was provided by *Qiyās*, which may result in inflexible and unfair demands, and choose a new ruling that the jurist considers to be more suitable (Zaydān, 1976, p. 231).

Kamali has looked at *Istiḥsān* in Sharīʿah and has considered it to resemble the Western legal frameworks of the equity principles. He, therefore, holds that: The foundation of Western law's concept of equity [50] and Islamic law's concept of *Istiḥsān* is justice and conscience; both principles favour departing from set law when it causes unfairness. The principal difference between them is that equity is based on natural law, whereas *Istiḥsān* is founded on Sharīʿah (Kamali, 1991, p. 207).

Istiḥsān can therefore be regarded as opposite to *Qiyās*, as the *Qiyās* works from the principle of identifying a case's injunction [51] by examining corresponding cases found in the main sources. *Istiḥsān* gives jurists the freedom to use their intellect to set a new case aside from any corresponding cases if unfair outcomes resulted from employing the same injunction as the corresponding cases (Al-Zarqā, 1998, p. 88). The famous example to demonstrate concerning the application of *Istiḥsān* is the 'contracts of manufacture' or *bay' al-istisnā'*. Contracts of deposit are founded in Sharīʿah on being trustworthy and the depositary's goodwill. Should there be disagreement between the depositor [52] and the

[50] **Equity**: "a system of English law that developed from the 17th to the 19th centuries that can still be used to judge a case fairly in a court of law if the rules of common law are not suitable". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/equity?q=equity+, (Accessed: 21/4/2021).

[51] **Injunction:** "an official order given by a law court, usually to stop someone from doing something". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/equity?q=equity+, (Accessed: 21/4/2021).

[52] **Depositor**: "a someone who deposits money". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/depositor?q=depositor+, (Accessed: 21/4/2021).

depositary[53], it is the depositary's claim that will be regarded as true (Al-Suyūṭi, 1983, vol. 2, p. 181) unless the depositor produces certain and irrevocable proof that the opposite is the case. *Istiḥsān* was employed to eschew the established rule in Islamic Sharīʿah, to wit, the onus of proof was on the plaintiff and the defendant had to swear that the claim was untrue, in favour of a fresh principle that establishes the authenticity of the claim of the depositary without any need to swear an oath. Furthermore, during ʿUmar Ibn al-Khaṭṭāb's time as the second Caliph, he suspended the legal punishment of stealing during the time of famine. It is also reported that he put a ban on selling female slaves whose master had children with them (*umm walad*) something that was permitted by the Prophet Muhammad (Al-Shawakānī, 2000, p. 903). These are examples of the *Istiḥsān.*

ʿUrf (Custom)

Being a secondary source in Islamic Sharīʿah, *ʿUrf* refers to widespread customs and practices that have been continued and accepted by people within particular regions, assuming that such customs and practices match the principles contained in the main sources (Ibn Ḥazm, 1999, p. 345).

Continuous practice for a long time amongst Muslims on a type of conduct or activity evolves into becoming *ʿUrf* (Ibn Bayyah, 2005, p. 34). If the *ʿUrf* is to be regarded by Islamic Sharīʿah, it must match with primary sources and is then known as *ʿUrf sahih* (or approved *ʿUrf*) (Al-Qaṭṭān, 2005, p. 277). However, if such conduct amounts to *ʿUrf fāsid* [invalid *ʿUrf*], for example, offering *riba* (usury) to creditors, these practices cannot be regarded as secondary sources of Sharīʿah, no matter how many peopleʿ may deal in it (Khallāf, 2002, p. 88). Wahba al-Zuḥaylī remarks that Muslim jurists, particularly *Ḥanafī* and *Mālikī* Schools, see *ʿUrf* as a Sharīʿah source, and regard whatever injunctions stem from a valid *ʿUrf* as having the same weight as injunctions stemming from the primary sources (Al-Zuḥaylī, 1998, p. 831). An example of this is that *ʿUrf* is very important in deciding the various rights and duties of husbands and wives – before they get married, while the marriage exists, and even if the marriage comes to an end. For example, according

[53]**Depositary**: "one to whom anything is given in trust or. a person or group to whom something is entrusted for safety or preservation". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/depositary, (Accessed: 21/4/2021).

to the *ʿUrf* the wife is allowed to retain the couple's furniture if the husband divorces his wife (Al-Zuḥaylī, 1998, p. 833).

The *ʿUrf* is also instrumental in interpreting the Qur'an and Sunnah. In al-Ashbah wa'l-Naza'ir, the author, al-Suyūṭī, describes that 'all the injunctions of Sharīʿah which appear in broad terms are to be interpreted according to *ʿUrf* (Al-Suyūṭī, 1983, p. 2, p. 198). Rulings that originate from *ʿUrf* evolve into elements of Sharīʿah sources, but these rulings are not necessarily set for all time. Islamic legal experts acknowledge that new *ʿUrf* can supplant old *ʿUrf* providing that the new *ʿUrf* maintains congruence with the primary sources (Al-Qarāfī, 2010, Vol .2, p. 201). *ʿUrf* plays an important role in charities and charitable organizations (Ibn Bayyah, 2005, p. 98). Every society has its own style of helping the less fortunate fellow men. The Islamic concept of Waqf has its roots in the Islamic law and the general practice of the society to help others. This thesis will show the use of *ʿUrf* of modern times for the charitable organizations. For example, the types of the charitable organizations, their administration, purposes and legal rulings.

An Overview of the Principles of (*Ijtihād*) in Islamic law

After providing a discussion regarding the range of sources of Islamic Sharīʿah, the principle to be discussed next is how the jurists arrive at their decisions and how the steps to these are made. This process is known as *Ijtihād*.

The Prophet Muhammad wanted to equip his followers and the subsequent generation of Muslims on the skills of how to solve legal issues by Ijtihād. An excellent example of this is the case of Muʿādh ibn Jabal when he sent him to Yemen as a governor. The Prophet Muhammad asked Muʿādh how he would deal with issues he faced. Muʿādh replied, "I would resort to the Book of Allah.' The Prophet then enquired, 'What if you cannot find it in the Book of Allah?' Muʿādh responded that he would look in the prophetic traditions. The Prophet then asked him, 'What if you cannot find it in the prophetic Sunnah?' He replied, 'I will exercise personal reasoning". (Abū Dawūd, Sunan, Ḥadīth: 1038). The Prophet Muhammad was clearly pleased with this reply which indicates his endorsement. Kamali attempts to dispel the scholarly dissention regarding the practise of Ijtihād by the prophetic companions by emphatically quoting the Tradition of Muʿādh and then he

asserts, “The correct view is, therefore, that of the majority, which is supported by the fact that the Companions did, on numerous occasions, practice Ijtihād both in the presence of the Prophet and in his absence.” (Kamali, 1991, p. 330) The strength of the evidence provided by Kamali gives weight to his claim, as well as Abū Zahra point out that the fact the majority of the jurists concur with this opinion (Ibn Ḥazm, 1999, p. 89; Abū Zahra, 2006, p.190; Al-Zarqā’, 1998, p. 78).

Ijtihād is very important for the matters of Islamic law generally and Waqfs in particular, this is because the rules of Waqf is mostly based on juristic reasoning (*Ijtihād*) (Al-Zarqā, 1998, p. 19).[54] The literal meaning of *Ijtihād* is to strive one’s utmost to arrive at a judgement (Al-Suyūṭi, 1983, vol. 4, p. 209). The technical legal explanation of *Ijtihād* can be described as the use of reasoning in the pursuit of trying to elaborate and explain a legal ruling (Al-Shawakānī, 2000, p. 1027). Therefore, *Ijtihād* requires a variety of skills related to a mental process of examining exegesis texts and coming to a conclusion. Thus, *Ijtihād* is distinct from *Qiyās* in the sense that *Ijtihād* is a form of *Qiyās*. In other words, all forms of *Qiyās* is a result of *Ijtihād* but not all *Ijtihad* is *Qiyās*. Hence, the legal technical definition alludes to the strenuous intellectual work that is put into working out a problem from the sources of Islamic law, in terms of it being the most probable injunction of the Sharīʿah (Al-Juwaynī, 1980, p. 64). In Sharīʿah, the primary or secondary sources mainly dealing with legal problems are used nowadays to solve arising legal issues. The concept of *Ijtihād* uses both legal reasoning and the Holy texts in a method known as analogy to come up with moderated legal rules that solved upcoming legal concerns. Through *Ijtihād*, solutions to new problems are found. Issues are discussed and Muslim jurists reach a conclusion of a given problem. The issues at hand about the charitable organizations can be solved by employing the methodology of *Ijtihād*.

[54] The approach modern scholars took to dealing with these challenges were to try and justify the opinions by proving its concordance with the opinions of the classical scholars. This meant that one single School of jurisprudence was not enough to solve the challenges of modern times. Rather, the opinion of multiple scholars and Schools were sometimes required to justify the opinion. There are some cases were all the schools had to be abandoned and independent *Ijtihād* had to be made in order to come to solution. Therefore, modern Muslim jurists may do *Ijtihād* and adopt different models of Waqf that maximum benefits the society but in doing so they should be very cautious about the reasons and nature of the differences of the jurisprudence developed by classical jurists and seek guidance when developing new models.

Ijtihād possesses great standing in the area of Islamic legal experience. It demands expert qualifications and a wealth of information about the sources of the Sharīʿah. Accordingly, only the jurists who are referred to as *mujtahiūn/ahl alʿilm* (people of knowledge) are allowed to exercise *Ijtihād* (Al-Shawakānī, 2000, p. 1027; Ibn Ḥazm, 1999, p. 450). As a result, the title or accolade '*mujtahid'* would not be referred to any Muslim. It cannot be stressed more emphatically here that only qualified scholars of Islam can exercise *Ijtihād,* and it is not open to any Muslim to engage in this practice. The reason why it is restricted to qualified scholarship is because the *mujtahid* is engaging in seeking to solve a problem using the Qur'an and Sunnah, and therefore this comes with immense responsibility to understand and engage with the sources properly otherwise it is sinful. It is logical that not everyone can be a lawyer or a physician or an engineer. Rather, these people must be qualified and competent people. If that is the case, then the preservation and sanctity of Islam and its laws requires that only qualified people can carry out *Ijtihād* (Harasani, 2013, p. 369).

As far as the primary sources are concerned, the role *Ijtihād* plays with regards to Qur'an and Sunnah is limited to seeking resolutions of particular issues. As noted earlier, not every text in the Qur'an is open to interpretation. [55] *Ijtihād* is therefore limited to the area of legal matters expressed in a speculative (*ẓannī*) manner in the Qur'an and the Sunnah, which are general and can be interpreted in a number of different ways. As far as the definitive-perspicuous texts are concerned, *Ijtihād* has no role regarding such verses (Al-Qarḍāwī, 1996, p. 65) .

Resorting to *Ijtihād* post death of the Prophet Muhammad by his companions was infrequent. However, within the hundred years post the death of the Prophet in 632 CE, the Islamic state extended its borders and incorporated people with different ethnicities and different religious and cultural backgrounds. During this time, it became necessary for Muslim rulers, judges and jurists to solve matters that were not directly referred to in the Qur'an or Sunnah. They, therefore, pronounced rulings based on *Ijtihād* by deducing legal

[55] The normal procedure of deducing legal rulings by the prophetic companions and the rulers who came after them was to look for solutions to issues firstly in the Qur'an, and then in the Sunnah, if reference was not made to the case in question in the Qur'an (Zaydān, 1995, 147). If there are no Hadith that covered the matter, a ruling could be issued by way of Ijtihād (Ibn al-Qayyim, 1993, Vol. 1, p. 76).

rulings (*ḥukm*) from the general principles found in the Qur'an and Sunnah. This saw a surge in the use of juristic reasoning.

The field of *Ijtihād* was developed by Muslim scholars in order to translate the messages of the Qur'an in terms of application to the changing needs of Muslim society. The crucial field of *Ijtihād* is also connected to the secondary sources. As noted earlier the secondary sources emerged after the Prophet's death to engage with contemporary matters and challenges which the Qur'an and the Sunnah has not mentioned or discussed. Therefore, all through the period of Islamic civilization, jurists have employed *Qiyās, Istiḥsān, Istiṣḥāb* and *maṣlaha mursalah* to create legitimate answers to whatever questions contemporary society may pose.

The role of *Ijtihād* in the present time and the myth of the 'Gates' being closed

It is undeniable the role *Ijtihād* has played in lives of Muslims societies, because it does not matter what period of age a person is living in, there will always arise new issues which need an Islamic edict to clarify its status. It is the responsibility the jurists and scholars of that time to step up and provide answers to the new issues. Orientalist studies have pushed the idea that the 'Gates of *Ijtihād'* are closed. Their conclusion was based on their misreading of what some Muslim scholars said. That is to say, *Ijtihād* can only be practiced by a qualified scholar known as a *mujtahid*. This is the highest level of scholarship in Islam and its criteria is very high.[56] Therefore, it is not surprising that only a very few people in

[56] Commenting on for conditions that must be present in a *Mujtahid*, Abdur Rahman doi argues: "To be *Mujtahid*, one must have a thorough understanding of Islam, the Sunnah, *Figh, and uṣūl al-fiqh*. He should have the following characteristics: a) He must be extremely knowledgeable and know about the Qur'an. That he understand the reasons for the Qur'an's verses and chapters being revealed, as well as why each one was revealed. b) He must be well-versed in the study of the Prophet Muhammad's traditions. That is, he must understand the difference between authentic Hadith and spurious Hadith; he must understand Hadith and *Ḥasan* (good Hadith), Hadith *al-Ḍaʿīf* (weak Hadith), and the like. C) He must be well-versed in *Ijmaʿ* principles. d) He must be aware of *Qiyās* injunctions and the circumstances around them.
In other words, in addition to academic achievement, the *muitahid* must have fantastic personality. He must have the following moral qualities: a) He must be a true Muslim. That is, he must be a practising Muslim rather than a mere Muslim by name. b) He must be very religious and follow all of the Holy Qur'an's injunctions. c) He should not be affected by a heretical impact. d) He must be just, dependable, trustworthy, and free of unfair practices". (Doi, Abdur Rahman, 1984, p.79). For more details about conditions that must be present in a *mujtahid* more deeply, please see: Kamali, (Principles of Islamic Jurisprudence), 1991, p. 330).

the history of Islam have reached that level. There are several categories of *mujtahiūn* [57] but by the passing of time scholarship weaken and the likes of the grand *mujtahids* of the formative period disappeared. Subsequent scholars would adhere to the established Schools of jurisprudence and express a disagreement of some opinions. As a result, the voices calling for *taqlīd* [58](or following the opinions of qualified scholars) started to get louder.

The starting point of this controversy was that Muslims scholars started to question whether qualified *mujtahids* existed. This disagreement began roughly during the sixth century Hijri/12th century. Ibn ʻAqil , a *Ḥanbalī* jurist, engages a debate with some *Hanafi* jurists who argued and justified their views using Scripture and reasoning of the necessity of existence of *mujtahids*. A century later, al-Āmidī, a *Shafīʿi* jurist, concurs with the *Ḥanbalīs* stance arguing that extinction of *mujtahids* is possible. Over the centuries, this controversy gained attention and currency with some scholars but not others. It became a point of contention. Thus, scholars became divided (Hallaq, 1984, pp.4-5). This was construed by Orientalists [59] as well as ordinary members of the Muslim community that the ʻgate of *Ijtihād*' was closed at the end of the classical period (Rabb, 2009, p.18).

Schacht maintains that due to rigidity in Islamic law the gates of *Ijtihād* were closed as it continuously limited Islamic "doctrine [60]" (Schacht, 1984, p. 56). Schacht supports the views of a minority of Muslims who also believed that the gates of *Ijtihād* are closed (Abū Zahrah, 2006, p. 255). Schacht was not alone in believing this. When he and many others

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[57] Abdur Rahman doi summaries the categories of *mujtahiūn* under three main headings "The *mujtahid's* can be classified into three broad categories:
a) *Mujtahid fi al-Sharīʿah*: They were those who practiced *Ijtihād* in issues of Sharīʿah. Until the third century of Islam, the Prophet's Companions existed. b) *Mujtahid fi al-Madhhab*: These were the people who did *Ijtihād* and later established jurisprudence schools .
The *mujtahiūn/ahl alʿilm* who followed them are as follows :
c) *Mujtahid fi al-Masaʾil*: This are the modern-day *mujtahiūn* who issue *Fatawa*, or religious legal opinions". (Doi, Abdur Rahman, 1984, p.79). For more details about categories of mujtahids, please see: Kamali, (Principles of Islamic Jurisprudence), 1991, p. 337).

[58] **Taqlīd:** means ʻimitation , unquestioning adoption (of concepts or ideas) uncritical faith (e.g., in a source's authoritativeness), adoption of legal decision of a Madhab". See (Dictionary of Islamic terms , Deeb Al-Khudrawi, 2012, p. 430).

[59] **Orientalists** : "a person who studies the languages and cultures of East and Southeast Asia". See the official website of the cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/orientalist?q=Orientalists, (Accessed: 21/4/2021).

[60] **Doctrine:** "a belief or set of beliefs, especially political or religious ones, that are taught and accepted by a particular group". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/doctrine, (Accessed: 21/4/2021).

who shared this view talked about this, they described it as that by about the middle of the third century of the *hijra* (ninth century A.D.), the idea that only the great scholars of the past had the privilege to "independent reasoning" and not the contemporary scholars (Schacht, 1984, p. 56) prevailed. Gradually, *taqlid* [61] became so dominate it replaced *Ijtihād* and it was expected of the "imitator" (*muqallid*) "to accept and follow the doctrine established by previous grand jurists of the formative period (Schacht, 1984, p. 65; Coulson, 2011, p. 47). Coulson observes and remarks, "an exaggerated respect for the personalities of former jurists induced the belief that the work of interpretation and expansion had been exhaustively accomplished by scholars of peerless ability whose efforts had fashioned the Sharīʿah into its final and perfect form" (Coulson, 2011, p. 81). It is believed by some that the gates of *Ijtihād* at some time around the ninth or tenth century were closed. According to this idea, Islamic jurists realised that *Ijtihād* principle was not being remarkably practiced as a result of basic of imitation" (*taqlīd*) (Coulson, 2011, p. 45; Weiss, 1978, p. 201; Harasani, 2013, p. 368). While there are some elements of this which are true, the essence of the issue has been lost. There was no closing of the gates of *Ijtihād* and the idea of it is not only inept and illogical, but it is detached from the reality. Firstly, with regards to *taqlīd* it cannot be denied by the virtue of the testament of Islamic history and scholastic heritage that the four major Schools of Islamic jurisprudence played a major in preserving legal interpretation.[62] Their contribution so extensive that all but a very small

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[61] For more details on *taqlīd*, see: Al-Juwaynī, 1980, p.p. 88-98.

[62] There are four schools of Sunni jurisprudence that the majority of Muslims follow today, a school of jurisprudence in Arabic is known as a *madhab* (pl. *madhāhib*) (Visser, 2019, p. 15).
These four schools were based on the codification of (following in chronological order): Imām Abū Ḥanīfa al-Nuʿmān bin Thābit, Imām Mālik bin Anas bin Mālik al-Aṣbaḥī al-Madanī, Imām Abū ʿAbdillāh Muhammad ibn Idrīs al-Shāfiʿī, and Imām Abū ʿAbdillāh Aḥmad ibn Muḥammad ibn Ḥanbal Al-Shaybānī (Zaydān, 1995, 147).

The *Ḥanafī* School
Founded in Kufa by *Abū Ḥanīfa al-Nuʿmān bin Thābit bin Zūṭā bin Marzubān* (690-760 CE**)** popularly known as *Abū Ḥanīfa*, the *Ḥanafī* school is the oldest surviving school of Islamic jurisprudence and the most flexible **(**Hallaq, 2009, p. 37**) .**

The *Mālikī* School
Founded in Madinah by *Imām Mālik bin Anas bin Mālik al-Aṣbaḥī al-Madanī* (711-795 CE), popularly known as *Imam Mālik*, the *Mālikī* School is noted for its development in close proximity to the heartland of Islam, Madinah (Ahmad, 2010, p.78).

The *al-Shāfiʿī* School
Founded in Baghdad by *Imām Abū ʿAbdillāh Muhammad ibn Idrīs al-Shāfiʿī* (767-820 CE), popularly known as *al-Shāfiʿī*, the *al-Shāfiʿī* school is the second largest madhab after the *Ḥanafī* school (Coulson, 2011, p.53). *Al-Shāfiʿī* was born in Gaza (city in Palestinian) in the same year in which *Imām Abū Ḥanīfa* passed away and he passed away in Egypt in 820 (Abdur Rahman Doi, 1984, p:103).

and negligible minority of scholars did not subscribe to one of the four major Schools. This was the case until recent history and the emergence of the reformist movement of Muhammad ibn ʿAbd al-Wahhāb. The subscription to one of the four major School by subsequent scholars is noteworthy because it proves that the Schools represented the authentic interpretation of Islamic law. It was not the scholarship of one person, but rather a collective contribution of a group of scholars which formed a School. The tremendous contribution has left such an indelible legacy that Muslims till today seek answers to issues using the scholarship of the past scholars. It is not as simple as one may think that their contribution can be disregarded. Their work is still relevant to contemporary life because their scholarship was unparalleled, and it was of the highest level. This does not mean that what they said is set in stone as cannot be revised. Rather, the contrary is true, and many scholars have revisited the views of the classical scholars and chosen to not accept it for their stated reasons.

Secondly, though recent research has confirmed that the practice of *Ijtihād* has never stopped in Islamic history, the range and methods of legal reform in the post-formative era are still debated (Al-Zarqā, 1998, p. 234). While it is true that the level of scholarship that existed during the formative period does not exist now, yet this does not mean that *Ijtihād* did not take place before and does not take place now. The existence of many scholars' associations is evidence that *Ijtihād* is active and taking place (Harasani, 2013, p. 369).

What the classical scholars were arguing about was the possibility of a person having the qualifications and skill sets of the likes of Abū Hanīfa, Mālik, Shāfiʿī, Ahmād and their counterparts.

Taqlīd did not stop Islamic jurists of extending intellectual efforts in the Islamic legal field; although, the intellectual effort was quite altered. Coulson observes, "from the tenth century onwards the role of jurists was that of commentators upon the works of the past masters, and their energies were perforce expended in a scholasticism which on occasions

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The *Ḥanbalī* School

The final school is the school of *Imām Aḥmad ibn Muḥammad ibn Ḥanbal Al-Shaybānī*. (781-855 CE). This *madhab* was founded in Baghdad (the capital of Iraq state) and its founder studied with *al-qāḍī Abū Yūsuf*, one of the premier jurists of the *Ḥanafī* School, and *Imām al-Shāfiʿī* (Visser, 2009, p.15). The classification of the various sources of Islamic law as well as commentaries of the Qur'an and Sunnah is accredited to them (Ḥammad, 1995, pp. 77-88).

attained a remarkable degree of casuistry" (Coulson, 2011, p. 45). Moreover, the primary sources like the Qur'an, Sunnah, and *Ijmāʿ* (consensus of scholars) are no longer in use when it comes to under *taqlīd* doctrine however the new generated schools of thought are in greater use which were corresponded to consensus (Schacht, 1964, p.72).

Schacht claims that many Muslim Scholars disagreed with the idea that the gates of Ijtihād were closed (Schacht, 1984, p. 72). The term of *Ijtihād* contains analyzing sources of law, whether it was primary or secondary in order to discover new legal standards to be appropriate to existed legal problems.

In a summary, *Ijtihād* has not been disappeared as the legal Islamic system has been promoted as a contemporary approach of legal system. This is originally aided the jurists to get advantageous of transferring the primitive principles besides their contribution (Al-Zarqā, 1998, p. 137). The predecessors have the main key of the continuity of *Ijtihād* as *Ijtihād* was important to generate legal schools of different perception and explanations of the matters. As a result, there would be little space to flourish micro-doctrine or "black-letter law"[63], that is needed to any lawful system. Naturally, the methods inherited from the past in addition to the schools of thought are still open to alteration and have indeed been altered. A systemized grounding is compulsory for any legal system to devote most of its attention, if not all, to micro-doctrinal concerns. However, this does not say that *Ijtihād* did not take part and that the legal creativity of Islamic jurists decreased from the 10th century onwards. More importantly, it did not deteriorate or fully stopped (Harasani, 2013, p. 369; Nyazee, 2005, p. 161). Imran Nyazee considers it a gross injustice to call this period as period of stagnation. He argues that 95% of the literature of Islamic law was developed during this era. The efforts of jurists of this era led to the full maturity of Islamic legal system. All disciplines, their classifications and elucidations are the result of this era. Nyazee accepts that the doctrine of *taqlīd* too is the product of this age but this is unfair to term the entire era and its great contribution as period of stagnation and not of any meaning full contribution to Islamic law (Nyazee, 2005, p. 161). In fact, many of the great and influential works in Islamic jurisprudence were compiled after the 10th century. Al-

[63] **Black-letter law**: "A term used to describe basic principles of law that are accepted by a majority of judges in most states". See the official website of the free dictionary, available at: https://legal-dictionary.thefreedictionary.com/black-letter+law, (Accessed: 21/4/2021).

Nawawī's in *Al-Majmūʿ Sharḥ al-Muhadhdhab* was compiled in 13th century, Ibn ʿAbd al-Barr's in *Al-Tamhīd limā fī al-Muwaṭṭaʾ min al-Maʿānī al-Asānīd* and was compiled in the 11th century, Ibn Taymiyyah in *Majmūʿ al-Fatāwā* were delivered in the 13th and 14th centuries, Ibn Qudāmah al-Maqdasī in *Al-Mughnī* was compiled sometime in the 12th and 13th century, and Ibn Ḥazm's *Al-Maḥallā* was compiled in the 11th century (Harasani, 2013, p. 370). Undoubtedly, this work had in fact a good point of being fair and independent and should not be ignored and hence, it is fair to say that after the 10th century, *Ijtihād* still existed.

Conclusion

The Waqf is regulated by Islamic law. This brief overview was meant to introduce the Islamic law before going into detail of Islamic law of the waqf. It has condensed the background and different stages of development of Islamic law in order to clarify the very nature of it. It is evident from above discussion that Islamic law is derived from primary and secondary sources. Secondary sources derive its legitimacy from primary sources. Moreover, there are legal rulings that are clear and fixed whereas there are some matters that only derives basic guidelines from primary sources and rest are left for the jurists to contemplate and extract rulings. This preliminary discussion is very essential regarding the Waqf. The Qur'an is the first and foremost source of Muslim law. The reason why it holds this position is because its truth is absolute for Muslims. This is because the information transmitted in the Qur'an is unquestionable due to the channel of its transmission. While the Qur'an or any part of it cannot be questioned in terms of its reliability, its verses and precepts are open interpretation by qualified jurists or exegetes. The prophetic Tradition has various categories because the channel of its transmission was not as robust as the Qur'an. There is some whose reliability is unquestionable like the Qur'an and there are some which are outright rejected. The prophetic Tradition like the Qur'anic precepts are also subject to interpretation.

The other sources of Muslim law are based on human reasoning known as *Ijtihād*. A part from *Ijmāʿ* the other tools of law are subjective and sometimes controversial. This is

because the outcome of human reasoning will always be debateable and disagreeable. Nevertheless, *Ijtihād* shows the powerful intellectual prowess of Muslim jurists to developed tools to assist them to derive rulings. *Ijtihād* is important to this research because there are very few legal precepts found in the Qur'an and Sunnah regarding Waqf law. The vast majority of the rules stipulated by jurists regarding Waqf was based their *Ijtihād*. In deriving these laws they were guided by the principle of maintaining the spirit of Waqf in Islam. If Waqf is to be relevant for today and tomorrow, then the institution of *Ijtihād* must play a vital role as it did during the formative period and the periods when the rules of were being developed. This research will show the important role *Ijtihād* plays in Waqf. In the forthcoming sections of the thesis, it will be discussed whether certain rules are established and unchangeable on the basis of primary sources or there are certain elements which can be updated according to the need of the hour.

Chapter Three

Synopsis of Islamic Waqf: Law and Practice Through the Differentiation of Opinions among Islamic Law Schools

Introduction

Abbasi rightly observes that Waqf has been one of the most significant institution in the history of Muslims as it is deeply connected to their religious life and the social economy of Islamic societies (Abbasi, 2012, pp. 121-153). For Muslims, the purpose of the Waqf is spiritual advancement and a stronger connection to Allah (Nyazee, 2005, p. 372), because it is in essence a charitable act, and all types of charitable deeds are acts of worship in Islam. Waqf was important in societies because it was the financial lifeline to many social and religious institutions in an Islamic society and it provided a myriad of facilities that were significant for the society (Mat Rani, 2010, pp.1-7). These services were created, funded and sustained through Waqf for centuries and some even for millennium (Çizakça, 1998, pp. 43-70). Muslims built mosques, hospitals, educational centres, markets, inns and many other institutions for services of people through the Waqf system (Raissouni, 2001, pp. 149-155). It has played a key role in the Muslim societies' socioeconomic growth, as well as in the delivery of vital provisions to both Muslims and non-Muslim communities (Karim, 2011, p. 6). This is because the community institutions which the Waqf fund financed was accessible to both people regardless of religion. Obliviously there were some institutions like mosques which were used exclusively by Muslims, but non-religious establishments were accessible to all members of society, residents or visitors. It may be worth noting, as some may wonder, why the state did not take this responsibility on. There are several reasons for this. The two primary reasons are firstly: the during the formative period the state did not see that as a responsibility or a priority for it to get involved with. It was seen as a civil matter and not one for the state to get involved with. Secondly, what is more influential in directing the state was finance. That is to say, in a situation where the state coffers were scant could it afford to get involved in what was at that time regarded as a tertiary priority? The slack was taken up by members of society and funded by them via the institution of Waqf. As time and age has passed the state has started to see itself as

responsible for providing some of these provisions such as education. Islamic political law did not define what exactly the state must do. Rather, the Caliph was given the responsibility of two things: protecting the religion of Islam and managing the affairs of this world (Al-Māwardī, 2008, p. 10). The latter description provides guidelines for Muslim leaders to see what they need to do in order to serve the people the best. Hence, what was not seen as a priority then may be a priority now.

In brief, the Waqf can be defined as an arrangement whereby a property which is privately owned by a Muslim is endowed for some charitable purposes. It is a particular type of philanthropic deed that has no defined time limit, and it can be applied to any non-perishable [64] intangible [65] or tangible[66] property through beneficiaries who are designated to benefit from the revenues or usufructs generated by the property (Abū Zayd, 1996, p. 12).

The aim of this chapter is to help the reader gain a conceptual understanding of Waqf, as a foundation for the rest of the study. In order to do so, the researcher will discuss several key aspects of Waqf, such as its history and background, its definition in classical and contemporary Islamic law. The chapter will also discuss the basis of Waqf in law and its permissibility in Islam. The discussion will familiarise the reader with several important matters that are related to Waqf.

The Origin of Waqf in Human History

The institution of charitable endowments existed among different nations in one form or another before the advent of Islam. For example, charitable endowments were prevalent in pre-Islamic Arabia, Greece, Mesopotamia and Rome (Çizakça, 1998, pp. 43-70). However, it is debatable whether those endowments were exactly like the institution of Waqf. Some claim that it is a reworking of the Roman and *Byzantine fidei commissum* and *piae causua*

[64] **Non-perishables:** "Items not readily subject to spoilage or decay". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/nonperishable (Accessed: 22/4/2021).
[65] **Intangible**: "used about something that has value for a business, although it does not exist in a physical way". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/intangible?q=intangible+, (Accessed: 21/4/2021).
[66] **Tangible:** "Relating to or being property of a physical nature, such as land, objects, and goods". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/tangible (Accessed: 22/4/2021).

[67] respectively, while others assert that Waqf had no precedents before the birth of Islam, and is a unique concept (Hennigan, 2004, p. 59). I believe that Waqf has unique features which were introduced exclusively by Islam.

One of the prominent features of Waqf is that it allows the ownership of property to be separated into legal and beneficial ownership; this was one of the characteristics of *fidei commissum*, which was commonly practised by the Romans. There are records evidencing individuals using *fidei commissum* to bestow ownership of property onto another for charitable purposes (Morice, 1902, pp. 535-536). This point is surely of convergence but despite this apparent resemblance however, the two are different as Waqf requires that the original owner of the property to completely relinquishes his ownership, in both spirit and letter. I will discuss this in detail further on.

The Turkish scholar Fuad Köprülü has claimed that there are several points in common between the Islamic Waqf and the *Byzantium piae causua*. To this it may be responded, that there may be some similarities between them, but the actual purpose of the two are different (Yildirim, 1999, pp. 27-52). Jones (1980, pp. 23-36) describes the aim of *piae causua* as the Church's sacramental and intercessory task being fulfilled, while the objectives covered by Waqf include both socio-economic and spiritual elements, making it more dynamics. Yildrim's research also seems to show that in fact, Waqf may have influenced *piae causua*, rather than the other way around. Yildirim maintains that it was the influence of the Waqf that caused *piae causua* to develop into philanthropic endowments (Yildirim, 1999, pp. 27-52).

In contrast, Abdullah Nadwi (2019, p. 183) claims to see a Persian[68] influence in the conceptual framework of Waqf*;* this claim finds resonance in the research by Perikhanian (1983, p. 664) who points to obvious similarities between the two. Common elements of the two frameworks include the stipulation that the subject must be non-consumable, the

[67] **fidei commissum and *piae causua* "** civil law a gift of property, usually by will, to be held on behalf of another who cannot receive the gift directly, also it is from Late Latin: (something) bequeathed in trust, from Latin fidēs trust, faith + committere to entrust]".see the official website of the free dictionary, available at: https://www.thefreedictionary.com/fideicommissum (Accessed: 22/4/2021).

[68] **Persian**: "belonging to or relating to Iran, its people, or its language". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/persian?q=Persian+, (Accessed: 22/4/2021).

possibility of separating proprietary[69] and usufructuary[70] rights, making the endowment irrevocable and administered by an appointed trustee, and underlying income distribution methods that are similar (Yar-Shater, 1982, p. 134). However, if one looks in detail at the idea of the Iranian endowment, which became popular in the Sassanian [71] period, its context reveals important differences between the two. During this period, the Zoroastrians [72] believed firmly that they could achieve the salvation of their souls and journey to the Hereafter if their relatives performed certain religious rituals in their name after their death (Henning, 2004, p. 60). Examples of these rituals are the giving of alms, distributing food to the poor, and organising a religious ceremony and commemorative events (Ibid). Individuals who could afford it therefore set aside money for these religious rites after they had passed away (Boyce, 1968, pp. 270-289). It was the responsibility of the deceased's eldest son to administer the funds and realise the wishes of his father, while also being entitled to take his share for time and labour. The written deed often also stipulated how any surplus funds were to be distributed among the family. The main distinction between this Iranian endowment and Waqf was that in the former there was no restriction preventing the spending of the principal of the endowed property, while this is not allowed in Waqf (Verbit, 2002, p. 250).

Other researchers have looked for the origins of Waqf in *Heqdesh*, which is a similar Jewish notion (Lev, 2005, pp. 125-140), and indeed the two share a number of similarities. In essence, *Heqdesh* was also a mechanism for endowing property for religious, socio-economic and charitable purposes, as is Waqf. The procedures for distributing the money and administering the endowment are also similar to each other. This claim of a Jewish

[69] **Proprietary:** "relating to owning something or relating to or like an owner". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/proprietary(Accessed: 21/4/2021).

[70] **Usufruct:** "the legal right to use someone else's property temporarily and to keep any profit made from it, so the usufructuary a person who has a usufruct of property". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/usufruct(Accessed: 22/4/2021).

[71] **Sassanian**: "Of or relating to a Persian dynasty (ad 224-651) and the last line of Persian kings before the Arab conquest. The Sassanian era was marked by wars against the Romans, Armenians, and Huns and by the revival of Zoroastrianism and Achaemenid custom". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/Sassanian, (Accessed: 22/4/2021).

[72] **Zoroastrians** "The religious system founded by Zoroaster and set forth in the Avesta, teaching the worship of Ahura Mazda in the context of a universal struggle between the forces of light and of darkness". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/Zoroastrians, (Accessed: 22/4/2021).

origin is substantiated by Koehler (2010, pp. 6-8), who points out that Mukhayriq, the Jewish comrade of the Prophet Muhammad was a well-known pioneer of Islamic Waqf. It is related that Mukhayriq gifted seven orchards that he owned in Medina to the Prophet, in order for it to be used for good purposes, an act that led the Prophet to describe him as the "best of the Jews" (Wafa, 2010, p. 126). The notion of Waqf being of Jewish origin is also supported by the fact that Safiyyah, the Prophet's wife, came from a Jewish background, and when she first converted to Islam, she made an endowment in favour of her brother. This could be seen as evidence of the fact that she was familiar with the Jewish notion of Heqdesh (Al-Khaṣṣaf, 1904, p. 8), thus adding weight to the view that Waqf was a borrowed concept from Jewish tradition. Nevertheless, when examining this from the view of cross-cultural influences between *Heqdesh* and Waqf, and when these occurred through the classical Islamic period, it is almost impossible to determine whether Waqf had an influence on *Heqdesh*, or vice versa (Hennigan, 2004, p. 58). There is also no specific suggestion that Mukhayriq knew about *Heqdesh* and was handing over his orchard with this in mind. It is possible that he gifted the orchards to the Prophet with no intention of making a gesture based on *Heqdesh*. Indeed, al- Khassaf claims that the bestowing of the orchard had no particular intention, while this was the Prophet's decision to assign these orchards as *ṣadaqah* (Al-Khaṣṣaf, 1904, p. 5).

Given the debates outlined above, we can see that although there are conceptual similarities between Waqf and practices from other socio-legal backgrounds, it is not possible to state definitively that Waqf has been borrowed from any particular foreign predecessor. Some scholars have suggested that rather than being based on one particular set of practices, Waqf was established in the shadow of a number of other organisations with similar goals. For instance, Othman (1983, p. 6) attributes the formation of Waqf to the convergence of several ideas that had emerged from the Byzantine notion of *piae causua*, charitable institutions and Iranian *ravanakan* (Iranian endowment), under which legacies were left to benefit the souls of the deceased. On the other hand, al-Shāfiʿī believes that Waqf originated with the advent of Islam, because before this in the time known as *Ayyām al-Jāhiliyah* (pre-Islamic period), there is no evidence that these charitable deeds had taken place (Al-Shāfiʿī, 1993, vol. 3, p. 204). Conversely, Nadwi (2012, p. 43) argues that this view of al-Shāfiʿī is in inconsistent with the perspectives of different jurists who have

maintained this. Nadwi has cited references of pre-Islamic ways and interpretations of Greek, Roman and Egyptian establishments that are comparable of Waqf.

In the light of above discussion, it can be summed up that although the examples of charitable establishments existed even before Islam, their designation and strategies for application were not quite the same as what the Sharīʿah presented through Waqf. Kahf supports al-Shāfiʿī suggestion, citing the unique scope and characteristics of Waqf, which would suggest that it was formed as a new Islamic concept, rather than being borrowed from pre-existing practices (Kahf, 1999, p. 2).

Legitimacy and Origin of Waqf among Muslims

Al-Kubaiysī mentions a number of scholars, such as Ibn al-Qayyim, Ibn ʿAbd al-Barr and others, to prove his claim that there is unanimous agreement among jurists that Waqf is a righteous deed in Islam (Al-Kubaiysī, 1977, vol. 1, p. 54). Although Waqf is not mandatory for Muslims to set-up (Al-Kubaiysī, 1977, vol. 1, p. 55) its practice is highly recommended. This is because Waqf is a charitable deed and therefore, although the Qur'an and Sunnah have not mentioned it by name it falls under the category of charity which in an undeniable institution in Islam and the Qur'an and the Prophet Muhammad spoke about it. For example, Allah says in the Qur'an:

"We will not attain righteousness unless You give (freely) of that which you love and whatever you give, of truth Allah knows it well" (Qur'an, 3:92).

Allah also says: "They ask thee what they should spend (in charity). Say: Whatever you spend that is good, is for parents and kindred and orphans and those in want and for wayfarers. And whatever you do that is good Allah is Ever-Knowing it well" (Qur'an, 2:215).

These verses and many others certainly indicate that Allah will reward charitable deeds. However, it is important to note that while Qur'anic verses encourage donation of the property for charity, they do not specifically mention the institution or the model of Waqf (Al-Kubaiysī, 1977, vol. 1, p. 59).

Despite this fact, Muslim jurists trace the institution of Waqf back to the Traditions of the Prophet Muhammad, either from his own actions or those of his companions, both during his lifetime and after his death (Ibn Qudāmah, 1994, vol. 6, p. 185). In the Qur'an, as we

have seen, verses refer generally to the merits of charitable deeds, and therefore as Waqf is a version of charity, it can be considered to be included in these general expressions (Al-Zuḥaylī, 1997, vol. I, p. 272). The verses in the Qur'an can therefore be applied to Waqf in general terms as it involves spending wealth for the sake of Allah.

Jurists such as Abū Zahra, Ibn Qudāmah, Al-Ramlī and Ibn Ḥājar have also been able to trace Waqf back to the Traditions of the Prophet, citing several anecdotal Traditions that form the basis of the law of Waqf (Al-Ramlī, 1995, vol. 5, p. 359; Ibn Qudāmah, 1994, vol. 6, p. 185, Abū Zahra, 1959, p. 9). The most commonly referred to Tradition in this context is that narrated by Abū Hurayrah. He narrated that the Prophet said: "When a man dies, his acts come to an end, but three, recurring charity (*ṣadaqah jāriya*), or knowledge (by which people) benefit, or a pious son, who prays for him (for the deceased)". (Ṣaḥīḥ Muslim, Hadith no:1632). Al-Sharbīnī and Abū Zahra call our attention to that jurists have interpreted the *ṣadaqah jāriya* referred to in this Tradition as Waqf, for the reason that the alternative type of Waqf was not commonly practised in that period (Al-Sharbīnī, 1958, vol. 2, p. 376; Abū Zahra, 1959, p. 9).

The Tradition of Ibn ʿUmar is one of the most important Hadith to prove Waqf. Therefore, it is important to mention the Tradition in full in order to give a better understanding of this Institution. The full text follows below. It is a Tradition narrated by Muslim in his book *Ṣaḥīḥ*, on the authority of Ibn ʿUmar who reported:

"ʿ*Umar* acquired a land at *Khaybar*. He came to Allah's Apostle (peace be upon him) and sought his advice in regard to it. He said: 'O Allah's Messenger, I have acquired land in Khaybar, I have never acquired property more valuable for me than this, so what do you command me to do with it?' Thereupon the Prophet of Allah said: 'If you like, you may keep the land intact and give its produce as *ṣadaqah*.' So ʿUmar gave it as *ṣadaqah* declaring that property must not be sold or inherited or given away as gift. And ʿUmar devoted it to the poor, to the nearest kin, to fund the emancipation of slaves, and in the way of Allah. There is no sin for one who administers it if he eats something from it in a reasonable manner or if he feeds his friends and does not hoard up goods (for himself). He (the narrator) said: I narrated this Hadith to Muḥammad ibn Sīrīn, but as I reached the words 'without hoarding (for himself) out of it,' Ibn Sirīn said: 'without storing the property with a view to becoming rich.' *Ibn ʿAyn* said: 'He who read this book (pertaining

to Waqf) informed me that in it (the words are) ‘without storing the property with a view to becoming rich” (Ṣaḥīḥ Muslim, Hadith no:1632).

This Tradition provided the foundation for the main principles of the law of Waqf. For example, from this Tradition the following legal principles were developed. Firstly, based on the Prophet’s reply instructing ʿUmar to retain the property and allow the usufruct to go to charity, and ʿUmar’s decision to not allow the property to be sold, given away or inherited, made the jurists derive the principle that the ownership of the property can no longer be transferred once a waqf has been made. Secondly, based on ʿUmar’s decision that any produce derived from the Waqf should go to the poor, nearest kin and the like, jurists concluded that the object of Waqf should always be for good purposes (*wujh al-khayr*). Thirdly, based on the Prophet’s instruction to ʿUmar to keep the property, it was concluded that the subject of the Waqf should be permanent and not diminished by use. Finally, because ʿUmar granted permission to the people who administered his Waqf to take some benefit from it, jurists hold the view that the founder of a Waqf may impose certain conditions provided they do not infringe with any of the legal principles of the law of Waqf (Al-Bassām, 1997, vol. 1, p. 249).

In relation to Waqf made by the Prophet, it was reported by ʿAmr Ibn al Harīth that the Prophet left three items of value when he died and all three were made subjects of Waqf*:* “The Prophet left neither a single dinar, dirham nor a male or female slave (at the time of his death), except his white female mule, his weapon and a piece of land that he gave in the way of Allah”. Qutayba, who transmitted this Tradition, referred to this as *ṣadaqah* (Sunan Al-Nass’ai, Hadith no:3001).

This Tradition illustrates that that the Prophet did not simply exhort his companions to practise Waqf*,* but he did this himself. His was the first example of this type of Waqf and many of his companions were inspired by his example to make Waqf themselves.

These Traditions have enabled jurists to trace back the institution of Waqf to the Prophet. Furthermore, the prophetic Companion Jābir stated that, “In practise, any Companion who was able to afford to make Waqf did so” (Al-Khaṣṣaf, 1904, p. 23), therefore, Al-Nawawī and Ibn Qudāmah concludes that the vast majority of jurists, regardless of their Schools of law, believed that Waqf is a valid Institution agreed upon by consensus (*Ijmāʿ*) (Al-Nawawī, 1996, vol. 16, p. 246; Ibn Qudāmah, 1994, vol. 6, p. 186). If we accept these

Traditions as being valid, then Waqf was undoubtedly common practice for the Prophet's companions, and the argument for it to be viewed as *Ijmāʿ* must also be valid. However, there has been dissent against the assertion of *Ijmāʿ* from Abū Ḥanīfa, al-Qāḍī Shurayḥ, al-Shaʿbī and even Ibn ʿAbbās (Al-Qarāfī, 1994, vol. 6, p 313). Moreover, Ibn Masʿūd did not recognise Waqf at all (Al-Sarakhsī, 1987, vol. 12, pp 28-29). There are two plausible reasons why these jurists questioned the legal legitimacy of Waqf. It may have been that the pertinent authentic Traditions did not reach them, or it may have been due to an existing inconsistency in their definition of the term *ḥabs* (which is another term for Waqf) (Haji Abdullah, 2005, p.89). Also of course it could have been a combination of the two. Al-Shāfiʿī states that Waqf (*ḥabs*) was rejected by Abū Ḥanīfa and Shurayḥ because they believed that *ḥabs* (Waqf*)* was an institution of *jahiliyah* (the pre-Islamic period) and there was in fact an early Islam dictum that forbade its practice (Al-Shāfiʿī, 1993, vol. 3, p. 305). Furthermore, Waqf by name is not mentioned specifically in the primary sources nor are its operational, theoretical or functional parameters categorically defined. Abū Yūsuf is said to have stated that most likely, these jurists disapproved of waqf because they were unaware of the authentic reports (Al-Mawṣilī, 2005, vol. 3, p. 74; Ibn Ḥājar, 2001, vol. 5, p. 566).

Despite the fact that Waqf originated from prophetic Traditions, there are still only a small number of Traditions relevant to Waqf*,* and as the work of jurists has shown, these Hadith provide limited information to formulate law in a systematic way. Rather, jurists through their *Ijtihād* relied heavily on the secondary sources of Islamic law, such as *qiyās*, *Ijmāʿ*, *Istiḥsān*, *ʿUrf* and *maṣlaha mursalah,* to develop comprehensive details and rules of Waqf (Al-Kubaiysī, 1977, vol. 1, p. 34; Al-Zarqā, 1997, p. 19; Haji Abdullah, 2005, p.98).

As is common with sections of the law, as time passed, new complexities arose in relation to Waqf, and jurists needed to find solutions for these. They have done so by basing their decisions on the principles of Islamic law. This has led to an in-depth discussions of Waqf in the books of *fiqh*, and inevitably a number of different opinions are voiced by jurists. As there are only a limited number of Traditions that can guide jurists on the application of the law of Waqf, we can see that the main development of this law is due to the *Ijtihād* of the jurists. This study will go on to investigate this perspective.

The above discussion leads us to the conclusion that Waqf originated from Traditions and was later developed by the jurists through the means of *Ijtihād*, rather than being derived directly from the Qur'an. Although this was a human-juristic endeavour it does not mean that this *Ijtihād* has no merit and can be dismissed so simply. The laws generated by *Ijtihād* which follows the general principles laid down in the Qur'an and the Prophet's Traditions must be taken into regard by later Muslims. If they see that their *Ijtihād* has errors or it needs to be looked at in a new perspective then that can be done. The reason for paying regard to the works and views of the classical jurists is important is because their opinions were based directly on Sunnic precepts or a deduction thereof. Therefore, later scholars have a duty to refer to the opinion of classical jurists before suggesting a relook at some of the rules of Waqf.

The First Waqf in Islam

There is disagreement between jurists and historians regarding which incident can be considered as the first ever establishment of Waqf, although they agree that this occurred during Prophetic era (Al-Wāqidī, 1996, p. 203; Al-Ṭabarī, 1966, vol. 4: pp. 31-32). Al-Zarqā found out that some view that the Mosque of *Qubā*, which was founded when the Prophet migrated from Mecca to Medina as the first example of the Waqf (Al-Zarqā, 1997, p. 29), while others maintain that the Mosque of the Prophet in Medina was the first instance of Waqf (Kahf, 2003, p. 3).

The researcher Mohammad Abdullah claims that, some jurists consider the story of ʿUmar ibn al-Khaṭṭāb as the first example of Waqf in Islamic history. This is used in many Islamic jurisprudential books as the example of the first Waqf (Abdullah, 2017, p. 185). ʿUmar owned some land in Khaybar and he asked the Prophet's advice on how to best deal with that land (Ibn al-Qudāmah, 1994, vol. 8, p. 32; Al-Jazīrī, 2000, vol. 3, p. 150). His endowment of that land is viewed by many scholars as the first Waqf in Islam (Othman, 1983, p. 3; Al-Shawkānī, 2008, vol. 2, p. 106).

On the other hand, there are jurists such as: al-Dusūqī, Al-Kasānī, Abū al-Aʿlā al-Mawdūdī and others, who attribute the first act of Waqf to the famous well of Medina, otherwise known *as Bi'r al-Rūmah* (Kahf, 2003, p. 3). The well is seen as an act of Waqf because the Prophet asked his companions to purchase it and nominate it as free for public use. The

narration reports that Othman ibn al-'Affān answered this call and became known as the first *wāqif* (Ibn Ḥanbal , Musnad Aḥmad, 2012, vol. 1, p. 75).

Furthermore, there are claims that because Abū Ṭalḥa's act of charity was the first incident of Waqf. He was the first person to respond to the Qur'anic verse revealed encouraging Muslims to share their wealth for charitable causes (Qur'an, 3: 92). The story of Abū Ṭalḥa reports that after this verse had been revealed, Abū Ṭalḥa expressed his desire to Prophet to grant his well-known grove '*Bayruha*' for the sake of Allah (Al-Qurṭubī, 2003, vol 4, pp. 200-204). Although there are some jurists such as: al-Bahūtī, al-Dardīr, al-Ṭabarī and others who consider this as the first example of the Waqf, others such as: al-Bayhaqī may argue that it is not clear whether the orchard was endowed as a general *ṣadaqah* (charity) or as a perpetual *ṣadaqah* (Waqf) the latter being a requirement of Waqf (Othman, 1983, p. 32).

Some of the scholars as an example: al-Wāqidī, al-Ṣāwī, al-Dāraquṭnī, al-Shawkānī and others who claim that the Prophet himself was the first *wāqif* when he endowed Mukhayriq's orchard, referred to previously (Gil, 1998, p. 138, cited by Abdullah, 2019, p. 190), or that the land of the Kaaba can be viewed as the earliest examples of Waqf (Al-Zarqā, 1997, p. 37).

Al-Khaṣṣaf authored one of the earliest comprehensive books on Waqf doctrines, and within the book it is reported that the Prophet's Companions held two distinct opinions about what constituted the first Waqf. In his book, Al-Khaṣṣaf relates that Miswar ibn Rifaʿah reported that the first instance of Waqf was indeed the endowment of the Prophet. Miswar ibn Rifaʿah investigated the first instance of the Waqf in Islamic history. He asked Ibn Kaʿb if ʿUmar's endowment was to be recognised as the first Waqf as mentioned by people. Ibn Kaʿb pointed out that the first instance was of Prophet's endowment that took place after the death of Mukhayriq (Al-Khaṣṣaf, 1904, pp. 6-7). He had already made it known that in the event of his death he wished his property to be gifted to the Prophet, He was killed in the battle of Uhud after thirty-two months of Hijrah and given that upon his death "the Prophet has taken ownership of his assets and made it Waqf immediately" (Al-Khaṣṣaf, 1904, pp. 7-8). On the other hand, ʿUmar's Waqf did not occur until the Prophet returned from the battle of Khaybar, which was in the seventh year of *Hijrah*, and therefore later (Ibid). This seems to confirm that this deed constituted the first philanthropic Waqf in

Islamic history, but Ibn ʿUmar still opines that the first reported Waqf was that of Thamag [73] in Khaybar (Ibid).

From the above discussion, it is evident that declaring any one incident as the first one to be the Waqf in Islamic history is a complicated task as there are several narrations about different occurrences with strong arguments. However, it can be concluded that the first incident of Waqf took place by divine assertion which was of Kaaba. The Qur'an states that "Mecca is the site of the first house of worship built for humans." (Qur'an, 3: 96), therefore we can assert with confidence that the *Kaaba* is the first example of Waqf by Divine assertion. With regard to the first Waqf by human action, there is little debate. However, according to the researcher, the stronger version is the Mosque of *Qubā* that was built while the Prophet was journeying from Mecca to Medina was the first incident of Waqf done by Muslims in Islamic History (Al-Zarqā, 1997, p. 62). The reason for preferring this incident as the first case of Waqf is that Muslims had been building mosques through Waqf throughout Islamic history. The Mosque of *Qubā* was the first ever Mosque that Muslims built when Prophet migrated to Medina. The rest of the cases took place afterwards. Thus, this is the stronger view. It is worth noting that Waqf can be classified into different categories on the basis of the purpose [74] (Al-Mīn, 1994, p. 113).

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[73] Thamag is the name of the land of 'Umar ibn al-Khattāb in Khaybar which he made into a Waqf.

[74] Categories of Waqf: There are two categories of waqf recognized under Islamic law: public waqf (waqf khayrī) and family waqf (waqf ahlī) (Al-Zuḥaylī, 1996, p. 52). The former is a waqf dedicated to a religious function or for the public, such as mosques, hospitals, schools and so forth. The latter is a family waqf for specific people such as children, grandchildren, or other relatives or for charitable purposes for the benefit of other (Al-Dardīr, 1995, vol. 6, p. 109). Only public waqf was recognized initially. This type of waqf is intended for the benefit of all, including the wāqif himself and his family. The tradition of public waqf can be seen in, for example the practice of ʿUmar and the waqf of the seven orchards by the Prophet Mohammed (Al-Zarqā, 1997, p. 65). However, subsequently, the Companions of the Prophet began to make waqf only for their relations, such as the waqf of Abū Bakr, ʿUmar, ʿOthman and a number of others. It has been suggested that this trend in making waqf was a ploy to circumvent the inheritance rights of women (Powers, 1993, pp. 379-406). This is a gross misrepresentation. The rights to inheritance for male and female heirs are enshrined in the Qur'an and cannot be changed or altered. There is no evidence to support this claim and there is nothing in historical accounts to suggest it may have been the case. It may in fact have been a result of concerns about frustrating the rights of heirs in inheritance by disposing of part or all of their property for public waqf. As stated previously, the Companions frequently made Waqfs and were eager to dedicate their property to waqf since they were aware of the waqf of ʿUmar.
This gave rise to concern among some of the Companions that their property would not be passed on to their heirs when they died. There is evidence for this in the statement of Umm Bakr bint Al-Musawwar, as reported by Al-Khaṣṣaf (1904, p. 20), that her father told her that he had been with ʿUmar ibn al-Khaṭṭāb when he spoke of his waqf with the Muhājirīn (The migrant Muslims from Mecca to Medina). The father had said nothing at the time, but if he had the chance, he would say that although ʿUmar ibn al-Khaṭṭāb was doing something very good, there would be people who would not make a waqf in such sincerity as he had,

Objective of Waqf

The Waqf has two main objectives. The first is to benefit the society and secondly to benefit himself by receiving spiritual reward (*thawāb*) through charitable deeds (Raissouni, 2001, pp. 149-155 ; Deguilhem, 2008, pp. 929-956). The motivation behind Waqf is a religious one; it serves as an act of gratitude and is a way of giving thanks for the blessings of wealth and prosperity, thus, the act of the Waqf is a way to please Allah (Hasan, 2007, pp. 287-316). By making a property as the Waqf, a person aims to purify their souls and no longer has to worry about coveting money or property because it is living up to the Qur'anic

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but would do it to try to circumvent inheritance laws. He hardly dared to say this, though, as the Muhājirīn would be agitated and might not make waqf at all (Al-Khaṣṣaf, 1904, p.28).

Such caution appears to be understandable. Making a large amount of public waqf while leaving only a small inheritance to one's heirs does not seem just. Hence, according to this report, some jurists hold that the tendency to make family waqf was to ensure that the property would not be used for public waqf, to the detriment of the rights of the heirs. Making family waqf ensures that the heirs to the property can benefit from it, as waqf, rather than inheritance and that they in turn can pass the property down to their descendants. If the line dies out, then the property will be used for general charitable purposes. In this way, they benefit from the reward of making waqf while at the same time ensuring their family's well-being (Al-Zarqā, 1997, p. 78). Indeed, family waqf protects the rights of family members to an even greater extent than does inheritance. A similar concept can be seen in the law of waṣiyya (bequests), which are permitted in Islamic law within a limit of one-third of the property. The reason for this cap on bequests is because, as stated by the Prophet, that it is better to leave your heirs rich than to leave them so poor that they have to become beggars (Al-Īmam Mālik, Muwaṭṭāʾ al-Īmām Mālik ,1992, vol. 1, p. 145).

Hence, it is extremely unlikely that the theory that the development of family Waqf among the Companions was to frustrate the rights of heirs is true as there is no evidence of any tendency to keep heirs from their legal rights. Islamic law would not recognize it as it would result in harming the heirs, which could not have been what the Companions intended in making waqf (Abū Zahra, 1959, p. 56).

Regarding the validity of family waqf in Islamic law, the Prophet himself approved it, as seen by the fact that he gave permission to Abū Ṭalha to give his property Bayruha' to his relatives. There is also a great deal of other evidence to support family waqf, such as exhortations to believers to give *ṣadaqah* or to their relatives. For example, there is a Tradition of the Prophet that he said: "Giving charity to a poor person is charity, and (giving) to a relative is two things, charity and upholding the ties of kinship" (Sunan an-Nasaʾi, Hadith no: 2582).

In terms of the Islamic law of waqf, there is no clear distinction between the nature and legal rules applied to public and family waqf (Othman, 1982, p. 40). However, family waqf has frequently been criticized by writers and politicians to the extent that it has been abolished in certain countries (Al-Kubasyī, 1977, vol. 2, p.345). Among these criticisms are that it damages the economy because property is extracted from it (Othman, 1982, p. 114). In 1949, legislation was passed in Syria (Legislative Decree No. 76) that after May 16th of that year that family waqf would be forbidden and any registration of such waqf considered to be legally void (Mahmood, 1988, vol. 8, pp. 1-20). In addition, all family Waqfs which had been set up before that date would be dissolved in accordance with the provisions of this decree. In 1952, a new law in Egypt provided that only public waqf for charitable purposes could be made and therefore, any existing family waqf was to be dissolved (Ibid).

The intention here is not to examine this modern legal practice from the standpoint of Islamic law, but rather to investigate and gain a greater understanding of the classical heritage of the Islamic law of waqf. Abolition of family waqf in the twentieth century is outside the scope of this research.

injunction “take alms of their wealth, wherewith thou mayst purify them and mayst make them grow” (Qur’an, 9:103). A person must not only focus on amassing the wealth and be extremely materialistic as to only think about himself ad not about the poor and needy fellow men around him (Lev, 2005, p. 211).

By creating the Waqf, people can show care for their community by contributing to basic facilities such as schools and hospitals or build shelters for homeless people. Although there are charities that cater for the needs of the disadvantaged, they are in short supply as mankind has a strong preference for accumulating money and property. Human society tends to be very materialistic and can be characterised by greed and selfishness [75]. This has been recognised by Islamic law, and property is regulated in such a way as to preserve the rights of everyone [76]. Some people are lucky enough to be given opportunities to amass wealth or property, while others are not so fortunate and their ability to earn money may be limited by disability or a lack of opportunities. Therefore, Waqf is a spiritual-material act because there is also a worldly goal of making the social space better for others. Because of this difference in opportunities and abilities, private property is protected by Islamic law and it is considered a right (Ismail Abdel Mohsin, 2009, p.18). Despite this, the group of people who do not have much money or belongings are also catered for, by giving them the right to share the resources of those richer than them. In this way, there is a balance and harmony in society, which allows Allah’s justice and wisdom to prevail.

There are two ways in which the right of the poor to share in the riches of the wealthy is guaranteed. Firstly, there are mandatory alms that rich people have to pay, known as zakat. Secondly, there is a voluntary way of giving through charity, of which the Waqf is one example. By donating the property through the Waqf, Muslims are reminded and become accustomed of exercising their duties towards their fellow men, as they are exhorted to do in the Qur’an “The true believers are those only who believe in Allah and His Messenger and afterward doubt not, but strive with their wealth and their lives for the cause of Allah”

[75] Allah says: “And you love wealth with immense love”.(Qur’an, 89:20), also, he says: “If Allah were to enlarge the provision for His Servants, they would indeed transgress beyond all bounds through the earth; but he sends (it) down in due measure as He pleases. For He is with His Servants Well-acquainted, Watchful.”(Qur’an, 42:2)

[76] For Example, Allah says :“O you who have believed, do not consume one another's wealth unjustly but only [in lawful] business by mutual consent. And do not kill yourselves [or one another]. Indeed, Allah is to you ever Merciful”.(Qur’an, 4:29).

(Qur'an, 49:15). This helps to make sure that needy members of society have their basic needs met, not just in the short term but in a guaranteed and enduring way.

Discourse Analysis of the Waqf in Classical *Fiqh* Literature

Before scrutinizing the discourse of classical jurists regarding Waqf, it seems apt to explore the term 'Waqf' linguistically and technically as it is understood in contemporary Islamic world. The word 'Waqf' (plural *awqāf*) is an Arabic verbal noun is derived from *wa-qā-fā*, which means *ḥabs* in Arabic (plural *ḥubūs* or *aḥbās'*) from *ḥa-bā-sā* (Ibnʿ Abidīn, 1994, vol. 6, p. 519; Al-Sarakhsī, 1987, vol. 11, p. 27). *Ḥabs* has a number of different translations in English such as suspension[77] (Nyazee, 2005, p.372), to hold (Abbasi, 2012, pp. 121-153), prevention[78] (Ibn Ḥazm, 2001, vol. 4, p. 196), confinement[79] (Haji Abdullah, 2005, p.p.1-2) and detention[80] or tying up (Qadri, 1963, p. 455).

In the technical sense, it generally means to prevent property from becoming the possessory right of anybody and to limit its usufruct (*manfaʿ*) to charitable purposes (Al-Zarqā, 1997, p. 10). When property can no longer be alienated through the modes of transfer of ownership like sale, gift or inheritance and is in no one's possession and only its usufruct can be used for a specific purpose by beneficiaries, in this case it is termed as 'Waqf'. There are usually three parties in this arrangement: the *wāqif* who creates the endowment by declaring his property as the Waqf for some specific purpose like mosque or the like. It can be in favour of some specific beneficiaries too for instance services and benefit to the poor and needy. Beneficiaries are called as *mawqūf ʿalayh.* The Waqf is managed by administrator.

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[77] **Suspension**: "an act of stopping something from happening or continuing either temporarily or permanently". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/suspension?q=suspension+, (Accessed: 23/4/2021(. usufruct

[78] **Prevention** "The act of preventing something". See the official website of the free dictionary, available at: https:/https://www.thefreedictionary.com/prevention, (Accessed: 23/4/2021).

[79] **Confinement** "The act of confining or the state of being confined or the act of keeping something within limits". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/confine (Accessed: 23/4/2021).

[80]**Detention**: "the act or condition of being officially forced to stay in a place". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/English/detention (Accessed: 23/4/2021).

Apart from the aforementioned definition proposed by a contemporary scholar, it seems germane to explore the discourse generated by classical Muslim jurists.

The Definition of the Waqf in the *Ḥanafī* School of Law

The *Ḥanafī* School has deliberated two definitions of the Waqf. One was furnished by al-Nuʿmān bin Thābit, famously known as Imām Abū Ḥanīfa and the other definition was proposed by two of his disciples, Yaʿqūb ibn Ibrāhīm al-Anṣārī, famously known as Abū Yūsuf and Muḥammad ibn al-Ḥasan al-Shaybānī (hereafter referred to as al-Shaybānī).

Abū Ḥanīfa describes the Waqf as a thing that remains in the possession of the *wāqif* (creator of the endowment) but the usufruct of this object is then devoted to charity (Al-Zaylāʿī, 1998, vol. 3, p. 325). In other words, this is the suspension of the property within the ownership of person making the Waqf. This makes the doctrine of *the* waqf of Abū Ḥanīfa distinct from other jurists. According to Abū Ḥanīfa's opinion, the ownership of the endowed property (*mawqūf*) belongs to the *wāqif,* thus rendering it revocable [81] (*ghayr lāzim*). This way it is akin to a loan (*ʿariyah*) (Ibn al-Humām, 1995, vol. 6, p.191). The *wāqif* can therefore dispose of the property as he/she deem fit, and may sell it, gift it or leave it to relatives in a will (Al-Kasānī, 1997, vol. 8, p.390). Abū Ḥanīfa opined that there are only two circumstances in which a *waqf* becomes irrevocable (*lāzim*). Firstly, a judicial decree[82] by the courts. That is to say, a matter of endowment is disputed amongst the heir, one party claiming that it should remain as an endowment and the other argues that it should be a part of the estate. They, therefore refer the matter to a judge to settle it. The judge rules in favour of endowment. This decree renders the endowed property an irrevocable[83] the Waqf (*lazīm*). The other instance where it becomes irrevocable is the case of testamentary[84] the Waqf. When the owner makes a testamentary the Waqf and gives up his ownership, in

[81] **Revocable**: "a revocable agreement can be made no longer effective if a situation changes". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/revocable?q=revocable+,(Accessed: 23/4/2021).
[82] **Judicial decree**: "to make a judgment in a court of law". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/decree(Accessed: 23/4/2021).
[83] **Irrevocable**: "impossible to change". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/irrevocable?q=irrevocable+,(Accessed: 23/4/2021).
[84] **Testamentary** "usually formal, written directive providing for the disposition of one's property after death; a will". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/testamentary, (Accessed: 23/4/2021).

this case it becomes irrevocable. Both of these circumstances make the Waqf absolute and thus abolish the *wāqif's* ownership of the property (Ibn-ʿĀbidīn, 1994, vol. 6, p. 520).

To support his argument, Abū Ḥanīfa cites a Tradition of the Prophet Muhammad. According to Ibn ʿAbbās, the Prophet said: "There is to be no withholding from the shares ordained by Allah" (Al-Bayhaqī, 2001, vol. 6, p. 162). This initially referred to an inheritance case where Allah forbade other people from withholding the rights of the deceased's heirs.

Abū Ḥanīfa applies the same Tradition upon the concept of Waqf and states that in the case of an absolute *waqf*, the ownership of the Waqf property still remains, thus denying the heirs of the *wāqif* their rights to the property. This would therefore go against the above-mentioned injunction of Allah against withholding heirs' rights (Al-Būṭī, 1999, p. 71). Therefore, Waqf is not absolute as making it so would deny the right of heirs. Abū Ḥanīfa also cites a report by Shurayḥ to support his argument. Shurayḥ reported that the Prophet was tasked to sell all endowments (Al-Dāraquṭnī, Sunan al-Dāraquṭnī, in Kitāb al Aḥbās, 1966, vol. 4, p. 193). This narration points to an Arab practice before Islam, when people would retain their property. The Prophet declared it was lawful to sell such property. Abū Ḥanīfa argues that the Prophet would not have made this declaration if the Waqf were absolute (Ibn Nujaym, 1997, Vo;.4 p. 162). According to this opinion, both of these pieces of evidence illustrate clearly that retaining property is a recognised Islamic practice and thus the Waqf is not absolute.

However, Abū Ḥanīfa's disciples did not agree with the definition of their teacher. Muḥammad ibn al-Ḥasan al-Shaybānī and Abū Yūsuf defined Waqf as the transfer of ownership of the endowed property to the ownership of Allah, thereby devoting its usufruct to charity (Al-Zaylāʿī, 1998, vol. 3, p. 324). This latter definition was adopted by most of the *Ḥanafī* jurists, and it is now the established opinion in the *Ḥanafī* School of law, and thus forming a strong base for this School's development of the law of the Waqf (Ibid).

The definition provided by the two disciples, offers a very different perspective of Waqf, compared to one advocated by Abū Ḥanīfa. According to this definition, ownership of the

property subject to the Waqf belongs to Allah, and therefore the waqf is absolute[85]. This means that it is irrevocable and that the object of the Waqf cannot be given to anyone else, sold or bequeathed[86] to heirs. The evidence for this definition comes from the Tradition of ʿAbdillāh ibn ʿUmar. When *Khaybar* was partitioned, ʿUmar ibn al-Khaṭṭāb received some land of *Khaybar* as a part of the spoils of war. He considered that land to be very valuable and sought the advice of the Prophet Muhammad regarding the best use of the land. The Prophet told him that he could retain the land and devote its fruits for charitable purpose. ʿUmar followed his advice, and announced that his land must not be given away, sold or inherited; rather he had given it as charity to the homeless, slaves, guests and poor (Ibn Ḥanbal , Musnad Aḥmad, 2012, vol. 6, p. 460). It is recorded that when Abū Yūsuf heard about this Tradition, he changed his view about Waqf, and instead of following Abū Ḥanīfa's opinion, he considered the Waqf as being the property of Allah Almighty (Al-Zarqā, 1997, p. 31).

The Definition of the Waqf in the *Mālikī* School of Law

In the *Mālikī* School, the Waqf is defined as the giving away the usufruct[87] of a thing. It is considered as binding on the *wāqif* for as long as the object exists. The *wāqif* retains its ownership in a legal and technical sense only. This means that the *wāqif*, although the legal owner, has no right to deal with the property. This type of ownership is called *taqdirī* [88] (Al- Ābī, 1988, vol. 2, p. 205). Although this definition and the one by Abū Ḥanīfa both assert that the ownership of the Waqf's object stays with the *wāqif*, there is a clear difference between them. In the *Mālikī* School's definition, the usufruct (*manfaʿ*) is transferred but the *wāqif* retains the right of ownership, and the property cannot be used by

[85] **Absolut**e "An absolute term denotes a property that a thing either can or cannot have". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/absolute. Accessed: 23/4/2021).

[86] **Bequeathed**: "to arrange for money or property to be given to somebody after your death". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/bequeath?q=bequeathed+,(Accessed: 23/4/2021).

[87] **Usufruct**: "the legal right to use someone else's property temporarily and to keep any profit made from it". See the official website of the Cambridge dictionary, available at https://dictionary.cambridge.org/dictionary/english/usufruct, (Accessed: 23/4/2021).

[88] What is meant by ***taqdiran*** in the definition is that the Waqf is valid even if the property is not yet owned by the *wāqif* but it will be his in the future. This is like he says: "If I own that house, it will become a Waqf."

anyone else. It is therefore irrevocable and absolute (Al-Būṭī, 1999, p. 71). However, according to Abū Ḥanīfa, the *wāqif* retains the absolute ownership and therefore can sell it, build on it or any other thing he wished.

However, it is important to examine the *Mālikī* doctrine of the Waqf in further detail. The Waqf is declared to be absolute, but not necessarily held in perpetuity. This means that the *wāqif* can take benefit from the usufruct (*manfaʿ*) of the object of the Waqf, but not the property itself. This is reiterated by the *Mālikī* School's other definition of the Waqf, which states that the Waqf is granting the usufruct of the property, possibly by lease, to the beneficiaries. Moreover, the said declaration of the Waqf can be for any period of time stipulated by the founder (Al-Ṣāwī, 1988, vol. 2, p. 296-297).

This definition clarifies that leased property can be the object of the Waqf, and a Waqf can be established for a predetermined period of time. For example, someone who rents a house or piece of land can make this the object of a Waqf for as long as the lease lasts (Al- Ābī, 1988, vol. 2, p. 207). Therefore, in view of the *Mālikī* School, the absoluteness of Waqf means that while it remains in the Waqf status, it cannot be given away, sold or bequeathed. When the time period specified in the Waqf comes to an end, the land or property reverts to its original status. This perspective of the Waqf is supported by the above-mentioned Tradition of Ibn ʿUmar. The *Mālikī* School interpreted the reply of the Prophet, "Retain the land and devote their fruits to charitable purpose" in the meaning that the ownership of the *wāqif* still remains with him and the usufruct is devoted to charity. In a nutshell, this School views Waqf as an absolute contract, but for the finite time period stated for the contract of the Waqf (Ibn Qudāmah, 1994, vol. 8, p. 156).

The Definition of Waqf in the al-Shāfiʿī School of Law

From the perspective of *Shāfiʿī* School, the Waqf is defined as the retention of income generating property while income is being devoted for charitable causes (*maṣraf mubaḥ*). This means that the *wāqif* relinquishes their rights and those of other people to own it (Al-Sharbīnī, 1958, vol. 2, p. 376). Following this definition, no one has rights to give away, sell or inherit the property and the usufruct is given to charity. Al-Qalyūbī concludes that some jurists in the *Shāfiʿī* School also use the term 'transferred to God Almighty' to convey this aspect of the waqf (Al-Qalyūbī wa-ʿUmayrah, 1979, vol. 3, p. 105).

Therefore, in this definition, retention refers to the property being retained in the ownership of Allah, which mirrors the view of the *Ḥanafī* jurists Abū Yūsuf and al-Shaybānī. This argument is also supported by the Ibn ʿUmar's aforementioned Tradition regarding the land of Khaybar (Al-Sharbīnī, 1958, vol. 2, p. 376). The *Shāfiʿī* School further cites the Tradition narrated by Abū Hurayra, where Prophet *Muhammad* said, "When a man dies, his acts come to an end, but three, recurring charity (*ṣadaqah jāriyah), or* knowledge (by which people) benefit, or a pious son, who prays for him." (Saḥiḥ Muslim, no:1631). The *Shāfiʿī* School interpret 'recurring charity'[89] as the Waqf because it cannot be considered as being continual (*jāriyah*) if it the ownership or right to ownership was not relinquished[90] (Al-Būṭī, 1999, p. 73).

The Definition of Waqf in the *Ḥanbalī* School of law

There are two definitions of the Waqf in the *Ḥanbalī* School as well, but they lead to the same juristic implications. First definition is very similar to the viewpoint of the *Shāfiʿī* School. According to this definition, a Waqf is the retention [91]of usable property (*al-muntafaʿ bihi*), thus relinquishing the right to exercise ownership of the property and devoting its usufruct for charity. The purpose of the Waqf is to draw a person closer to Allah (Al Bahūtī, 1982, vol. 4, p. 240 –241). The second definition, which is accepted more widely in the School, is retaining the property and giving its usufruct or produce to charity (Al-Mardāwī, 2000, vol. 6, p. 185).

Although the expression of both definitions is different, nonetheless they articulate the same idea of the Waqf. Both emphasise on the 'retention (*ḥabs*)' of the property and the devotion of usufructs for charity. However, the term 'retention' has somewhat deeper meaning in view of this School. In the *Ḥanbalī* School, the concept of retention rests on two principles. First, the ownership of the property transfers to Allah if the Waqf is in favour of a mosque or if it is related to public facilities like a bridge or a school. Secondly,

[89] donations that happening many times or regularly.

[90] **Relinquished** "To give up or abandon (control of something or a claim, for example)". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/relinquished, Accessed: 23/4/2021).

[91] **Retention:** "the continued use, existence, or possession of something". See the official website of the Cambridge dictionary, available at https://dictionary.cambridge.org/dictionary/english/retention, (Accessed: 23/4/2021).

the ownership can be transferred in the name of beneficiaries if the Waqf is made in the name of a defined group of people, children or an identified individual (Al-Bahutī, 1982, vol. 4, pp. 254-255). Both of these principles convey the idea that the property cannot be given away, sold or bequeathed, thus carrying on the tradition of Ibn ʿUmar (Ibid, p. 240). In both definitions, 'retention' conveys two ideas of ownership: firstly, that it is retained for Allah, and secondly for the beneficiaries. This is distinct from the definitions of waqf presented by the *Mālikī* jurists and Abū Ḥanīfa as discussed earlier. In essence, the *Ḥanbalī* definition is concordant to the *Shāfiʿī* School as well and the two *Ḥanafī* jurists Abū Yūsuf and al-Shaybānī . Thus, it is an agreed upon matter among them that the object of the Waqf (*mawqūf*) cannot be the subject of any transactions for disposal [92] of the property because the word *'ḥabs'*, which is translated as 'to prevent', means that no one can own the property, not even the *wāqif*, and its ownership cannot be transferred to any other party (Al-Zuḥaylī,, 1997, vol. 8, p. 155). The *Ḥanbalī* School further argues that this was the practise of the Prophet's companions, their successors and the Muslim community who made Waqfs for the benefit of mankind, and which cannot be owned by the *wāqif* or other people. Therefore, in their viewpoint, it is a matter of consensus (*Ijmāʿ*) unanimously agreed upon by the Muslims (Ibn Qudāmah, 1994, vol. 6, p. 320).

The Definition of the Waqf in Contemporary Islamic Law

The study of different definitions across the respective schools of thought is more than a semantical exercise. The variety of definitions echo a range of normative viewpoints. Having examined all the definitions of the Waqf afforded by the well-known Muslim jurists, there are two separate schools of thought in contemporary juristic discourse regarding the definition of the Waqf:

The first group of scholars did not develop a new definition of the Waqf. This group includes scholars such as Abū Zahrah (Abū Zahrah, M., 1959, p. 17), Ḥammād (Ḥammād, N., 1995, p. 20), Al-Kubaysī (Al-Kubaiysī, 1977, vol.1, p. 38), Al-Ṣalaḥāt al-ʿUmar, Al-Jazīrī and Al-Bassām (Al-Jazīrī , 2000, p. 112; *Al-Ṣalaḥāt* , 1996, p. 36; *Al-Bassām* 1997,

[92] **Disposal**: "the act or means of getting rid of something or the act or process of transferring something to or providing something for another". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/disposal, Accessed: 23/4/2021).

vol. 1, p. 307; Ab Rahman, 2017, p. 177), Rather, they confined their approach to the Waqf by adopting the definition afforded by the classical jurists. According to them, the *Ḥanbalī* definition is regarded as the most quintessential one. They consider this opinion stronger one because it was derived from ʿUmar ibn al Khaṭṭāb definition. The definition, from the second Caliph ʿUmar*,* is accorded authority on account of his life being in the same era as the Prophet, as well as the fact that it was derived from Hadith that referred to reserving capital and donating its profit. This definition is also regarded as wide-ranging because no objections are raised to it, which makes it dissimilar to other definitions. It progresses to the essential meaning of Waqf, through a concise expression that relates the meaning.

2 –Munzer Kahf (Kahf, 1998, p. 4), al-Zuḥaylī (Al-Zuḥaylī, 1996, p. 45) and others have appropriated the definition of Waqf to suit the challenges of the modern world. In Munzer Kahf's definition, the Waqf is represented as the retention of an asset[93] either on a short-term or permanent basis and forbidding it to be consumed so that its usufruct could be withdrawn over and over, so as to serve a charitable and/or philanthropic objective (Kahf, 1998, p. 4). Munzer Kahf utilizes the term *māl*, or an asset, as it repeatedly produces usufruct while its principal is maintained (Ibid). This declaration is qualified by Kahf in his statement that the principal may issue from its inherent nature, as in the case of land, or from whatever considerations or arrangements that the Waqf founder may prescribe (Ibid). Kahf, thus states that the time-honoured concept of everlasting [94] Waqf assets is encompassed by the definition, and the Waqf endures for the life of the asset, in other words, as long as benefit is derived from the assets. He maintains that all four schools of jurisprudence agree on this point. He further claims that his definition includes the version of the Waqf that is rendered as short-term by the *wāqif's* will and stipulations. Only the *Mālikī* School has debated and sanctioned this. His definition embraces a number of new Waqfs forms that the classical writings have not discussed: the Waqf of usufruct and the Waqf of financial rights, for example. He accomplishes this by the use of the term *māl*:

[93] **Asset**: "something having value, such as a possession or property or land, that is owned by a person, business, or organization". See the official website of the Cambridge dictionary, available at https://dictionary.cambridge.org/dictionary/english/asset?q=assets+, (Accessed: 23/4/2021).

[94] **Everlasting**: "lasting forever or for a long time". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/everlasting?q=everlasting+,(Accessed: 23/4/2021).

this can cover such financial entitlements as the right to publish a certain manuscript[95], and usufruct of a rented asset, for example, in line with the majority jurists. According to Munzer Kahf this definition is adopted definitively in contemporary *Fatāwa* issuing agencies, particularly that relating to the Islamic *Fiqh* Academy [96] (OIC)[97]. The notion of quasi perpetuity of Waqf's subject matter is still retained by Kahf, as he attached importance to the principle of abstaining from consumption so as to allow the asset's availability for multiple usufruct extractions (Kahf, 1998, p. 4).).

Being able to restate and refine that thought appears to constitute a huge step towards rebuilding the Waqf concept, because it will eschew the old idea of perpetuity[98] being contained in such things as land, buildings, weapons, farming implements, books and other items. Collectively, these things are known as *māl*, a term that the jurists refer to as consisting of fixed or moving property, in addition to rights and usufructs that are not just temporal as regards the property's life but are transitory in terms of the property's nature. Kahf, however, still sticks to the notion of keeping the principle and letting its benefits issue, as he acknowledges that the property should permit multiple usufruct extractions such an understanding of the Waqf satisfies the different forms of *aḥbas* (trusts) that were followed in the time that when the Prophet and the four Caliphs were alive; this indicates that Waqf's subject matter need not be interpreted inflexibly.

Additionally, broadening the Waqf's scope will attract a number of sources of funds and resources, thereby allowing modern Waqf institutions to fund the revitalization of the

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[95] **Manuscript:** "the original copy of a book or article before it is printed". See the official website of the Cambridge dictionary, available at https://dictionary.cambridge.org/dictionary/english/manuscript (Accessed: 23/4/2021).

[96] On April 26-30, 2009, the Council of the International Islamic *Fiqh* Academy of the Organization of Islamic Cooperation held its nineteenth session in Sharjah (United Arab Emirates), in accordance with resolution No. 181 (7/19). see the official website of the Islamic Fiqh Academy, available at: https://www.iifa-aifi.org/ar/2307.html, (Accessed: 23/4/2021).

[97](OIC) is the Council of the International Islamic *Fiqh* Academy of the Organization of Islamic Cooperation is one of very important Islamic law council of *Fatāwa* in nowadays. This Council was established 1978 in Jeddah, Kingdom of Saudi Arabia. The Islamic *Fiqh* Academy becoming the world's leading jurisprudential source to which the Islamic world's countries and Muslim societies turn in order to explain legal judgments on matters of interest to Muslims and offer effective solutions to deal with issues that have emerged in the contemporary era. The principles of this Organization is to find a solution using both the primary sources of Islamic law, namely the Qur'an and the Sunnah, as well as the secondary sources.

[98] **Perpetuity** "The condition of an estate that is limited so as to be inalienable either perpetually or property law a limitation preventing the absolute disposal of an estate for longer than the period allowed by law". see the official website of the free dictionary, available at: https://www.thefreedictionary.com/perpetuity, accessed: 23/4/2021).

deceased properties and improve society through their generosity. On its own, this is an important public interest issue and would constitute a good reason for reinterpreting the Waqf and its principles. Kahf insists that no mention of ownership was made, so the various much-recorded differences of view amongst jurists about who are the owners of the Waqf property are avoided (Ibid). However, it is also noted that the definition appears to concern the same classical texts parameters, although Kahf has combined the different views without establishing the spirit of the Hadith, the companions' diverse practices and their opinions on the traditional interpretations. According to Kahf's definition, the view appears to be that the Waqf should be regarded as the dedication of a treasure, whose value is later amortized, with the ensuing funds being invested into particular beneficiaries' welfare beneficiaries (Sabit and others, 2005, p. 34). Describing the Waqf thus will additionally contain whatever benefits ensue from fixed items, whether they are chattels[99] or rights. Cash is also involved in the Waqf, as are property types that early jurists did not describe in detail. Modern business and financial entities, such as equities[100], trademarks[101], brand names[102], copyright[103] and intellectual property[104], even goodwill[105], could be included in this version of the Waqf.

[99] **Chattels**: "a piece of personal property, including something that can be moved, or rights such as copyright and patents, but not usually including land and buildings". See the official website of the Cambridge dictionary, available at https://dictionary.cambridge.org/dictionary/english/chattel?q=chattels, (accessed: 23/4/2021).
[100] **Equities**: "shares in companies, especially ordinary shares, or the activity of trading these shares". See the official website of the Cambridge dictionary, available at https://dictionary.cambridge.org/dictionary/english/equities, (accessed: 23/4/2021).
[101]**Trademarks:** "a name or symbol on a product that shows it was made by a particular company, and that it cannot be used by other companies without permission". See the official website of the Cambridge dictionary, available at https://dictionary.cambridge.org/dictionary/english/trademark?q=Trademarks, (accessed: 23/4/2021).
[102]Brand names: "the name given to a particular product by the company that makes it". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/brand-name?q=brand+names, (accessed: 23/4/2021).
[103] **Copyright**: "to get the legal right to control the production and selling of a book, film, photograph, piece of music, etc. for a particular period of time". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/copyright?q=copyright+. (accessed: 23/4/2021).
[104] **Intellectual property**: "someone's idea, invention, creation, etc., that can be protected by law from being copied by someone else". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/intellectual-property, (accessed: 23/4/2021).
[105] **Goodwill**: "the value to a company or organization of things that cannot be directly measured, for example, its good reputation or its customers' loyalty". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/goodwill, (accessed: 23/4/2021).

Analysis of the Definition of the Waqf

Definitions and discussions of four schools of law regarding the Waqf enable us to grasp its fundamental concept as understood by classical jurists. The variances in the definition of the Waqf are largely technical, but they all embrace the same concept, namely, that the Waqf constitutes an act of charity in which the beneficiaries receive usufruct. There are three factors involved – the property's ownership,[106] the owner's right to exercise the

[106] **Modes of Transfer of Ownership of Property by Waqf**
The points already discussed in this study have provided a basic understanding of the unique characteristics of waqf law. Here we will present an overview of the differences in order to understand and see a clear picture as to how the waqf is different to other methods of transferring ownership of property from a legal point of view.
In relation to property, Islamic law is mostly concerned with the transfer of ownership of property. Property can be transferred in three ways. First mode is between two parties who are alive, while second is after death by inheritance and the third one by testamentary documents.
These all methods are all permitted under Islamic law, but different rules apply to each of them. For example, when a person is alive, he or she is at liberty to transfer any part of his or her property in whatever manner or way he or she wishes. However, if the transfer of property is intended to be done after the death of a person, then this right is limited and restricted to only one-third of the estate. Regarding inheritance, the transfer of property has to follow the specified rules of inheritance found in the Qur'an and prophetic Traditions which stipulates the shares of every legal heir in the property (Haji Abdullah, 2005, pp.10-15).
The traditional way of transfer of ownership of property is through a bilateral exchange of property, either property for money or property for property. Another way of transfer of ownership is a unilateral transaction. That is to say, during person's lifetime, he may transfer the ownership of his property to another person for no return. This can be done through *hiba* (a deed of gift), *ṣadaqah* (Anything given in charity), zakat, *hadiyya* (gift) among others. The *waqf* falls under this category. The purpose of this discussion is to distinguish the waqf from other forms of charitable or unilateral transfers of property ownership. These will be discussed in detail and compared with the waqf from a legal perspective, focusing on the legal consequences and nature of the contracts. The methods which are similar to the waqf are included in this discussion for the purpose of relevance.
Hiba, which can be translated as 'gift', can be defined as the transfer of the right of the ownership (*tamlīk*) by one person to another without consideration or return (*bilaʿiwaḍ)*. It is a condition of *Hiba* that the transfer of property can only be done by a person during his life (Al-Sharbīnī, 1958, p. 328). Using this definition, we can say that *hiba* includes *ṣadaqah* and *hadiyya* because there is little difference between these two (Ibn Qudāmah, 1994, vol. 6, p. 246). The difference between *hiba*, *ṣadaqah* and *hadiyya* is that if the gift is given to a poor person in need, with the intention of earning a reward in the next world, it is known as *ṣadaqah*. If it is given out of respect or love for the recipient, then it is known as *hadiyya*, and if it is for none of the above, then it is *hiba* (Al-Zarkashī, 1993, vol.4, p.300). However, *ṣadaqah* is of two types; i.e. obligatory and non-obligatory. The non-obligatory ṣadaqah can be further sub-divided to two types; i.e. absolute or non-absolute (Abdullah, 2017, p. 47). If it is non-absolute, *ṣadaqah* has three types: (a) it entitles the beneficiaries to benefit from the usufruct only e.g. *manfaʿ* (gift of usufruct); or (b) ownership is transferred to the beneficiary on the condition of its equivalent repayment; or (c) ownership is suspended with the recurring benefits being allocated to the chosen beneficiaries. The latter form is the same as the waqf (Ibid).
The actual difference between a deed of *waqf* and an absolute *ṣadaqah* can be seen by looking at technical and legal details. In absolute *ṣadaqah*, complete ownership is transferred, while waqf permits the beneficiary to enjoy its benefits only (Al-Shaybānī, 1997, vol. 5 pp. 249-283; al-Shāfiʿī, 1993, vol. 4, p. 129). Thus, *waqf* covers both poor and rich people in terms of bestowing benefits, but absolute *ṣadaqah* is limited in its scope, being able to benefit only poor people, or to be used for pious reasons (Al-Shaybānī,

1997, p. 263). Regardless of which form they take, all of the above are good deeds that Muslims are encouraged to carry out – the Prophet said: 'Give presents to each other for the increase of your love' (Al-Bayhaqī, 2001, vol. 6, p. 169).

With the exception of *Abū Ḥanīfa*, jurists maintain that a *hiba*, *ṣadaqah* or *hadiyya* cannot be revoked, unless it is a gift from a parent to a son or daughter. This is based on a tradition that states: 'It is not lawful for a man to give a gift except a father regarding what he gives his child then takes it back' (Sunan Abī Dawūd , No; 3539).

All the above methods of transfer of ownership are similar to the waqf because they are all good deeds based on generosity. It is lawful for a person to dispose of properties in his ownership and possessions in this way. The feature that distinguishes waqf from other forms of charity is that only the use of the possession of the property is transferred to another person; it is owned by Allah and the beneficiaries can enjoy its profits only. However, in *hiba*, *ṣadaqah* or *hadiyya*, the possession as well as ownership is transferred (*tamlīk*) and the recipient can use it for any purpose that he/she desires because the reciepient legally owns it for all intents and purposes. A similar feature between all of these methods is that of irrevocability; once the gift has been made in any of the above manner, it cannot be revoked, with the exception of the aforementioned point.

ʿAriya (loan) can be defined as 'transferring the right to enjoy the uses or profits of something without any return' (Al-Sarakhsī, 1987, vol. 11, p. 133). Ownership is not transferred in this case, but the borrower may use and benefit from the property. *ʿAriya* can be an absolute loan (*ʿariyah muṭlaqa*) or a limited loan (*ʿariya muqayyada*). In the former there are no imposed restrictions on how the property can be used, who can use it, or where and for how long. Thus, the borrower (*mustaʿir*) can benefit from the possession as long as he does not abuse it. In a limited loan (*ʿariya muqayyada*), there is a contract that sets out the conditions under which use of the possession is allowed (al- Syarbini, 1958, vol. 5, p. 53). Jurists agree that with regard to the revocation of an *ʿariya*, if it is unlimited the lender may decide to revoke it at any time, but if it is limited, the lender may only revoke it if the conditions of the contract are not being met (Al-Zuḥaylī, 1997, vol. 5, pp. 62-64).

On the surface, the waqf and *ʿariyah* are the same as both transfer the use or benefits of a possession, not the ownership of the possession itself. However, with the waqf this ownership passes to Allah, while with *ʿariyah* it remains with the lender. Also, as previously discussed, *waqf* is irrevocable (*ʿaqd lazīm*) while *ʿariyah* is only irrevocable if it is unlimited (*ʿariya muṭlaqa*). Thus they are different by nature although their definitions are very similar. This makes the position of *Abū Ḥanīfa* understandable, as he defines *waqf* as being equivalent to *ʿariyah* as both allow the beneficiary to enjoy the benefit of the property (Ibn Ḥazm, 2001, vol. 3, p. 20-21).

Some scholars advocate that *waqf* is an independent branch of law within Islamic law, despite the fact that it was not so while the Prophet was alive or indeed during the early days of Islam (Abbasi, 2012, p.151). However, *Saḥnūn* and *Ibn Qudāmah* see differences between the waqf and *ṣadaqah*, maintaining that the waqf later developed into a separate branch of law. Moreover, *ṣadaqah* becomes *lāzim* (binding) as soon as it is uttered, which is not the case with the waqf (Ibn Qudāmah, 1994, vol. 10, p. 185). Two of the six compilations on the traditions, Sunan al-Nasaī and Sunan al-Tirmidī, contain a section dedicated to waqf. The chapter on *waqf* in Sunan al-Nasʿai is called *Kitāb al-Ahbās* and *Sunan al-Tirmidī* has a section on waqf in the chapter entitled "*Kitāb al-Aḥkām an al-Rasūl*" (Injunctions from the Prophet).

Although *waqf* is afforded importance within the books of Traditions of the Prophet (Sunnah), it is not the best criterion for determining its status within Islamic law – better would have been its classification within *Fiqh* books. We have to accept that it is often difficult to establish a hierarchy of laws due to the parallel developments in several branches of law and the varying matters that are dealt with by each branch.

This discussion illustrates the unique characteristic of the waqf that distinguishes it from other similar laws. In *the* waqf*,* the ownership of the possession is suspended, as it is transferred to Allah, signifying that it is a respected deed for the sake of Allah. The majority of jurists agree that a waqf cannot be revoked, and once made, no one has the right to own that property; the beneficiaries are only entitled to the usufruct. Anyone wishing to deal with lawful matters connected to the waqf must have a good understanding of this special feature of the waqf.

property, and whatever benefits or usufruct the property used. These three entities are seen as the foundation of the Waqf, as well as the construction of the Waqf, which is what classical Islamic law more or less states. We now seek to scrutinize the afore-mentioned definitions and divide them into definite legal maxims.

The common ground among all the definitions is the ownership of the Waqf, is that the property of Allah or otherwise? All Schools believe that it is the ownership of Allah, apart from Abū Ḥanīfa. This notion of Allah having ownership involves that after dedication of Waqf*,* the property in question can no longer be privately owned, and neither the *wāqif* or the recipient can claim ownership (Al-Zuḥaylī, 1997, vol. 8, p. 155). This is a difficult and complicated concept, because one person cannot both own it and use it as they wish, as it is no longer theirs to do so. The result of this principle is that the nature of the Waqf is absolute and perpetual (*lazīm*), i.e. this cannot be changed, so any attempt to transfer ownership through any procedures such as selling it, or allowing it to be inherited, or presented as a gift are deemed as being against the law. This therefore means that the association between inalienability[107] and perpetuity is of the same nature.

Abū Ḥanīfa's position that the *wāqif* retains the ownership of the property renders it to be revocable or *ghair lāzim.* The view espoused by his disciples was different and they believed that ownership became transferred, and the *Ḥanafī* School adopted this doctrine. In contrast, the *Mālikī* School adopted Abū Ḥanīfa's understanding of the Waqf and maintained that ownership of such a property stayed 'in the *wāqif's* hand', but not during the time period of waqf. The *wāqif's* property rights are taken away from him for the set period that the founder stipulates for Waqf, therefore a temporary Waqf is allowed. In theory, this principle has also been espoused by some *Shāfiʿī* jurists that the *wāqif*, or anyone else's, proprietorial rights are deferred, which is in line with the meaning of 'belongs to Allah'.

The *Ḥanbalī* School makes a distinction between the Waqf that is intended for a mosque and Waqf that relates to an individual or a collective group. The first is regarded as Allah's property and the second is considered to be the property of the beneficiaries, an opinion

[107] **Inalienability**: "the quality of being impossible to damage or hurt in any way". see the official website of the Cambridge dictionary, available at:https://dictionary.cambridge.org/dictionary/english/invulnerability, (Accessed: 23/4/2021).

that echoes the meaning that the others ascribe to it. The Schools therefore all agree that 'the property belongs to Allah'. This is therefore an absolute principle in terms of the Waqf, which all four law schools adhere to except some of the jurists mentioned above.

Al-Zuḥaylī criticizes Abū Ḥanīfa's definition of the Waqf as flawed on the basis of the position of Ibnʿ Umar's that there cannot be a sale, gift or bequest of a property reinforces this argument. Additionally, Abū Ḥanīfa's evidence is considered to be misplaced by the jurists. His initial supporting evidence was about pre-Islamic Arab culture (*jahiliyya*); the Arabs in this period would disbar women from succession and prevent them from becoming heirs. His second argument was the action of the Prophet, who eradicated the common practice of granting endowments to idols (Al-Zuḥaylī, 1997, vol. 8, p. 154). However, neither of these two incidents refers to Waqf specifically, which is the subject under examination Ibn Qudāmah asserts that the nature of the Waqf is that it is absolute. The evidence being that the Prophet himself established this principle by making the Waqf of Medina's seven gardens. These Waqfs endure, without any alteration, right up until today. Further Waqfs that are still in existence in unchanged form were made by the four guided Caliphs and the other companions (Ibn Qudāmah,1994, Vol. 8 p. 231).

Nevertheless, a group of contemporary jurists – who are in the minority but still have a collective voice [108] appear to disagree with the greater mass of classical jurists on the subject and idea of perpetuity (*lazīm*) within the Waqf, and they allow a temporary, or non-perpetual Waqf (Abd al-Rahman and others, 2017, p. 178). This minority group of scholars have developed their case on the basis of views propounded by Abū Ḥanīfa and the *Mālikī* School. Yūsuf Ibrāhīm, a contemporary scholar, remarks that Abū Ḥanīfa's viewpoint does not constitute an opposite view to the Hadith of ʿUmar that there should be no sale, gift or bequest made of the land. Yūsuf points out that at first glance, the Hadith seems to necessitate perpetuity, but the Hadith must be read in totality, in conjunction with the adjoining Hadith, which states that the original object of Waqf may be retained but its benefits could be apportioned to welfare. There are two point to be noted here: firstly, the Hadith indicates the permissibility of Waqf having different forms. The absence of mentioning an object does not mean the prohibition of an object. Secondly, the Hadith

[108] Such as: Abū Zahrah, Al-Saritī, Al-Raysunī, Al-Rifaʿī, Al-Nujimi, Al-Zarqa, (Ab Rahman, Muhamad Firdaus, 2017, p. 17) and Kahf (Kahf,1999, p. 7).

permits the property owner to offer his property in the Waqf yet retain the ownership of the property. However, the response to this claim is that ʿUmar's case is a special case which the Prophet allowed. The varying interpretations delineates a sense of flexibility and fluidity in Waq*f* laws. This therefore implies that new models of the Waqf can easily be subsumed as Islamic Waqfs (Yūsuf, 2006, p. 32).

To claim that only the modes of the Waqf found in the Tradition of the Prophet and his Companions is valid is not a strong argument. This is because the religious texts do not provide a restrictive and prescriptive ordinance to govern the Waqf laws. They merely depict the existing the Waqf paradigms during that time. The juristic maxim underpinning the validity of any type of the Waqf rests on one fundamental issue, namely, the usufruct is devoted to charitable causes. The question of ownership, while important, should not be a fundamental issue to determine the validity of the Waqf (Yūsuf, 2006, p. 63). This rule should be set under the juristic principle that a rule is allowed unless and until evidence is presented that renders it invalid. In the light of this juristic principle, a liberal view should be adopted when the text favours permissibility, but a rigid standpoint should be taken when the action is prohibited by the text. As the Waqf exists in the interests of the *ummah* (the Muslim community), and no barriers are put on donations from good-hearted people, it is hard to see the reason why jurists should seek to disallow temporary Waqf (Abū Zahrah, 1959, p. 83).

No common concurrence exists among the Prophet's Companions (*ṣadaqah*) as regards perpetuity of the waqf or *ḥabs*. The legality of the Waqf of ʿUmar may be ratified by *Ijmāʿ* consensus, but the issue is about one particular kind and does not prevent the permissibility of other kinds of the Waqf. In support of temporary forms of Waqf Ibn Bayyah remarks that the permissibility of temporary Waqf may go against the majority view of jurists who contend that the Waqf is always perpetual (Ibn Bayyah, 2005, p. 12), and al-Tirmidhī's (Sunan Tirmidhī, 1991, vol. 2, p. 417) report suggests that the position of land being Waqf property is under perpetuity, however this does not constitute an *Ijmāʿ* in perpetuity.

In addition, it is noteworthy that jurists have permitted *ibdāl* and *istibdāl* of the Waqf property, which goes against the perpetuity rule. These contexts allow the bartering of one parcel of land with another, or the sale of one section and the acquisition of a second section with the funds generated by the sale of the former. In this process, it is permissible to sell

a section of Waqf land so that re-development of the rest of the land can take place (Al-Kubaiysī, 1977, vol. 2, p. 104).

Additionally, there seems to be an element of contradiction regarding the perpetuity rule. That is to say, it lacks consistency. This is because they all seem to agree that a temporary form of Waqf is possible for instance, mobile property like plants and trees, livestock, books, even money. These items are transitory and not perpetual, yet all law schools allow this (Abū Zahrah, 1959, p. 90; Al-Kubaiysī, 1977, vol. 2, p. 107; Al-Zuḥaylī, 1997, vol. 8, p. 205; Ab Rahmān and others, 2017, p. 179).

Permitting items such as plants and trees, buildings, livestock, or food as a matter of fact was recognizes temporal Waqf. Should the Waqf be thought to echo its subject matter, it must be remembered that the Prophet's Hadith justify them, as the Hadith justify Waqfs that are temporary and non-perpetual as well. Kahf asserts that these entities as non-standard forms of Waqf cannot be justified, as it is not fair to class one Hadith as being of lower status than another, particularly when common logic and the prevailing public interest suggest otherwise (Kahf, 1999, p. 2). Kahf's view that 'it is not fair to class one Hadith as being of lower status than another' is incorrect and a gross error in the discipline of Hadith studies. This is because it is well-known that the prophetic Traditions do not share an equal status as there are some which are considered authentic and beyond criticism and others week and rejected.

Minus this point, there is merit in his argument. That is to say, if this point of view is followed through, one can arrive at the conclusion that the question of perpetuity should not be seen as the fundamental nature of the Waqf. Therefore, a gift of philanthropy can take any form: temporal perpetuity, actual, rights or interests, or usufruct and the results of such a gift should be either for the good of the beneficiaries, if the subject matter is able to generate funds, or it should be absorbed or further invested. Even if it cannot be amortized or is not capable of perpetuity, the gift is still valid and there should not be any barrier to its status as Waqf (Sabit and others, 2005, p. 27). Kahf draws our attention to the fact that perpetuity in Waqf should be regarded as the rule rather than the exception. For this reason, we accept the standpoint of the jurist majority, who regard the Waqf as perpetual in essence, and that any temporality of Waqf needs to contain a clear statement of the will of

the founder or a clear and obvious need for temporary Waqf, either for general purposes or for mosques in particular (Kahf, 1999, p. 2).

In sum, the common and agreed upon principle of Waqf in the divergent juristic views is that the object the Waqf must be something which benefits people, and hence the *wāqif* may expect and anticipate the reward from Allah in the Hereafter. The Qur'an declares: "Those who (in charity) spend of their goods by night and by day, in secret and in public, have their reward with their Lord; on them shall be no fear, nor they shall grieve" (Qur'an, 22: 77).

In the words of the al-Zarqā, the rules of Waqf is mostly based on juristic reasoning (*Ijtihād*). There is no prescriptive rule in Waqf law save one which is agreed unanimously, namely, that the aim of the Waqf must be charitable and generous (Al-Zarqā, 1998, p. 19).

Conclusion

In spite of the fact that there is the possibility of the concept of Waqf was not totally strange to the pre-Islamic Arabic community, there is, however, no adequate proof that the idea of Waqf was acquired from any previous establishment. This chapter discussed that like many other institutions, this institution of charitable endowments existed among different nations such as pre-Islamic Arabia, Greece, Mesopotamia and Rome in one form or another before the advent of Islam. However, they were different from the exact concept of Waqf. After the advent of Islam, the Prophet Muhammad and many of his Companions gave their properties as Waqf. Though there is a debate about who gave his property first and the chapter threw sufficient light upon different events and concluded that it seemed more plausible that the first mosque that Muslims built during the journey of Prophet from Mecca to Medina was the first ever case of Waqf in Islamic history.

In the second century after *hijrah* its distinctive jurisprudential features and theoretical frame evolved. This chapter has discussed the definition of the Waqf in classical and contemporary *fiqh.* Additionally, the legal basis and the permissibility of Waqf in Islam. There are differences of opinion among the jurists regarding every one of these previous matters. These differences are based on the principles that they established regarding the issues facing them. Every school offers its view based on their principle on each issue, for

which reason we find there is a lot of disagreements among them regarding many juristic points on every issue.

The common ground among all the definitions relates to the ownership of the property. Abū Ḥanīfa's position of *wāqif* 's retention of property's ownership makes Waqf not to be absolute. Whereas the *Mālikī* School's opinion of taking away the property rights of *waqif* for the set period that the founder stipulates makes temporary Waqf permissible. The *Ḥanbalī* School's understanding brings us to the same conclusion that they too ascribe to the opinion of other schools that 'property belongs to Allah'. In short, the majority classical of Schools agree that 'the property belongs to Allah'. This chapter has further discussed that although there seems to be a unanimous opinion of classical jurists regarding perpetuity and ownership, still there is a group of contemporary jurists who disagree on the subject and idea of perpetuity (*lazīm*) within Waqf and seek to tolerate a temporary, or non-perpetual, Waqf. This chapter deliberates their arguments for doing so and discussed how they sought their standings from the jurisprudential views of Abū Ḥanīfa and the *Mālikī* School.

This chapter argues that new models of Waqf can be subsumed as Islamic Waqf. This is because the Texts do not provide a restrictive and prescriptive ordinance to govern Waqf laws. They merely depict the existing Waqf paradigms during that time. The researcher argues that there should be a liberal approach when the text favours permissibility, but a rigid standpoint should be taken when the action is prohibited by the writings.

Al-Zarqā correctly points out that the rules of Waqf are mostly outcomes of juristic reasoning (*Ijtihād*). That being the case, there is no prescriptive rule in Waqf law save one which is agreed unanimously, namely, the aim of the Waqf must be charitable and generous. Therefore, modern Muslim jurists may do *Ijtihād* and adopt different models of Waqf that maximum benefits the society but in doing so they should be very cautious about the reasons and nature of the differences of the jurisprudence developed by classical jurists and seek guidance when developing new models.

This chapter is like an introduction to Islamic world of Waqf. The following chapter will look at the formation of Waqf company and its position in Islamic law.

Chapter Four

Formation of the Waqf Company: The Islamic Perspective

Introduction

In the previous chapter we have discussed the juristic definition of Waqf as well as its historical inception. After understanding how Waqf was interpreted by the jurists of the formative period as well as the contribution of contemporary scholars of defining it so that it be relevant in modern time, it is important to now move to discuss the idea of Waqf companies. As we have mentioned in previous chapters that the institution of Waqf did not remain stagnant throughout the history rather it evolved with the passage of time. Hennigan observes, "In their initial stages, the institution of Waqf and Sharīʿah evolved together" (Hennigan, 2004, p. 65). The simplified form of Waqf passed the test of time, fulfilled the need of the hour, and transformed into the modern-day company due to its adaptability. In the beginning phase of the inception of Waqf it was a simple mode with limited structural setting, but gradually it evolved and took the shape of a formalized charitable institution in one and half century. Mohammad Abdullah found out that centuries went by and Muslim jurists kept on enriching the corpus of Waqf rules (Abdullah, 2017, p,60; Haji Abdullah,2005, p.209). The twenty-first century was the era of globalization which revolutionized the concept of markets and contracts. Thus, the need of the hour led to re-analyzing many Islamic contracts and transactions that could meet the challenges of the modern era. Resultantly, Waqf in the modern-day form is a financial product that encapsulates microfinance,[109] *qarḍ ḥasan* (interest free loan with an unstipulated due date) and microcredit [110] and the like. This chapter is a brief overview regarding the evolution of the institution of Waqf in order to shed some light on the modern forms and concepts of Waqf. Moreover, the researcher has dedicated this chapter to explain the concept of

[109] **Microfinance**: "the activity or business of providing financial services to poor people or new businesses in poor countries or the activity or business of providing financial services, such as small loans, to poor people or new businesses that cannot use traditional banking services, usually in developing countries". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/microfinance(accessed: 23/4/2021).

[110] **Microcredit**: "a very small amount of money lent to a person or group, especially in order to make it possible for people in poor countries to start businesses or a very small loan to individual people or families, for example in developing countries, especially in order to start a business". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/microcredit,(accessed: 23/4/2021).

companies and whether the notion of Waqf based companies can be endorsed in the light of Islamic law, the definition of the Waqf company and its types as well as the type which is concordant or most suitable to Islamic law and its values. Also, this chapter will answer one of important research questions of this thesis which is to what extent the pillars of the Waqf can apply on the Waqf company from Islamic law perspective.

The Development of Classical Waqf to Modern Waqf Company: A Historical Evolution

The development of Islamic jurisprudence of Waqf has been divided into four main epochs (Kahf, 2000, p. 10). The period of Prophet Muhammad and his Companions is naturally considered as the first period. This period is marked by the generosity of a number of Waqf in the form of agricultural lands, gardens, agricultural tools and other equipment. Some Waqfs were made while the donor was alive, and some were done through wills (Ibid).

After the inception period of the institution of Waqf, which is regarded as the period of the Prophet Muhammad and his Companions, the next three centuries were considered to be the golden age for Islamic jurisprudence (Haji Abdullah, 2005, p.187; Abdullah, 2017, p. 50; Al-Qaṭṭān, 2005, p. 560). During this period the Muslims classical jurists discussed significant matters related to Waqf, but they did not deal with all details (Al-Zuḥaylī,1997, p.306). The dominant discourse of that era focused on the ownership of Waqf, permissibility of Waqf, and ccategories of Waqfs (Ibid). It is also interesting to note that during this period the matters related to the Waqf used to be referred to the Caliph and his representatives in different provinces and not the courts (Abdullah, 2017, p. 53). The next period is marked with the compilation of *fiqh* and discussion in detail about the rules of Waqf (Ibid). The later jurists of this period faced many new cases and issues that were unknown in previous times. Therefore, they needed to address it. They took up the matters and further enriched the *fiqh* by responding to these queries (Kahf, 2003, p. 8). The analysis of the historical evolution of Waqf indicates that the original model of Waqf was proposed by Prophet Muhammad, but jurisprudential corpus was developed by jurists in later eras (Bearman, 2000, p. 99).

A close look at the jurisprudence of Waqf indicates that the early jurists did not ritually follow rules of *uṣūl al-fiqh* (principles of jurisprudence) (Abdullah, 2017, p. 56). Rather they were more driven by an objectives-based approach focusing on the *kulliyāt* (the universal values) of the Sharīʿah (Haji Abdullah, 2005, p.196). Therefore, jurists regarding the Waqf governance framework seem to be more likely to apply the law's objective (*Maqāṣid al-Sharīʿah*) than the 'tools of deriving law' (*uṣūl al-fiqh*) (Abdullah, 2017, p. 57). Therefore, while developing the *fiqh, Maqāṣid al-Sharīʿah* were kept in focus so that the body of rules displays a coherent approach fulfilling the objectives of Islamic law. Jurists employed the tools of *ʿUrf* (local custom), *sadd al-dhrā'ʿ* (prohibition of evasive legal devices)*, maṣlaḥah maṣlaha (*public interest) and *Istiḥsān* (juristic preference) to expound the *fiqh* of Waqf (Ibn Bayyah, 2005, p.34).

The reason for this exercise is that Sharīʿah provides basic guidelines for the important matters and left the gaps to be filled in through the process of juristic reasoning (*Ijtihād*) according to the principles of Islamic jurisprudence. Basic guidelines were provided in the Qur'an and the Traditions of the Prophet Muhammad as well as the actions of prophetic Companions. The case of ʿUmar for instance is an excellent axiom regarding the *fiqh* of Waqf (Kahf, 2003, p. 9). It gives a concise concept regarding Waqf, but it does not include every detail. Yet, Al-Bassām concludes that the Muslims classical jurists were able to use it to deduce a lot of *aḥkām* (legal rulings) from the discussion that took place between ʿUmar and the Prophet Muhammad. Moreover, the generous act of Abū Ṭalha also provides some important doctrines regarding Waqf (Al-Bassām 1997, vol.1, p.405). For example, Ibn Ḥājar call our attention to Muslims classical have learnt that a Waqf is valid even if the boundaries [111]of the real estate are not demarcated[112]. In the same way, the case of *Masjid al-Nabwī* (the Prophet's Mosque) indicates that co-sharer can collectively give away their properties as Waqf*,* such as what the tribe of *Banī al-Najjār* did regarding the Prophet's Mosque (Ibn Ḥājar , 2001, vol. 5, p. 600). Likewise, is the case of Khālid ibn Walīd who gave his weapons and horse as Waqf which paved the way for Waqf of similar objects.

[111] **Boundaries**: "a real or imagined line that marks the edge or limit of something". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/boundary?q=boundaries,(Accessed: 24/4/2021).

[112] **Demarcated**: "to show the limits of something or to separate or distinguish between (areas with unclear boundaries)". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/demarcate,(Accessed: 24/4/2021).

Nonetheless, in the milieu of *fiqh* of Waqf, the portion of available *naṣṣ* (text) is narrowly limited (Ibn Bayyah, 2005, p.48). This scenario led jurists to adopt a more *Maqāṣid al-Sharīʿah* based approach rather than adhering to the strict formulaic principles of *fiqh* (*uṣūl al-fiqh*) (Harasani, 2015, p.67; Abdullah, 2017, p. 60).

Fiqh of Waqf reflects the refined engagement of principles of Islamic jurisprudence namely *ʿUrf* (local custom), *sadd al-dhrā'ī, maṣlaḥah maṣlaha* (public interest) and *Istiḥsān* (juristic preference) with *naṣṣ* or scriptural text (Al-Khaṣṣaf, 1904, p. 32). Moreover, people who endowed their properties as Waqf during the earliest first few years of *hijrah* did not know all the minute details of the Waqf jurisprudence (Ibn Ḥājar, 2001, vol. 5, p. 600). They did it with as much knowledge as they had. Entire corpus of jurisprudential details was determined in the later era. Jurists of this era were perplexed regarding the determination of the kind of voluntary charity of the prophetic Companions (Ibid). For instance, the legal status of Abu Bakr's house in Makkah was difficult to decide for the jurist (Ibn al-Qayyim, 1993, vol.2, p.234). Visiting descendants and his progeny used to reside in that house. Al-Khaṣṣaf argues that classical jurists concluded that it was 'Waqf' on the ground that it was not distributed among his heirs as inheritance and remained as it was constructed (Al-Khaṣṣaf , 1904, p. 8) Likewise, the orchard-Waqf made by Abū Talha is also a matter of dispute among jurists, (Ibn Ḥājar, 2001, vol. 5, 603), as is the Waqf of *Mukhayriq*, who made seven orchards Waqf for Islam (Al-Khaṣṣaf , 1904, p. 8). Waqf took the shape of institution in the following centuries when jurists recognized it, before this stage, the status and nature of the institution was blurred (Hennigan, 2004, 67). By 8th century CE, it was an established institution and juristic discourse covered the topic of Waqf with all conceptual and jurisprudential details (Abdullah, 2017, p. 61). This discourse was shaped in line with *Maqāṣid al-Sharīʿah.*

Ibn Taymiyyah demonstrated that the perpetual nature of Waqf as comprehended through definition is not mentioned explicitly in the primary sources of Sharīʿah, rather the idea was discovered across the ages through the scrutiny carried out by classical jurists (Ibn Taymiyyah,1997, vol.7, p.457). On the face of it, Waqf appeared to be an alternative for

ṣadqah and *ʿāriyah* (a borrowed item) as both of them have their distinctive characteristics and Waqf appeared to be a bridge between them (Ibid).[113]

Moreover, the desire for establishing recurring charity could be fulfilled through Waqf. The notion of *luzūm* (irrevocability) makes the perpetuity a key feature of the Waqf thus ensuring the continuity of reward for *wāqif*. Waqf not only provided the opportunity for perpetual charitable institution but also works as tool for intermediate [114] property-conveyance[115] (Al-Khaṣṣaf, 1904, p. 9). Al-Khaṣṣaf claims that classical Muslim jurists were extra careful and conscious while expounding and establishing the rules of Waqf so that the Waqf may not be used in any form to circumvent the established rules of other *fiqh* tools of distribution of property like inheritance, bequest, general charity and gift (Al-Khaṣṣaf, 1904, p. 20). Therefore, classical jurists were conscious not to develop contradictory notions while deducing the rulings of Waqf. As mentioned in the previous chapter, classical *fiqh* literature reveals that the initial structuring of the concept of Waqf had a lot of disparity because of the lack of unanimity among classical jurists according to Al-Shāfiʿī (Al-Shāfiʿī, 1993, vol. 3, p. 321; Al-Khaṣṣaf, 1904, p. 30). Abbasi point out that this disparity among the views of classical jurists regarding the essentials of the Waqf and its legal status continued till later eras and remained the most debated aspects of the *fiqh* of Waqf (Abbasi, 2012, p. 121).

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[113] This might beg the question, what problem does the perpetual nature of Waqf this create for the Muslim practitioner? The argument between temporality and perpetuity impacts the future of waqf, since doubts regarding the feasibility and profitability of perpetual waqf as an economic institution are frequently posed. Perpetuity is viewed with distrust today, despite the fact that it is one of the core tenets of Waqf law. In today's world, economists or some of Muslim practitioner usually feel that non-perpetual waqfs deserve the same respect and attention as perpetual ones (Rashid, 2018, pp.61-62). Rashid point out that many Muslims, it appears, prefer to have a non-perpetual waqf in addition to a perpetual one. The growing popularity of monetary waqfs indicates that non-perpetual ones will be accepted as well (Ibid). In more recent times, cash *Awqāf* have become more accepted by jurists to allow investments in bonds and banks, and loans or to investing in the commercial development of waqf properties with the twin goal of making a profit for cash waqf investors and transforming decaying waqfs into revenue-generating institutions. If money is invested in property, it is always possible that it is damaged or destroyed by natural disasters, which obviously reduces the property's value. Cash *Awqāf* are therefore an alternative to property Awqāf as good management can increase their value, meaning that they are lucrative in today's Islamic financial system (Al-Kubaiysī, 1977, vol:2, p.130; Al-Zzarqā, 1997, p. 30; Mohammad, 2011, p.91, 2003, p.91).

[114] **Intermediat**e: "being between two other related things, levels, or points or to act as an intermediary; mediate". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/intermediate?q=intermediate+,(Accessed: 24/4/2021)

[115] **Property-conveyance** "a legal document that states that land or property has passed from one owner to another". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/conveyance,(Accessed: 24/4/2021).

Modern Developments

The development of the institution of Waqf has many changes since then despite the difference of opinion regarding many essential features. Many innovative reforms have taken place and scholars of later era and contemporary times such as: al-Zuḥaylī, Abū Zahrah, al-Zarqā, al-Kubaiysī, Ibn Bayyah and others have extended the corpus of jurisprudence to many new shores and accommodated new trends (Al-ʿAbdu al-minʿim, 2019, p.235). Historically speaking, Waqf were mainly real estate, however modern Waqf constitutes of cash, stocks, securities[116], intellectual property rights and many others (Ahmad, 2015, pp.63-74; Abdullah, 2017, p.61).[117].

The Sixteenth and Seventeenth century of Ottomans rule provides multiple glimpses that Waqf was based on providing financial support to the community. Pools of cash-Waqf were employed for the said purpose. Donations on the basis of cash-Waqf were gathered to provide finances to various people (Çizakça, 1998, p. 42). Moreover, these pools of Waqf were utilized to provide seed capital[118] for small and medium enterprises (SMEs) [119]. It was done on *muḍārabah* [120] basis and was given for the purpose of consumption too. Despite this widespread practice of cash-Waqf in Ottoman Empire cash Waqf remained disputed for a long period (Mandaville, 1979, pp. 289–308). It was very gradual that cash-Waqf was accepted as permissible mode outside Ottoman Turkey, but it was still not on global scale rather the scholars of Indian subcontinent, Iran and Egypt were still hesitant to endorse the mode as a valid Waqf (Cizakca, 2013, pp.7-8). This reluctance remained as late as the dawn of the 20th century (Ibid).

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[116] **Securities** "A financial instrument, such as a stock or bond, representing rights of ownership or creditorship and often traded in secondary markets". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/securities, accessed: 24/4/2021).

[117] In other words, it could be possible to say that the monetary system evolved and thus Waqf adapted to the economic reality of modern life

[118] **Seed capital**: "money used to start a business or activity". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/seed-money?q=seed+capital+,(Accessed: 24/4/2021).

[119] **Small and medium enterprises**: "a company, or companies considered as a group, that are neither very small nor very large". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/sme,(Accessed: 24/4/2021).

[120] ***Muḍārabah*** is a form of business investment through partnership. By means of this mechanism a person with a capital invests in a business venture. He is the 'sleeping partner', and is not otherwise active in the venture. From the proceeds of this business he takes his share of profit according to the ratio fixed at the time of the formation of the partnership (*Shabīr, Muḥammad ʿUthmān*, 1997, p. 300).

The journey of evolution of Waqf continued and in 1907 company shares[121] and European perpetual bonds[122] were also accepted as permissible forms of Waqf by some prominent scholars (Cizakca 2013, pp. 7-8; Abdullah, 2017, p.67). After some decades, in 1967 the Waqf based associated companies were also present on the financial scene as accepted mode of Waqf (Abdullah, 2017, p.68). At last, cash-Waqf was accepted as permissible mode through the resolution of the International Islamic *Fiqh* Academy (IIFA)[123]. This endorsement on global level has proved that the Waqf has now developed into a financial product . It has further broadened the capacity of the realm of the institution of the Waqf to include many modern innovative modes as modern waqfs (Mohsin, 2013, p. 303).

Last half century is the era of revival of the evolution of the realm of jurisprudence of Waqf (Abdullah, 2017, p.70). This pace can be attributed to the decolonization of Muslim world and contribution of the bodies of Islamic scholars (Kahf, 2004, p. 11). National and international organizations like various International Islamic *Fiqh* Academy and Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI)[124]analyzed the discourse of Waqf in the light of contemporary needs. Globalization further accelerated the process as people around the globe wanted to collaborate and participates in all kinds of economic activity including charitable too. The jurisprudence of Waqf needed to be revisited to bring innovation of this mode according to the modern times (Kahf, 2004, p. 11; Joseph, 2014, p. 427). Scholars in this era are mainly relying on the same tools as did the classical jurists. Kahf claims that it is unclear

[121] **Company shares** "one of the equal parts that the ownership of a company is divided into, and that can be bought by members of the public". see the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/share,(Accessed: 24/4/2021).

[122] **Perpetual bond** "Non-redeemable bond with no maturity date that pays regular interest rates indefinitely". In other words, the term perpetual bonds is defined by free dictionary as "A bond in which the issuer does not repay the principal. Rather, a perpetual bond pays the bondholder a fixed coupon as long as he/she holds it. Prices for perpetual bonds vary widely according to long-term interest rates. When interest rates rise, perpetual bonds fall and vice versa". see the official website of the free dictionary, available at: https://financial-dictionary.thefreedictionary.com/perpetual+bonds, accessed: (25/4/2021).

[123] On March 6-11 Mar 2004, the Council of the International Islamic *Fiqh* Academy of the Organization of Islamic Cooperation held its fifteenth session in Muscat (Sultanate of Oman), in accordance with resolution No. 140 (6/15). see the official website of the Islamic *Fiqh* Academy, available at: https://www.iifa-aifi.org/ar/2157.html,(Accessed: 25/4/2021).

[124] In this regard, the status of Sharīʿah Standards has become one of very important and trustworthy reference in the area of *Fiqh al-Mu'amalat* contemporary (Islamic Jurisprudence of Financial Transactions) around the globe. These standards have acclaimed wide popularity in Islamic banking industry in generally. Also, it became an important part of academic curricula in colleges, universities, and institutions that provide Islamic banking education filed.

the exact justification used by modern scholars to deal with the modern challenges of accepting cash-Waqf (Kahf, 2004, p. 15). Haji Abdullah concludes that *Maṣlaḥah*, *Istiḥsān*, and *ʿUrf* are the principles of Islamic jurisprudence that are typically employed in order to assist jurists to develop rulings of Waqf as are the opinions of classical jurists (Haji Abdullah,2005, p.220). For example, al-Ṣalaḥāt Argues that the inclusion of corporate Waqf among the permissible modes of Waqf is purely on the basis of customary practice *(ʿUrf)* and public interest *(maṣlaḥah maṣlaha*) (Al-Ṣalaḥāt, 2016, p.91). Cash Waqf and Waqf *mu'aqqat* (temporary Waqf) were perhaps allowed on the basis of *Istiḥsān* (Al-Muhanā, 2012, p. 102; Al-Ḥumayd, 1999, p. 49). Similarly, the concept of long-term lease[125] known as *ḥakr* and swapping of Waqf properties that is known as *Istibdāl* are result of the principle of *maṣlaḥah* (Al-Ḍuḥyān, 2000, p. 78). The analysis of the modern jurisprudence of Waqf discloses interesting phenomenon of integration of different schools of Islamic law. It is argued that cash-Waqf is permitted on the basis of Zufar ibn al-Hudhayl, who was a classical *Ḥanafī* jurist, while the Waqf *mu'aqqat* (temporary Waqf) is deduced from the *Mālikī* School. The Shāfiʿī School was adopted for validation of Waqf of movable assets as well as immovable ones; whereas *the Ḥanbalī* School of jurisprudence was consulted and adopted to allow *Istibdāl* of Waqf property.

Just like the Waqf pool,[126] the discussion about the permissibility of Waqf company is still on the ground, although it has been practiced for a long time. For example, Koc Holdings formed the first ever noticed corporate Waqf in Turkey and that too was in 1967 (Çizakça, 1998, pp. 1-42). The Turkish company declared that 10,000 of its shares would be donated to Waqf, with its affiliate Koc Foundation serving as the Waqf's administrator (Abdullah, 2017, p. 66).

The notion of Waqf company attracted the interest and attention of scholars once again when a Malaysian corporation, Johor Corporation (JCorp) created a Waqf by dedicating its shares worth RM 200 million in 2006 (Ramli and others, 2013, p. 23). This was not limited

[125] **Long-Term Lease** is defined by the free dictionary as "A lease for longer than one, five or 10 years, depending on the specific asset being leased. A long-term lease locks in the price one pays for the asset, which is usually advantageous because prices often trend upward. However, long-term leases offer little flexibility. For example, one may have to pay significant penalties if one cancels a long-term lease". See the official website of the free dictionary, available at: https://financial-dictionary.thefreedictionary.com/long-term+lease, accessed: (25/4/2021).

[126] That is to say, the participants of the Waqf fund.

to the creation of Waqf only but for administration of this Waqf, another corporate body was appointed by the name of WANCORP which is a subsidiary of Waqf company JCorp (Mohsin, 2013, p. 310; Abdullah, 2018, p. 168).

These practices of Waqf company have yet to be endorsed in Islamic world at global level. Some of the researchers argue that Waqf company is an independent type of Waqf [127]while other deems it a subcategory of the cash-Waqf.[128] Nonetheless, it has been practiced and the permissibility is still debatable.[129] The Waqf company model seems remarkably interesting due to the Waqf company practice has evolved rapidly without a valid adaptation and conception to its juristic basis in Islamic law. Whereas the contemporary Islamic jurists did not reach a consensus on whether to make the company as Waqf or not? For this purpose, the researcher has dedicated this chapter for the concept of companies and whether the notion of Waqf based companies can be endorsed in the light of Islamic law, the definition of the Waqf company, its types and to what extent the pillars of the Waqf can apply on the Waqf company and its legal problems and its solution from Islamic law perspective. All of these issues will be highlighted in this chapter.

The Waqf Based Companies

From the above discussion it is concluded that Waqf is a very practical and important instrument for economic activity and many researchers argue that it can be manifested in the form of company. Thus, the discussion now requires some details to be discussed regarding the concept of company and its rules in Islamic law.

The Concept of Company or sharing/Partnership in Islamic law

The concept of partnership is known as *sharika* in Islamic law (Shabīr, 1997, p.174). Al-Zuḥaylī maintains that in Islamic law the term *sharika* (pl. *sharikāt*) denotes all kinds of partnership whether it is corporations, companies or private individuals making

[127] For example, Al-Ṣalaḥāt, Al-Rājḥī, Al-ʿAbdu al-minʿim and others (Al-Ṣalaḥāt, 2016, p.88; Al-Rājḥī, 2016, p.77; Al-ʿAbdu al-minʿim, 2019, p. 287).

[128] For example, Khaznah, Al-Rāshid, Al-Ismāʿil and others (Khaznah, 2016, p. 34; Al-Rāshid, 2019, p.67; Al-Ismāʿil, 2020, p.33).

[129] There are some of contemporary jurists who prevent the modern form of waqf company. This is because there are many issues that will be faced the Waqf company such as: Cash Waqf, ownership of the Waqf company, dissolving of the Waqf company and others. These issues are conflict with the majority of classical jurists maintain that the waqf is an indispensable deal, it cannot be revoked.

partnerships (Al-Zuḥaylī, 1997, vol. 7, p. 123). Thus, the chapter of *'sharikāt'* from the books of *fiqh* is the most relevant one for the matter of Waqf Company and this word will be used in the rest of the chapter bearing meaning of corporations, companies and individual partnerships. The Arabic word *sharika* is used for this matter. *Sharika* is derived from the root words of *sha-raa-kaa*. It denotes mixing, expansion, integrity[130] and absence of individualism (Ibn Manẓūr, 1999, vol. 10, p. 448). Therefore, it means that now a person is not alone in his wealth and work, rather there is someone else with him with whom these things are to be shared with. The use of the word *sharika* can be found in the Qur'an but its meaning does not conform to the literal one rather depending on the context, the meaning is different although it still has a connection to its literal roots (Nāṣyif, 2013, p.45). For example, the Qur'an mentions supplication of Moses when he wanted Aaron (peace be upon them) to be his co-Messenger in conveying the divine message. Allah says in Qur'an: "And let him share my task; make him my partner in message and prophecy." (Qur'an, 20:32) In the same way, it has been used for associating partner-deities with Allah. Allah says in Qur'an: "Only worship Allah, show sincere submission by following His orders and stay away from what He forbade, and do not make a partner with Him in worshipping." (Qur'an ,4:36) These verses talk about partnerships but not in a commercial sense. Rather, the partnership mentioned in these verses are in a theological sense. In fact, the Qur'an does not mention *sharika* in a commercial sense at all, instead most of the meaning is restricted to a theological meaning of associating deities to Allah with few exceptions such as the verse about inheritance which means they should share a third of the estate (Qur'an, 4:12). The Qur'an does mention partnership in a commercial sense but uses another word. The Qur'an records the Prophet David's response to a complainant about his business partner, "He has certainly wronged you in demanding your ewe to his ewe. And indeed, many partners oppress one another." (Qur'an, 38:24). Here the word partner is *khulata'* which comes from the root word *kha-la-ta* which also means partnership.

[130] **Integrity**: "the quality of being honest and having strong moral principles that you refuse to change". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/integrity, accessed: 29/4/2021.

In Islamic law the contract of *sharika* is called *mushārakah* and it derives its legitimacy from Qur'an, Sunnah, *Ijmāʿ* and *ʿUrf* (Al-Khuwayīṭr, 2005, p. 70). As mentioned above, the Qur'an discusses the contract of *mushārakah* among partners not by name but through reference. The following verse is discussing a commercial dispute that occurred between two brothers. This conflict was raised in the court of Prophet David, the Qur'an states: "…He has certainly wronged you in demanding your ewe to his ewe. And indeed, many partners oppress one another, except those who believe and do the good deeds; and how very few they are…" (Qur'an, 38:24) In this verse, Allah is discussing the characteristics of partners. This verse provides the legitimacy of partnership and sharing work and profit sharing. Partnership is also discussed in *Ḥadīth Qudsī* where Allah says: "I am the third of every two partners as long as neither one betrays the other. However, if one betrays the other, I leave their partnership." (Sunan Abī Dawūd, Hadith no: 3377). Furthermore, *Al-Saʾib ibn Abi Saʾib* said that he came to the Prophet. The people began to praise me and make a mention of me. The Messenger of Allah said: I know you. I said: My father and mother be sacrificed for you! The Prophet said: You were my partner and how good a partner; you neither disputed nor quarreled (Sunan Abī Dawūd, Hadith no: 4818). *Ijmāʿ* and *ʿUrf* further strengthen the lawfulness of the *mushārakah* contracts (Al-Khayyāṭ, 1994, p. 120). There exists no difference of opinion regarding the permissibility of *mushārakah* and this has led people to engage in this type of business (Ibn Qudāmah, 1994, vol. 5, p. 90; Al-Khayyāṭ, 1994, p. 20; Al-Khafyīf, 2009, p. 111).[131] Hence, when the mentioned evidence is put together, the concept of *mushārakah* is undisputed as a lawful means of business.

The Definition of *Mushārakah*

There is no uniform definition of *mushārakah* although the meaning rotates around the same spirit. The *mushārakah* contract is defined by many scholars and there is difference of opinion regarding the *mushārakah* contract that includes all its kinds. The *Ḥanafī* School of law defines *mushārakah* "as a contract between the parties by virtue of which

[131] Al-Khayyāṭ mentions a number of scholars, such as Ibn Qudāmah ,Ibn al-Qayyim, al-Nawawī, Ibn Taymiyyah, Ibn 'Abd al-Barr and others, to prove his claim that there is unanimous agreement among jurists on that (Al-Khayyāṭ, 1994, p. 20).

they share the capital and profit." (Ibn ʿĀbidīn, 1994, vol. 4, p. 299; Al-Kasānī, 1997, vol. 6, p. 430). However, this definition is deficient and applies only where the capital and profit are shared and is not inclusive of *muḍārabah* where one partner only invests money and the other participates by his skill or labour (Rashād, 1981, p. 89). Furthermore, the definition does not include labour partnership (*shirkat al-abdān*) where both partners only come together to invest with their skills and not capital and also excludes credit partnership (*shirkat al-wujūh*)[132] (Al-Khayyāṭ, 1994, p. 101). The *Mālikī* School of law defines *sharikah* "as permission for partners to transact in the assets of partnership while still they have the right of retain appointing any partner to deal in the business." (Al-Dardīr, 1995; vol. 3, p. 348; Al-Ṣāwī, 1988, vol. 2, p. 501). However, this definition is not plausible either as it is defining *wakālah* (Agency) and not *sharikah.* Moreover, every partner is not necessarily an agent too because right of disposal[133] and transactions may be only for some partners and is not available for others as in the case of *muḍārabah* (Al-Khafyīf, 2009, p. 111). Furthermore, this definition does not provide the actual purpose that is sharing of the profit.

The *al-Shāfiʿī* School maintains that *sharikah* is: "Proving the right to something for two people or more pertaining to property." (Al-Shirbīnī, 1958, vol. 2, p. 287). This definition is vague as it only states one of the aspects of *sharikah* and does not include the actual purpose or distinctive nature of *sharikah* from other types of contracts. The definition also ignores the labour partnership (*shirkat al-abdān*) and the credit partnership (*shirkat al-wujūh*) (Rashād, 1981, p. 69).

Lastly, definition provided by the *Ḥanbalī* School maintains that *sharikah* is: "joining together in the right of ownership (*istiḥqāq*) or the right of transaction (*taṣarruf*)." (Ibn Qudāmah, 1994, vol. 5, p. 109). This definition is more comprehensive than the definitions given by previous two Schools. It has combined two rights in one definition that are sharing the right of ownership and transaction. But this too is not comprehensive enough, because

[132] The term credit partnership refers to "a contract between two or more individuals with a great reputation where the partners do not spend money or labour; instead, they purchase products or services on credit with the intention of selling them and distributing the profit according to the individual liability ratio." (Ebrahim, 2015, p.249).

[133] **Right of disposal** "something that is sold by a company, such an asset, property, or part of its business, or the act of doing this." See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/disposal?q=disposal+,(Accessed: 26/4/2021).

it falls short of mentioning the actual purpose that is the sharing of profit. Moreover, *sharikah* does not necessitate the ownership or right of transactions by all partners as in the case of *muḍārabah* where right to transact only lies with the *muḍārib* (i.e. the person employed to work). For this matter, this definition too cannot be declared as exhaustive (Al-Khayyāṭ, 1994, p. 120).

In classical *fiqh*, one does not find a comprehensive and exhaustive definition for *sharikah*. That is to say, there is no definition without shortcomings. However, some modern jurists such as Rashād, al-Khayyāṭ, al-Zuḥaylī and al-Khafyīf (Rashād, 1981, p. 76; Al-Khayyāṭ, 1994, p. 130; *Al-Khafyīf*, 1994, p. 92; Al-Zuḥaylī, 1997, vol. 7, p. 198) have endeavored to offer one-size-fits-all kind of definition that may include all kinds of partnership. One of these definitions of the partnership is "a contract between two or more people to deal with any part of the partnership's joint property to earn money via capital and its profits or services or labour or credit based on the rule no reward without risk between them, through a legitimate agreement." (Rashād, 1981, p. 77; Al-Khayyāṭ, 1994, p. 132). The researcher is of the view that this definition is the strongest one as it clearly declares that this contract is for partnership. It is inclusive of the definitions given by classical jurists with the addition of mentioning the actual purpose that is sharing of profit. Moreover, the reference to the *shūyuʿ* (blending one of two or more shares with the other in a way that the two cannot be differentiated one from the other) is significant factor of *sharikah*. It means that partners are co-sharer in each unit of shared property of partnership's assets. Furthermore, this definition has elaborated the tools through which the *sharikah* has to be conducted, for instance: capital, labour or credit. For this reason, scores of modern jurists chose this definition (Al-Khuwayīṭr, 2005, p. 102; Al-Khafyīf, 2009, p.94; Al-Zuḥaylī, 1997, vol.7, p.200).

The forms of business do not remain stagnant rather they keep evolving with the advancement time and civilization. Joint Stock Company[134], limited company [135]and limited liability partnerships[136] are such examples which businessmen of present era have newly formed (Al-Khayyāṭ, 1994, p. 140). In order to ascertain the Islamic rulings regarding these new types of companies, preeminent jurists have exercised *ijtihad* in order to answer these new issues. For this reason, the International Islamic *Fiqh* Academy[137] issued a statement and conducted studies on the new companies as a joint-stock company, a limited company, and a limited liability partnership, and acknowledged them alongside with the doctrines of corporations as having legal entity.[138]

However, there are always terms and conditions for every contract. As Sharīʿah has used this word *sharikah* for company, corporation, and partnership, therefore the rulings of *sharikah* will be followed. The first and foremost clause is the terms and conditions which are subject to the partners' agreement based upon the maxim of Prophet Muhammad: "Muslims must keep to the conditions they have made." (Sunan Abū Dawūd, Hadith no: 3594). This maintains that any involvement in a business, whether a corporation or a

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[134] **Joint-stock company**: "a business that is owned by the group of people who have shares in the company or a company that is owned and controlled by shareholders, with shares that are traded on a stock market". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/joint-stock,(accessed: 26/4/2021)

[135] **Limited company**: "a company, especially one in the UK, whose owners only have to pay part of the money they owe if the company fails financially". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/limited-company,(accessed: 26/4/2021).

[136] **A limited liability partnership:** "A legal business entity partnership whereby the limited liability partnership is responsible for the debts of the business and not the partners". See the official website of the free dictionary, available at: https//legal dictionarythefreedictionary.com/limited+liability+partnership, (accessed: 26/4/2021).

[137] On January 11-16, 2003, the Council of the International Islamic Fiqh Academy of the Organization of Islamic Cooperation held its fourteenth session in Doha (Qatar), in accordance with resolution No. 130 (4/14). see the official website of Islamic Fiqh Academic available at: https://www.iifa-aifi.org/ar/2120.html,(accessed: 26/4/2021).

[138] **Legal personality:** Legal entity or legal personality both refers to the ability to exercise legal rights and responsibilities under a specific legal framework, such as entering into contracts, own property, suing, and being sued et cetera (Smith, 1982, pp.283–299). Legal personality is a necessary condition to legal capacity (Kornhauser, 2010, p.14). Therefore, the ability of any legal individual to amend (enter into, pass, etc.) rights and obligations, requires legal personality (Smith, 1982, pp.283–299).

An owner of legal entity is named as a person (Fisher, 191, p.40). As claimed by fisher, the persons can be divided to two types: firstly: natural persons (also known as physical persons), secondly: a non-human being is referred to as juridical persons (also known as juridic, juristic, artificial, lawful, or fictitious persons, entities such as companies that are regarded as though they were persons in law (Fisher, 191, p.40). Human beings gain legal personality when they are born, but juridical persons acquire it when they are incorporated according to legislation (Kornhauser, 2010, p.21).

partnership, is subject to the terms and agreements of the partners. Rests of the conditions are summarized in following part.

As this is a contract, therefore all pre-requisites of a valid contract such as offer and acceptance must be fulfilled in the contract of *sharikah* too. Apart from that, there are some exclusive conditions too for the contract of *sharikah*. First condition is regarding 'agency'. Ibn-ʿĀbidīn point out that majority of the classical jurists demanded that the contract should be of such nature that it accepts agency as each partner is agent of the other partner (Ibn-ʿĀbidīn, 1994, vol. 4, p. 300). Thus, the contract and contracting parties both must be capable of accepting and acting as agent (Al-Dardīr, 1995, vol. 3, p. 349; Al-Sharbīnī, 1958, vol. 2, p. 288; Ibn-ʿĀbidīn, 1994, vol. 4, p. 300). However, the *Ḥanbalī fiqh* does not mention agency rather they only demand the capability of the parties to enter into a contract (Al-Bahūtī, 1993, vol. 2, p. 260). This seems more reasonable as the capability of entering into contract by default means that they are capable of appointing and agent and can be an agent themselves as well. This opinion seems stronger than the majority's viewpoint, because of their justification (Ibn Qāsim, 1976, vol.3, p.407). Al-Khayyāṭ demonstrated that it is also a prerequisite according to the majority of jurists that the capital must be known in clear terms quality and quantity wise (Al-Khayyāṭ, 1994, p. 345). This should be done in such an unequivocal manner that eliminates every ambiguity that may lead to the dispute in future.

At the time of liquidation[139], it is the capital that plays a decisive role in determining the share in the profit (Al-Sarakhsī, 1987, vol. 11, p.152; Ibn Rushd ,1996, vol. 2, p. 275; Ibn Qudāmah, 1994, vol. 5, p.111). The *Shāfiʿī* School viewpoint is a bit different. They do not make it a prerequisite for a valid contract of *sharikah*. They reasoned that the parties can decide to enter into the contract and may determine the share and type of capital later on. It is their right to know the share in capital and they decided to determine later on. Therefore, it is a valid contract, even if the capital is not decided at that time (Al-Mardāwī, 1999, vol. 6, pp. 470-472). Those who demand that it is pre-requisite to decide the capital at the time of contract also ask for its existence and presence at the time of contract and it

[139] **Liquidation** "Liquidation is the process in accounting by which a company is brought to an end". See the official website of the free dictionary, available at: https://encyclopedia.thefreedictionary.com/liquidation, accessed: (26/4/2021).

must not be a debt of or upon either party (Ibn al-Humām, 1995, vol. 6, p.154; Al-Dardīr, 1995, vol. 3, p.352; Al-Sharbīnī,1958, vol. 2, p. 290; Ibn Qudāmah, 1994, vol. 5, p.112). Some jurists[140] ask for mixing up the capital in a manner that the capital become indistinguishable whereas majority of the scholars do not deem it compulsory (Al-Nawawī, 1988, vol.3, p.507; Ibn al-Humām, 1995, vol. 6, p.156). *Al-Shāfiʿī* and *Zufar*, from the *Ḥanafī* School, wanted the capital to be mixed so that if there is some perishable thing that is to be lost, it must be lost from everyone's property and the burden of loss should not be incurred on only one party. Ibn Rushd point out that the majority of jurists, on the other hand, opined that the purpose of *sharikah* is realised through the contract and it does not necessarily require mixing. Moreover, *sharikah* is done to earn profit that can be done even without mixing the properties. Partners become agents of each other and can transact on each other's behalf and on each other's assets that are made the capital of the contract (Al-Kasānī, 1997, vol. 6, p. 58; Al-Bahutī, 1982, vol. 2, p. 260; Ibn Rushd, 1996, vol. 2, p. 279).

The opinion of the majority of jurists seems stronger in this matter. This is because capital can be in monetary form for instance, gold or paper money. Ibn Qāsim showed that jurists are unanimous in this regard (Ibn Qāsim, 1976, vol.3, p.410). But some of the scholars do not recognise non-fungible[141] goods or real estate as capital for *sharikah* (Al-Sarakhsī, 1987, vol. 11, p.155; Al-Dardīr, 1995, vol. 3, p.352; Al-Mardāwī, 1999, vol. 6, p. 479; Ibn Qāsim, 1976, vol.3, p.410). The ratio of profit sharing must be decided at the time of the contract, and it should not be left for later. Lump sum amount or any rate related to the invested capital must not be fixed. Only ratio can be determined for division of the property and jurists are unanimous regarding this issue (Ibn-ʿĀbidīn, 1994, vol.4, p.305; Al-Shirbīnī,1958, vol. 2, p. 300; Al-Nawawī, 1991, vol.3, p.530; Ibn Qudāmah, 1994, vol. 5, p.130).

[140] Such as: Al-Nawawī and Ibn al-Humām (Al-Nawawī, 1988, vol.3, p.507; Ibn al-Humām, 1995, vol. 6, p.156).

[141] **Non-fungible** "not easy to exchange or mix with other similar goods or assets." See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/nonfungible?q=non-fungible,(Accessed: 26/4/2021).

Modern Companies in Present Time from Contemporary Islamic Jurisprudence Perspective[142]

As discussed earlier, cooperates as joint-stock companies, a limited company and a limited liability partnership are the result of evolution of the different form of business models and venture. These are new contemporary issues which demand competent Muslim jurists to solve via employing *Ijtihād* for determining the legality of these new forms of businesses. Al-Khafyīf call our attention to modern scholars contend that the modern forms of companies are permissible in Islamic law under the general rule of permissibility (*ibāḥah*) (Al-Khafyīf, 2009, p.p. 122-127). The ruling entails that in *muʿāmalāt* all things are permissible unless they are prohibited directly or indirectly by Injunctions of Qur'an and Sunnah (Al-Khafyīf, 2009, p.189). Thus, the new forms of companies should follow the rulings of Qur'an and Sunnah that is applied for *sharikah* (Al-Khayyāṭ, 1994, p.145; Al-Khafyīf, 2009, p.190; Al-Khwayīṭr, 2005, p.119).

According to Nyazee, it is also mandatory for the corporation to fulfill the main principles of Islamic law of contract. These principles are four in numbers (Nyazee, 2016, pp.154-157). First and foremost is that it should comply with the principle of *al-kharāj bi- al-damān*. This maxim enshrines the principle that the entitlement of the profit lies with the duty to bear the loss (Nāṣyif, 2013, p.111). In other words, the investor will only be able to claim the profits if he is ready to bear the risk of loss of the entire investment. Secondly, liability must exist side by side with ownership: This ruling addresses the main concerns of Islamic contractual law regarding partnership. For instance, it addresses the issue of ownership of the capital that is held and kept by the investor (Al-Khayyāṭ, 1994, p.166). Likewise, the matters of entitlement to profit, ratio for profit distribution and the practice of limited liability.[143] These principles entail that the entitlement to the profit corresponds to the liability. He would not be entitled to the gains profit by the credit or loan on which

[142] It is worth mentioning in this context that the modern companies that I mean here are corporations which have been started since 19th (Al-Khafyīf, 2009, p.7).

[143] **Limited liability**: "a situation in which the owners or other shareholders of a company are not responsible for all of its debts if the company fails ".See the official website of the Cambridge dictionary, available at:https://dictionary.cambridge.org/dictionary/english/limited-liability?q=limited+liability+, (Accessed: 26/4/2021).

he was not responsible to repay for (Rashād, 1989, p.346). Because of this, an investor's liability in all legal commercial dealings is still without limit. For this stringent rule, the liability of businessman is unlimited. Thirdly, *Riba* prohibition: This principle must be applied in the company, and all of its activities, whether they relate to borrowing, the issuance of shares, or anything else, must meet the conditions of this principle in order to be considered legal (Ibid). Fourthly, using a well-known agreement: Any new form of business must try to recognized forms of contract so that its terms and conditions are clear (Al-Khwayīṭr, 2005, p. 312). *Amānah* (trust), *wakālah* (agency), *kafālah* (surety) and *ijārah* (hire) are the four contracts that Muslim jurists employed for the law of business organization (Nyazee, 2016, pp.154-157). If new forms do not fall in any such category, then they must be analyzed through shared characteristics. For instance, the concept of share is admissible on the ground that it represents ownership. The share can be returned if it was not predefined. Debentures will not be allowed. A person remains owner of shares unless he transfers willfully to someone else. Corporations may lend and borrow money and in the event of loss, shareholder must bear the loss according to the investment (El-Saadouni ,2013, p.166).

The Islamic *Fiqh* Academy has passed a resolution in favour of modern forms of corporations[144]. They have discussed different forms of new model of corporations. For instance, *sharikat al-amwāl* (companies based on finances) which is further divided into *sharikat al-musāhamah* (joint stock), *sharika al-tawsiya bi'l ashām* (partnerships limited by shares) and *sharikt dhat mas'uliyya al-mahdudah* (limited liability companies). These are corporations which are formed on the basis of the capital invested by the partners. Shares are of equal value in *sharikat al-musāhama* (joint stock) and partners are liable only to the extent of their shares (Cited by El-Saadouni ,2013, p.166). Shares are tradeable in this form. In *sharikat al-tawsiya bi'l ashum* (partnerships limited by shares) a corporation whose stocks is made up of tradable shares, with two types of partners. Some partners are only liable for their shares value while others opt for jointly or severely liable for the loss.

[144] On January 11-16, 2003, the Council of the International Islamic *Fiqh* Academy of the Organization of Islamic Cooperation held its fourteenth session in Doha (Qatar), in accordance with resolution No. 130 (4/14). see the official website of Islamic *Fiqh* Academic available at: https://www.iifa-aifi.org/ar/2120.html,(accessed: 26/4/2021).

S*harikat dhat mas'uliyya al-mahdudah* (limited liability companies)[145] is the company where shares are not tradable, and partners are only liable for their share of the capital. These companies have a small number of partners.

Second type of the company is not based upon the capital investment, rather it is dependent on the skills and goodwill of the partners. Such type is called *sharikah al-ashkhāṣ*. This type is also divided further in three kinds: *sharikat al-taḍamun* (partnership), *sharikah al-tawsiya al-baṣiṭa* (limited partnerships) and *sharikat al-musāhamah* (joint stock). *Sharikat al-taḍamun* (partnership) a company formed by two or more people for the purpose of trade. Partners will split the capital and will be equally responsible for the company's debt and obligations to the sum of their whole wealth. This style of company is basically dependent upon the relationship of the partners. In *sharikat al-tawsiya al-baṣiṭa* (limited partnerships) includes one or more general partners are responsible for the *Sharikah* debts to the extent of their entire fortune, and one or more limited partners are responsible for the *Sharikah* debts to the extent of their value from the partnership's capital. *Sharikat al-musāhama* (joint stock) does not possess legal personality. This is formed when two or more people invest in business that conducted under one of their names or both of their names and agree to share profit or loss in a defined proportion. Third kind of the company is *sharikat al-kabiḍah* (holding company). A company that holds equity or stakes in the stock of another company or businesses is known as a holding company. Such ownership would be in the form of a percentage that allows the holding company to lawfully regulate the management and general plans of the other companies.

Lastly *sharikat mutaʿadidah al-jinsiyyah* (multinational company): This is the company that has many subsidiaries in different countries. These subsidiaries remain under the mother company and often acquires the nationalities in the respective country but remain interconnected with mother company (El-Saadouni ,2013, pp.167-171).

[145] **Limited liability partnership**: "A limited liability partnership is a partnership in which some or all partners (depending on the jurisdiction) have limited liabilities. It therefore can exhibit elements of partnerships and corporations. In this form, each partner is not responsible or liable for another partner's misconduct or negligence". See the official website of the free dictionary, available at: https://encyclopedia.thefreedictionary.com/Limited+liability+partnership, accessed: (26/4/2021).

The Islamic *Fiqh* Academy agreed on a resolution[146] whereby joint stock companies were acknowledged as possible forms of *Sharikāt.* It based its ruling on the legal maxim that the original rule in financial matters in Islamic law is of permissibility (Cited by:Al-Khwayīṭr, 2005, p.187). Thus, the joint stock company should be a permissible mode as long as it does not contradict any commandment or prohibition of Islamic law. For Example, *ribā* (usury or interest) or dealing in prohibited merchandise such as alcohol, pork or activities such as pornography, gambling[147]. A person obtains an undivided share in the capital of the company by purchasing a share (Sharīʿah Standard, 2017, p.339).). The certificate of share is the evidence of the right. The subject-matter of the contract in the sale of shares is an undivided share in the assets of the company (Ibid, p.340).

The resolutions of Islamic *Fiqh* Academy present a revolutionized scenario for the business industry that is inclusive of many modern trends in the formation of corporations. Nyazee, however, does not agree with the arguments and basis of the Islamic *Fiqh* Academy for permitting the new forms of corporations (Nyazee, 2016, pp.175-184). He is of the view that these resolutions do not depict a thorough examination of principles of Islamic law and recourse to the traditional law of business enterprise. Moreover, the dictum of general principle of permissibility is heavily relied upon. He further maintains that Muslim scholars must scrutinize the structure of business enterprises in the light of principles of Islamic law and then propose new models (Ibid).

However, the researcher believes that Islamic Law of Corporations can be best formulated as guided by the International *Fiqh* Academy. The rationale behind my opinion is the dictum of Prophet Muhammad: “Muslims must keep to the conditions they have made, except for a condition which makes unlawful something which is lawful, or makes lawful something which is unlawful.” (Sunan Abū Dawūd, Ḥadīth no: 3594). This shows that any involvement in a transaction, whether a corporation or a partnership, is subject to the terms and agreements of the partners. Secondly, this view is supported by many eminent

[146] On May 9-14, 1992, the Council of the International Islamic *Fiqh* Academy of the Organization of Islamic Cooperation held its seventh session in Jeddah (Saudi Arabia), in accordance with resolution No.63 (1/7). see the official website of Islamic *Fiqh* Academ available at: https://www.iifa-aifi.org/ar/1845.html,(accessed: 26/4/2021).

[147] **Gambling**: “the activity of risking money on the result of something, such as a game or horse race, hoping to make money”. See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/English/gambling, accessed: 29/4/2021.

contemporary jurists such as Abū Zahra, ʿAli al-Khafyīf Al-Zuḥaylī, IbnʿUthaymeen, ʿAbdulwahab Khallāf and al-Khayyṭ who used Islamic jurisprudential principles to justify the contemporary companies, modern financial trust, and joint-stock, limited liability company (Al-Khayyāṭ, 1994, p.260; Al-Khuwayīṭr, 2005, p.198; Al-Zuḥaylī, 1997, vol.7, p.218). These scholars have consulted the juristic principle of mutual consent on a matter of preponderant merit devoid of harm or injustice (Sharīʿah Standard, 2017, p.350).

Technical Definition of Waqf Company

After I have discussed the theoretical framework on the concept of Waqf among the classical and contemporary scholars with a critical analysis for their opinions. And then I moved to give a brief review to the concept of the company in Islamic jurisprudence and its terms among the classical scholars and presented the contemporary scholars contribution in term to adapt the modern forms of companies through *Ijtihād*.

The points already discussed in this study have provided a basic understanding of the unique characteristics of the Waqf law and company law in Islamic law. In this section I will present and give an explanation of the concept of a Waqf company in order to understand and create a clear picture as to how the Waqf company is different to other methods of classical Waqf in the past, from a legal point of view. The Waqf company is an amalgamation of these two financial institutions. It is the modern form of establishment and administration of Waqf. I will define the concepts according to some contemporary academic researches. In addition to this, I will critically analyze the definition and give my conclusion regarding preferred definition. However, it is to be noted that the Waqf company was not mentioned or discussed in the work of classical jurists because it is a contemporary jurisprudential concept and requires diligence in the correct jurisprudential adaptation. Modern Waqf company needs to be compatible with the notions of Sharīʿah regarding the rulings and principles of a Waqf and company. The Waqf company has been defined by many contemporary researchers. For example, al-Rājḥi defined it as: A contract that binds a share of capital between two or more Waqfs in a profit-making project, in order to earn profit from it and then donate it to the charity (Al-Rājḥi, 2016, p. 15).

However, it is contested that it confines a Waqf company to a consortium of the Waqf assets, with the possibility that the Waqf company will be of a single Waqf assets. For instance, a jointly owned property [148] which is divisible in nature such as land and shares, if all the joint owners agreed to make the assets a Waqf and they transfer their assets to a Waqf company, the waqf is valid. Al-Faziʿī disputes this account of the definition as it excludes one-man company even though it is a form of contemporary company that can be established as a Waqf company (Al- Faziʿī, 2016, p. 50). While al-Ani argues that this definition ignores the possibility of establishing the Waqf company through IPO (Initial Public Offering)[149] (Al-Ani, 2018, p. 35). The term 'Waqf company' is used by the Saudi law to refer to meeting and management of Waqf assets with a view of trading in accordance to the commercial regulations (Al-Muhanā, 2012, p.56). Therefore, the definition is not all-inclusive and exhaustive. This is because the word Waqf in this definition includes all forms of collective investments such as commercial companies and investment funds.

In addition, the nature of investment fund[150] does not commensurate with the nature of a Waqf. For this reason, investment funds cannot be considered a type of Waqf because the investor in the investment fund cannot replace the fund manager. This is inconsistent with the conditions and provisions of Waqf that permit the removal of the '*nāẓir'* (person looking after affairs of Waqf) in certain cases (Al-Faziʿī, 2016, p. 50). Furthermore, the term 'trade' indicate the act of multiplying wealth for the purpose of profit, and it goes without saying that the multiplication of wealth does not fit with the concept of a Waqf, because gaining profit is not the basic intention of a Waqf, for it is not a purely commercial endeavour intended for profit only, rather it is a charitable work intended to help and benefit the poor and needy (Sulaymān, 1986, p. 70). One of the observations about this definition includes that the assets of the Waqf and its management and trade, does not require waqf

[148] **Jointly owned property**: "A situation in which two or more persons co-own a property". See the official website of the free dictionary, available at: https: https://financial-dictionary.thefreedictionary.com/jointly+owned+property, accessed: (26/4/2021).

[149] IPO: "abbreviation for initial public offering: the first sale of a company's shares to the public". see the Official Website of Cambridge Dictionary, available at: https://dictionary.cambridge.org/dictionary/english/ipo [accessed: 2/8/2020].

[150] **Investment fund**: "An investment fund is a way of investing money alongside other investors in order to benefit from the inherent advantages of working as part of a group such as reducing the risks of the investment by a significant percentage". See the official website of the free dictionary, available at: https:https:https://encyclopedia.thefreedictionary.com/investment+fund, accessed: (26/4/2021).

to be in the form of a contract of company but may be otherwise. According to al-Faziʿī, a Waqf company is an investment of the waqf assets according to the form of modern companies in light of the rulings of Waqf law (Al-Faziʿī, 2016, p. 50).

However, this definition is too broad because it encompasses all models of modern-day companies and this is inaccurate because it is not feasible for all forms of the companies to be similar with the rulings of Waqf law. The reason for this is that the *fiqh* adaptation for Waqf companies dictates that a Waqf company is similar to the companies based on financial resources. The contribution for the increase in capital funds is only through wealth whether it is monetary or through assets. In addition, it is possible for this definition to encompass different types of companies, whose main objective is to provide a service due to the absence of the personal element in the Waqf company. Moreover, the liability in the Waqf company is limited. The Waqf is unique in the sense that jurists have considered it as a separate legal entity[151] and therefore they have attributed it with certain features analogous of a natural person, therefore it has an independent financial liability and separate legal entity.

Khaznah has defined a Waqf company as a contract between two or more people to contribute in an investment project by providing a financial share in a legal trade and by earning all or part of the resulting profits even if it is temporary. The loss is limited to previous installments (Khaznah, 2016, p. 161). However, this definition has ignored the possibility of establishing a waqf company through an initial public offering (IPO). Despite this fact, I am of the opinion that the definition of Khazanh is the strongest definition keeping in mind the aforementioned observations and the definition is expounded as

[151] **Legal entity:** Legal entity or legal personality both refers to the ability to exercise legal rights and responsibilities under a specific legal framework, such as entering into contracts, own property, suing, and being sued et cetera (Smith, 1982, pp.283–299). Legal personality is a necessary condition to legal capacity (Kornhauser, 2010, p.14). Therefore, the ability of any legal individual to amend (enter into, pass, etc.) rights and obligations, requires legal personality (Smith, 1982, pp.283–299).
An owner of legal entity is named as a person (Fisher, 191, p.40). As claimed by fisher, the persons can be divided to two types: firstly: natural persons (also known as physical persons), secondly: a non-human being is referred to as juridical persons (also known as juridic, juristic, artificial, lawful, or fictitious persons, entities such as companies that are regarded as though they were persons in law (Fisher, 191, p.40). Human beings gain legal personality when they are born, but juridical persons acquire it when they are incorporated according to legislation (Kornhauser, 2010, p.21).

following: A Waqf company is a contract between two or more persons to contribute in an investment project that allows the general public to purchase shares through an IPO by providing a financial share and reserving all or some of the resulting profits even if it is temporary and in permissible means (i.e. the Waqf is dedicated to matters that are permissible and not necessarily considered righteous) and the loss is limited to purchased shares. In other words, each of shareholders will be held responsible according to value of his financial share only in case of any loss occurred.

The researcher prefers this definition due to following reasons:

1- The word *ʿaqd* (contract) indicates the inclusion of the concept of Waqf in contractual issues, based on this, a Waqf company is only established through contractual agreements rather than oral agreements. This agreement establishes an obligation which is the standard requirement for the Waqf company unlike the normal Waqf in the past. These type of old Waqfs where established by a sole entity and they were not considered contracts according to the majority of jurists (Khaznah, 2016, p. 165).
2- The declaration (between two or more people) clarifies that the Waqf is a legal commercial enterprise for it is a contract between two or more individuals. If it is established by one person then it would not amount to pure Waqf as defined in classical waqf and not waqf company.
3- The declaration (to contribute to an investment project) is to indicate that the legality of the partnership is based on the contribution to the project and not the capital; this is because the ownership of the assets is transferred to the company and does not remain with the partners. In addition, the declaration (project investment) the purpose of this company is to achieve a financial return.
4- The declaration (that allows the general public to purchase shares through an IPO) in order to make it clear that it is possible to establish a Waqf company by offering it to the public and inviting the contributors (they must purchase shares) to the Waqf to participate in it.

5- The declaration (by providing a financial share) makes it clear that the contribution is only achieved by purchasing a share. It is important to note that the shareholders[152]' stake in the Waqf enterprise is only achieved with monetary wealth or in assets.
6- The declaration (and reserving all or some of the resulting profits) makes it clear that the profits are given in charity and not owned by the shareholder of the Waqf.
7- The declaration (and all or some of the resulting profits even if it is temporary) means that the reserving of shares can be for a perpetual charitable cause or a temporary charitable cause. Other shares are owned by the non-*wāqif* shareholders. Whereas, if the Waqf company is made for a temporary period, the Waqf company will be terminated at the end of the period and a pure commercial company will return.
8- The declaration (in permissible means), this is in order to increase the number of the beneficiaries, even if it does not appear that the Waqf has religious roots as long as it is not considered immoral or sinful.
9- The declaration (the loss is limited to purchased shares), in order to make it clear that the liability in the Waqf company is limited.

Types of the Waqf Company

There is a considerable demand for the waqf to be modernized and moulded according to the model of companies. Resultantly, it has paved the way for the evolution of *fiqh al-awqāf* (jurisprudence of Waqf) to adapt to contemporary models. In order to fully take advantage of the Waqf, there is a need of scrutinizing different models of the company and evaluating which one amongst them is best suited for Waqf keeping in mind the compatibility with the principles of Islamic law. I have mentioned earlier about the types of partnership in Islamic law among classic jurists and the types of modern companies. Moreover, the efforts from the contemporary jurists to analyze as to how far these current companies are compatible with principles of Islamic law. On the face of it, it seems like a settled issue whereas the combined form of both Waqf and company needs analysis. Thus,

[152] **Shareholders:** "a person who owns shares in a company and therefore gets part of the company's profits and the right to vote on how the company is controlled". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/shareholder?q=shareholders'+, accessed: (26/4/2021).

selecting the model of company that can be adapted in the best manner for the purpose of Waqf is the real task.

Al-Khathlān Showed that the basic principle for jurists is that a person is responsible for his actions and consequent obligations towards others (Al-Khathlān, 2011, p.279). If he has made a contract with others, he is responsible for the obligations arising out of this contract, no matter how much the value, and this liability is not limited to the amount mentioned in the contract, it is unlimited responsibility even if it envelopes all his wealth (Al-Shawkānī, 2008, vol. 11, p. 231). While in the company's law of most of the Arabic countries[153], limited liability of the partner is stipulated in some contemporary companies, foremost of which is the joint stock company, where the responsibility of the partner is limited to the amount of his share in the capital of the company, the value paid for shares (Al-Sanhūrī, 1993, vol. 5, p.347). But, if the company's debts and obligations exceed its capital, the partner will be responsible for his share in the capital only (Ibid). This opinion is supported by the decision of the International Islamic *Fiqh* Academy[154], in which it is stated, 'Determining the liability of the limited joint-stock company is permissible'. Depending on the principle of Sharīʿah*,* that human transactions are permissible as long as there is no clear injunction against establishing a joint-stock company with limited liability with its capital, coupled with the fact that it cannot avoid its obligations to people dealing with it' (Sharīʿah Standards, 2017, p. 733).

As for the matter of the liability in the Waqf, according to the opinion, who has transferred the ownership of the Waqf to Allah or beneficiaries, based on this, the *wāqif's* responsibility will be absolved from any obligation that is accrued on the waqf after he has created it. It is because there is no connection between him and the waqf after giving it up in the name of Allah (al-Ṣalāhāt, 2016, p. 97). However, even according to Abū Ḥanīfa and the *Mālikī* School who are of the opinion that the Waqf property remains in the ownership of the *wāqif*, they too are of the view that the liabilities incurred upon the Waqf of like debt or lease, it is incurred on the waqf and is not the *wāqif's* responsibility (Al-Ṣāwī, 1988, vol.

[153] For example, Egypt, Syria, Lebanon, Jordan, Iraq and Saudi Arabia (Al-Sanhūrī, 1993, vol. 5, p.347).
[154] On May 9-14, 1992, the Council of the International Islamic *Fiqh* Academy of the Organization of Islamic Cooperation held its seventh session in Jeddah (Saudi Arabia), in accordance with resolution No.63 (1/7). see the official website of Islamic *Fiqh* Academ available at: https://www.iifa-aifi.org/ar/1845.html,(accessed: 26/4/2021).

4, p. 120). Thus, this renders the Waqf a juristic personality[155] and financial entity independent[156] in such a way that it cannot avoid its obligations to people dealing with it. On the other hand, although the *wāqif* retains its ownership in a legal and technical sense only he or she has no right to transact in Waqf property like selling it or bequeathing it further. In other words, the *wāqif*, despite being an owner, his rights have been cut off from him with regards to the effects of ownership, which are: the right to use, the right to exploitation, and the right to usufruct. This type of ownership is called *taqdirī* (defective title) (Shaḥāta, 2012, p.85). Resultantly, the *wāqif* is absolved of all of liabilities related to ownership of the Waqf property.

Abū Ḥanīfa and the *Mālikī* School are of the opinion that the obligations and responsibilities have been accepted by the Waqf not the *wāqif*, although the ownership of the Waqf remains in the *wāqif's* hand.[157] It can be fairly concluded that Jurists were aware of the concept of the separate legal entity and they did consider Waqf a separate entity and attributed to it some features akin to the natural person (Khaznah, 2016, p. 146). Contemporary legal framework has recognized the juristic personality in the modern companies too. Consequently, it cannot evade the obligations that it owes other people that deals with it (Al-Khayyāṭ, 1994, vol.1, p.370). Moreover, the concept of the juridical personality of the modern corporation is affiliated with the idea of limited liability[158] which draws a fine line between the liability of the company and that of the shareholders who happen to be the co-owners (Ibid).

Another important aspect is that the modern company law has been divided into following two main classes:

Firstly, *sharikāt al-amwāl* (companies based on finances) and secondly *sharikat al-ashkhāṣ* (this type of the company is not based upon the capital investment rather it is dependent on the skills and goodwill of the partners). Since, the Waqf has a financial liability independent and separate legal entity, the understanding is that the individual i.e. the *wāqif*

[155] Legal entity.
[156] Has its own separate financial existence.
[157] This will be discussed in detail later on.
[158] **Limited liability**: "If a company goes bankrupt and has limited liability, the owners of the company (the shareholders) are only obliged to pay back company debts with the money they have already invested in the firm. They will not be forced to sell their personal possessions to help pay debts ". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/limited+liability, accessed: 6/5/2021.

is completely separate from the status of the Waqf. [159] Accordingly, in the Waqf company, as was adopted, the ownership of the Waqf still remains in the ownership of the *wāqif*. So, the responsibility in the Waqf company must be the 'limited liability' only. Consequently, the Waqf company should not take one of the forms of the *sharikat al-ashkhāṣ*. This is due to the overlapping of the legal status of a natural person from the shareholders with the juridical personality of the company, due to this fact, there is no way to separate the liability of the company from the liability of its shareholders in such companies, thus each shareholder will be held responsible for the day-to-day affairs and for the debts of the company (Al-Khayyāṭ, 1994, vol.2, p.13). As this type of partnership is basically dependent upon the relationship of the partners (Khaznah, 2016, p. 148), therefore, they are jointly **liability** [160] for the company's debt on the basis of full personal responsibility (Ibid).

Accordingly, the Waqf company is not suitable or similar to the companies based on the personal element where the contracting partners combine both money and physical effort in the running of their company. Because of this reason, those companies get terminated if one of the personal elements defaulted from one of the shareholders such as death, bankruptcy or loss of eligibility.Al-Zarqā mentions a number of scholars, such as Ibn Qudāmah, Ibn al-Qayyim, al-Nawawī, Ibn Taymiyyah, Ibn ʿAbd al-Barr and others, to prove his claim that there is unanimous agreement among jurists that the Waqf is not revocable when any of the causes regarding the personal elements happened, irrespective of the fact that it is from the *wāqif* or *nāẓir* or beneficiaries (Al-Zarqā, 2004, Vol. 1, p.340). Thus, there is no impact on the Waqf company in term of causes regarding to the personal elements.

Moving on now to consider the *sharikāt al-amwāl* (companies based on finances) we have already discussed that law has recognized the juristic personality of the companies which draws a fine line between the liabilities of company and shareholders. Both entities have their own set of liabilities which they cannot legally evade. However, not all such types of

[159] This will discussed in detail later on.

[160] **Joint liability**: "a situation where more than one person or organization share responsibility for paying a debt or for paying for damage that has been caused, etc". See the official website of the Cambridge dictionary, available at:https://dictionary.cambridge.org/dictionary/english/joint-liability, (Accessed: 26/4/2021).

aforementioned companies can be applied on the Waqf company and not all of them are attuned with the jurisprudence and rulings of waqf unless their dispositions are restricted. This is supported by one of the most important Tradition of ʿUmar who acquired a land at Khaybar. This Tradition provided the foundation for the main principles of the law of Waqf, such as that it cannot be sold, give away or inherited, the jurists derived the principle that the ownership of the property can no longer be transferred once a waqf has been made (Al-Kubaiysī, 1977, vol. 1, p.120).

According to this, the public joint stock company and company limited by shares are not similar to a Waqf company because these companies are allowed to do trading in the shares in stock markets. This is against the general principle in which the majority of jurists are in agreement, that the ownership of the Waqf belongs to Allah and its usufruct is devoted to charity (Ibid). Thus, the consequent effect of a Waqf is that it is an absolute contract (*ʿaqd lāzim*) which cannot be revoked, and the object of Waqf cannot be sold, given away or inherited (Abū Zahra, 1959, p. 29). According to this principle, it is not permissible to undertake the trading in the shares of the company by sale and purchase in the Waqf company because it is conflicting with this principle. Furthermore, because the reality of the stock markets is great risk and may have elements of *gharar*, therefore we should keep the assets of the Waqf company away from this type of transactions such as trading in the stock markets. Consequently, many contemporary researchers such as al-Ṭarīqī, al-Rājḥi, Khaznah, al-Khathlān, al-Ṣalāḥāt and others, have suggested some models of corporations that are suitable with Waqf Islamic jurisprudence (Khaznah, 2016, p. 150; Al-Ṣalāḥāt, 2016, p. 56; Al-ʿAbd al-Munʿim, 2019, p. 298). Rulings of Waqf are joint stock or limited liability companies are concordant to Waqf (Al-Ṣalāḥāt, 2016, p. 56; Al-ʿAbd al-Munʿim, 2019, p. 302). Therefore, these are the only models which can be applied on the Waqf company.

Al-Faziʿī, nonetheless, criticized most contemporary jurists and he added that one more model can be applied on the Waqf company, which is one-man company. He believes that this type is suitable with Islamic jurisprudence and the rulings of Waqf (Al-Faziʿī, 2016, p. 57). However, a major criticism of al-Faziʿī work is that it ignored an important requisite according to the majority of jurists which is that a contract between two or more is a 'company'. Therefore, this type of one-man company fails to achieve one of a major

component of the company, which is the multiplicity of partners. So, the definition of partnership in Islamic law cannot be applied upon such types of companies. Also, Muḥammad al-Qāsim showed that the idea of the one-man company is not recognized by many countries, and it is a novel idea that still needs a lot of research and understanding.[161] Therefore, the opinion of the majority of contemporary jurists has the strongest justifications while the opinion al-Faziʿī lacks solid Sharīʿah evidence.

This Waqf company will be formed when all the partners have agreed to be the Waqf's shareholders, and therefore the establishment of this Waqf company will not be either of the two cases: Firstly: when the joint stock company or limited liability company already have set up as commercial company in its known form, then each shareholder whether a juridical person or a natural will make all of his shares as the Waqf. In this way, the company has turned into a Waqf company. Secondly: when the limited liability company be established from the Waqf assets of not less than the Waqf assets of two Waqfs and not exceeding fifty of the Waqf assets or if the joint stock company has set up from the Waqf assets of not less than five of the Waqf assets through commercial register owned by those Waqf assets in order to establish this company which has the independent juridical personality. Hence, the *wāqif* shareholders will be having completely separate status from the status of the company which in itself is a separate entity (Al-Rājḥi, 2016, p. 23; Al-Ani, 2018, p. 39). As a juridical person, this fictitious person has a legal personality, which means it can be sued or sued, make contracts and keep property under its name, and retain the legal status of a natural person in all its activities undertaken in its role as a juridical person (Al-Muhanā, 2012, p. 58).

Khaznah point out that among the positives of this form of companies are the following: Firstly, the limited number of partners in the limited liability company while the closed joint stock company has no limit on the number of partners in it. Secondly, it prevents the

[161] *Sharikat al-Shakhṣ al-Wūḥad fi Ḍwāʾ Ḍawābiṭ al-fuqahā Muqāranah bi al-Qawānīn al-Ḥadīthah,* Article in *Al-Iqtisṣdiah* Magazine, Thursday, April 22, 2014.

issuance of shares or bonds[162] that are able to be traded in shares in stock markets [163]of the limited liability company whereas in the closed joint stock company, the trading in the shares in stock markets is permissible after two years of its establishment. Thirdly, the partner is not responsible except with the amount of his share of the capital in both companies. As partners are related to the modern financial corporation only through their financial shares which define their financial responsibility (Sharīʿah Standards, 2017, p. 572). Fourthly, the shareholder partner has not acquired the trader status in both companies. Fifthly, the limited liability company is established in small projects that require small capital while a closed joint-stock company is set up for large projects that need large capital (Khaznah, 2016, p. 149).

However, one major drawback of these two forms of companies is that documentation of any amendment in the company's memorandum of association[164] ought to be made by the Ministry of Justice, as it is the authority responsible for amending the company's memorandum of association in many Arab countries, including Saudi Arabia which is time-consuming and expensive (Al-Ṣalāḥāt, 2016, p. 102). However, the researcher agrees with this procedure as it will have benefit in order to match the Waqf deed with the required amendment, as well as ensure that there is no contradiction or conflict between them in order to achieve the goals of Waqf company shareholders.

[162] **Bonds** "an official paper given by the government or a company to show that you have lent them money that they will pay back to you on a future date at a particular interest rate." See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/bond?q=bonds+,(Accessed: 26/4/2021).

[163] **Stock market**: "The market in which stocks are bought and sold in some particular companies, usually including the organized exchanges and over-the-counter markets in a particular country or economic region". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/stock+markets, accessed: (27/4/2021).

[164] **Memorandum of association**: "a legal document needed to officially form a new company, which gives details of its name, activities, managers, share capital, etc.". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/memorandum-of-association, (Accessed: 26/4/2021).

The Adaptation of the Waqf Company in the Light of the Integral-Pillars (*Rukn*) of Waqf

The texts of Qur'an and Sunnah have not mentioned any specific form of Waqf or method and kinds. Rather, it is a set of concepts which could be accommodated by several models and methods. This work has to be done by qualified Muslim jurists.[165]

A modern model or method regarding the kinds of Waqf such as the Waqf company cannot be rejected just because it does not have any similar precedent in the past. As a matter of fact, any new model may be agreeable as long as it does not infringe with any essential principle in the text of the Qur'an, the Sunnah or the consensus of Muslim scholars.

Here, I will explore the ingredients of Waqf together with the application of these principles to modern Waqf company. This discussion will be aimed toward introducing the Waqf company as one of contemporary methods of financing and investment for charitable objectives without conflicting with the integral-pillars of Waqf from the perspective of Islamic jurisprudence. Kamali (2005, 34) remarks that all forms of worship in Islam, such as prayer, Zakat and fasting and the like, must have integral-pillars. These integral-pillars (known in the language of Islamic law as (*rukn* pl. *arkān*) are essential in order to establish whether the execution or performance of any type of worship is valid or not. In Islamic law, failure to observe the integral-pillars renders the entire act of worship null and void. The ultimate objective from the Waqf is to seek the pleasure of Allah, whilst taking into consideration the requirements of the Islamic law.

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[165] I mean the development Waqf law need to be analyzed in the light of contemporary needs by the process of *Ijtihād* to find a solution using both the primary sources of Islamic law, namely the Qur'an and the Sunnah, as well as the secondary sources. Hence, there is a necessity of a continuous primitive *Ijtihād* to provide answers to legal questions that randomly arise. Secondly, Islamic jurists should not stop improving Islamic law in generally and the Waqf law in particular as there is still an open expectation of renew the application of 'legal' norms as perceived by Western basics of law. Also, there are so many diverse issues and so much breadth of knowledge required in modern life that one person cannot possibly know everything relating to *Ijtihād*. It is therefore important to transform *Ijtihād* into a system of consultation that makes use of not only Islamic law jurists but also of people who are authorities in fields such as healthcare, business and finance, and science and technology. As well as helping to meet people's needs, a shared sense of *Ijtihād* might foster greater consensus and togetherness within the Muslim community. Finally, Islamic jurists would have critical answers if the time comes to provide to the world (Weiss, 1978, p. 203). The role secondary sources play in Islamic Sharīʿah are summed up by Kamaili: "These sources are all designed, each in their respective capacity, to relate the Sharīʿah to social reality, to serve as instruments of adaptation, and provide formulae for finding solutions to new issues." (Kamali, 1996, p. 72).

Absence of any integral-pillar will render the act of worship invalid, and this equally applies to the case of Waqf as it is one of the philanthropic acts of worship which are made for the sake of Allah. The constitution of Waqf was dependent on four integral-pillars mentioned below briefly:

1- *Wāqif* (the donor/founder) an individual who donates his assets or money for philanthropy.

2- *Mawqūf* (the wealth designated for the Waqf): Property and assets or funds invested for charitable purposes as Waqf etc.

3- *Ṣighah* (The legal statement): The declarations[166] whereby *wāqif* specifies its property or funds as Waqf.

4- *Mawqūf ʿalaih* (beneficiaries): Individuals or places that are allowed to benefit from the Waqf's income.

Absence of any of the aforementioned integral-pillar will render the Waqf invalid. All the rulings regarding these integral-pillar must be stated clearly before the establishment of the Waqf. Recently, the cases of such companies have been a matter of contention and debate among the Sharīʿah experts in this century. The main challenge faced by many researchers is to what extent the integral-pillars/ requirements of Waqf can be applied on the modern Waqf company? To answer this question, the Waqf company should be referred to the books of Islamic jurisprudence of the past and present in order to discuss the problems which may help in solving this riddle.

We have to adapt the contract of a Waqf company juristically. Juristic adaptation of a contract means investigating the compliance of its consequences with one of the recognised contract types in Islamic law so that it can inherit its rulings from that type (Al-Zarqā, 1998, p.599). If it is not possible to relate the contract to one of the recognised contract types, then there is nothing in Sharīʿah to prevent introducing a new type of contract for a Waqf company. Pondering over the consequences of this new type and fleshing out rulings that are compatible with the general fundamentals and

[166] **Declarations**: "an announcement, often one that is written and official or the act of making a statement". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/declaration?q=declarations+, (Accessed: 27/4/2021).

principles of Islamic jurisprudence about transactions is what makes Sharīʿah practical for all times and areas.

Accordingly, juristic adaptation of a Waqf company contract requires examining the alignment of its consequences and rulings with the Waqf consequences and rulings on the one hand, and with the modern company whose consequences and rulings have been adopted juristically on the other. It is essential to confirm the fulfilment of the ingredients of Waqf contract, *Wāqif, Mawqūf, Ṣighah and Mawqūf ʿalaih* in a Waqf company in both of the abovementioned forms. The Waqf company would take the form of a company in terms of the operation of investment, while preserving perpetuity of the Waqf assets as much as possible and ensuring there is a yield for the beneficiary.

If this is properly achieved, it can be said then that a Waqf company contract is a new contract type that differs from the recognised contract types and has its own consequences and rulings.

We may divide this section into four main parts:

1) The legal statement of the Waqf (declaration of Waqf) between Article of Incorporation[167] and Subscription[168]

2) The founder; his ownership and legal capacity[169]

3) The wealth designated for the Waqf between shares and capital

4) The beneficiary; subscribers[170] and others

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[167] **Article of Incorporation**: "a document that must be given to a state before a company can be legally created. It usually includes the name and address of the company, its purpose, and the number and type of shares that it will issue". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/articles-of-incorporation, (Accessed: 27/4/2021).

[168] **Subscription**: "to formally ask to buy particular shares when they are issued". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/subscribe?q=Subscription, (Accessed: 27/4/2021).

[169] **Legal capacity**: "the legal right of a person or company to make particular decisions, have particular responsibilities, etc.". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/legal-capacity?q=legal+capacity+,(accessed: 27/4/2021).

[170] **Subscribers:** "someone who signs a memorandum of association (= document needed to officially form a new company) of a new company and promises to buy a particular number of shares". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/subscriber?q=subscribers+,(Accessed: 27/4/2021).

The legal statement of the Waqf (The First Integral-Pillar: *Ṣighah*)

Within the ingredients of Waqf, an important one is the declaration of Waqf itself. This integral-pillar clarifies the stipulations for the establishment of Waqf. Therefore, if the conditions are not followed, then the formation of a valid Waqf would not be possible. This is quite similar to the other contracts where alienation of ownership takes place e.g. sale, purchase, and *waṣiyya* (bequest). Broadly speaking, any transaction made between two sides can be broken down into two parts. First, it could be transactions (*muʿawaḍah*) or a bilateral transaction[171] where exchange of properties has been made by one side and is accepted by the other side. This case could occur whilst transferring the ownership via sale, loan of a property or even for usufruct right (*manfʿ*) as in a lease or sharecropping [172](*muzāʿrah*). Secondly, there are the transactions or unilateral transaction[173] where only on party transfers ownership to another without receiving anything in return. According to Al-Qarāfī (Al-Qarāfī, 1994, vol; 1, p.135), this is considered like a will, gift, guarantee (*ḍamān*), Zakat, Waqf and the like. In terms of a Waqf, it is necessary in the legal statement or declaration to have both an offer and an acceptance of the offer. For instance, this is ordained in the law of contract (*ʿaqd*) which falls under the general injunctions found in the Qur'an: "Fulfill your obligations" (Qur'an, 5:1). In this part of the research, the aim is to analyze the different aspects of the contract.

Firstly, the Offer (*ījāb*)

Whilst examining offers, it was found that offers are grouped into two categories: one where the words are direct (*ṣarīḥah*) and the other is where the meaning is implied (*kināyah*). In the case of a direct offer, the words Waqf*, tasbil,* or *taḥbīs* can be expressed, such as a person saying, "*Waqaftu"* (I have made a Waqf), or "*Sabbaltu"* (I have made a

[171] **Bilateral transaction**: "a formal agreement between two people or groups that both promise to do something for each other". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/bilateral-contract,(Accessed: 27/4/2021).
[172] **Sharecropping**: "a farmer who rents land and who gives part of his or her crop as rent to the land owner". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/sharecropper?q=sharecropping+,(Accessed: 27/4/2021).
[173] **Unilateral transaction** :"a formal agreement in which only one of the people or groups involved agrees to do something". See the official website of the Cambridge dictionary, available at:https://dictionary.cambridge.org/dictionary/english/unilateral-contract,(Accessed: 27/4/2021).

gift in the way of Allah), or "*Ḥabbastu"* (I have tied up). Another possibility is to say, "My land has been made into a Waqf" (*ardi hadhīh mawqūfah*), or my land is tied up (*maḥbusah*) (Al-Ramlī, 1995, vol. 5. p. 371; Ibn Qudāmah 1994, vol. 6, p. 190). All of the above-mentioned are examples of a direct expression of a person wanting to make waqf in Sharīʿah. Therefore, they are always used whilst making a Waqf (Al-Bahūṭī, 1993, vol:4, p.290). This shows that words like these are the correct ones to use when making the legal statement of the Waqf. The *Mālikī* School maintains that the use of such words demonstrates the continuity of a Waqf, unless a specific period is stated in the declaration of the Waqf (Al-Dusūqī, 1992, vol. 4, p. 84).

An offer will be deemed as indirect one where following words are used: "*taṣaddaqtu*" (I have made a *ṣadaqah*); '*ḥarramtu'* (I have consecrated), and '*abbadtu'* (I have disposed of permanently) as stated by Ibn Ḥajar (Ibn Ḥajar, 1979, vol. 6, p. 250). These words are like innuendos that may refer to the establishment of a Waqf, however, it should be kept in mind that different meanings other than Waqf can be inferred too. For example, the word '*ṣadaqah'* means Zakat as well as suggested *ṣadaqah* (*ṣadaqat al-taṭawwaʿ*). Moreover, the word '*taḥrīm'* is also said in *ẓāhir,*[174] and lastly the word '*ta'bīd'* can be used in any situation to set out permanency (Haji Abdullah, 2005, p.94). As a result, it can be said that the employment of such words causes the jurists to comprehend whether this indirect offer is made to establish Waqf (Al-Bahūṭī, 1999, vol: 4, p.291). The *Ḥanbalī* and *Shāfiʿī* Schools require further confirmation when indirect offers are made, to ensure that a Waqf is sincerely meant.

There are three ways of deciding so:

(1) Part of the legal statement must include the direct words, e.g. *taṣaddaqtu ṣadaqah mawqūfh* (I have made a *sadaqah* with the effect of a Waqf), or *ṣadaqah muḥabbasah* (*ṣadaqah* that has been precluded from any right of ownership), or *ṣadaqah musabbalah*

[174] "A form of imprecation which involves the separation of husband and wife until expiation is made. *ẓāhir* signifies the likening of a woman to a kinswoman within the prohibited degrees, which interpretation is found in the comparison being applied to any of the parts or members of the body improper to be seen. The usual formula is: «You are to me as my mother's back». Before Islam, *ẓāhir* stood as a divorce, but Islam changed it to a temporary prohibition, for which expiation must be performed, viz. either freeing a slave, or two month's fast, or feeding sixty persons". See, Dictionary of Islamic law terms, Deeb Al-Khudrawi, 2012, p. 373.

(*ṣadaqah* that has been given in the way of Allah). In certain situations, multiple words may be used with each other, such as when a *wāqif* says *hadhīh al-ʿain muḥarramah muabbadah* (this property has been dedicated in perpetuity)'. Concluding, the use of only indirect words does not have any lawful impact to create the Waqf. It must be accompanied by some clarification that elucidates that it is intended for Waqf.

(2) In the announcement, the features of a Waqf must be present. For instance, 'I have made a *ṣadaqah* that cannot be the subject of sale, gift or inheritance', or he further states about the appointment of *nāẓir* in the statement 'I have made a *ṣadaqah* and the office of *nāẓir* will be held by myself.' These statements explicates that the *nāẓir* is appointed because the property is endowed as Waqf.

(3) If the *wāqif* uses the implied words, the intention (*niyyah*) behind making a Waqf should be there (Ibn Qudāmah, 1994, vol. 6, p. 191; Ibn Ḍawyan, 1996, vol. 2, p. 704). In such scenario, as said by Ibn Qudāmah, if indirect words are used in the legal statement, an acceptance and confirmation will be demanded from the *wāqif*, in order for a Waqf to be created. If the person does not aim to make a waqf, this will be accepted and believed from him as the intention is exclusive for that person (Ibn Qudāmah, 1994, vol. 6, p. 191). For the above conditions, the *Mālikī* School follow the second condition only. As well as two more distinguished points on the legal side of the legal statement are used in the Waqf. The first point expresses that if the word '*taṣaddaqtu*' is used along with this condition (pointing out that the *ṣadaqah* cannot be sold or given away, or, if the *wāqif* destines the endowment to ultimate beneficiaries who will not die out), consequently it will be evidence of the Waqf. However, if the word is used by itself, a Waqf cannot be created, as the ownership of the property will be by the beneficiaries side and then they will have the right to sell or rent it or do whatever they want (Al-Dardīr, 1995, vol. 4, p. 84; Al-Dusūqī, 1992, vol. 4, p. 84). Such point is also used by the *Shāfiʿī* and *Ḥanbalī* Schools. The second point that the *Mālikī* School follows is that if the word '*taṣaddaqtu'* is used along with this condition, it highlights the continuity of the waqf or else, the Waqf is not perpetual (Al-Khurashī, 2000, vol. 4, pp. 88-89).

As noticed by most jurists, the announcement of a Waqf is not always an understandable statement. This can be shown by a *wāqif's* intention when he or she made the Waqf. This is evident in the case of fixed properties, such as mosques or graveyards. Therefore, the

wāqif has the right to allow people to make use of the places, such as making the *azan* (the call to prayer), or using the public notice board to show that a Waqf has been made (Al-Dardīr, 1995, vol.2, p.299; Al-Al-Bahūṭī, 1983, vol:4, p.452; Ibn Qudāmah , 1994, vol. 6, p. 190). This idea can also be applied to different properties as done by the *Mālikī* School. An example would be announcing that a Waqf was created by publishing books. But, it is necessary to keep in mind that a verbal announcement could also be needed if the books are used as the object of the Waqf, and the people are not familiar with these books have been made as the Waqf (Al-Dusūqī, 1992, vol. 4, p. 84).

On the other hand, the *Shāfiʿī* School have a somewhat rigid stance about this situation. According to them, in order to establish a Waqf, the announcement must be clear and understandable (Ibn-Ḥajar, 1979, vol. 6, p. 248). For instance, if we take the case of establishing a mosque, in this situation the *al-Shāfiʿī* believe that allowing Muslims to use such premises will not establish a mosque. Same is the case with the establishment of a graveyard or an irrigation system.

According to my understanding, the agreement of opinion between most jurists should be accepted, as they are adaptable and very flexible. The significant thing to remember whilst making a contract between two parties is the purposes behind the contract as well as the legal impacts it imposes. It is agreed that such intentions can be realized without the need for a formal method. In order for the legal statement of a Waqf to be valid, the *wāqif* has to be aware of the intentions and the legal impacts, regardless of the method. In Muslims societies it is the matter of custom that if someone builds a place, and allows Muslims to perform prayer in there, a mosque would be established, although no mention of such intention was made. Same is the case for graveyards, irrigation systems and shelters, etc. Ibn Qudāmah and Ibn al Humām both confirm that the viewpoint of the majority is more apt. It can be evidenced from the fact that it has become customary (*ʿUrf*) in Muslim societies that such actions are meant to be establishment of the Waqf (Ibn Qudāmah, 1994, vol:6, p. 192; Ibn al-Humām, 1995, vol. 6, p. 217).

Secondly, The Acceptance (*qabūl*)

The discussion above is where an offer is made from one side. As a Waqf is a kind of contract, the acceptance by the other side should be taken into consideration too

(beneficiaries). If a Waqf is made to benefit the general public, in this case no acceptance is required. For example, building a mosque will not require acceptance from the general public for whose sake it is made (Al-Qarāfī, 2010, vol;1, p.111; Al-Khurashī, 2000, vol. 4, p. 92), as the acceptance from the public would be impossible to carry out. However, jurists have difference of opinion when it comes to a Waqf being made for the benefit of a certain individual. This disagreement is due to different viewpoints regarding the concept of Waqf. One group of jurists considers Waqf as disposing off (*isqāṭ*) of the right of usufruct, whereas the second group take it as the conferment of the right of usufruct (*tamlīk al-manfaʿa*) (Ibid). For the first group of jurists (like some of the *Ḥanafīs* and *Ḥanbalīs*) [175] acceptance is unnecessary due to analogy with emancipating a slave, where the acceptance from the slave is not a requisite. Therefore, as long as an offer is made by one side which is from the owner, the contract will be deemed as completed, regardless if the acceptance there or not. Nevertheless, for the second group of jurists (the *Shāfiʿīs*, *Mālikīs* and some of the *Ḥanafīs* and *Ḥanbalīs*)[176] who believe that an acceptance of the offer is required in order for a Waqf to be created. According to their point of view, a Waqf is compared to the contract of *hiba* (gift) or sale, thus an acceptance must be provided following an offer (Ibn Qudāmah, 1994, vol: 6, p. 189). This condition is only for the first generation of the beneficiaries. Where more generations of beneficiaries are in the process, not refusing the Waqf is the only requirement. If it is refused, the Waqf will be considered as (*munqaṭaʿ al-wāsiṭah*) as a result the Waqf will be returned directly to the final beneficiaries (Al-Ramlī, 1995, vol. 5. p. 372).

The Conditions of a Valid Declaration

A declaration of Waqf is subject to certain conditions that ought to be followed. There are four conditions that are discussed by the jurists in this regard:

1- Perpetuity (*ta'bīd*)

[175] Such as: al-Kasānī, Ibn Nujaym, Al-Mardāwī , Ibnʿ Uthaymeen and others (Al-Ṣuqiyyah, 2014, p.199).

176 Such as :al-Nawawī, Ibn al-Humām, Ibn Rushd, Ibn Qāsim, Ibn ʿĀbidīn,Ibn Taymiyyah and others (Ibn Bayyah, 2005, p. 134).

As discussed earlier, the question of perpetuity is vital regarding Waqf. Ibn Qudāmah concludes that the majority of the jurists of Islamic Schools of Law are in agreement regarding perpetuity to be imperative for the validity of Waqf (Ibn Qudāmah, 1994, vol:6, p.221). A Waqf will not be a valid Waqf if a waqf is such that its declaration stipulates a certain period of time, for example a *wāqif* says "I have made a Waqf for the benefit of the needy of my land for a year". As there is no perpetuity in this declaration, it is not a valid Waqf (Al-Nawawī, 1991, vol. 16, p. 259; Al-Khaṣṣaf, 1904, p. 127; Niẓām, 1983, vol. 2, p. 357; Ibn Qudāmah, 1994, vol:6, p.221). Al-Shaybānī even goes further in this respect, saying that 'perpetuity', or any word that creates an impression that it implies perpetuity, should be mentioned it in clear terms, such as 'beneficiaries' who do not die out such as the needy. So, in al-Shaybānī's view, for a valid Waqf it must be a declaration in unequivocal terms, 'I have made this land of mine a Waqf in perpetuity" (*ardi hādhihī mawqūfah mu'abbadah*)', or 'I have made this land of mine a waqf for the needy' (Ibn-ʿĀbidīn, 1994, vol. 6, p. 535). However, Al-Zuḥaylī found out that the majority does not agree with al-Shaybānī in this respect and state that since a Waqf in its nature is perpetual, so the declaration does not need the mentioning of 'perpetuity' (Al-Zuḥaylī, 1989, vol. 5, p.45). Nonetheless, the opposite view too exists in this regard.

Abū Ḥanīfa has a completely different viewpoint. He considers Waqf to be similar to *ʿāriya* or borrowing. While *ʿāriya* is a revocable contract and stands void upon the death of the founder, consequently waqf is revocable too (Al-Sarakhsī, 1987, vol. 11, p. 90; Al-Zuḥaylī, 1989, vol. 5, p.45). Abū Yūsuf and al-Shaybānī, two most prominent disciple of Abū Ḥanīfa and significant jurists of the *Ḥanafī* School are of the view that Waqf is perpetual and not something that can be revoked. Moreover, they consider Waqf similar to manumission [177]and divorce in the sense that ownership or relationship ceases to exist merely on the basis of verbal announcement, without the need for the other party to accept it. Imām Mālik however, has allowed temporary Waqf. Therefore, he does not consider perpetuity to be a mandatory condition (Al-Dusūqī, 1992, vol.4, 77) According to a

[177] **Manumission**: "The agreement by which the owner or master of a slave sets him free and at liberty". See the official website of the free dictionary, available at: https: https://legal-dictionary.thefreedictionary.com/manumission, accessed: (27/4/2021).

statement attributed to Imām al-Shāfiʿī, the nature or the purpose of the Waqf must be perpetual for it to be valid. Otherwise, it is invalid (Al-Shāfiʿī, 1993, vol:4, p.129: Al-Khaṣṣaf, 1904, p.20; Ibn ʿĀbidīn, 1994, vol. 6, p.291).

In my view, the strongest opinion is the opinion of the *Mālikī* School which has less rigidity. This is because they say that a Waqf can be made for a limited period of time and is even revocable in some cases. This is because of many reasons which are given as follows:

1- The condition of perpetuation is not stated in any of the prophetic Traditions explicitly or implicitly, but the majority of scholars considers it an intrinsic requirement for declaring the waqf being absolute. They do so because of the Tradition of ʿUmar, when the Prophet said to him, "You could retain the land and devote their fruits to charitable purpose." The researcher believes that the perpetuity should not be seen as the fundamental nature of Waqf. This can be supported by what Yūsuf Aḥmad (a contemporary academic researcher), points out that at first glance, the Hadith seems to necessitate perpetuity, but the Hadith must be read in totality, in conjunction with the adjoining Hadith, which states that the corpus may be retained but its benefits could be apportioned to welfare. There are two points to be noted here: firstly, the Hadith indicates the permissibility of Waqf having different forms. The absence of mentioning an object does not mean the prohibition of an object. Secondly, the Hadith permits the property owner to offer his property in Waqf yet retain the ownership of the property. However, it is possible to respond to this claim that *ʿUmar's* case is a special case where the Prophet allowed it. The varying interpretations delineate a sense of flexibility and fluidity in Waqf laws. This, therefore, implies that new models of Waqf can easily be subsumed as Islamic Waqfs (Yūsuf, 2006, p. 32). Accordingly, this meaning of the perpetuation is not necessary, so the declaration of Waqf may be perpetual or temporary. As for the claim that it was widespread among the Companions and those after them, it does not mean it is necessary and a requirement to make the Waqf.

2- In addition, it noteworthy that the jurists who permitted *Ibdāl* and *Istibdāl* of Waqf property, too went against the perpetuity rule. These contexts allow the exchange of one

parcel of land with another or the sale of one section and the acquisition of a second section with the funds generated by the sale of the former. In this process, it is permissible to sell a section of Waqf land so that re-development of the rest of the land can take place (Al-Kubaiysī, 1977, vol: 2, p. 104).

Additionally, there seems to be an element of contradiction regarding the perpetuity rule. That is to say, it lacks consistency. This is because they all seem to agree that a temporary form of Waqf is possible for instance, mobile property like plants and trees, livestock[178], books, even money. These items are transitory and not perpetual, yet all School of Laws allow this (Abū Zahrah, 1959, p. 90; Al-Kubaiysī, 1977, vol. 2, p. 107; al-Zuḥaylī, 1997, vol. 8, p. 205; Ab Rahman, 2017, p. 179). Permitting items such as plants and trees, buildings, livestock, or food are as a matter of fact recognizing temporal Waqf. There is an interesting question which arises from this, should the Waqf be thought to sustain its subject matter? It must be remembered that the Prophet's Hadith justify not only permanent but otherwise too, as the Hadiths justify Waqfs that are temporary and non-perpetual items as well. Kahf asserts that these entities as non-standard forms of Waqf cannot be justified, as it is not fair to class one Hadith as being of lower status than another, particularly when common logic and the prevailing public interest suggest otherwise (Kahf, 1999, p. 2). That is to say, if this point of view is followed through, one can arrive at the conclusion that the question of perpetuity should not be seen as the fundamental nature of Waqf. Therefore, a gift of philanthropy can take any form: temporary or perpetually.

3- It is one form of charity that is based fundamental teachings of Islam, so it may not be abolished unless there is another text that prohibits or prevents it, which there is not.

4- The opinion that the temporary Waqf is possible gives more room for doing good which should not be reduced.

[178] **livestock**: " animals and birds that are kept on a farm, such as cows, sheep, or chickens ". See the official website of the Cambridge dictionary, available at:https://dictionary.cambridge.org/dictionary/english/livestock, (Accessed: 27/4/2021).

5- The temporary Waqf does not conflict rather it agrees with the objectives of Sharīʿah concerning Waqf.

6- Kahf asserts that Scholars of later era and contemporary jurists from various legal Schools expanded in permitting Waqf that some of their predecessors did not permit (Kahf, 1999, p. 20). They sought this permission in consideration of the need of society and its societal and economic changes. For instance, the *Ḥanafīs* expanded on permitting declaring movables as Waqfs, coming close to scholars of other legal Schools (al-Zuḥaylī, 1997, vol. 8, p. 308). Others expanded by including movables that cannot be useful without being consumed, thus allowing delayed loans and loans as Waqf too (Abū Zahrah, 1959, p. 145).

Therefore, researcher is of the view that the rule of the perpetuity in Waqf should be considered as the rule and not as an exception. He agrees with the majority of jurists to this extent but as there is already flexibility in this regard and few eminent jurists do not accept perpetuity as a mandatory rule, thus temporary Waqf can be allowed in cases of need. The analysis of the researcher is based on the fact that the rules of Waqf are based on *Ijtihād* and there is no reason on modern jurists not to do it according to the changing times and needs. Thus, it is permissible for them to choose which model of Waqf suits at a given point of time within the purview of Islamic law, whether it is related to the Waqf property or beneficiary or the methods of management of the Waqf or investment.

2- Immediate Effect (*al-tanjīz*):

Al-Kubaiysī call our attention to a Waqf in view of the majority of jurists is a contract in which ownership is immediately transferred after declaration like a gift or a sale. In other words, it takes effect immediately (Al-Kubaiysī, 1977, vol. 2, p. 178). Therefore, if a declaration contains a postponement, then it is not a valid Waqf. For instance, 'I will make a waqf for the needy of this land belonging to me after a year'. As the immediate effect is missing in this declaration, it is against the rules of Waqf (Al-Sharbīnī, 1958, vol. 2, p. 385; Ibn Ḥajar, 1979, vol. 6, p. 252; Al-Bahūṭī, 1983, vol:4, p.250). Moreover, *wāqif* should intend the immediate effect of the contract. When a person declares to endow his property for Waqf in favour of some specific beneficiaries and for a particular purpose, the

ownership is immediately transferred. Majority of jurists endorse this notion (Ibn ʿĀbidīn,1994, vol. 6, p. 522; Al-Sharbīnī,1958, vol. 2, p. 385; ; Al-Bahūṭī, 1983, vol. 4, p. 250). Therefore, *wāqif* must not include any such clause in the contract of Waqf that will hinder the immediate transfer of ownership and creation of Waqf and delay it till the occurrence of any specific event. Conditional waqfs are usually regarded as void because it is argued that a Waqf is an irrevocable contract, under which the ownership of the property is transferred immediately, and this cannot be subject to conditions like a normal gift or sale (Ibn ʿĀbidīn, 1994, vol. 6, p.288). Therefore, a Waqf is only valid if it is perpetual and unconditional. The *Mālikīs* however, allow the conditional Waqf where founder stipulates that Waqf will be effective and enforceable after a certain time or event. Thus, according to this School, immediate effect is not mandatory for the Waqf to be valid (Al-Dardīr, 1988, vol.2 p. 299).

Only exception to the general rule is the testamentary[179] Waqf whereby the founder of the waqf declares that on the event of his death, his said property will be considered Waqf in favour of such beneficiaries for such reason. Ibn ʿĀbidīn argues that majority of jurists agree on the validity of such Waqf (Ibn ʿĀbidīn, 1994, vol. 3, p. 360-362). The evidence proposed for the validity of such type of Waqf is the action of ʿ*Uma*r whereby he endowed his property of *Thamagh* in case of his death. The Tradition narrated by ʿUmar, often quoted as an authority on the subject of the validity of the Waqf, does not state that it is necessary condition for a valid Waqf that it has to be an immediate effect. Such a Waqf gets amalgamated with bequest (*waṣiyya*), thus the requirements of the bequest will be followed in this regard, i.e. not exceeding the one third of the property (Ibn al-Humām, 1995, vol. 6, p. 193; Ibn Qudāmah, 1994, vol. 6, p. 220).

3-Irrevocability (*ilzām*):

As stated by most of the jurists, the concept of waqf is irreversible[180] in terms of nature that needs to be clearly on the legal statement of the Waqf (Ibn Qudāmah, 1994, vol. 6, p. 198).

[179] an official declaration of what an individual has agreed to do with their money and property after they die.

[180] **Irreversible: "**not possible to change and impossible to return to a previous condition or not able to be revoked or repealed; irrevocable". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/irreversible?q=irreversible+,(Accessed: 27/4/2021).

Thus, the legal statement of the waqf would not be approved if any such instances are mentioned that prevents the irrevocability. A *khiyār* (option) is one such example which is a choice of cancellation and reconsidering the conditions that have already been appointed. An example where such things could take place is as follows: if a *wāqif* states that, 'I made a Waqf of that land for the benefit of the poor, and within three days I shall have the right to make a *khiyār'*. A second example is in terms of conditions where the *wāqif* says, 'I made Waqf of this house for the poor and will be entitled to change the beneficiaries whenever I wanted that'. Such conditions lead to an invalid legal statement due to the revocability, (Al-Ramlī, 1995, vol. 5. p. 376; Al-Sarakhsī, 1987, vol. 11, p. 42).

When evaluating the *Mālikī* School, it was found out that the School does not mention or refer back to such situations in the Waqf. Nevertheless, on the face of it, presumption will be that the principles followed by the *Mālikī* School do not have a problem, when it comes to making the Waqf as temporary or reconsidering the conditions. This is according to the *Mālikī* School, as a Waqf can be carried out for a certain period of time.

4- Mentioning the beneficiaries (*bayān al-maṣāraf*)

The *Shāfiʿī* School and a number of the *Ḥanbalī* jurists believe that the people who are the beneficiaries should be clearly mentioned in an announcement (Ibn Ḥajar, 1979, vol. 6, p. 252; Al-Bahūṭī, 1999, vol: 4, p.29). Therefore, it can be concluded that saying 'I have made a Waqf' with no mention of the person's name, then the Waqf is unacceptable. As believed by aforementioned jurists, a Waqf enables the person to grant someone the right of usufruct (*tamlīk al-manfaʿa*), therefore the name of the recipient should be stated. If the name of the recipient is not provided, then the Waqf cannot be followed. It is necessary to remember that in the case of *waṣiyya*, such requirement is not needed. That is due to the fact that a *waṣiyya* would usually be given to the needy, so no name of a recipient is mentioned whereas, in the case of a Waqf, different rules apply (Ibid). While all of the *Ḥanafīs*, *Mālikīs* and a number of *Ḥanbalīs* do not require such condition. According to them, if a Waqf has no mentioned recipient, then it will directly go to the needy or a charity (Al-Khurashī, 2000, vol. 4, pp. 91-92; - Al-Ābī, 1986, vol. 2, p. 208; Al-Bahūṭī, 1993, vol: 4, p.29). This point of view can be justified because the main aim of Waqf is to support the

needy or any other form of philanthropy. A *waṣiyya* also has a close point to the Waqf where its main aim is to provide resources to the needy or any other form of philanthropy, which is becoming a custom nowadays.

Establishment and Subscription of the Waqf Company

Returning now to the establishment and subscription[181] of the Waqf company, the company starts with an idea by the founders, who then complete the technical and legal requisites of formation. Then, an open invitation to the public to the IPO[182] or private subscription to a limited number of people such as the founders is made (Nāṣyif, 2013, vol.7, p.119). It could be said that the formation of a joint stock company or limited liability company goes through two main stages:

Stage one: The Memorandum of association

The founders write the preliminary contract for memorandum of association[183] of the company to present it to the subscribers[184]. This includes the necessary information about

[181] **Subscription**: "an offer to buy shares or bonds issued by a company". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/subscription, accessed: (27/4/2021).
[182] **IPO:** "stock exchange initial public offering". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/IPO, accessed: (27/4/2021).
[183] A company's memorandum of association is a legal document used to describe the company's relationship with its members during the creation and registration process. The company's name, physical address of registered office, names of shareholders, and share distribution are all described in the memorandum of association, which is open to the public. The company's constitution is made up of the memorandum of association and the articles of association. The company's articles of association are a text that contains all of the company's laws and regulations. The company's articles of association lay down the guidelines on how the company's directors should manage it. Whilst the memorandum of association establishes the company's constitution. Therefore, it serves as its foundation. On contrary, the articles of association are a set of bye-laws that regulate the company's internal relations, management, and behavior. When a company is formed, both the memorandum of association and the articles of association must be registered with the Registrar of Companies (Al-Sanhūrī, 1993, Vol.5, p.309).
[184] **Subscribers**:" someone who signs a memorandum of association (= document needed to officially form a new company) of a new company and to buy or claim a particular number of shares ". See the official website of the Cambridge dictionary, available at:https://dictionary.cambridge.org/dictionary/english/subscription, (Accessed: 27/4/2021).

the founders and the company. They also include in it its articles of association[185], which describe its activities and methods of operation (Al-Qalyubiyy, 2011, p.99).

Stage two: Subscribing to the company's shares

The founders subscribe[186] either partially or fully to the company shares. If their subscription is partial, they have to offer shares for public subscription by publishing a subscription prospectus. Those interested in subscribing should apply, and the company will allocate shares to them. If demand exceeded the available shares, shares are allocated proportionally (Al-Sanhūrī, 1993, Vol.5, p.358).

The researcher believes that adapting the subscription by the founders and subscribers to be the contract of company, rather than the company's memorandum of association. This is because of the subject of the subscription is the shares, which represents the capital of the company which is the subject of contract. The subject of the memorandum of association on the other hand, is the obligations of the founders and what is required of them to bring the company into being. It establishes the joint responsibility of the founders for errors, for missing information, or for failure to bring the company into existence. According to this it can be juristically adapted as a contract between the founders themselves to form the company that needs many of actions and obligations that forming it requires (Nāṣyif, 2013, vol.7, p.104).

Moving now to discuss the possibility of the formation (establishment) and subscription contracts fulfilling a Waqf contract (declaration of Waqf), we can say that the Waqf contract is fulfilled by a Waqf company through the subscription to it, whereas the

[185] **Articles of association** "a document that contains details of how a company is organized internally, for example, the duties of management, rights of shareholders, and when meetings will be held. It is one of the documents needed to create a new company ". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/articles-of-association, (accessed: 27/4/2021).

[186] **Subscribe**: "the act of purchase or claim the shares of (a new issue of stock, bonds, or other securities)". See the official website of the free dictionary, available at: hhttps://www.thefreedictionary.com/subscribe, accessed: (27/4/2021).

formation contract is an obligation by the founders to form the Waqf company, which can exist only through subscription. A subscription request represents an application (offer) and allocating the required shares to the subscriber represents acceptance of the offer. The deed of association of contract, subscription prospectus, and articles of association contain all necessary information about the Waqf that is required for the waqf to be valid. This includes the subject of Waqf, which are the shares that represent the capital of the company, areas of investment, and so on. It also includes the beneficiaries of the income. This will be explained later.

The declaration of Waqf in contract of a Waqf company is fulfilled through writing the company contract, the articles of association, and the subscription prospectus. Through the latter the shareholders subscribe to shares in the company. Along with the founders, they represent the general assembly[187] of the company. Accordingly, the Waqf company does not require the consent of the beneficiaries, because they are unspecified. The Waqf company distributes its profits to unspecified parties, in line with the company's contract and articles of association. With respect to modern companies, legislation has allowed making a company temporary by specifying a certain lifespan or by making it dissolve[188] upon reaching the goal that it sets out to achieve (Al-Sanhūrī, 1993, Vol.5, p.351). It is possible to apply this to the Waqf companies, combined with favoring the opinion that a Waqf can be temporary. This is done by the subscriber specifying an end date for their Waqf at the time of subscription to shares. This must be declared in the formation contract or subscription[189] prospectus[190], so when the company expires, the Waqf assets revert to the ownership of the subscriber. If, on the other hand, the subscriber has made the Waqf perpetual, the ownership of the assets does not revert to him after the expiry of the

[187] A general assembly here is the highest governing body in company, composed of shareholders of a company (Al-Fazi'ī, 2016, p. 51).

[188] to end the company

[189] **Subscription:** "an occasion when shares in a company are issued, or the number of shares involved". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/subscription, (Accessed: 27/4/2021).

[190] **Prospectus**: "a legal document offering a company's shares for sale and giving details about the company and its activities". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/prospectus, (Accessed: 27/4/2021).

company, so the assets remain as the waqf that must be transferred to similar a Waqf company which has the same aims.

The founder between ownership and legal capacity (The Second Integral-Pillar: *Wāqif*)

Anyone who disposes[191] his property for the purpose of 'Waqf' is called '*wāqif*'. Generally, a *wāqif* can create as many Waqfs as they like without limitations (Al-Zarqā, 1997, p. 141). By contrast, in principle, commercial company laws state that the subscriber has full ownership of their shares, so they have complete freedom to use them (Al-Qalyubiyy, 2011, p.9189). But there are differences between commercial companies regarding restrictions and complete freedom, the details of the said topic it is not possible to cover here. It is legally accepted by the modern companies according to the permissibility concept in general, i.e. everything is permitted unless explicitly prohibited by Qur'an and the Sunnah (Al-Khafyīf, 2009, p.p. 122-127). Legislation states that the subscriber must be competent to be bound by obligations (Al-Sanhūrī, 1993, Vol.5, p.289). This means that they must be competent to be bound by obligations that arise from the operations of the company regardless of whether those obligations are limited to their shares in the company such as the joint stock company where the determination of the liability of partners will be done according to his share in the capital, or extend to their private properties are jointly liability for the company's debts to the extent of their whole wealth, in such as the *sharikat al-taḍamun* (partnership) whereby partners are jointly and severally liable for company debts and partners are only responsible on the amount of the value of their shares (Al-Khayyāṭ, 1994, p.339; Sharīʿah Standard , 2017, 349)

A joint liability[192] is compatible with Islamic law, according to this juristic maxim (*al-kharāj bi-al-ḍamān*). The maxim, as discussed earlier, mandates that the investor will only be entitled to receive profit if he is ready to bear the risk of losing his investment during the course of business. This principle has been consistently applied by jurists in the entire

[191] **Disposes**: "give, sell, or transfer to another". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/disposes, accessed: (27/4/2021).

[192] **Joint liability**: "a situation where more than one person or organization share responsibility for paying a debt or for paying for damage that has been caused, etc.". See the official website of the Cambridge dictionary, available at:https://dictionary.cambridge.org/dictionary/english/joint-liability?q=joint+liability+, (Accessed: 27/4/2021).

realm of the Islamic laws of contract and business organization (Al-Muhanā, 2012, p.64). Speaking about a subscriber in a Waqf company requires the consideration of two matters which we need it in order to have a new juristic adaptation so that the Waqf company is aligned with the consequences and rulings of the Waqf as follows:

First: The ownership of the shares in the Waqf company

Second: The competence (Legal capacity) of the subscribing donor

Firstly: The ownership of the shares in the Waqf company.

The ownership of Waqf was really perplexing. This is because Muslim scholars were dealing with it at a time when the concept of legal entity or legal personality, outside natural persons, was not yet developed (Zuryati and others ,2009, p.12). The subject of the ownership of Waqf has been previously addressed.[193]

The juristic maxim underpinning the validity of any type of Waqf rests on one fundamental issue, namely, the usufruct is devoted to charitable causes. The question of ownership, while important, should not be a fundamental issue to determine the validity of Waqf (Al-Ṣalāḥāt, 2003, p. 63). This rule should be set under the juristic principle that a rule is allowed unless and until evidence is presented that renders it invalid. In the light of this juristic principle, a liberal view should be adopted when the text favours permissibility, but a rigid standpoint should be taken when the action is prohibited by Scripture.

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[193] Here is a brief summary of these opinions:

1- Abū Yūsuf and al-Shaybānī defined waqf as the transfer of ownership of the endowed property to the ownership of Allah, thereby devoting its usufruct to charity (Al-Zaylāʿī, 1998, vol. 3, p. 324). This has also been espoused by *al-Shāfiʿī* School (Al-Shirbīnī, 1958, vol. 2, p. 376). Also, the *Ḥanbalī* School point out the ownership of the waqf transfers to Allah if the waqf is in favour of a mosque or if it is related to public facilities like a bridge or a school (Al-Bahūtī, 1982, vol. 4, p. 254-255).

2- Abū Ḥanīfa describes waqf as a thing which remains in the ownership of the *wāqif* (creator of the endowment) but the usufruct of this object is then devoted to charity (Al-Zaylāʿī, 1998, vol. 3, p. 325). The *Mālikī* School adopted *Abū Ḥanīfa's* understanding of waqf, and maintained that ownership of such a property stayed in the *wāqif's* possession, but not during the time period of waqf. *Wāqif's* property rights are taken away from him for the set period that the founder stipulates for waqf, therefore a temporary waqf is allowed (Al-Ṣāwī,, 1988, vol. 2, p. 296-297).

3- The ownership of the waqf is transferred to the beneficiaries if the waqf is made in the name of a defined group of people, children or an identified individual according to the *Ḥanbalī* School as well as adopted by some jurists in the *al-Shāfiʿī* School, by virtue of analogy on the donations. Analogically speaking, the one who owns the yield of something means owning its sources as well, once the ownership of the donor has been removed of it (Al-Bahūtī, 1982, vol. 4, pp.254-255; Al-Zaylāʿī, vol. 3, p. 324).

After this explanation of the positions of jurists on the ownership of the Waqf, the opinion that is most aligned with a Waqf company is that ownership ought to be for the subscribing donor. This view allows the organisation of the rulings of the Waqf company in a way that is aligned with the objectives of the Waqf. This argument can be supported by following reasons:

1) Keeping ownership with the subscribing donors results in the requirement that they are members of the general assembly. This, in turn, energises and activates the assembly. The subscribers are most keen on looking after the performance[194] of the company and appointing the best qualified and capable board of directors to manage it. They oversee the performance of the board of directors[195] and hold it to account. They may remove the board of directors if they find it failing or underperforming, as is the case in joint stock companies.

2) When favouring the opinion of the transfer of ownership of the Waqf to Allah, the Waqf company would fall under the responsibility of public, i.e. government, Waqf institutions. These institutions then start managing the company, as they have the authority to do so and would therefore be the general assembly of the company. The company would thus become a public, i.e. government Shareholding Company. Repeated experiments have shown that these kinds of companies are doomed to fail, as they suffer from poor management and limited profitability (Al-Ṣalāḥāt, 2003, p. 63). In fact, many of them suffer huge losses, forcing the government to privatise them and sell its shares (Ibid).

3) The opinion of allowing the temporary Waqf, which is the position of most of the modern jurists[196] and applying it to Waqf companies requires that the subscriber remains getting the ownership of their shares in the Waqf company. The temporary Waqf stipulates that ownership stays with the donor while the consequences of ownership are suspended for the stated period as far as the owner is concerned. These include the right of use, the

[194] **Performance**: "how successful an investment, company, etc. is and how much profit it makes". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/performance: 29/4/2021.

[195] **Board of directors**: "the group of people who shareholders choose to manage a company or organization". See the official website of the Cambridge dictionary, available at:https://dictionary.cambridge.org/dictionary/english/board-of-directors?q=board+of+directors+, (Accessed: 27/4/2021).

[196] Such as :Abū al-Aʿlā al-Mawdūdī , al-Qarḍāwī ,al-Zuḥaylī ,Ibn Bayyah, al-Zarqā, Khaf and others (Al-Ṣuqiyyah, 2014, p.346).

right of exploitation[197], and the right of dispensation.[198] Once the stated period expires, all consequences of ownership revert to the donor, exactly as was the case before the donation. Therefore, accepting the temporality of a Waqf requires acknowledging that the ownership of the Waqf stays with the donor, otherwise it would not revert to him automatically without a new contract. This is why the *Mālikī* School who have accepted the temporary Waqf is the way that the waqf remains owned by the donor. It is worth noting that in the *Mālikī* School that the *wāqif* retains its ownership in a legal and technical sense only. This means that the *wāqif*, although the legal owner, has no right to deal with the property. This type of ownership is called *taqdirī*. In the *Mālikī* School's definition, the usufruct (*manfaʿ*) is transferred but the *wāqif* retains the right of ownership, and the property cannot be used by anyone else. It is therefore irrevocable and absolute.

4) Founding the rulings of tradable[199] Waqf shares requires that these shares are owned by the donor. I will discuss it in the next part.

Secondly: The competence (legal capacity) of the subscribing donor

Jurisprudentially there is a difference between the *wāqif* (donor) and the partner in partnership activities. Any person who has a full legal capacity is permissible to make the Waqf during his lifetime through action or a will. In any activity of alienating ownership[200], the person who wants to make disposition[201] of his assets has to be holding the full right of disposal[202] on his assets (*ahliyyat al-tabarruʿ*) (Abū Zahrah, 1959, p. 127; Al-Zarqā, 1997, p. 55). The reason for the aforementioned rule is that the Waqf is a type of disposition of

[197] **Exploitation**: "the use or development of something for profit or progress in business". See the official website of the Cambridge dictionary, available at:https://dictionary.cambridge.org/dictionary/english/exploitation, (Accessed: 27/4/2021).

[198] **Dispensation**: "dispensation - a share that has been dispensed or distributed share, percentage, portion, part - assets belonging to or due to or contributed by an individual person or group; "he wanted his share in cash". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/dispensation, accessed: (27/4/2021).

[199] The act of buying and selling shares in stock market.

[200] **Alienating**: "To transfer (property or a right) to the ownership of another, especially by an act of the owner rather than by inheritance". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/alienating, accessed: (27/4/2021).

[201] **Disposition**: "An act of disposing; a bestowal or transfer to another." See the official website of the free dictionary, available at: hhttps://www.thefreedictionary.com/disposition, accessed: (27/4/2021).

[202] **Disposal**: "the act or process of transferring property or money to someone or providing something for another". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/disposal, accessed: (27/4/2021).

ownership. So, the *wāqif* must have important characteristics. These are that they have reached the age of puberty, be of sound mind, free and one who was not declared lawfully incompetent[203] (that is to say, no interdiction[204] applies to him (*hajr*)) or bankrupt (Ibn Ḥajar, 1979, vol. 6, p. 236; Al-Bahūṭī, 1982, vol:4, p.240; Niẓām, 1983, vol. 2, p. 352; Al-Zuḥaylī, 1997, vol. 5, p. 331; Al Zarqā', 1997, p. 60). Therefore, a Waqf is void if it were made by a person who has been declared insolvent[205] or incompetent (Niẓām, 1983, vol. 2, p. 355; Al-Bahūṭī, 1982, vol:4, p.240; Al-Ramlī, 1995, vol. 5. p. 359). Furthermore, a Waqf cannot be created on their behalf even by their guardian (Al-Shirbīnī, 1958, vol. 2, p. 377). This rule has been made to prevent overspending or destroying of the property of a legally incompetent person so that the rights of creditors to the property of insolvent can be guaranteed (Al-Junaydal, 1985, p.72). The Prophet's Tradition is the basis of this. The Prophet said, "People should neither cause harm nor should they reciprocate it." (al-Bayhaqī, *Sunan al-Kubrā*, vol. 6, 2001, p 114). This Hadith provides instructions that no harm can be bought upon another person. The loss of wealth is a form of harm. When a person gives away some part of his wealth there is a form of harm in the sense that he has caused some loss to himself. Of course, giving charity may technically be considered a loss, but it is done for the sake of religious spirituality. Therefore, because there is an element of loss and harm it requires the person who is making the donation to directly give the wealth himself and cannot be done by a third person without their consent. In Islamic law, a child is considered to be 'incompetent' to express consent to financial dealings (Ibn Qudāmah, 1994, vol. 6, p. 405). Therefore, no one, not even the child's guardians may make a donation from his wealth although it is a noble and righteous act.

In a case when the donor is a debtor, this rule is dependent on the creditors of the insolvent. If the creditors give permission, the man can make a valid Waqf according to some jurists[206], even if he is insolvent towards the permitting creditors (Al-Zarqā, 1997, p. 143).

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[203] **Incompetent**: "not legally qualified or marked by lack of ability, skill, etc". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/incompetent, accessed: (27/4/2021).

[204] **Interdiction**: "To prohibit (an action or thing) or forbid (someone) to do something, especially by legal or ecclesiastical order" . See the official website of the free dictionary, available at: https://www.thefreedictionary.com/interdiction, accessed: (27/4/2021).

[205] **Insolvent**: "not having enough money to pay debts owed". See the official website of the Cambridge dictionary, available at:https://dictionary.cambridge.org/dictionary/english/insolvent, (Accessed: 27/4/2021).

[206] For example, al-Nawawī, al-Khaṣṣaf ,Ibn al-Qayyim, al-Sarakhsī, al-Shawkānī and others (Al-Zuḥaylī, 1997, vol. 5, p. 580).

The Waqf according to these jurists is valid because when the creditors give permission of the Waqf it amounts to absolve the rights of the creditors on the property of person who is insolvent (Abū Zahrah, 1959, p. 134). On other hand, for the partner in partnership, it should be necessary that from the type of transaction envisaged in partnership be of a nature that accepts agency as I have mentioned before. According to this, the majority of jurists agree for allowing a 'discerning child'[207] boy or girl to be a 'business partner' and allow them to sign partnership contract if he or she got permission from the guardian (Al-Khafyīf , 2009, p.199). However, the *Shāfiʿī* School did not agree with this opinion, and maintains that whoever does not possess full legal capacity his contract in the partnership is invalid (Ibid, p.201; Al-Zuḥaylī, 1997, vol. 5, p. 588). This is what has been adopted by many Arab countries as a part of their civil law system, but they allowed for the guardian or trustee to invest money for those who are not of full age, of sound mind on their behalf, this is compatible with Islamic jurisprudence (Al-Sanhūrī, 1993, Vol.5, p.338). So, by applying these rules in the Waqf company, the *wāqif* shareholders[208] in the Waqf company must be having full legal capacity at the beginning of contract when set it up. Thus, the shareholder must have full right of disposal over his share. In other words, they have to be of full age, of sound mind and free (*ʿaqil, bāligh, ḥurr*) and one who has not been declared legally incompetent or insolvent. Therefore, their guardian or trustee[209] cannot be a partner in the Waqf company on their behalf due to Waqf is a kind of disposal of property; the *wāqif* must be having full right of disposal over his property. However, if the *wāqif* shareholder has lost some or all [210] of his full legal capacity after setting up the company or has made the application for shares, in this case the jurists point out that their guardian or trustee can manage the company on their behalf, because the ownership of Waqf share belongs to the shareholder permanently and this cannot be taken away after losing legal capacity (Khaznah, 2016, p. 173; Al-Ṭayyār, 2010, Vol.2, pp.340-360). This is because the person

[207] (*sabiyy mumayyiz*): a child not of full age but with sound mind; this is a child who has reached the age of seven)

[208] **Shareholders:** " a person who owns shares in a company and therefore gets part of the company's profits and the right to vote on how the company is controlled: ". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/shareholder?q=shareholders+, (Accessed: 27/4/2021).

[209] **Trustee** :" a person, often one of a group, who controls property or money for the benefit of another person or an organization". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/trustee?q=trustee+, (Accessed: 27/4/2021).

[210] Such as who been declared insane.

made the Waqf while he was possessed of full legal capacity and therefore it stands, much like any property he bought prior to losing legal capacity remains under his ownership.

It is important to ask about the legal capacity of non-Muslim *wāqif* shareholders in the Waqf company. A Waqf is not limited to the Muslims only and can even be created by non-Muslims as they are also allowed to make a Waqf (Al-Shirbīnī, 1958, vol. 2, p. 376) and if a valid Waqf is made by them, then that Waqf should be treated similarly as the Waqf made by Muslims and they share all the prerequisite stipulations as Muslims do. However, there are some special rules regarding the waqf made by a non-Muslims and its validity among the jurists. This will be discussed later on.

As it is a unanimous opinion of jurists from almost all Islamic Schools of law that the basic objective behind the contract of a Waqf is to seek pleasure of Allah by giving away usufruct for charitable purposes (Ibn al-Humām, 1995, vol. 6, p. 110; Ibn Qudāmah, 1997, vol. 6, p. 59), thus the charitable nature of Waqf is fundamental for a valid contract of Waqf. This charitable nature must be made for a pious purpose (*al-birr*). For instance, it can be for building of mosques or other religious educational activity, hospitals for needy and the like. '*Al-Birr*' can be defined as any act that is good and that pleases Allah (Al-Zarqā, 1997, p. 21). The expression employed by the classical books is *qurba* that represents the spiritual closeness to the Allah Almighty. It is derived from the expression *taqarrub īlā Allāh* (seeking spiritual closeness to Allah by pleasing him through good deeds) Therefore, Waqf cannot be established for any prohibited activity or purpose. Jurists of all schools are unanimous in this regard (Al-Kubaiysī, 1977, vol, 1, p.41). However, the point of divergence among the jurists is Waqf made for *mubāḥ* (permissible) activities; that is to say, can the property be endowed as Waqf for *mubāḥ* activities? A minority of jurists from Mālikīs and Shāfiʿīs School allow Waqf for *mubāḥ* projects, but most of jurists from Ḥanafī, Ḥanbalī Schools and a number of Mālikīs and Shāfiʿīs jurists do not permit it (Al-Zuḥaylī, 1989, vol:5, p.110; Ibn Qudāmah, 1994, vol. 6, p. 78; Al-Bahutī, 1982, vol. 4, p.246; Al-Mymān, 2009, p.102; Al-Dasūqī, 1992, Vol.4, p.74; Al-Māwardī, 1999, Vol.7, p.524). For instance, teaching poetry is a *mubāḥ* activity, but it is not something that can be regarded as a pious endeavour even though education is considered as charitable in Islamic law. Hence, these jurists consider that endowing property exclusively for the sole

purpose of teaching of poetry cannot be valid purpose of Waqf (Al-Kubaiysī, 1977, vol, 1, p.69).

Ibn Taymiyyah argues while endorsing the viewpoint that the *wāqif* will not be rewarded for *mubāḥ* activities and it will not benefit him. This is because the main objective of the Waqf is to seek the pleasure of Allah and gain spiritual-reward (*thawāb*) in the Hereafter. Therefore, when a Waqf is devoid of this basic purpose, it cannot be valid (Ibn Taymiyyah, 1995, vol.31, p.60). Some contemporary jurists differ in this regard. For instance, the argument of Nāṣir al-Mayman entails that the objective of Waqf does not necessarily have to be a pious one. It can be something that is *mubāḥ* (Al-Maymān, 2009, p.102). He presents the Tradition of the Prophet Muhammad as evidence when he states that Muslims must abide by conditions, provided that these conditions do not stipulate something that is forbidden or forbid something that is allowed (Sunan al-Tirmidhī, Ḥadīth no: 1352). Al-Maymān contends that as long as conditions are not making permissible something that is forbidden, or prohibiting something that is permitted, they should be followed in any contract. Consequently, *mubāḥ* conditions of a Waqf can be considered as permissible and binding. The opinion of the *Nāṣir al-Maymān* relies upon prophetic Tradition. It shows flexibility in Waqf, an area of law which lacks details in prophetic instructions and is open to scholastic reasoning. The strengthening of the Nāṣir al-Maymān opinion is not only on the fact that he has relied upon prophetic Tradition but also that his opinion is most suitable to the contemporary needs. The real strength in al-Maymān's view can be seen in that all *mubāḥ* act which are there to promote goodness of some kind, and therefore, it falls under *birr* (righteousness). Teaching poetry has multiple benefits as is the teaching of all other secular knowledge. In short, any lawful act which provides benefit to the inhabitants of Earth, be they humankind or animals is a worthy cause for Waqf.

The Wealth Designated for the Waqf between Shares and Capital (The Third Integral-Pillar: *Mawqūf*)

The third ingredient for Waqf company is wealth designated for the Waqf (*mawqūf*). *Mawqūf* in Arabic is known as subject of the Waqf (Haji Abdullah, 2005, p.64). In respect of making a Waqf valid, the *mawquf* must possess qualities needed that are legally

acceptable. Only certain types of property can be made Waqf. The Waqf company's capital, on the other hand, protects all of its assets as long as it has its own legal identity. It makes no difference if the company's assets are monetary, tangible assets[211], or movable assets, regardless of which form is more prevalent, and each of these assets has its own set of rules for establishing the Waqf:

1- The Waqf of immovable (*ʿiqār)* property[212]

Jurists developed the law of Waqf using the tools of *Ijtihād*. As mentioned previously, most of the Traditions show that the subjects of Waqf were immovable properties such as houses and lands. Accordingly, all the School of jurisprudence agree that the Waqf of immovable objects is permissible (Ibn al- Humām, 1995, vol. 6, p. 113; Al-Ramlī, 1995, vol. 5. p. 367; Ibn Qudāmah, 1994, vol. 6, p. 234; Al-Māwardī, 1999, Vol.7, p.789). There can be no room for dispute on this as it was practiced by the Prophet Muhammad and his Companions. However, jurists disagree about other types of property. (The following parts discusses the views of jurists of various Schools concerning the Waqf of other types of property).

2- The Waqf of movable (*manqūl*) property[213]

The *Mālikī*, *Shāfiʿī* and *Ḥanbalī* Schools permit the Waqf of movable things such as horses, weapons, clothes, furniture books, and so forth (Al-Mawāq, 1999, vol. 6, p. 21; al-Shirbīnī, 1958, vol. 2, p. 377; al-Al-Bahūṭī, 1982, vol. 4, p. 243). The evidence to prove this is the Tradition recorded by Muslim that the Prophet Muhammad talks in favour of Khālid ibn Walīd that he had left his articles of war (such as weapons, armour, horse and the like) as

[211] **Tangible asset**: "a physical asset whose value can be easily measured, such as cash, property, goods, or machinery". See the official website of the Cambridge dictionary, available at:https://dictionary.cambridge.org/dictionary/english/tangible-asset, (Accessed: 28/4/2021).
[212] **Immovable property**: "fixed and impossible to move or property such as land or buildings, not a person's possessions See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/immovable-property, accessed: 28/4/2021
[213] **Movable property**: "property that you own and can take with you or able to be moved, which does not include houses, apartments, or land". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/movable?q=movable+, accessed: 23/4/2021.

Waqf (and therefore there should be no zakat levied on those goods) (Ṣaḥīḥ al-Bukharī, Hadith no: 1468). This Tradition proves that movables are appropriate objects for Waqf. The context of this Tradition is that Zakat collectors came to collect Zakat from Khālid ibn Walīd on those items because they believed it to be merchandise. Khālid refused so they informed the Prophet Muhammad about Khālid's refusal, whereupon the Prophet spoke in favour of Khālid telling them that Khālid has designated those items as Waqf. This Tradition establishes a number of things, one of which is that movables are appropriate objects for Waqf. Based on this Tradition, jurists argued that all movables are valid for Waqf. They hold that the Tradition does not imply that the validity is limited to weapons and armour, but it can also apply to other types of movable goods (Al-Bahūṭī, 1982, vol: 4, p. 243).

In principle, the *Ḥanafī* School does not acknowledge that the Waqf of movable as valid (Ibn al- Humām, 1995, pp. 199-200). They believe that the object of Waqf must have the quality of permanence (*tā'bīd*) and movable things do not possess this quality. However, the most widely held opinion of the School is that there are three exceptions to this principle. The first: if the movables are an accessory (*tabaʿi*) to an immovable property, such as when somebody has devoted his land to Waqf, in which case such movables as may be an accessory to the land, such as cattle, slaves, and so forth, are valid subjects of the Waqf. The second is that they regard the Waqf of arsenals[214] as valid due to the Tradition of Khālid ibn Walīd. This is a special dispensation because it was endorsed by the Prophet Muhammad. The third, as put forward by al-Shaybānī (al-Tarabūlsi, 1981, p. 28), consists of such things that have been made Waqf because of the existence of the custom *(taʿāmul*) at that time, such as the Waqf of the Qur'an and other religious books (Al-Zaylāʿī, 1998, p. 327).

Only in above noted three cases movables were made Waqf and these cases have been accepted as the doctrine of the *Ḥanafī* School by its jurists (Ibid). Hence, it seems that the *Ḥanafīs* do not use the analogy method as the majority of jurists have, and therefore they

[214] **Arsenals**: "a building where weapons and military equipment are stored". See the official website of the Cambridge dictionary, available at:
https://dictionary.cambridge.org/dictionary/english/arsenal?q=arsenals+, accessed: 28/4/2021.

do not to permit any other types of movables to be Waqf, instead they confine the Waqf of movable items to be those in the above categories. In this respect, the majority of jurists are very flexible since all types of movable items can be the subject of Waqf. This was a result of analogy based on the Tradition of Khālid ibn Walīd. However, the *Ḥanafī* School rejects the application of analogy in this case, and therefore views the objects of Waqf in a limited scope. The *Ḥanafī* School depends on custom (*ʿUrf*) to decide the validity of a movable property. If it is the custom, to make such property a Waqf then it is valid, otherwise not. It is difficult to appreciate why the *Ḥanafī* School have adopted such a literal position towards movable-Waqf. They are well-known for exercising juristic reasoning and using analogy to expand legal rulings.

The position of the *Ḥanafī* jurists seems to restrict the dimensions and dynamics of Waqf without a strong justifiable reason. Their opinion seeks to be restrictive when the prophetic Tradition shows space and flexibility. The rigorously authentic Hadith shows that Khālid ibn Walīd left movables as Waqf with the endorsement of the Prophet Muhammad. The greatest weakness of the *Ḥanafī* opinion is that the protagonists of this view found themselves cornered by their stipulations that Waqf must be immoveable items, which opposes the prophetic Tradition, they sought to overcome this problem by claiming that the items mentioned in the prophetic Tradition are an exemption of the rule. They do not provide evidence to support their claim of it being an exemption of the rule. Rather, reasoning would suggest that if some movables are allowed, then, other movables should be allowed on the grounds of analogy. The opinion of the *jumhūr* (The opinion of the majority of Muslim jurists), on the other hand, relies upon prophetic Tradition. It shows flexibility in Waqf, an area of law which lacks details in prophetic instructions and is open to scholastic reasoning. The strengthening of the *jumhūr's* opinion is not only on the fact that they have relied on prophetic Tradition but also that their opinion is most suitable to the contemporary world.

Al- Zuḥaylī mentions a number of scholars, such as Ibn Qudāma, al-Nawawī, Ibn ʿAbd al-Barr and others, to prove his claim that there is unanimous agreement among jurists that consumable goods or goods that will perish are not valid as Waqf such as food, drink, perfumes and candles (Al- Zuḥaylī, 1989, vol:5, p.378). Some jurists, such as al-Sharbīnī and al-Bahūṭī, argue that precious metals, such as gold and silver, are not valid

as items for Waqf (al-Shirbīnī, 1958, vol. 2, p. 377; al- Al-Bahūṭī, 1982, vol. 4, p. 242). They believe that precious metals are from the 'perishable goods' like foodstuff and therefore not permissible for Waqf. However, the *Shāfiʿī* and *Ḥanbalī* Schools consider gold and silver to be valid if they are made into ornaments (Al-Nawawī, 1991, vol. 16, p. 247). It is reported that Ḥafṣah, one of the Prophet's wives, bought ornaments for twenty thousand dirhams and then made them Waqf for the women of al-Khaṭṭāb's family and Zakat was not deducted from these jewels (Sahih al-Bukhari, Hadith no: 4913). Ornaments are considered valid for Waqf because they can be used without decreasing their value (Ibn Qudāmah, 1994, vol. 6, pp. 233-234). The researcher believes that the *Shāfiʿī* and *Ḥanbalī* Schools have the strongest evidence. This is because al-Sharbīnī and al-Bahūṭī restrict the forms of the Waqf without a strong justifiable reason. Moreover, their opinion lacks solid Sharīʿah evidence. Oddly, what highlights the contradiction in their argument is the fact that if some movables are allowed then other movables such as horses and weapons as in the Tradition of Khālid ibn Walīd previously and these things are perishable goods, so according to this it should be allowed to make the Waqf of precious metals and foodstuff too based on analogy. The opinion of the *Shāfiʿī* and *Ḥanbalī* Schools, on the other hand, relies upon the Tradition reported of Ḥafṣah previously.

3- The Cash waqf

A further aspect of Waqf that we should consider is that of a Waqf of money. This is a rather controversial issue as a large number of scholars and jurists such as Abū Ḥanīfa, Abū Yūsuf (Al Sarakhsī, 1987, vol. 11, p.45) and Imām Aḥmad ibn Ḥanbal (Al-Bahūṭī, 1982, vol. 4, p.268), as well as the *Mālikī* School (*Ibn Rushd*, 1996,vol:2, p.270) and most *al-Shāfiʿī* School (Al-Māwardī, 1999, vol.3, p.128) hold the view that in principle the Waqf of money is invalid, as the value of money decreases with use (Ibn Qudāmah, 1994,vol:6, p. 235). This is easy to understand, as in order to benefit from money, it has to be used, and it therefore diminishes with use. Furthermore, a cash Waqf may go against the Tradition that the property subject to a Waqf is immovable and Islamic rulings against collecting interest. This is not a view shared by all scholars however, as al-Zuhrī (Ibn

Qudāmah, 1994, vol:6, p. 239) and Zufar (Ibn al-Humām, 1995, vol:6, p.254), viewed cash Waqf as acceptable, a view maintained by most later the *Mālikī* jurists and the late pre-modern *Ḥanafī* jurists. Ibn Taymiyyah from the *Ḥanbalī* School also confirmed that the School's preferred view was that a cash Waqf was permissible (Ibn Taymiyyah, 1997, vol: 31, p. 19).

Zufar held the view that a cash Waqf could fulfil the standard of perpetuity required by Waqf, but only when the money in question was utilized in *muḍārabah*[215] trade and any income was shared between the beneficiaries (Ibn al-Humām, 1995, vol:6, p.256; Ibn Nujaym, 1997, vol:5, p.67). Zufar's opinion is refreshing although it goes against the *Ḥanafī* School's principle which only permits the Waqf of movables in the three cases aforementioned, but money does not fall into any of these. Supporters of Zufar, like Ibn ʿĀbidīn among others, justify cash Waqf by referring to Imām Muḥammad ibn al-Ḥasan al-Shaybānī's ruling, which permitted moveable properties to be the subject of Waqf, provided that this was customary in the local community. They therefore see cash Waqf as a sub-category of a movable Waqf, which was usual practice (*taʿāmul*) in that period. Despite the fact that it was not recognised at the time of al-Shaybānī, it still conforms to the accepted principle of (*taʿāmul*), which was established by al-Shaybānī (Ibn ʿĀbidīn, 1994, vol. 6, pp. 555-556). These jurists therefore validate their argument in favour of cash Waqfs through *muḍārabah* and customary practice.

Jurists from the *Mālikī* School agree on the whole that cash Waqf is acceptable if it is used as a way of loaning money (without interest) to people in need, with the same amount of money eventually being paid. The first proponent of this view is claimed to be Imām Mālik in *al- Mudawwanah* (Al-Mawāq, 1999, vol. 6, p. 21; al-Ābī, 2004, vol. 2, p. 205), and this form of cash Waqf is the only one permissible by the *Mālikī* jurists.

Therefore, if we look closely we see that both the *Ḥanafī* and *Mālikī* Schools do not recognise money Waqf because money does not represent permanent property, and the principle behind Waqfs that the property involved is permanent. Therefore, in order to lend

[215] ***Muḍārabah*** is a type of business investment that involves forming a partnership. An individual with capital invests in a business venture using this mechanism. He is the 'sleeping partner,' meaning he is not involved in the company. He receives his share of proceeds from the profits of this company in accordance with the ratio established at the time of the partnership's setting up. (*Shabīr, Muḥammad ʿUthmān*, 1997, p. 300).

some validity to cash Waqfs, they use *ḥiyal* (stratagems/means to fulfil a goal) (Al-Kubaiysī, 1977, vol, 2, p.369). The *Ḥanafī* School redirect the funds into *muḍārabah* whereas the *Mālikīs* treat it as an interest-free loan. Through these *ḥiyal* (stratagems) jurists are able to give cash Waqfs a sense of permanency, showing that they do not diminish or perish because the capital itself is preserved and only the profit is spent. Comparing both Schools viewpoints, it seems that the perspective of the *Mālikīs* is closest to the original concept of Waqf and its requirement for permanency. The reason for this is that the person who makes the loan is ultimately responsible for any losses that may incur, which he would have to pay back the person who actually owns the money. We can see, then, that there is a sense of permanency because whatever happens, the owner of the money will get the money back. In *muḍārabah* law, however, advocated by the *Ḥanafī* School, there is not the same quality of permanency as the owner of the money, who is the sleeping partner, must ultimately bear any loss (Al-Zarqā, 1997, p. 111). It is therefore possible that losses will occur as there are no real guarantees.

On this issue of a cash Waqf and using *ḥiyal* to justify it, there is an absence of views from the *Shāfiʿī* and *Ḥanbalī* Schools. They do not agree that a money-Waqf can be considered valid if it can be shown to have a quality of permanence, because in their view neither an interest-free loan nor a Waqf in the form of *muḍārabah* fulfil the criteria for a true Waqf, because in both cases the original money no longer exists.

In more recent times, cash Waqf*s* have become more accepted by jurists[216] to allow investments in bonds and banks, and loans. If money is invested in property, it is always possible that it is damaged or destroyed by natural disasters, which obviously reduces the property's value. Cash Waqfs are therefore an alternative to property Waqfs as good management can increase their value, meaning that they are lucrative in today's Islamic financial system (Al-Kubaiysī, 1977, vol:2, p.130; Al-Zarqā, 1997, p. 30; Mohammad, 2011, p.91, 2003, p.91). There are therefore a number of advantages offered by a cash Waqf, due to its inherent utility: (a) more members of the public have cash than immovable property; (b) cash Waqfs are the best way for more than one person to have a joint Waqf (*waqf mushtrak/waqf jumāʿi*), and they are therefore valuable sources of finance for large

[216] Such as Kahf, al- Zuḥayl, al-Kubaiysī, al-Zarqā, al-Maymān ,al-Bassām, al-Qarḍāwī, Ibn Bayyah, Abū Zahrah and many others (Al-ʿUmrī, 2014, p.27)

and diverse projects; (c) it is possible to invest a cash Waqf in a variety of economic activities, resulting in greater returns than a purely property-based Waqf; (d) this type of Waqf can be used for any purpose or social objective; (e) there is a higher probability of growth with a cash Waqf than with a property waqf (Al-Maymān, 2009, p. 46). Further advantages of cash Waqfs have been listed as follows: (i) currency can be used in exchange for goods instead of coins; (ii) currency can be replaced with similar (i.e. it is a *māl mithlī*); (iii) as everyone has cash, many people can make a cash Waqf, meaning that more needy people can benefit from these donations; and (iv) cash Waqfs can be seen as a type of economic stimulus, and a wide range of projects, including health and educational programmes, can be sponsored in this way (Al-Rifāʿi, 2013, p. 23).

4- Jointly Owned Property (*Mushaʿ*)[217]

A Waqf can also be made of property that is owned jointly; this can be either immovable or movable. Jurists have discussed two types of jointly owned property that can be the subject of a Waqf – indivisible or divisible in nature. The latter includes buildings and land, while indivisible property comprises of items such as books, cars and small houses. There is a lack of agreement among jurists about whether a Waqf can be made of jointly owned property due to the principle that the *nāẓir* must take possession (*qabḍ*) of the property, once the Waqf is made.

For example, al-Shaybānī of the *Ḥanafī* School maintains that a Waqf made of divisible joint property is not valid (Ibn ʿĀbidīn, 1994, vol. 6, p. 600). The reason for this is that the property must be divided before it can be made the subject of a Waqf, or the beneficiary of the donation cannot take possession of it (Ibid). However, such a Waqf is valid if all of the joint owners make the Waqf simultaneously and to the same *nāẓir*, because then all of the owners' shares are part of the waqf and the beneficiary can take possession of the property (Al-Sarakhsī, 1987, vol. 11, p. 38). However, this condition does not apply if the property is indivisible in nature, because then no usufruct can be derived from it. If this is the

[217]**Jointly Owned Property or joint ownership**: "Property held in the name of more than one person or a situation in which two or more persons co-own a property". See the official website of the free dictionary, available at:https://financial-dictionary.thefreedictionary.com/Jointly+Owned+Property, accessed: 28/4/2021.

situation, possession can, therefore, be transferred without division, and thus the Waqf will be valid (Ibn al-Humām, 1995, vol. 6, p. 196).

On the other hand, some jurists[218] from the *Mālikī* School consider that divisible property that is jointly owned can be made subject of a Waqf because no damage occurs by dividing the property, so the beneficiary can still take possession of it (Al-Dusūqī, 1992, vol. 4, p. 165). If the jointly owned property is indivisible, however, it is not a valid subject for Waqf because it is not possible to take possession of it, which is vital for the completion of a Waqf (Al-Ḥaṭṭāb, 1992, vol. 6, p. 18-19).

This last point is, however, still subject to debate. The *Shāfiʿīs, Ḥanbalīs* Schools and Abū Yūsuf do not believe that taking possession is essential for the completion of a Waqf, so in their view both types of jointly owned property can be valid subjects of a Waqf (al-Zayʿlai, 1998, p. 326; Ibn Qudāmah, 1994, vol. 6, p. 238). This view is also based on the Tradition of ʿUmar who acquired a portion of land in Khaybar and made this subject to a Waqf. In their opinion, this was a type of jointly owned property and this act was approved by the Prophet, lending it legitimacy (Al-Kāsānī, 2001, vol. 8, p. 913). There is no distinction in their rulings between properties that are divisible or indivisible, as it is clearly stated in the Tradition that ʿUmar's property was divisible, because it was land.

The disagreement between the Schools is based on the principle of taking possession. If a School holds the view that the *nāẓir* must be able to take possession, a Waqf that is made of jointly owned property is not valid. If possession is not seen as being essential, then this type of Waqf is valid. This latter view, advocated by Abū Yūsuf, and consistent with the beliefs of *al-Shāfiʿīs* and *Ḥanbalīs*, has been adopted by the *Ḥanafī* jurists (Ibn Qudāmah, 1994, vol. 6, p. 238; Al-Māwardī, 1999, vol.3, p.177; Niẓām,1983, vol. 2, p. 365).

Regardless of the view of the validity of a Waqf made of jointly owned property, most jurists across the legal Schools are in agreement that this type of property cannot be made a Waqf if the intention is for it to become a graveyard or a mosque, as the joint ownership means that possession cannot be passed over fully to Allah (Al-Kubaiysī, 1977, vol:2, p.193; Al-Zarqā, 1997, p. 62). The reason for this is that there is ambiguity over the status of the land (Al-Sarakhsī, 1987, vol. 11, p. 37). Although al-Zayʿlai from the *Ḥanafī* School

[218] For example, Al-Ṣāw, Ibn Rushd, al-Dusūqī (Al-Ṣāwī, 1988, vol. 2, p.499; Ibn Rushd, 1996, vol. 2, p. 679; Al-Dusūqī, 1992, vol. 4, p. 165).

asserts that there is a consensus on this point (al-Zayʿlai, 1998, vol. 3, p. 326), the *Shāfiʿī* and *Ḥanbalīs* maintain that a Waqf to found a mosque is valid, on the condition that the property is divided immediately. This difference of opinion renders al-Zaylaʿi claim of consensus highly doubtful. Until, the property is divided, however, the land must be treated as if it were a mosque, and all the rules pertaining to mosques will apply to the land, such as access cannot be granted then to the impure (*junub*),[219] or menstruating women, for example (Al-Ramlī, 1995, vol. 5, p. 359). Once division occurs, the part of the property that will be established as a mosque will continue to be treated as such, while the other part will be returned to the owner and can then be used as private property (Ibn Ḥajar, 1979, vol. 6, p. 239; Al-Bahūṭī, 1982, vol. 4, p. 243-244).

5- The Waqf of shares [220]

The term of the share is used to refer to one of the forms of financial assets (Sharīʿah Standard, 2017, p.560). Shares represent ownership of a certain part of the capital of a corporation (Ibid; Al-Jabr, 1996, p.307). They represent a contribution to the capital and carries profits or losses, when issued; the shares may have a market value[221] that is different from the face value.[222] They are traded in the exchange markets[223], like other commodities in their respective markets (Sharīʿah Standard, 2017, p.561; Al-Ṭayyār, 2010, Vol.2,

[219] Ceremonially impure. *Junub* is a person who is in a state of *janābah*. On suffers from ritual impurity some religious ritual like prayer, fast, etc.

[220] **Shares**: "A certificate giving the person or company listed a portion of ownership in a stock in a general or limited partnership, mutual fund, or some other investment vehicle. A share is the smallest unit of ownership. They may be bought or sold on or off an exchange. The share is sometimes used interchangeably with the word stock". See the official website of the free dictionary, available at: https://financial-dictionary.thefreedictionary.com/share, accessed: 28/4/2021.

[221] **Market value**: "the total value of a company's shares, or of all companies together on a particular stock market". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/market-value?q=market+value+, accessed: 6/5/2021.

[222] **Face value**: "The face value of stock is the amount shown on the certificate, or, for bonds, the maturity value or the face value of things such as coins, paper money, investment documents, or tickets is the amount of money that they are worth, and that is written on them". See the official website of Collins dictionary, available at: https://www.collinsdictionary.com/dictionary/english/face-value, accessed: 6/5/2021.

[223] **Exchange markets**: "A place, whether physical or electronic, where stocks, bonds, and/or derivatives in listed companies are bought and sold. A stock exchange may be a private company, a non-profit, or a publicly-traded company (some exchanges have shares that trade on their own floors)". See the official website of the free dictionary, available at: https://financial-dictionary.thefreedictionary.com/exchange+markets. 28/4/2021

p.167). However, the shares and bonds[224] are forms of financial assets that were not known in the past (Sharīʿah Standard, 2017, p.560). So, it needs adaptation from the perspective of Islamic law.

Al-Qalyubiyy point out that the law experts have noticed that there is distinguishing feature of the ownership of the company's capital from the ownership of its shares because it separates the liability of the company from the liability of its shareholders[225] (the co-owners) (Al-Qalyubiyy, 2011, p.123; Sharīʿah Standard, 2017, p.561). Accordingly, the capital is not owned by the all the partners on *shuyūʿ* (blending one of two or more shares with the other in a way that the two cannot be differentiated one from the other) but rather the ownership of the capital belongs to the company only (Al-Khayyāṭ, 1994, p.369). This is because if the partners own the company's capital and the company itself together at the same time, it will lead to a dual ownership[226] which is invalid (Sharīʿah Standards, 2017, p. 561) whereas the share is a document that is considered to be proof of the shareholder's possession of his undivided share of the company's assets (Ibid). On the other hand, al-Sanhūrī showed that the law experts differed in the legal adaptation of the share after their agreement to the difference between the stock's financial ownership and the company's assets to two opinions: Firstly, as financial rights (moral money)[227] (Sharīʿah Standards, 2017, p. 561; al-Sanhūrī, 1993, Vol.5, p.394). Secondly, it seems to be such as the debt for the shareholder over the company. This opinion has been supported by many legal experts (Al-Qalyubiyy, 2011, p.145). In contrast, most of the contemporary Islamic jurists have debated regarding the best method of the stock adaptation. So far, they are divided into two opinions encapsulated as follows:

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[224] **Bonds** "an official paper given by the government or a company to show that you have lent them money that they will pay back to you on a future date at a particular interest rate". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/bond?q=bonds+,(Accessed: 26/4/2021).

[225] **Shareholders:** " a person who owns shares in a company and therefore gets part of the company's profits and the right to vote on how the company is controlled". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/shareholder?q=shareholders+, (Accessed: 27/4/2021).

[226] This is when one object is owned by two people. For example, my phone cannot be owned by another person.

[227] This means money which is generated on the principles of ethics and morality and not purely on legality.

Firstly, the stock represents a common or *shuyūʿ* share (blending one of two or more shares with the other in a way that the two cannot be differentiated one from the other) in the company's assets and the partners are the real owners of the company's assets that includes cash, tangible assets or debts, financial rights, moral money, etc. Therefore, the stock is neither a financial asset nor a document of finance or ownership, rather to be a document that is deemed evidence of ownership of the shareholder for his undivided share in the assets of the company that can be translated into a financial value (Sharīʿah Standards, 2017, p. 561). This opinion was adopted by International Islamic *Fiqh* Academy[228] and most Islamic contemporary jurists [229](Al-Khathlān, 2011, p.91 Al-Khurashī, 2000, p. 26; Sharīʿah Standards, 2017, p. 562). The standpoint is based on two reasons: firstly, this based on the dictum of Prophet Muhammad: "Muslims are committed to their conditions." (Sunan Abū Dawūd, Ḥadīth no: 3594). This means that any participation in a transaction, whether a corporation or a partnership, is subject to the terms and agreements of the partners.

Secondly, they have justified the modern corporation, the modern financial trust and the joint-stock or limited liability company on the basis of the received rules of Islamic jurisprudence (Sharīʿah Standards, 2017, p. 572). Especially in view of the fact that parallels of the categorisation of these corporations are found in Sharīʿah recommended contracts, such as *ʿanān* partnership,[230] *muḍārabah* and the like. So, if the partner owns his share of the assets of the *ʿanān* partnership, this would be the same as to a shareholder in a joint stock company (al-Khayyāṭ, 1994, p.403). Second opinion:[231] the stock is a secure financial paper that represents a common or undivided share for the shareholders in the company itself by it juristic personality independently nor represents an undivided share to

[228] On May 9-14, 1992, the Council of the International Islamic *Fiqh* Academy of the Organization of Islamic Cooperation held its seventh session in Jeddah (Saudi Arabia), in accordance with resolution No. 63 (1/7). see the official website of Islamic *Fiqh* Academ available at: https://www.iifa-aifi.org/ar/1845.html ,(accessed: 26/4/2021).

[229] Such as al-Zuḥaylī ,al-Khathlān, Abū Zahrah, Ibnʿ Uthaymeen, Al-Qarḍāwī, al-Zarqā and others (Al-Khurashī, 2000, p. 40).

[230] The term '*ʿanān* partnership' is used by Nyazee (2016) to refer to " it is participation of two or more persons, with the permissibility of stipulating equality, through their work on their wealth, or through their work on the wealth of another , or through their credit-worthiness without wealth, so that profit can be shared by them as agreed."(Nyazee, 2016, p.124).

[231] This opinion was adopted by minority of contemporary jurists such as: al-Ṭarīqī, al-Bassām, al-Jazīrī, Khaznah, ibn Bayyah and others (Khaznah, 2016, p. 169).

the assets of the company which makes up the capital of the company (Al-Khalīl, 2013, p. 154). The basis of this opinion is the distinction between the ownership of the shares and the company's assets since the company has a financial value and is deemed evidence of ownership (Nāṣyif, 2013, vol.7, p.134). So, these assets are owned by the company while the stock is owned by shareholders (Fawzī, 2013, p.264; Al-Shabylī, 2014, p.152; Khaznah, 2016, p. 169). The liability of company and that of shareholders is distinct to each other in terms of debts, obligations and damages.

In my view, the second opinion seems to be the strongest one for the following reasons:

First: The shares differ in their judgments from the company's assets in what it represents. This is the judicial proceedings[232] in Saudi Arabia (Al-Durayb, 2008, p.56). For example:

- The right of pre-emption (*shufʿah*) [233] does not prove in the shares and they are tradable in stock markets even if the main activity for the company is trading property. However, if a joint share is sold in a property owned by a joint stock company, the right of *shufʿah* will be valid (Al-Sanhūrī, 1993, Vol.5, p.394).
- It is not valid to lease shares that are tradable in stock markets, whereas it will be valid if we lease a joint share in a property owned by a joint stock company (Khaznah, 2016, p. 169).

Shares from a legal point of view and judicial proceedings are secured financial papers and are treated as movable assets that can be translated into a financial value. The rules of properties are not applied on it, even if these shares belong to the company that is trading in the property (Al-Durayb, 2008, p.78; Sharīʿah Standards, 2017, p. 562). Whereas, if we were dealing with these shares the same as other shares that represents an undivided stock in the capital of a companies, it is mandatory to undertake trading in its stocks in light of the rules of joint shares sold in a property (Sharīʿah Standards, 2017, p. 563).

Secondly, the market value of the shares differs from the value of the company's assets, as the market value of the shares may often decline while the company has made a profit and

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[232] **Judicial proceedings**: "any action by a judge re: trials, hearings, petitions, or other matters formally before the court". See the official website of the free dictionary, available athttps://legal-dictionary.thefreedictionary.com/judicial+proceedings, accessed:28/4/2021.

[233] *Shufʿah*: "The right of pre-emption is power of possessing property which is for sale, and is established upon the teaching of Islam. It applies not to movable property but to immovable property «*aqār*». This right of pre-emption appertains in the first place to the co-sharer or partner in the property; secondly, to a sharer in the immunities and appendages of the property such as the right to water, or to roads; and thirdly, to the neighbour." See, Dictionary of Islamic law terms, Deeb Al-Khudrawi, 2012, p. 173

the vice versa. The reason behind this is that the value of the stock is directly affected by both supply and demand and does not reflect the value of the company's assets (Nāṣyif, 2013, vol.7, p.209).

Thirdly, it represents the opinion that the stock is undivided share in the company's assets to ban on trading shares, which is not admitted by the jurists who believe with the first opinion. While there is no such problem in the opinion that believes the stock represents undivided shares in the juristic personality to the company is similar to that on all assets of a corporation which are composed of it such as tangible assets, benefits, cash and debts, where they are related by this juristic personality (Sharīʿah Standards, 2017, p. 564). Therefore, the validity to sale and purchase of shares in stock markets would not be banned regardless of the percentage of the company in them, in accordance with the Islamic jurisprudential rule that *al-tābiʿ tābiʿ* (The appurtenant is deemed appurtenant).[234] According to this view, it is permissible to make the company's capital represented by its assets or make the company's shares without its assets in order to the Waqf because of the financial value that is stable in both of them.

In addition, it is important to ask about the ruling on the waqf of shares. This is because the shares whether were an undivided or *shuyūʿ* share represent a contribution to the capital in the Waqf company.[235] Thus, the view of the validity of a Waqf made of the stock is based on two issues:

First: The ruling of the Waqf that is made of jointly owned property. This has been mentioned this issue previously. By adapting these rulings on the stocks, the researcher would prefer to adopt the view of the *Shāfiʿī, Ḥanbalī* Schools and Abū Yūsuf that is there is no distinction between property that is divisible[236] or indivisible, so in their views both

[234] This means: "This maxim means that whatever belongs to a certain thing goes with that thing to which it belongs. It can be explained as follows: That which follows a thing in reality, follows it in law. In other words, when a pregnant animal is sold its embryo is sold as well. The maxim is based on the Prophetic hadith (The slaughtering of the animal embryo is slaughtering its mother)" (Abdul Baki, 2012. p. 64).

[235] This is also related to the third ingredient for Waqf company is wealth designated for the Waqf (*mawqūf*) by the adapting the Waqf Company on the light of the Integral-Pillars (*Rukn*) of Waqf. Absence of any one of the integral-pillars will render the Waqf invalid. Therefore, it is important to make sure if the Waqf company complies with the Waqf principles and rules imbedded in within classical *fiqh*. As result for this, I will be tried to give the best method that how can be adapted this issue by using the approach modern scholars took to dealing with these challenges were to try and justify the opinions by proving its concordance with the opinions of the classical scholars as there are enough dictums and maxims imbedded in within classical *fiqh* to deal with contemporary issues.

[236] able to be divided.

types of jointly owned property can be valid subjects of a Waqf (Al-Zaylāʿī, 1998, p. 326; Ibn Qudāmah, 1994, vol. 6, p. 238). By analogy this may be justified to say that the Waqf can also be made from the stocks.

Secondly, can the juristic personality be the subject for the Waqf? To answer this question, I should give the reader the best method that can be adapted in this issue in the light of Islamic law. The concept of the juridical personality of the modern corporation is affiliated with the idea of limited liability (Ḥammād, 1995, p.118). It seems that the nearest example that can be taken in the case of a limited liability for joint-stock company (Khaznah, 2016, p. 173), such as this example, is linked to a period of time where slaves were treated as objects owned by their masters, in slavery (Uusmani, 2002, p.150). It is a fact that the term slavery has died out and vanished in this era, however an Islamic jurisprudence student can still gain advantages of studying such circumstances; specifically, looking at the legal ideas used by the jurists when managing areas of 'trading slaves' would enable the student to use such problems to solve arising problems in today's world. Therefore, such example would be the most suitable to use. Uusmani claims that when examining the history of slavery, it was found out that slaves were split into two types. The first type includes the slaves who were not allowed to enter into any commercial transactions. These slaves were known as '*qinn'*. However, the second type of slaves was the ones who were allowed to trade and they were known as *al-ʿabd al-madhūn*. The second type of slaves is when the master has given his slave the initial capital for the purpose of commerce. However, he is still able to enter into all commercial transactions (Uusmani, 2002, p.152). This shows that whatever the slave invests in, it would be owned by the master. Additionally, the slaves did not have full freedom when it came to income. This is because the master would be the person responsible for all of the income earned by the slave. If the slave had debts whilst trading, the slave himself would be the one responsible to pay the debt back; whether it was in cash or stock (Al-Zarqā, 1998, p.667). However, if the slave had nothing to pay for his debt, the creditor would be able to sell the slave and take the income earned by the slave. Something that the creditor cannot do, is ask for the payment of the debt from the slave's master; that is if the slave could not pay off his debts even after working for the creditor (Al-Khafyīf, 2009, p.432). When analyzing the full situation, it can be said that the master was the owner and manager of such business, where the slave was only used by the master as a tool, to

earn transactions. Unfortunately, the slave could not gain anything of the business. From a master's point of view, the responsibility was finite to both of the capital and the price of the slave. If the slave died, the creditor would have no choice of claiming anything from the master that including his private assets (Al-Khayyāṭ, 1994, p.703). This example was used to demonstrate the finite responsibility of shareholders in a company in Islamic *fiqh* by analogy (Uusmani, 2002, p.158).

Turning now to the slaves who were allowed by their masters to trade, can it be the subject of a Waqf? The jurists have discussed this issue into two opinions. Firstly, Abū Yūsuf from the *Ḥanafī* School maintains that the slave is not subject of the Waqf unless if the slave is adjunct to the immovable property, as when someone has dedicated his land for Waqf, in which case the movables that may be an accessory to the land are valid as a subject of the Waqf, like cattle, slaves etc (Ibn al-Humām, 1995, vol. 6, p.319). The evidence for this is the Tradition of the Prophet Muhammad who said: "If somebody keeps a horse in Allah's cause motivated by his faith in Allah and his belief in His promise, then he will be rewarded on the Day of Resurrection for what the horse has eaten or drunk and for its dung and urine" (Saḥīḥ al-Bukhari, Hadith no: 2853). The Prophet also said: As for Khālid, "he has retained his armour and war equipment in for the sake of Allah" (Saḥīḥ Muslim, Hadith no: 983). In principle, the Ḥanafī School does not acknowledge that the Waqf of movables is valid (Ibn al- Humām, 1995, pp. 199-200). They believe that the object of Waqf must have the quality of permanence (*ta'bīd*) and movable things do not possess this quality. However, the items mentioned in the prophetic Tradition are an exemption of the rule. Secondly, Al-Khayyāṭ demonstrated that most of jurists are in agreement that a slave is valid to be the subject of the Waqf (Al-Khayyāṭ, 1994, p.703). This is based on the previous Tradition and they use the method of analogy to make other movables a valid subject of Waqf. Since armour and war equipment are both movables they decree that other movables can become a valid subject of Waqf. According to them the Tradition does not mean to confine the valid subject to armour and war equipment only. It can be applied to other kinds of movable also, it just depends on custom (*ʿUrf*) (Al-Bahūṭī, 1982, vol. 4, p. 243).

The researcher is of the opinion, the majority of jurists have the strongest evidence. This is because the first opinion lacks strong justifiable reason. They do not provide evidence to support their claim that it is exemption of the rule. Rather, reason suggests that if some

movables are allowed then other movables should also be allowed on the grounds of analogy. The opinion of the majority, on the other hand, relies upon the prophetic Tradition. It shows flexibility in Waqf, an area of law which lacks details in prophetic instructions and is open to scholastic reasoning. The strength of the majority opinion is not only on the fact that they have relied on prophetic Tradition but also that their opinion is most suitable to the contemporary circumstances. As a result, it would be permissible that the Waqf could be made possessing such juridical personality that has limited liability. It can be done in two ways, either by making the entire company as the Waqf in such as the case of a company with a limited liability or by the Waqf made of shares only, which represents an undivided or *shuyūʿ* share in the company itself such as the joint stock company.

6- The Waqf of bonds:

Bonds are defined as an official document that guarantees loans taken from a corporation or banks or an office and so on, with the aim of returning it back (Al-Ṭayyār, 2010, Vol.2, p.200; *Al*-Jabr, 1996, p.267; Sharīʿah Standards, 2017, p. 568) Using bonds allows the person to pay back the loan at a specific time, keeping in mind that interest would also apply. The thing that distinguishes a share from a bond is that a share is a contribution to the capital with its gains or loss. However, a loan is mainly interest where the person would have a number of repayments. The role of bond holders is mostly limited, where they have no power of managing the administration of the corporation. It is important to remember that both bonds and shares have a market price, which is practically unlike the face value. They would both be traded via the exchange markets, just like other items. The values of bonds and share would vary, from time to time, due to various factors. These factors include the successful results of the companies which have issued it and also, local and international economic and political impacts in the state (Sharīʿah Standards, 2017, p.568; Al-Maymān, 2009, p.189; Al-Rifāʿi, 2013, p. 40).

According to most contemporary Muslim jurists[237] and International Islamic *Fiqh* Academy[238] bonds is not allowed in Islam. Their standpoint is based on two reasons: First

[237] For example: Ibn Bāz, al-Zuḥaylī, Ibn Bayyah, Ibn Jibrīn, al-Albānī, al-Zarqā and many others (Al-Rifāʿi, 2013, p.139, Al-Khathlān, 2011, p.69).

[238] On March 14-20, 1990, the Council of the International Islamic *Fiqh* Academy of the Organization of Islamic Cooperation held its seventh session in Jeddah (Saudi Arabia), in accordance with resolution No.60

of all, the basic concept behind interest-bearing bonds is that they represent loans. Therefore, the term and rulings of loan shall apply on these bonds in terms of the adaptation by Islamic law. It is confirmed that any loan that results in a benefit is considered as *ribā* according to Islamic law. Bond issuance is based on interest-bearing loans. Thus, bonds would be prohibited according to Sharīʿah (Al-Shabylī, 2014, p.194; Al-ʿumrī, 2014, p.234). Secondly, the prohibition of trading with bonds is based on *ribā* prohibit (Sharīʿah Standards, 2017, p.568). This is due to the fact that a bond is continued and transferred from a person to another as implemented by the word 'negotiation', so benefits are counted. The final thought would be that, a person who buys a bond would be considered a creditor of the corporation that has issued it and *ribā* is claimed from his debt. Finally, Sharīʿah does not approve of such actions or any transactions that lead to *ribā* (Al-Durayb, 2008, p 91; Al-Ḥumayd, 1999, p. 67). However, according to some modern scholars such as Muhammad Sayyid Tantāwī who believed dealing in bonds particularly when it comes to the transactions of the Waqfs fund to be permissible (Al-Rifāʿi, 2013, 179). He believes there are still some issues which are open to juristic interpretation, for example, whether or not *ribā* does explicitly conflict with the modern notion of interest (Abdul-Karim, 2010, p. 196).

Tantāwī's argument is based on some scholars of Islamic law [239] who mentioned that the treasury of the Muslim state, the *Bayt al-Māl*, can accept money attained by unlawful or non-Sharīʿah compliant means like theft or from dubious business ventures. This is because the *Bayt al-Māl* is conceptualised as a community fund and thus investing in an interest-bearing apparatus would be permissible because of a lack of other options along with the community conceptualisation; such logic could also be extrapolated to apply to the funds of the Waqfs (Abdul-Karim, 2010, p. 202).

The researcher believes that the opinion of the majority contemporary Muslim jurists is the closest to the truth due to the power of their argument.

Based on the above, making the waqf of bonds is not valid on the basis of following reasons:

(11/6). see the official website of Islamic *Fiqh* Academ available at: https://www.iifa-aifi.org/ar/1813.html, (accessed: 28/4/2021).

[239] Such as: Ibn Taymiyyah (Ibn Taymiyyah, 1997, vol: 25, p. 456).

1- Investment in the Waqf through it is not valid due to *ribā*. Muslims believe that they cannot get close to Allah by disobedience. So, if it is not valid to invest in the Waqf through it, it is not permissible to make the Waqf of bonds. Moreover, it is noteworthy that the ultimate purpose of a Waqf is an act of worship. Engaging in an act of worship via means which is so profoundly against the core teachings of Islamic business law is contradictory. There is consensus of jurists regarding the prohibition of the *ribā* and beyond the consensus is clear and explicit prohibition of *ribā* in the Qur'an (Al-Khathlān, 2011, p.100). There is a difference between engaging in *ribā* based contracts and taxing unlawful items of trading. The property of individuals and the means by which they are acquired it is their problem and it is between them and Allah. Taxation is concerned with extracting money from merchandise and not investigating the means of the property. Secondly, property can be lawful and unlawful based of the person who possesses it. For example, it is permissible to charge custom tax on pigs and wine from non-Muslims, because that is property for them. While if Muslims possessed it, it would be confiscated (Al-Ḥumayd, 1999, p. 90).
2- Bonds are not money in reality, and it does not represent a separated share of a company's capital. It also does not represent a separated share of the company's assets and the rights associated with it upon conversion of the capital into tangible things, benefits, debts and so on (Sharīʿah Standards, 2017, p.569). Moreover, bonds are only a borrowing instrument that carries predefined terms of interest and series of repayments which is conflicted with legal conditions for the validity of the waqf. As it is stipulated that the Waqf property should be known and is possible to buy or lend the Waqf property (Ibn Qudāmah, 1994, vol. 6, p. 768). So, making the Waqf from bonds is invalid.

The Beneficiary between Subscribers and Others (The fourth Integral-Pillar: *Mawqūf ʿalaih)*

Beneficiary[240] is the party that benefits from the Waqf. The beneficiary in the *fiqh* of the Waqf has been divided into two categories: identified beneficiaries and undefined beneficiaries (Ibn al-Humām, 1995, vol. 6, p.321). The identified beneficiaries include people which may be one or more beneficiaries whereas unidentified beneficiaries include group of persons such as needy and jurists. Likewise, Waqf could be used by the general public such as in the cases of mosques and universities, and the like.

These divisions can be achieved in the Waqf company, where the Waqf assets is invested in a financial project and the returns of those projects will be distributed among the beneficiaries as specified by the contract of company or the memorandum of association as well the conditions from *wāqif's* shareholders. The services, projects and products issued by the company are originally to be paid in cash and are aimed at beneficiaries and customers. Thus, the income which the company earns from it must be covering the company's own operating expenses[241], and then payment should be made to the beneficiaries because the Waqf income is distributed in favour of the beneficiaries and this is according to the Waqf deed which is confirmed by the Sharīʿah court and the company's basic law. In principle, non-shareholders (beneficiaries) would benefit from the profits and services of the Waqf company (Al-Mīn, 1999, p. 48). However, is it possible that the shareholder could also nominate himself as the beneficiary or one of the beneficiaries of the Waqf company's proceed ? To answer this question, two issues need to be considered: First: Taking benefit of the shareholders from the Waqf company's services. Second: Taking benefit of the non-shareholders from the Waqf company's services.

[240] **Beneficiary**:" a broad definition for any person or entity (like a charity) who is to receive assets or profits from an estate, a trust, an insurance policy or any instrument in which there is distribution". See the official website of the free dictionary, available at: https://legal-dictionary.thefreedictionary.com/Beneficiary, accessed: 28/4/2021.

[241] **Operating expenses**: "A company's expenses related to the production of its goods and services". See the official website of the free dictionary, available at: https://financial-dictionary.thefreedictionary.com/operating+expenses, accessed:28/4/2021.

The issue of non-share-holders taking benefit from the services of the Waqf company, is somewhat similar to the issue of *wāqif* creating the waqf to benefit him. There is a disagreement between the jurists regarding validity of a Waqf by a *wāqif* in order to benefit him. One of the views of the *Ḥanbalī* School and the opinion of Abū Yūsuf from *Ḥanafī* School has declared such a Waqf as valid (Al-Zayʿlai, 1998, vol. 3, p. 328 ; Niẓām,1983, vol. 2, p. 371; al Al-Bahūṭī, 1982, vol. 4, p.247*;* Ibn Ḍawyan, 1996, vol. 2, p. 707). They have deduced this stance on the basis of the Tradition of ʿUmar where he has maintained that, " There is no sin for one who administers it if he eats something from it in a reasonable manner or if he feeds his friends without hoarding (for himself) out of it." (Saḥīḥ Muslim, Hadith no:1632). It was assumed that he himself held the role of administrator and kept on enjoying the usufruct of the waqf that he made and according to the rules he has formed for is Waqf (Ibn Qudāmah,1997, vol. 6, p. 164). There are other Tradition of the Prophet which have been also adopted and accepted by the *Ḥanafī* and *Ḥanbalī* Schools in order to facilitate and encourage Waqf (Al-Ṭarabulsī, 1981, p. 98; al Al-Bahūṭī, 1982, vol. 4, p.247). The Tradition says: "The expenditure of someone for himself is considered a *ṣadaqah* (charity)"(Sahih al-Bukhari, Hadith no: 6022).

Contrarily, the *Shāfiʿī*, *Mālikī* Schools, al-Shaybānī and one of the reported views from the *Ḥanbalī* School are of the opposite view and they reject any kind of interest of *wāqif* in the Waqf (Al-Ramli, 1995, vol. 5, p. 327; al-Shirbīnī, 1958, vol. 2, p. 377 ; Al-Mawwaq, 1999, vol. 6, p. 25; al-Ābī, 2004, vol. 2, p. 206 ; al-Zaʿylai, 1998, vol. 3, p. 328 ; Nizam,1983, vol. 2, p. 371; al Al-Bahūṭī, 1982, vol. 4, p.247; Ibn Ḍawyan, 1996, vol. 2, p. 707). In their view, it does not make sense that an owner who already owns the property, will have to make a Waqf to confer the right of ownership again (Al-Ramlī, 1995, vol. 5, p. 327; Al-Sharbīnī, 1958, vol. 2, p. 380). It is tantamount of selling one's property to himself (Al-Bahūṭī, 1982, vol. 4, p.247; Ibn Ḍawyan, 1996, vol. 2, p. 707).

Moreover, as propounded by al-Shaybānī, the purpose of the Waqf is to seek closeness to Allah by pleasing him through giving away the property to the needy. If one does not give it away to the poor and needy and make the usufruct exclusively for him, in this case there is no way that he is seeking the pleasure of Allah by becoming closer to him. Thus, this

kind of arrangement will render the Waqf invalid (Cited in: Niẓām, 1983, vol. 2, p. 371: Haji Abdullah, 2005, p.83)

On the contrary, the *Shāfiʿī* School have a slightly lenient view in this regard. They deem the Waqf valid if the Waqf was established for scholars and needy and he too is one amongst them. Or if the *wāqif* made it for his father's descendants bearing certain qualities and he himself fulfil that criteria, in these two cases, *wāqif* can be one of the beneficiaries of the Waqf and can benefit from it (Al-Ramlī, 1995, vol. 5, p. 327; al-Shirbīnī, 1958, vol. 2, p. 380).

Ibn Qudāmah concludes that in case of the Waqf made for public at large like a well, mosque or graveyard, there is no difference of opinion that the wāqif too can benefit from such Waqf (Ibn Qudāmah, 1994, vol. 6, p. 193). Ibn Taymiyyah call our attention to there seems to be unanimity amongst the jurists about that (Ibn Taymiyyah, 1997, vol: 25, p. 456). The incident of the well of Rumah given away by ʿUthmān is one such example. ʿUthmān said: "My pail at this well is like all the pails of all the Muslims" (Sunan Al-Nassʾai, Hadith no:3608). It clearly indicates that he too was entitled to take water from the well which he had given away to diminish the shortage of water among common Muslims.

The researcher agrees with the opinion that the *wāqif* shareholder has right to benefit from the services provided by the Waqf company, especially in the charitable, where the purpose is public benefit only, especially in the field of education, health, culture and so on. According to this, the *wāqif* can benefit from these services provided free by the company like any other beneficiary. This is because the beneficiary here is not specified and the waqf is intended for the general public and he too is amongst the general public.

On the other hand, the issue of taking benefits of the non-shareholders from the Waqf company, it is important to identify some important provisions regarding beneficiaries of the Waqf. Jurists stipulate certain conditions for the beneficiaries too. The *Shāfiʿī* and *Ḥanbalī* Schools demands a beneficiary to be legally entitled to own something at the time

of Waqf. Therefore, they do not allow deceased, fetus or animals to be the beneficiaries of the Waqf (Al-Māwardī, 1999, Vol.7, p.523; Al-Bahūṭī, 1982, Vol.4, p249). The *Mālikī* School again have a flexible view in this matter. They allow the *wāqif* to make fetus a beneficiary of Waqf because it will acquire the eligibility to own the properties in the future (Al-Dusūqī, 1992, Vol.4, p.77).

If the beneficiaries cease to exist or the objective cannot be fulfilled in the Waqf property, then the usufruct or benefit will be reverted to some other similar purpose. For instance, if a Waqf property was assigned for educational purposes of the students of some specific area, if the services are no longer required there, in this case, students of some other area who are in same kind of needs will be catered (Ibn ʿĀbidīn, Vol. 3, p 3710 -373). Moreover, according to the *Mālikī*, *Ḥanbalī* Schools and Abū Yūsuf from the *Ḥanafī* School consider the Waqf to be valid even if the *wāqif* declares that he has endowed his property as Waqf but does not specify the beneficiaries or the specific purpose for which it has to be utilized (Al-Bahūṭī, 1992, vol. 2, p. 460; al-Ramli, 1995, vol. 5, p. 368). Abū Yūsuf thinks that such Waqf should be assumed for poor and needy while *Mālikīs* prefer to resort to the customary practice of that area. If the practice of the locals is such that the Waqf is mostly established for scholars and religious purposes, then it will be declared so. If no such specific practice exists, then they too call for distribution of the Waqf among poor and needy. The *Ḥanbalī*, on the other hand, give priority to the relatives of the *wāqif*. The *Shāfiʿī* School and al-Shaybānī from the *Ḥanafī* School declare Waqf without the specification of beneficiaries as invalid (Ibn ʿĀbidīn, Vol. 3, p 365 -366; Al-Māwardī, 1999, Vol.7, p.523). There are some details in classical books regarding Waqf in favour of relatives but that is out of the scope of this thesis.

Another aspect of the beneficiaries is the explicit acceptance of waqf on their behalf. There is no question of acceptance on the behalf of beneficiaries if the Waqf is endowed for the mosques, hospitals, inns, bridges and the like. Almost all Schools agree in this regard (Ibn ʿĀbidīn, Vol. 3, p 360). But the case is different if the Waqf is made for some specific persons. Acceptance must be declared by them according to the *Ḥanafī* School. Contrarily, the *Mālikī*, *al-Shāfiʿī* and *Ḥanbalī* Schools do not acknowledge it as a prerequisite for a

valid contract of Waqf (Al-Nawawī, 1988, vol. 16, p. 263; Ibn Qudāmah, 1994, vol. 6, p. 214; al-Ābī, 1986, vol. 2, p. 206). For those who consider it to be an important clause of the valid Waqf, the *Ḥanafī* demand that it be endowed for the needy if they were intended to be next in line (Ibn ʿĀbidīn, 1994, vol. 3, p. 360). The *Mālikī* School believe that the ruler to decide about the beneficiary if it was wished for Waqf in any case. If it was only envisioned for that specific group, it would return to the ownership of the *wāqif* (Al-Dusūqī, 1992, vol. 4, p. 88).

Conclusion

This chapter reveals several interesting points. There are three major findings from this investigation. From the above discussion, it can be concluded that although the concept of Waqf was fairly elucidated by classical jurists, the concept of the Waqf company, however, is relatively new and was not mentioned or discussed in the work of classical jurists because it is a contemporary jurisprudential concept and requires diligence in the correct jurisprudential adaptation. One of the unique characteristics of Islamic law is that there are enough dictums and maxims imbedded in within classical *fiqh* to deal with contemporary issues. As pointed out in previous chapters, it is the responsibility of scholars to look at contemporary issues and challenges and find solutions to the problem or problems. Waqf was an established institution which lost its significance, most likely because of the decline of the Islamic state and the challenges of time which lost its focus from scholars. In recent times, the revisiting of Waqf to see how it can be bought back to the center of funding vital social services scholars has found that Waqf companies is a vital and significant instrument.

The models for companies in modern times are multifarious. The challenge for contemporary jurists was to see which company paradigm is the most suitable for Waqf. To this end, and by the adaptation of the Waqf Company in the Light of the Integral-Pillars (*Rukn*) of Waqf, the research finds out that the model of the Waqf company is compliant

with the Waqf principles and rules imbedded in within classical *fiqh* but it should be noted that not all type of company/ies models can be suit with the rulings and principles law of Waqf. Moreover, the investigation revealed that the models of joint stock companies and limited liability partnerships or limited liability companies are the most suitable for the Waqf. This is because they conform to the rulings and principles law of Waqf.

As Waqf company is a relatively recent concept, various researchers have defined Waqf cooperation according to their understanding. In the view of the researcher, the Waqf company can be best put in a nutshell as a contract between two or more persons to contribute in an investment project that allows the general public to purchase shares through an IPO by providing a financial share and reserving all or some of the resulting profits even if it is temporary and in permissible means. That is to say, the Waqf is dedicated to matters that are permissible and not necessarily considered righteous and the loss is limited to purchased shares.

The current era is the time of companies and firms. The demand to update the version of Waqf model is the cause for development of Waqf law as per the underlying complexities of the modern model of corporations. The concept of limited liability is one of the main issues for jurists for deliberation. The basic principle for jurists is that a person is responsible for his actions and consequent obligations towards others. If he has made a contract with others, he is responsible for the obligations arising out of this contract, no matter how much they value, and this liability is not limited to the amount mentioned in the contract, it is unlimited responsibility even if it envelopes all his wealth. Moreover, the concept of the juridical personality of the modern corporation is affiliated with the idea of limited liability, in which, It separates the company's liabilities from that of its owners (the co-owners).

One of the major challenges of modern times is understanding how *mawqūf ʿalayhi* could be adapted to a more modern friendly object. What is a more popular way of making donations is cash, but this comes with challenges and marred with juristic dissention. According to *jumhūr*, i.e. the *Mālikī, Shāfiʿī* and *Ḥanbalī* Schools, permit the Waqf of movable things such as horses, weapons, clothes, furniture books, and so forth. Cash,

according to the *Ḥanafī* and *Mālikī* Schools cannot be Waqf because money does not represent permanent property. Therefore, in order to lend some validity to cash, scholars use *ḥiyal* (stratagems) as a means to fulfil a goal. The *Ḥanafī* School redirect the funds into *muḍārabah* whereas the *Mālikī* School treat it as an interest-free loan. Through these *ḥiyal* (stratagems) jurists are able to give cash Waqfs a sense of permanency, showing that they do not diminish or perish because the capital itself is preserved and only the profit is spent. Comparing both Schools' viewpoints, it seems that the perspective of the *Mālikī* school is closest to the original concept of Waqf and its requirement for permanency.

Another important topic discussed is regarding the ownership of stocks. There have been diverse opinions but the apt attitude regarding stock is that it is neither a secure financial paper that represents a common or *shuyūʿ* share in the company itself by its juristic personality nor represents an undivided share in its assets. So, it can be deduced that assets are owned by the company while the stock is owned by shareholders. Another aspect of Waqf company is adaptation of the rules for the beneficiaries. The beneficiaries do not need explicit acceptance of Waqf on their behalf.

Chapter Five

The Waqf Company: Administration and Challenges

Introduction

So far, I have discussed the integral-pillars of Waqf and the methodology to implement these pillars in the context of modern Waqf company. Furthermore, in the previous chapter I have explained how the Waqf company rules can merge with the rules of the Islamic jurisprudence to form a company whose rules ae concordant with Islamic law. Despite this, there are still some issues and challenges that are faced by Waqf company, despites its influential role in the Islamic world and Muslim communities. It hinders its revival and prevents exploitation of full potential. Like any other commercial company, a Waqf company also will face the financial challenges. The reason is twofold. it needs both liquid funds[242] and collateral[243] for loan, such as where the notions of perpetuity and inalienability[244] are upheld. Moreover, if the company adhered to the concept of immovable property only, the Waqf company will not be able raise funds of their own too. It will further be barred from acquiring development finances. This is because the notions of inalienability and perpetuity prevent Waqf property from being placed as collateral for loan financing and joint ventures[245]. This has restricted the investment in the past. Moreover, the restrictions over exchange transaction were also a reason for investment illiquidity[246] and short of charity funds. Moreover, investors find those business activities

[242] **Liquid funds**: "in the form of money or cash, rather than investments or property, or able to be changed into money easily". See the official website of the Cambridge dictionary, available at: https: https://dictionary.cambridge.org/dictionary/english/liquid, accessed: 29/4/2021.
[243] **Collateral**: "valuable property owned by someone or business who wants to borrow money, that they agree will become the property of the company or person who lends the money if the debt is not paid back". See the official website of the Cambridge dictionary, available at: https: https://dictionary.cambridge.org/dictionary/english/liquid, accessed: 29/4/2021.
[244] **Inalienability**: "That cannot be transferred to another". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/Inalienability, (Accessed: 13/4/2021).

[245]**Joint ventures**: "an arrangement between two or more companies to work together on a particular commercial project in temporary partnership". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/joint-venture?q=joint+ventures, accessed: 29/4/2021.
[246] **Illiquidity**: "Not readily converted into cash: illiquid assets or lacking cash or liquid assets". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/illiquidity, accessed: 29/4/2021.

attractive where there is more income, less risk and high expectations of future development. Contrarily, Waqf has limited prospects in terms of less diversification less income yield and limitations about sale transactions. All of these characteristics make it less attractive for investors.

According to Ibrahim (2013, p. 8) another reason for lack of prosperity of Waqf companies is the inconsistent legislations regarding Waqf. That too stops the Waqf companies from thriving. They argue that the corporate Waqf administration is dependent upon the efficiency of corporate legal framework. [247]

In order to clarify all these perplexities, I will discuss these issues with regard to the underlying Islamic law as well as their workable model within the jurisprudence of Waqf and partnership. I have based my discussion upon the opinion of some jurists who prohibit the modern form of Waqf company[248]. I will discuss and analyze their arguments keeping in view the Islamic law and modern structure of Waqf company.

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[247]For example, the disparity in the legislative framework can be imagined by the fact that some donors in the Kingdom choose to establish their endowment company with the Ministry of Labour and Social Affairs as a non-profit organization, while others choose to register with the Ministry of Commerce as a regular company (Al-Rājḥi, 2016, p. 67). This reason is a lack of a competent authority for regulation of Waqf (Al-Ismāʿil, 2020, p.24). That is to say, an authority that can issue laws regarding the Waqf and manages the relationship between the endowment institutions and stakeholders. It is evident that this lack of legislative and managerial structure is a major stumbling block. Some other obstacles in realizing the full potential of Waqf includes inefficient management, inflexible laws and a rigid interpretation of Sharīʿah framework, over-protection of the Waqf assets and dearth of innovative instruments in financing the development of the Waqf (Al-Salwūmi, 2013, p. 34). This reason behind that is because of the legislation theoretical framework for Waqf application in many Muslim countries is built on the *fiqh* if Waqf and the Sharīʿah opinions (fatwa) issued by the Sharīʿah boards or from contemporary scholars who are well known (Al-Rājḥi, 2016, p. 89). The idea of a Waqf company has been hotly debated and is somewhat controversial among Islamic scholars and contemporary jurists (*fuqhā*) of Saudi Arabia and in many Muslim countries (Al-Muhanā, 2015, p.190). This controversial status of permissibility of Waqf company led to deficient legal framework and cause the lack of legislation for Waqf application in the modern.

[248] There are some of contemporary Saudi jurists who prevent the modern form of Waqf company such as: al-Fawzān, al-Shinqṭī, Ibn Jibrīn, al-Ahmad and others (Al-Ismāʿil, 2020, p.180). This is because a model of the Waqf will be faced many issues that is non-compliant with the principles that have been stated by the majority of classical jurists in the past. Al-Zāmil identified that many issues that will be faced the Waqf company such as:

1- One of the major challenges of modern times is understanding how subject of the Waqf could be adapted to a more modern friendly object. What is a more popular way of making donations is cash, but this comes with challenges and marred with juristic dissention. Cash, according to the view of most classical jurists cannot be Waqf because money does not represent permanent property. The argument that cash Waqf is not allowed because the nature of the assets or property must be permanent and the consumption of cash Waqf would diminish that.

2- As a Waqf company, the company must be empowered to receive Waqfs in the form of cash, shares. However, they believe that the Waqf of shares is invalid. This is because the share is document that is

Modern Challenges faced by the industry of Waqf company with critical analysis

New approaches and insight to some key challenges and problems **faced by the Waqf company** industry.

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deemed evidence of ownership of the shareholder for his undivided share in the assets of the company. Due to there is a lack of agreement among jurists about whether a Waqf can be made of jointly owned or undivided property due to the principle that the *nāẓir* must take possession of the property, once the Waqf is made.

3-One challenge is related to legal entity of the Waqf company. They refuse to be the juristic personality be the subject for the Waqf.

4- As a Waqf company, the company will face some the financial challenges. Which can be led to need some of liquid funds and collateral for loan by using its shares as a guarantee. This is conflict with the notions of inalienability and perpetuity prevent Waqf property from being placed as collateral for loan financing and joint ventures. Also, lending the shares of the company are banned due to the Waqf is an indispensable deal, it cannot be revoked, and the capital cannot be spent. In addition, the Waqf company could be used its shares as a mortgage. This is known mortgage shares that is an agreement that allow a company to borrow money from a bank or other financial institution by using its shares as a guarantee (Al-Faziʿī, 2016, p. 68). According to the classical jurists were rigid in this regard and did not allow giving Waqf asset as a security for payment of debt because mortgaging entails withholding of Waqf assets against loan which should be of equal price and value to the Waqf (Al-Kubaiysī, 1977, vol. 1, p.289). The main contention is that the Waqf is to be a trust with the borrower and is out of anyone's possession. Therefore, it cannot be mortgaged (Abū Zahra, 1959, p. 98). Moreover, this is against the general principle in which the majority of jurists are in agreement, that the consequent effect of a Waqf is that it is an absolute contract (*ʿaqd lāzim*) which cannot be revoked, and the object of Waqf cannot be mortgaged, sold, given away or inherited (Ibn-ʿĀbidīn, 1994, Vol. 4, p. 456; Al-Māwardī, 1999, Vol.7, p123).

5- The concept of the juridical personality of the modern corporation is affiliated with the idea of limited liability, in which, it separates the company's liabilities from that of its owners (the co-owners). This is cannot be imagined it in the Waqf. This is based on the fundamental principle that the ownership of the Waqf belongs to Allah. According to the view of most classical jurists.

6- There are some rules of companies that is contrast with the Waqf law. For example, there are some types of companies that allowed to do trading its shares in stock markets. This is against the general principle in which the majority of jurists are in agreement, that the ownership of the Waqf belongs to Allah and its usufruct is devoted to charity. Thus, the consequent effect of a Waqf is that it is an absolute contract (*ʿaqd lāzim*) which cannot be revoked, and the object of Waqf cannot be sold, given away or inherited. According to this principle, it is not permissible to undertake the trading in the shares of the company by sale and purchase in the Waqf company because it is conflicting with this principle. Furthermore, because the reality of the stock markets is great risk and may have elements of *gharar*, therefore we should keep the assets of the Waqf company away from this type of transactions such as trading in the stock markets. In addition, the fundamental principle in law companies that companies get terminated if one of the personal elements defaulted from one of the shareholders such as death, bankruptcy or loss of eligibility. This is against with unanimous agreement among jurists that the Waqf is not revocable when any of the causes regarding the personal elements happened, irrespective of the fact that it is from the *wāqif* or *nāẓir* or beneficiaries (Al-Zarqā, 2004, Vol. 1, p.340). Thus, there is no impact on the Waqf in term of causes regarding to the personal elements. (Al-Zāmil in a paper that has been submitted in "the second conference for regulating and development Waqfs" that was held on 14/02/2017. in Intercontinental Hotel in Riyadh).

The important challenges faced by the industry of Waqf company are identified as follows:

1- The relationship of the constitution of Waqf of incorporation and the statute of the Waqf company and the memorandum of association[249]

Ibn Taymiyyah maintains that the main principle of Waqf law according to most of the jurists is that the ownership of property subject to a Waqf passes to Allah, and it therefore does not fall under anyone's jurisdiction (Ibn Taymiyyah, 1995, vol: 31, p. 245). Special rules apply whereby only the usufruct of the property can be used and the limitations of these uses too. The *wāqif* is able to make a number of stipulations on the subject of how the Waqf is administered, who is appointed as the *nāẓir*[250], who is designated as a beneficiary and how the Waqf is to be distributed. These stipulations must be followed (Al-Ābī, 1988, vol. 2, p. 225). This assertion is based on a juristic maxim that is employed widely in the law, 'The stipulations of the *wāqif* are as binding as those enacted by the Lawgiver' (*shurūṭ al-wāqif ka naṣ al-shārʿī*)" (Ibn Ḍawyan, 1996, vol. 2; Haji Abdullah, 2005, p.109).

Although the maxim states that the stipulations of the *wāqif* are to be respected and followed, just as the desire of Allah should be followed, we should note that the stipulations of the *wāqif* cannot be as completely binding as the word of Allah, otherwise it would equate to blasphemy[251] (Ibn Taymiyyah, 1995, vol: 31, p. 258). The words of Allah are the only mandatory ordainments that Muslims are obliged to follow; the *wāqif's* stipulation must therefore be translated in letter and spirit as far as it is possible, but there are limitations. These limitations are the degree to which the stipulations follow the teachings

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[249] The current process for establishing Waqf company in Saudi Arabia is via the drafting of a 'Waqf deed'. The deed spells out what assets are in the ownership of the Waqf company with specific reference to amounts of cash, shares, and property. This Waqf deed is similar in composition to the articles of association and the memorandum of association that forms the constitution of a modern-day company. The deed thus covers the relationship between the different elements of the Waqf like the principles of management, company's statutes, the methods of distribution of funds, and the general structure of the Waqf company. The Waqf deed is fundamental for the operation of the Waqf company; it plays an important role in the management and commercial dealings of the Waqf as its primary regulatory base (Alomair, 2018, p. 150). Accordingly, the Waqf deed must be formed adhering to legal and Islamic principles related to the operation and composition of the Waqf.

[250] The person responsible for managing the Waqf is referred to as *nāẓir*.

[251] **Blasphemy**: "something that you say or do that shows you do not respect God or a religion". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/blasphemy, accessed: 29/4/202

of Islam, and they are not binding if they contravene these teachings in any way. They also have to fulfil the requirements of the law of the land which have been placed to govern the best interest of people and it does not contradict the teachings of Islam (Ibid). This ruling is taken from the Tradition of the Prophet, that states: "What do people think when they make stipulations that are not in the Book of God. If anyone makes a stipulation that is not in the Book of God, it is void even if he makes one hundred stipulations" (Ṣaḥīḥ al-Bukhārī, Hadith No. 2155). Therefore, any stipulations that break this principle will not be followed and will be considered to be invalid.

Ibn Taymiyyah has described three types of stipulations in Waqf:

1- Stipulations that conform to the teachings of Allah. These are based on deeds that are recommended or deemed to be obligatory by Islamic law. They must be followed, and the beneficiaries have the right to demand that these ought to be fulfilled.

2- Stipulations that involve acts prohibited by the Lawgiver. All jurists agree that these types of stipulations are not valid.

3- Stipulations that involve acts that are permitted (*mubāḥ*). The majority of jurists hold that this type of stipulations is invalid, but some assert that it is permissible (Ibn Taymiyyah, 1995, vol: 31, p. 265-266).

The first two categories are accepted by jurists because they are seen to be basic principles of the law (Ibn al-Mundhir, 1994, p.23). As highlighted by the maxim quoted above, it is necessary to follow obligatory and recommended stipulations as they are as valid as the word of the Lawgiver. Similarly, stipulations that involve acts explicitly forbidden by Allah should not be followed, because doing so will contravene the teachings of Islam (Al-Nawawī, 1988, vol. 16, p. 257).

While Ibn Taymiyyah asserts that there is a majority view regarding the invalidity of stipulations falling into the third category, the al-Nawawī states that all four Schools agree that stipulations of indifferent acts are valid and therefore should be enacted (Ibid). On this subject, Abū Zahra, a contemporary scholar, says, 'I see that the opinion of the majority of the jurists regarding this matter, as demonstrated by the *fiqh* books of the Schools of law, differs from the statement of Ibn Taymiyyah'. Scholars from the past and in the contemporary ones agree that the stipulation of *mubāḥ* acts is valid and there is no evidence that they are forbidden (Abū Zahra, 1959, p. 149). If we accept this majority view, it is

reasonable to conclude that it is obligatory to follow any stipulation unless it contravenes the teachings of Islam.

One of the stipulations that might fall into this latter category includes that the beneficiaries of the Waqf must be celibate in order to be able to benefit from the usufruct, for example. This is against the teachings of Islam. Any stipulation that prevents Muslims to marry, such a stipulation is invalid (Ibn Taymiyyah, 1995, vol.31, p. 266). However, the *Ḥanbalī* and *al-Shāfiʿī* Schools hold the view that it is valid to stipulate that an ex-wife can only benefit from the usufruct as long as she does not re-marry (Ibn Ḥajar, 1979, vol. 6, p. 256).

Furthermore, the *Ḥanafī* School maintains that any stipulations that causes disadvantage to beneficiaries should not be followed. For example, any stipulation demands maintenance work from beneficiaries or one that forbids the *nāẓir* being appointed. Such stipulations are regarded as invalid because they cause disadvantages to the Waqf (Al-Nawawī, 1988, vol. 16, p. 255).

Regardless of the above, the *Shāfiʿī* and *Ḥanbalī* Schools also hold the opinion that if a stipulation contradicts the absolute nature of Waqf, it cannot be considered as valid (Al-Bahūtī, 1982, vol. 4, p. 251). This may be, for example, if it is stipulated by the *wāqif* that he can choose whether to revoke or continue the Waqf, change the beneficiaries or sell the property. These stipulations cannot be allowed because they go against the very principle of a Waqf. On the other hand, it is maintained by Abū Yūsuf that it is valid to stipulate that a choice can be made within three days. Al-Shaybānī still claims that such an action would be void (Al-Sarakhsī, 1987, vol. 12, p. 42).

What has been discussed here is that the principles of the mechanism regulate how a *wāqif's* stipulations are to be administered. Even a *wāqif* is unable to revoke a valid stipulation unless he has included in his declaration that he has the right to do so. If this is the case, the *wāqif* can change the stipulations at any time he wishes (Al-Zarqā, 1997, pp. 163-164), so that even a binding stipulation can be changed if desired.

With respect to the *nāẓir* or *qāḍī* [252], there is some flexibility in the manner the *wāqif's* stipulations will be implemented. According to Ibn Taymiyyah, it is lawful to alter a stipulation by the *wāqif* for the better. For instance, if a Waqf was originally created for

[252] The Judge.

scholars, but the army are in greater need (Ibn Taymiyyah, 1995, vol.31, p. 509). Ibn ʿĀbidīn in his commentary of *Rad al-Muhtār* provides seven types of stipulations that can be either disregarded or altered by a *qāḍī* or *nāẓir* (Ibn ʿĀbidīn, 1994, vol. 6, p. 587-588):

1- Stipulations prohibiting an exchange (*Istibdāl*) of the Waqf property.

2- Stipulations that forbid the *nāẓir's* removal. If the *nāẓir* can be proved to be incompetent, he can be removed by the *qāḍī*.

3- Stipulations that forbid the rental of the property for a period longer than a year. This can be overturned by the *qāḍī* if doing so would benefit the needy.

4- Stipulations that require the Qur'an to be recited over a person's grave. This stipulation can be disregarded if the concerned people are of the opinion that it is disliked (*makrūh*).

5- Stipulations that the Waqf's usufruct has to be presented as *ṣadaqah* to the beggars of a particular mosque. The *nāẓir* has the authority to decide which beggars are more appropriate to receive benefit from the usufruct.

6- Stipulations that meat and bread be given to the beneficiaries of a Waqf every day. The *nāẓir* has the discretion to substitute these provisions for others that are of the same value.

7 - If the salary of the *nāẓir* is deemed to be inadequate, it can be increased by the *qāḍī*.

All of the above represent cases in which the stipulations of the *wāqif* can be altered. From these we are able to deduce some general principles that are agreed upon by all schools of law (Al-Kubaiysi, vol. 1, 1977, p. 65). The aforementioned can be summarized as following: if a stipulation does not benefit the Waqf property, the beneficiaries, or anyone who serves the property, it is permissible to modify it.

Adaptation for Memorandum of Association and Waqf Constitution from the perspective of Islamic law

After discussing the general principles for the constitution of Waqf among Muslim classical jurists, let us now consider the extent of possible compatibility between the memorandum of association and the general assembly for the Waqf company and the rulings of the Waqf constitution.

The Memorandum of Association is drawn up by the partners' agreement. By virtue of this agreement, approval is issued for the establishment of the company and the statute is approved by the General Assembly of the joint stock company (Al-Qalyubiyy, 2011, p.222) The Waqf constitution is comprised of stipulations regarding creation of the Waqf; administration of the Waqf, development, investment, the appointment of a *nāẓir*, the manner for transferring the responsibilities from the *nāẓir* to another, the designation of beneficiaries and the distribution of the Waqf and so on. The Waqf deed is the law that is the Memorandum of Association or the company's statute, therefore no contract or regulation can be made that contravenes it (Al-Ṣuqiyyah, 2014, p. 350). For instance, the *wāqif* made it a condition that the Waqf property will not be invested in the agricultural or industrial sector by mentioning this in the Waqf deed. Any contract thereafter made by Waqf company in aforementioned activities will be considered null and void.

I want to propose that when the Waqf company is established and it acquires ownership of multiple Waqf assets as its capital like shares and cash, it seems plausible to formulate an ample and inclusive Waqf deed that would include new assets and would present a new model of Waqf deed. It should contain memorandum of association, company's statute of Waqf and define the terms of functions between all parties to the Waqf company i.e. executive management, board of trustees and general assembly. Thus, it regulates the relationship between different elements of resources. The Waqf deed of the Waqf company is to be registered in Sharīʿah Court in Saudi Arabia (Al-Rājḥi, 2016, p.78), because this ensures that the assets of Waqf company are safe.

Therefore, there is no dissociation between the memorandums of association in the waqf company from the Waqf deed. The memorandum of association is not formulated in isolation from the conditions of the *wāqif*. The memorandum of association or the company's contract is a translation of the Waqf deed and an expression of the will of the *wāqif*. As for changing the memorandum of association or modifying it with regard to the status of the assets and the manner they manage and direct investment in them, this is permissible as long as it achieves the public interest of the company, and its benefit is reflected in the increase in the company's income or the rise of the value of its shares. All

of these are the powers of the General Assembly of the company represented in the *nāẓir*, provided that no amendment to the conditions of the Waqf that fixed in the memorandum of association in the company, such as related to the type of investment, or the party benefit upon it when the profits are made and so on, all of this is outside the powers of the General Assembly, and the amendment to it is subject to a number of provisions relating to changing the conditions of the *wāqif*, or violating it for other requirements (Al-Khalīl, 2013, p. 200)
.

2- Borrowing loan for the Waqf company

Another challenge is that the Waqf company may face some circumstances that compel it to borrow loans from the banks or other financial institution. Therefore, it is important to talk about the Islamic legal ruling to borrow for the benefit of Waqf. As it is mandatory for the validity of Waqf company to be in conformity with the *fiqh* of Waqf, it is pertinent to examine jurists' opinions regarding borrowing for Waqf.

According to the *Ḥanafīs* School, loan cannot be raised in order to distribute it among beneficiaries. This is not permissible even if the judge allows it. The *nāẓir*, however, is permitted to raise loans if it is in the interest of the Waqf when the judge allows it. He can do so if a Waqf is in need of an essential restoration if it had been unleased for a very long time. He can raise loan in a situation where a mosque was demolished for a justified reason and a loan is to be raised for its rebuilding. Moreover, for continuity of the religious activities, loan can be taken for instance if there is a need to pay the salary of *nāẓir*. In like manner, if the Waqf land needs to be prepared for cultivation and a loan needs to be taken for buying seeds or taxes has to be paid and the like. This loan must be paid from the proceeds of Waqf. However, it will not be repaid from the proceeds[253] of Waqf if the loan was raised without the permission of the judge (Ibn al Humām, 1995, vol. 6, p. 278; Ibn ʿĀbidīn, 1994, vol. 6, p. 657). The *Mālikī* and the *Ḥanbalī* Schools are of the view that this loan will be dealt like any other loan that has to be taken in the best interest of Waqf (Al-Dardīr, 1995, vol. 4, p. 89; Al-Bahūtī, 1982, vol. 4, p. 278; Ibn Qudāmah, 1997, vol.

[253] **Proceeds**: "the profit or return derived from a commercial transaction, investment, etc.". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/proceeds, accessed: 29/4/2021.

6, p. 356). The *Shāfiʿī* School, however, prohibit any such loan transaction that is done without the permission of Caliph or judge. However, the *nāẓir* is authorized to lend the proceeds of Waqf if there are no beneficiaries to take benefit from it and he is in fear of harvest being destroyed. He should lend it to any reliable person (Al-Shirbīnī, 1958, vol. 2, p. 293). It is well known that a debt should be paid in the same amount or through similar modes without any increase that may resemble interest (Abū Zahrah M, 1959, p.220; Al-Kubaiysi, 1977, Vol.2, p.120).

Thus, it is evident that there is an agreement of the four Schools of thought that it is permissible to borrow for the Waqf in some specific cases. Another important angle related to loan is about the sources of the loan. From which financial institutions Waqf can take loan and how the loan will be administered?

The borrowing can be either from the *nāẓir's* own money or through *Bayt al-Māl* (Treasury) or from any other Waqf. The Schools of Thought have allowed this to be made with a small difference among them. The *Ḥanafī* and *Mālikī* Schools permit the borrowing from the *nāẓir's* own money with the judge's permission and proper documentation of the procedure (Ibn ʿĀbidīn, 1994, vol. 6, p. 675; Al-Zaylāʿī, 1998, vol. 3, p. 460; Al-Dardīr, 1995, vol. 4, p. 96). The *Shāfiʿī* and *Ḥanbalī* Schools maintain that the borrowing is permissible in general. Hence, it can be made through the *nāẓir's* or the *wāqif's* money or the Waqf proceeds or from any other financial institution (Al-Shirbīnī, 1958, vol. 2, p. 293; Ibn-Qudāmah, 1997, vol. 6, p. 360).

These principles of borrowing for administration of Waqf can be adapted for the Waqf company too. Therefore, it will be allowed for all the members of the board of directors [254]to lend money to Waqf company from their own personal properties. The analogy is deduced from the *nāẓir* of the Waqf as the *nāẓir* and the members of board of directors of Waqf company both are responsible for taking care, developing and administrating the company. This can be executed by demanding an increase in the company's capital and henceforth allowing the additional shares to increase the capital. These shares will be considered as documentation of loan as required by the *Ḥanafī* and the *Mālikī* Schools.

[254] **Board of directors**: "the group of people who shareholders choose to manage a company or organization". See the official website of the free dictionary, available at:https://dictionary.cambridge.org/dictionary/english/board-of-directors, accessed: 29/4/2021.

Borrowing from the *Bayt al-Māl* (Treasury) can be adapted though the Ministry of Finance. This has not been adopted by most of the laws related to companies (Al-Qalyubiyy, 2011, p.444). Therefore, it will be overridden here too.

By applying the aforementioned views of the *Shāfiʿī* and *Ḥanbalī* Schools on the Waqf company, it will be possible to sell some of the shares of the Waqf company or borrow from other Waqf companies or any other financial institutions. The researcher prefers this opinion with the following conditions:

Firstly, this opinion will be adopted if it is not possible to fulfil the need through Waqf's proceeds or from means such as issuing new shares for increasing the capital of the company instead of the borrowing. Secondly, when the Waqf company is suffering a loss, or in case the Waqf company proceeds come to a stoppage or the value of the shares declines with the passing years and therefore that it is not possible to raise enough money through the profit of Waqf company or issuing new shares. Thirdly, the entire process of loan or debt should be according to the rules of Islamic law. This includes the prohibition of interest (Abū Zahrah M, 1959, p.220; Al-Kubaiysi, 1977, vol.2, p. 120).

3- Lending the Shares of the Waqf company[255]

Before going into details, it is important to first have a brief overview about the equity lending rules in Islamic law. Contemporary jurists are divided into two groups regarding the rulings of equity lending.

Opinion of First Group: A minority of contemporary jurists who refused lending the shares of company[256]. They are very rigid about the notion that this paper is considered a proof of ownership of the shareholder for undivided share in the company's assets comprising tangible assets, benefits, cash and debts and so on (Al-Maymān, 2009, p. 192;

[255] Lending the Shares of the company in general is a contract that allows a company to lend its shares or other financial products to a third party for a set period of time in exchange for interest (Al-Qalyubiyy, 2011, p.589).

[256] For example, al-Zuḥaylī, Ibn Bayyah, Abū Zahrah, Ibnʿ Uthaymeen and many others (Al-Durayb, 2008, p 132).

Sharīʿah Standards, 2017, p. 572). As these shares are undivided one, it is not easy to determine the exact ratio as the value of assets may fluctuate. For this reason, these Islamic scholars have prohibited the lending of shares. According to them, it bears *gharar* (uncertainty) about the amount and type of the contract (Al-Ṭayyār, 2010, p. 219). In addition, fluctuation of value[257] of the share at the time of repayment is also the issue that leads to the impermissibility of the lending of shares. This may happen due to the constant change in the assets of the corporation and can cause a financial dispute among the parties (Sharīʿah Standards, 2017, p. 576).

Opinion of Second Group: On the other hand, other group of contemporary scholars who allowed lending the shares of company. They considered the stock is a financial value independent and distinct from the capital of the joint stock company. They are in majority than the previous one [258]. The basis of their permissibility is analogy. They argue that it is an established principle of Sharīʿah that anything can be loaned if its sale is permissible. As the sale of shares is permitted, lending them is also legitimate (Al-Qalyubiyy, 2011, 234, Sharīʿah Standards, 2017, p. 573).

The researcher finds the opinion of the jurists who considered the stock to be a representation of the financial value independent and distinct from the capital of the joint stock company to be stronger one. According to their argument I have concluded that it is permissible to lend shares. I find the reasoning of the former group as contradictory and paradoxical, and therefore it is difficult to believe their arguments for prohibiting the lending of shares.

Moreover, the independence of the financial value of the shares from the company's assets has made each share similar to the commodities. The rule for commodities is that if destroyed, it can be compensated by the similar commodities in quality and quantity because of the union of shares in their types and their value (Al-Shabylī, 2014, p. 189).

[257] **Fluctuation of value:** "a situation in which share prices go up and down". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/fluctuating-market, accessed: 29/4/2021.

[258] For example, al-Khathlān, al-Zarqā, Ḥammad, al-Qarḍāwī, al-Bassām, Khaznahand many others (Ḥammad, 1995, p146; Khaznah, 2016, p.169; Fawzī, 2013, p.199).

The value of the share in the company shall be determined at par value[259] of the stocks on the basis of the current market rate[260], prevalent at the date of the commencement of company. Therefore, it is deduced that in principle the lending of the shares of company is permissible. But current market practice of lending and borrowing involves many activities that are not appreciated by Sharīʿah. For Instance, the lending and borrowing are mostly based on interest (Fawzī, 2013, p. 340) Taking and giving interest has been condemned by Sharīʿah in the strongest terms. Furthermore, these companies make the transactions from a short-selling contract [261] where the sellers do not own the shares in most of the cases. They have only acquired it by borrowing. Without having the title, they sell it further, only to buy it back when the price is lower. There are no two opinions amongst jurists regarding prohibition of such transactions (Nāṣyif, 2013, vol.7, p.124). This verdict is on the basis of well-established rule of Sharīʿah that prohibits the sale of anything that a person does not own. It is authentically recorded that the Prophet Muhammad instructed, "Do not sell that which you do not possess (own) (Sunan Abū Dāwūd, Hadith no: 3503).

From the above discussion, it may be concluded that in principle lending of shares of the joint stock company is permissible provided that no other prohibited activity accompanied it. The second part of the issue is regarding the permissibility of lending from the funds of the Waqf. According to majority of scholars, it is not permissible to lend from the funds of the Waqf company as no benefit can be derived without consuming it (Khaznah, 2016, p.169). It will lead to the diminishing of the funds.

Regarding lending from cash Waqf, it may be noted that cash Waqf is itself impermissible according to a group of scholars as discussed earlier. Thus, according to them, no question arises as to permissibility of lending from cash Waqf (Al-Kubaiysī, 1977, vol: 2, p.130). The other group of scholars who considers the formation of cash Waqf as legal has different viewpoints related to lending. They have allowed the cash Waqf by way of granting an

[259] **Par value**: "The stated value of a security, such as a bond or share of preferred stock, from which interest payments or dividends are calculated as a percentage. Also called face value. Or the minimum price at which a share of common stock is initially issued to investors". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/proceeds, accessed: 29/4/2021.

[260] used to describe stocks price that is sold at the usual market price rather than at a reduced price.

[261] **Short-selling contract**: "The activity of selling shares that you have borrowed, hoping that their price will fall before you buy them back and return them to their owner, so that you make a profit". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/short-selling, accessed: 29/4/2021.

interest-free loan (*salaf*) to needy people. Later on, same amount will be taken back. A recent development in this regard is that contemporary jurists have accepted the idea of cash Waqf for the purpose of loans and investment in bank and bonds. They contest against the argument employed for the prohibition of the cash Waqf. The argument that cash Waqf is not allowed because the nature of the assets or property must be permanent and the consumption of cash Waqf would diminish that, is rejected on the ground that immovable properties can be demolished and destructed too due to mishaps and natural catastrophes or other reasons. This group proposes that instead of Waqf assets, cash Waqf be considered since the worth of the Waqf can be increased by careful management. They believe that cash Waqf is more beneficial than property, books, or houses, and that it is more profitable in today's Islamic financial system practices (Al-Kubaiysī, 1977, vol:2, p.130; Al-Zarqā, 1997, p. 30; Mohammad, 2011, p. 3).

In my view, second group has presented more viable solutions to the concept of Waqf. Thus, the researcher considers it permissible to lend others from Waqf funds when the aim of the Waqf is to grant interest-free loans (*salaf*) to needy people. Thus, cash Waqf can be set up and lending can be done from it. However, it should be kept in mind that unnecessary borrowing and lending is highly discouraged in Sharīʿah. There are various texts related to Islamic commercial laws where it is dissuaded to ask other people unnecessarily. It is recorded that the Prophet Muhammad said, “He who asks others to give to him in order to increase his own wealth, is akin to one who asks for live coals. He who wishes to have more, let him have it and he who wishes to have less, let him have it.” (Ṣaḥīḥ Muslim, Hadith no. 661). It is also narrated from him that he warned against unnecessary debts by saying that: “Whoever begs when he has enough to suffice him, his begging will come on the Day of Resurrection like lacerations on his face.” It was said: “O Messenger of Allah, what is sufficient for him?” He said: “Fifty Dirham or their value in gold.” (Sunan Ibn Mājah, Hadith no. 1840). Therefore, in general the Waqf company should not indulge itself into the stock markets’ practices of unnecessary borrowing and lending.

Another issue regarding the lending is that it cannot be imagined to lend the shares of the Waqf company while preserving the proceeds for the beneficiaries in the Waqf. This is because it goes against the principle of the law of loan in Sharīʿah. This is because it

requires the subject of the ownership of loan to be transferred to the borrower. *Nota bene*, that this is what is happening on the global exchanges and the stock markets where the traders borrow shares and granting their rights and profits to the borrowers (Sharīʿah Standards, 2017, p. 578). Accordingly, the fundamental rule is that lending the shares of the Waqf joint of stock company is not permissible when there is no benefit or necessity of lending. This goes against the principle of the law of Waqf which requires the subject of the Waqf to be permanent. In addition, the kind of lending that is prevalent in the market is akin to the short sales[262] where a person sells a commodity without fully acquiring the ownership and this is not permissible in Sharīʿah (Ibid).

4- The Mortgaging of Shares in the Waqf Company

Another challenge is related to mortgage shares[263]. Al-Khayāṭ point out that most of contemporary jurists[264] have allowed to mortgage shares (Al-Khayāṭ, 1994, p. 402).[265] The basis of the permissibility of mortgaging of the stocks of company is the established principle which entails that anything that is permissible to sell, is also permissible to mortgage (Sharīʿah Standards, 2017, p. 578). Therefore, when the sale of shares of corporations is permissible, the mortgaging it is also legalised. Moreover, it does not make any difference if the assets of the corporation are comprised of tangible assets, cash or combination of both and whichever type constitute the major portion of assets (Al-Khayāṭ, 1994, p. 402). The reason is that a loan is secured through mortgage. A creditor can recover

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[262] **Short sale**: "an occasion when someone sells shares that they have borrowed hoping that their price will fall before they have to replace them so that they make a profit". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/short-sale?q=short+sales+, accessed: 2/5/2021.

[263] **Mortgage shares**: an agreement that allow a company to borrow money from a bank or other financial institution by using its shares as a guarantee (Al-Fazi'ī, 2016, p. 68). In other words, a form of deal that is secured by a mortgage on company shares that can be sold to repay the debt if necessary.

[264] Such as:Ḥammād, al-Zarqā, al-Zuḥaylī ,al-Khafyīf, al-Khayyāṭ, al-Rājḥi, al-Fazi'ī, al-Shabylī, al-Ṣuqiyyah,Ḥammād, Khaznah and mnay others(Khaznah, 2016, p. 175; Al-Fazi'ī, 2016, p. 70; Al-Rājḥi, 2016, p.87;Al-Shabylī, 2014, p.61 ;Al-Ṣuqiyyah, 2014, p.64).

[265] This opinion was adopted by International Islamic *Fiqh* Academy as well. On April 26-30, 2009, the Council of the International Islamic *Fiqh* Academy of the Organization of Islamic Cooperation held its nineteenth session in Sharjah (United Arab Emirates), in accordance with resolution No. 181 (7/19). see the official website of Islamic *Fiqh* Academic available at: https://www.iifa-aifi.org/ar/1845.html, (accessed: 26/4/2021).

his amount by selling the mortgaged property if it is not recoverable from the debtor. Therefore, mortgaging the shares is allowed. (Ibid).

In Sharīʿah the Waqf can be in a situation where it requires money to cover maintenance or repair work. Al-Kubaiysī argues that classical jurists were rigid in this regard and did not allow giving Waqf asset as a security for payment of debt because mortgaging entails withholding of Waqf assets against loan which should be of equal price and value to the Waqf (Al-Kubaiysī, 1977, vol. 1, p.289). The main contention is that the Waqf is to be a trust with the borrower and is out of anyone's possession. Therefore, it cannot be mortgaged (Abū Zahra, 1959, p. 98). Moreover, it prevents perpetuity too. The *Ḥanafī* and *Shāfiʿī* Schools considers it a transgression on the part of the *nāẓir* and they demand his replacement (Ibn-ʿĀbidīn, 1994, Vol. 4, p. 456; Al-Māwardī, 1999, Vol.7, p123). However, some of jurists in the Mālikī School have allowed mortgaging the right of usufruct from the Waqf. It is lawful in the *Mālikī* School to make Waqf of the usages (*manfaʿa*) only and not the property itself (Al-Dasūqī, 1992, Vol.4, p.82). This inference is based on the argument that Waqf is to grant the usage of the thing owned, even by lease, to the beneficiaries. This can be done by declaration of Waqf for the period which is agreed by the founder. The fundamental principle that an item may be mortgaged if its sale is permitted is the basis for the permissibility to mortgaging the right of usufruct from the Waqf. Just as it is allowable to sell shares, it is therefore valid to mortgage them (Al-Kubaiysī, 1977, vol. 1, p. 290; Sharīʿah Standards, 2017, p. 824).

The researcher is of the view that in principle it is not permissible to mortgage the shares of the Waqf company or its profits. The reason for this is that the mortgage of the shares leads to the disruption of the shares in the Waqf company on one hand. On the other hand, mortgaging the dividends of the shares is not permissible. The reason is that the shareholder who is the owner for this share is the current debtor and not the company. Which means the debt is on the *wāqif* and not upon the Waqf itself. In this way, mortgage can be risky for the property of Waqf.

However, there can be an exception to the general rule. There can be temporary Waqf shares for this purpose. Mortgaging the temporary Waqf shares would be permissible. This is based on the *Mālikī* School, where the Waqf can be made for a limited period. Therefore,

purchasing of such shares and selling them in the contemporary stock markets is allowed (Sharīʿah Standards, 2017, p.571). This entails that the meaning of Waqf will be terminated in them. It is possible to describe it as non-Waqf shares. Thus, these shares may be mortgaged to a debt from the *wāqif* shareholder. As mentioned earlier, the basis for the permissibility of mortgaging the right of usufruct from the Waqf is the established principle that if the sale of a commodity is permissible, its mortgage would be allowed too. Shares can be sold; therefore, it can be mortgaged too. Property is mortgaged in order to secure the loan. It provides the creditor the option to sell the property if debtor is unable to pay the debt. In this way he recovers his loan. This is what is achieved through the mortgaging of shares and is, therefore, permitted, only if Waqf is in need of finances and the only option to acquire finances is the mortgage. This is because there would be greater risk if finances are not provided to the Waqf. Notwithstanding the above, there is an alternative solution of creating a sinking fund[266] of approximately 10% of the gross income so that the future maintenance and repair can be done from this reserve and there would be no need of borrowing (Al-Shabylī, 2014, p.102). This should be the policy of the Waqf company. This is very similar to what the classical jurists referred to as restoration (*taʿmir*). The term *taʿmir* denotes the maintenance of the Waqf and involves all activities that are needed to maintain the Waqf, and this is a unanimous opinion of the jurists that the reinstatement of the Waqf must be done through proceeds of Waqf (Ibn Taymiyyah, 1995, vol.31, p. 607). In contrast if any condition is contradictory to this, then the Waqf will be declared it will be null and void even if it is set by the *nāẓir* (Al-Kubaiysī, 1977, vol. 2, p.302). Whatever remains after restoration costs the *nāẓir* may distribute it to the beneficiaries (Al-Zarqā, 1997, p. 201).

[266] **Sinking fund**: "money saved by a company for the payment of future debts or repair". See the official website of the Cambridge dictionary, available at:https://dictionary.cambridge.org/dictionary/english/sinking-fund?q=sinking+fund+t, accessed: 29/4/2021.

5- Application of accounting assets to the Waqf company:

Another challenge is related to accounting[267]. Generally speaking, the jurists among different Schools of the jurisprudence are in agreement on the principle of accountability and the responsibility of the Waqf manager (*nāẓir*) (Al-Kubaiysī, 1977, vol. 2, p.482). The basis of this consensus is the Tradition narrated by Abū Humayd al-Saʿīdī, "The Prophet appointed a man from the tribe of *Banī Asad*, called Ibn Al-Utabiyya to collect the Zakat. When he returned (with the money) he said (to the Prophet), "This is for you and this has been given to me as a gift." The Prophet stood up on the pulpit and after glorifying and praising Allah, he said, "What is wrong with the employee whom we send (to collect Zakat from the public) that he returns to say, 'This is for you and that is for me?' Why did not he stay at his father's and mother's house to see whether he will be given gifts or not? By Him in Whose Hand my life is, whoever takes anything illegally will bring it on the Day of Resurrection by carrying it over his neck: if it is a camel, it will be grunting: if it is a cow, it will be mooing: and if it is a sheep it will be bleating!" The Prophet then raised both his hands till we saw the whiteness of his armpits (and he said), "No doubt! Have I not I conveyed Allah's Message?" And he repeated it three times (Saḥīḥ al-Bukhari, Hadith no: 7174) .

The above Tradition not only highlights the employee's internal self-censorship[268] stemming from his faith in Allah, but it also established the external surveillance of employees too. This also provides the main principles to hold employees accountable for public funds (Al-Kubaiysī, 1977, vol. 2, p.55). However, the accountability and the responsibility have gradually evolved into a specialised field and subject. So, any of the commercial transactions of Waqf company should take care of the accounting principles too (Khaznah*,* 2016, p. 170).

Therefore, we find that the jurists have stipulated that the Waqf manager is responsible to maintain the Waqf (Abū Zahra, 1959, p. 108). He should maintain the Waqf in good

[267] **Accounting**: "the skill or practice of maintaining and auditing accounts and preparing reports on the assets, liabilities, earns, spends, of a business". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/accounting, accessed: 29/4/2021.

[268] **Self-censorship**: "control of what you say or do in order to avoid annoying or offending others, but without being told officially that such control is necessary". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/self-censorship?q=self-censorship+, accessed: 29/4/2021.

condition so that the Waqf can be of maximum benefit to the beneficiaries (Al-Zarqā, 1997, p. 70). Therefore, Waqf manager should be supervised too. He must be faithful to the interest of the Waqf and must be held liable in cases of negligence[269] (Abū Zahra, 1959, p. 109). He will be removed from the said designation if he is found to be treacherous[270] or negligent. The protection of waqf is a primary objective (Ibn ʿĀbidīn, vol. 6, p. 578). Moreover, there are many books of jurisprudence and research that wrote in detail about the responsibility of the Waqf manager from different perspectives. However, I cannot cover all of these issues because it is outside of the scope of this research.

To answer the question of how the application of accounting Waqf assets in a Waqf company takes place, it is pointed out that this is a novel and innovative idea to apply the concept of Waqf in the companies to achieve the objectives of business and company. Basic purpose is to optimize the efficiency of Waqf by applying modern mechanism of corporation (Ab Rahman, 2009, p. 23). Accordingly, the board of directors, created by the founders, has to appoint the *mutawallī* (trustee), specifically for the accountability and responsibility in order to manage the affairs of the Waqf company (Al-Faziʿī, 2016, p. 57). Thus, the Waqf company's accountability and responsibility system is different from the traditional Waqf system. The basic principle is that Waqf institution must be generally subject to the principles of accounting for non-profit organisations that adhere to the provisions and principles of Islamic law. In other words, for their investment activities we can apply the principles of accounting which apply on Islamic investment as well as the traditional accounting principles as long as they do not conflict with the provisions of the Islamic law and its principles (Al-ʿĀnī, 2018, p. 52).

However, this approach too is problematic. If we agree that the Waqf company should be treated as a non-profit organisation and the laws for non-profit organisation should be implemented over it, in this case the international accounting standards of non-profit organisations have some provisions that conflict with the principles of Islamic law. For

[269] **Negligence**: "the fact of not giving enough care or attention to someone or something". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/negligence?q=negligence+, accessed: 29/4/2021.

[270] **Treacherous**: "of a person guilty of deceiving someone who trusts you or unreliable". See the official website of the Cambridge dictionary, available at: https: https://dictionary.cambridge.org/dictionary/english/treacherous, accessed: 29/4/2021.

instance, allowing the company to borrow money from other financial institutions using interest-based loans (Ibid). Moreover, such companies allow the delay in the price and the priced commodity, for this is the sale of a debt for a debt, which is prohibited by unanimous opinion (Sharīʿah Standards, 2017, p.572; Khaznah, 2016, p. 174). Furthermore, the seller, mostly, does not own the shares for which the futures contract has been concluded and is, therefore, selling something that is owned by another and that is also impermissible (Ibid). For this reason, contemporary jurists came up with some solutions according to their opinions. These opinions can be broadly divided into two categories. First solution entails that the Waqf has a special nature and must have its own accounting standards. This opinion was adopted by the Fifth Waqf Issues Forum held by the General Secretariat of Endowments in Istanbul from May 13-15, 2011(Al-Faziʿī, 2016, p. 62; Al-Rājḥi, 2016, p.24). Second opinion calls for adjustment in existing system. It states that the Waqf has a special nature, but the international accounting standards can be applied to the Waqf institution after adjusting what is necessary in accordance with the *fiqh* of waqf and that does not conflict with the principles of Islamic law. The researcher ʿAbd al-Ḥalīm Muḥammad too adopted the view closer to this one (Muḥammad,2011, p. 43). It is important to notice that there are no exclusive standards and principles for Waqf yet. However, there are some landmark advancements in this regard. Accounting and auditing organization for Islamic financial institutions (AAOIFI) have announced in March 2017 'Waqf Standards Packet' through its official website[271]. It will consist of three tier detailed standards i.e. Accounting standards, governance standards and Sharīʿah standards for Waqfs. It was expected that the draft documents of this document will be published in early 2019. However, so far, Accounting and auditing organization for Islamic financial institutions (AAOIFI) have not published it.

According to my view, setting up the accounting standards exclusively for the Waqf in general and the Waqf company in particular is not an easy task. The reason is that it will be done by the regulatory authorities in Muslim countries and may take years to come up with such standards. So, at this stage the Waqf company can adopt the international accounting standards, especially the one for non-profit companies with an amendment to

[271] See the official website of Accounting and auditing organization for Islamic financial institutions (AAOIFI), available at: http://aaoifi.com, (accessed: 29/4/2021).

eradicate any conflict with the principles of Islamic law. This is because the rules of Waqf are based on *Ijtihād*. Therefore, there is no objection on modern jurists to make *Ijtihād* in order to choose what suits the waqf interests best and keep pace with the changing times. Moreover, this is supported by the *Istiṣḥāb* which dictates that the basis in financial transactions is permissibility until the clear injunction of Islamic law states otherwise (Al-Zarqā, 1997, p. 390).

6- Ruling on trading the shares of the Waqf company in stock markets:

Another challenge is related to trading the shares of the Waqf company in stock markets. A transferable share is one of the core components of many modern business corporations that separate partnerships from other types of business enterprises. It means that a particular stake in a corporation can be transferred to wherever the stakeholder wishes without affecting or interrupting the business (Al-Ṣuqiyyah, 2014, p.264; Sharīʿah Standards, 2017, p.564). Generally, trading of the stock means the transfer of ownership from one shareholder to another by the sale and purchase of shares in stock markets (Al-Khayyāṭ, 1994, p.289). Transferable shares can be subject to restrictions in certain private companies. In these cases, the transfer of stakes will have to remain within a particular group of individuals or will be subject to controls from the board of directors .

The overall rights of management rest with the manager who has not put forward an investment. Additionally, a combination of partnership (*mushārakah*) and investment (*muḍārabah*) is permissible according to the Sharīʿah; a company thus has the ability to issue some shares that have voting provisions and some without (Al-Ṣuqiyyah , 2014, p.264). By purchasing some shares from the stock market, a member of the general public can initiate an investment with a specific company. With these shares they can receive profits and can additionally take part in the decision-making process of the company via the right of vote that comes with the shares. When they want to divest[272] from the company, they are within their rights to sell their shares too, though whether they incur an overall

[272] **Divest**: "to get rid of an investment, part of a business, etc. by selling". See the official website of the Cambridge dictionary, available at:https://dictionary.cambridge.org/dictionary/english/divest?q=divest+, accessed: 29/4/2021.

capital gain or loss depends on the performance of the company they invested in (Al-Khayyāṭ, 1994, p.289) .

On the other hand, the trading of shares is a subject in which there is some difference between the Muslim scholars. Generally, it seems many contemporary jurists [273] have allowed the trading in the shares though there are certain conditions that some jurists have stipulated. [274]

For example, some jurists mentioned that shares of a public company should only be traded with the public.[275] This is because giving a priority for some shareholders to receive a part of the company's profit before some of them, is that this leads to the severance of participation in profit and the imposition of unfairness on the other owners (Sharīʿah Standards, 2017, p.572; Al-Khayyāṭ, 1994, p.291). Additionally, a corporation should be in possession of some non-liquid assets [276]prior to the commencement of trading in the open market (Ibid). Organisations like the Islamic *Fiqh* Academy have approved of corporations trading in the market if the value of their real assets are greater than cash or debts[277]. The justification for this is according to the nature of money, if all the value of a company is in liquid form then the shares will be a direct representation of a cash value and thus according to Islamic law, trading would be prohibited as money cannot be traded for money unless under strict conditions which is swapped in equivalent quantities together within the same place immediately in order to avoid the usury (Al-Ṣuqiyyah, 2014, p.264). This condition, however, may not be prohibited in Islamic law if there is a provision in company law that that allows the transfer of shares if some of the assets of the company are in a non-liquid form (Al-Khayyāṭ, 1994, p. 289).

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[273] For example, Ibn Bāz, al-Zarqā, Ḥammad, al-Qarḍāwī, al-Bassām, Khaznahand, al-Zuḥaylī, Ibn Bayyah, al-Ṭarīqī, al-Khathlān, al-Khafyīf, al-Khayyāṭ, many others (Ḥammad, 1995, p146; Khaznah, 2016, p.169 ;Fawzī, 2013, p.199; Al-Khayyāṭ, 1994, p. 289).

[274] For more details about these conditions, please see (Sharīʿah Standards, 2017, pp.562- 578).

[275] Such as: Abū al-Aʿlā al-Mawdūdī, a l-Qarḍāwī ,Abū Zahrah, (al-Ṭayyār, 2010, vol.3, p.200).

[276] **Liquid asset**: "cash or an investment or something valuable that can be easily sold". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/liquid-asset?q=liquid+assets, accessed: 30/4/2021.

[277] On April 26-30, 2009, the Council of the International Islamic *Fiqh* Academy of the Organization of Islamic Cooperation held its nineteenth session in Sharjah (United Arab Emirates), in accordance with resolution No. 181 (7/19). see the official website of Islamic *Fiqh* Academic available at: https://www.iifa-aifi.org/ar/1845.html,(accessed: 26/4/2021).

Contemporary jurists who have allowed the trading in the shares base their argument on the ground that the activity of corporation is permissible and shares are owned by the shareholders and therefore he can make any transactions that he wishes be it sale, gift or any other way of disposal. Each shareholder has acquired this permission to make such transactions through their subscription and participation in the memorandum of corporation (Sharīʿah Standards, 2017, p.570). Moreover, the basic principle in *muʿāmalāt* is that all human transactions are permissible (*mubāḥ*) unless there is a clear injunction for its prohibition (Al-Rifai, 2013, p. 48). This, however, is not a unanimous opinion of all contemporary jurists. Few scholars such as: Saleh al-Fawzān and Muhammad al-Mukhtar al-Shinqṭī have not endorsed this opinion (Al-Ṣalaḥāt, 2016, p. 98). According to them, the trade in the stock market is not allowed. They argue that a share is an intangible good that combines heterogeneous forms of corporate assets that includes receivable debts and cash. For this reason it is not feasible for every buyer of the share to scrutinize the balance sheet and income statement of the company and cannot comprehend the different factors that play the role in the value of a company's share. Since a buyer does not exactly know the situation of company and shares, he would commit *gharar*.[278] Without the exact estimation of what the 'share' stands for, purchasing and selling would amount to gambling (Al-Ṣalaḥāt, 2016, p. 99).

The response to this objection is made by pointing out that this *gharar* is minor, and it should be kept in mind that there is some sort of *gharar* in business. Minor *gharar* (*gharar yasīr*) can be present in transactions and that is excused. Such *gharar* can be ignored and they can hardly generate any dispute and thus they do not affect the contract. For example, a person rents a house for one month. The period of one month can be 29 days or it can be 30 days. This type of uncertainty (*gharar*) is allowed and excused. This is for the reason that Sharīʿah wants to ease hardships for people as Allah, the Almighty, states: "He has chosen you and has not placed upon you in the religion any difficulty" (Qur'an, 22:78).

[278] *Gharar* is a state of uncertainty that exists when the process of concluding a transaction involves an unknown aspect. In other words, *Gharar* refers to the status of results that may or may not materialize (Sharīʿah Standard, 2017, p. 772). Prohibition of concluding a contract or making a condition that involves *Gharar* is based on the Hadith which states: "The Prophet (peace be upon him) has forbidden aleatory sale."

This principle is equally good for both public issues and private issues. Shariah Standard endorsed this too and uses the maxim, "Need (*hājah*), whether public (*ʿāmm*) or private (*khāṣṣ*), enjoys the same status of necessity" to justify its position (Sharīʿah Standard, 2017, p. 784). Islamic law prohibits major *gharar* (*gharar fāḥish*). This is when the uncertainty is so much that it will most likely lead to disputes. It is the government and lawmakers who will determine what is major *gharar*. They will use local praxis and present culture and society to determine this. What will help them is the number of cases referred to the courts regarding a particular issue.

Furthermore, *gharar* can also be avoided in this specific case by two ways. Firstly: all relevant information and indicator and partakers must gain the analytical ability or seek the services of experts to analyze such data to acquire dependable assessments for the factual anticipated exchange values of the shares (el-Din, 1996, p. 35).

Regarding the Waqf company many contemporary jurists have declared that it is not permissible to trade in the shares in stock markets[279]. This opinion was adopted by Islamic *Fiqh* Academy as well[280]. This is because the general principle is that the ownership belongs to Allah and devoting its usufruct in charity is the basis of Waqf. Majority of jurists agree on that. Thus, the consequent effect of a Waqf is that it is an absolute contract (*ʿaqd lāzim*). This cannot be revoked, and the object of Waqf cannot be sold, given away or inherited (Al Zarqā, 1997, p. 20; Abū Zahra, 1959, p. 11).

According to this opinion, it is not permissible to undertake the trading of the shares by sale and purchase in the Waqf company, because it will be a conflict with this principle. The stock market is a risky place. Its transaction bears major *gharar* and risk. Therefore, the assets of Waqf company should be kept away from this place and should not indulged

[279] For example, Ibn Bāz, al-Zarqā, Ḥammad, al-Qarḍāwī, al-Bassām, Khaznahand, al-Zuḥaylī, Ibn Bayyah, al-Ṭarīqī, al-Khathlān, al-Khafyīf, al-Khayyāṭ, Ibn Jibrīn, many others (Ḥammad, 1995, p146; Khaznah, 2016, p.169; Fawzī, 2013, p.199; Al-Khayyāṭ, 1994, p. 289; Al-ʿUmrī, 2014, p.27).
[280] On April 26-30, 2009, the Council of the International Islamic Fiqh Academy of the Organization of Islamic Cooperation held its nineteenth session in Sharjah (United Arab Emirates), in accordance with resolution No. 181 (7/19). see the official website of Islamic Fiqh Academ available at: https://www.iifa-aifi.org/ar/1845.html ,(accessed: 26/4/2021).

in it activities such as trading in the stock market (Khaznah, 2016, p. 180; Al-Faziʿī, 2016, p.62; Al-ʿĀnī, 2018, p. 49; Al-Rājḥi, 2016, p.27).

The researcher does not agree with this opinion. The question of major *gharar* and risk is subjective. By restricting Waqf companies from engaging in trading in the stock markets may restrict the potential income of the company. If we want the Waqf companies to be formed and succeed, it is imperative to have their shares traded in the stock market. Trading in stock market will reveal the nominal value of the shares in stock market and will be a source of marketing of the company as well. It will encourage and instigate the board of directors to further improve the performance of the company. In this manner, the Waqf joint stock company will enter the world of competition with other joint stock companies, and impact multiple economic areas.

Granting the permission to the Waqf company to trade the shares in the stock market is essential for its success as a Waqf company. However, it needs a new doctrinal adaptation that combines the possibility of trading the shares alongside the principle of perpetuity of the waqf company relatively. On the face of it, there seems to be no issue in doing that. For that purpose, it is to be scrutinized whether there is ownership of the Waqf; and if the Waqf is of perpetual nature or it is temporary.

The researcher believes that the opinion of Abū Ḥanīfa and the *Mālikī* School should be adopted in this regard. As mentioned earlier, they have called for the principle that the ownership of the waqf belongs to the *wāqif*. Based on this view, it can be said that it is permissible for the *wāqif* of shareholders to trade the shares of the Waqf company in stock market, because the ownership of the Waqf share belongs to this shareholder. As for the temporality of the Waqf company, the *Mālikī* School's opinion may be adopted that allows the waqf to be temporary. According to this opinion, it is possible to stipulate in the memorandum of association that a Waqf is to be made for a limited time period. Thus, the ownership returns to the shareholders or to their heirs. This will grant the shareholder the right to trade the shares accordingly.

With regard to the conditions of perpetuity and irrevocability of the Waqf, I have mentioned previously about the disagreement among the jurists in that. Based on Abū Ḥanīfa's opinion, the ownership of the endowed property belongs to the *wāqif*, thus rendering it revocable. According to the opinion of the *Mālikī* School, W can be made for a limited period of time and is revocable in some cases such as if the *wāqif* make stipulations in the Waqf deed an option of cancellation that the property will return to them or it may be sold in case they need it. According to this, it can be said that the Waqf shares in the Waqf joint stock company are not perpetual. The ownership of these shares will be transferred to the new buyer. Thus, it will be permissible for the *wāqif* to make stipulations in the memorandum of association for termination[281] of sale and purchase of shares of the Waqf company in the stock market.

It is now clear that according to my view, Waqf company can be both permanent and temporary and the ownership of assets and shares of Waqf company belongs to *wāqif*. Accordingly, in terms of trading, the shares of Waqf company can be divided into three types:

First: Tradable Shares of the Waqf Company

This type of shares implies the transfer of ownership and rights without termination of the Waqf of this share. The circulation of this share requires the transfer of ownership of this Waqf share to a new *wāqif* shareholder with the same fixed ownership of the former *wāqif's* shareholder. It will give him all the rights that previous shareholders held for instance, the right to run for the board of directors of the company or the right to own the profits of its shares. These stipulations must be mentioned in memorandum of association.

Second: Shares of the Temporary Waqf Company

This type of waqf mandates the termination of Waqf at its trading, consequently dissolving Waqf share of the *wāqif* shareholder. The ownership of the share will be transferred to a new *wāqif* shareholder with full ownership. So, if the new buyer does not want to make the

[281] **Termination**: "to (cause something to) end or stop". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/termination, accessed: 30/4/2021.

Waqf of it but intends to invest the share, he can do so. The basis for the permissibility of this opinion is the *Mālikī* School which permits that the Waqf can be made for a limited period of time and is revocable in the case where *wāqif* has make stipulations in the Waqf deed. So, if the *wāqif* shareholder has made stipulations in memorandum of association to make the Waqf shares of temporary nature, he will be allowed to do so.

Third: The Shares of the Waqf Company that is Perpetual in Nature

It is not permissible to trade such shares in stock markets. This is because the general principle is that the ownership belongs to Allah and devoting its usufruct in charity is the basis of Waqf. Majority of the jurists agree on that. Thus, the consequent effect of a Waqf is that it is an absolute contract (*ʿaqd lāzim*). This cannot be revoked, and the object of Waqf cannot be sold, given away or inherited.

The owner of these shares has same fixed ownership rights in the Waqf shares that are tradable Waqf company except to participate in the assets of the company after will be termination it. This is because the Waqf shares were intended to be perpetual. A company, on the other hand, can cease to exist if it goes into liquidation or enters a state of negative equity [282]. In the case of share-holding [283], where the shares have no value, the same thing would be happen. Nevertheless, if the company faces a financial crisis, and there is still value in the assets, it can merge with another Waqf company that was founded on the same grounds as it had been.

7- The Administration (*Naẓārah*) of the Waqf Company:

Another challenge is related to trusteeship[284]. Trusteeship is among the vital components of the *fiqh* of Waqf, as it is the foundation that manages the waqf (Al-Zarqā, 1997, p. 190).

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[282] **Negative equity**: "a situation in which the value of a property has become less than the amount of money its owner borrowed in order to buy it". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/negative-equity, accessed: 30/4/2021.

[283] **Share-holding**: "the shares in a company that a particular person or organization owns considered together as a unit". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/shareholding, accessed: 2/5/2021.

[284] **Trusteeship**: "a situation in which someone's money or property is managed by another person or organization". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/trusteeship, accessed: 30/4/2021.

The person who takes the responsibility of the management is termed as a *nāẓir*, *mutawallī*, or *qayyim*, best-known in English as 'trustee'. The success and failure of waqf depends upon the administration of the Waqf. Hence, it is a huge step to decide who will administer and takes over it, because the administrator of the Waqf is the one who is in charge of the actual management of the Waqf. No Waqf can be imagined without a supervisor. Administration of the Waqf is an important aspect of Waqf in order to safeguards its interests and takes care of the affairs of the Waqf so that it runs smoothly, and it grows reasonably (Al-Muhanā, 2012, p.66). Therefore, classical jurists have elaborated the provisions of the *fiqh* of Waqf's administration and mentioned several jurisprudential rulings in this regard.

The administration of Waqf takes several forms in Islamic jurisprudence, it is either performed by the *wāqif* himself or by the principal person appointed by the *wāqif* and then to the guardian of the Waqf who stands in after his death (Al-Kubaiysī, 1977, vol. 2, p.75). The evidence for this is the previously mentioned Tradition of ʿUmar ibn al-Khaṭṭāb[285] where he looked over the Waqf by himself, and then entrusted its administration to his daughter Ḥafṣah, and then to the first order of heirs of her family.

The administrator of the Waqf should accept and follow the conditions of the *wāqif* and he has to be fair and qualified. There is a consensus of scholars that the wishes of *wāqif* should be respected with regards to the appointment of the administrator (Al Zarqā, 1999, p. 87). However, the Waqf company is quite different from the classical forms of Waqf prevalent in past. It is not generally feasible to invite every single investor to make a decision on the day-to-day running of the company. This is particularly true of larger modern corporations who delegate their decision-making power to a specific elected board of directors appointed in part or in full by shareholders. As the *wāqif* in the Waqf company is not one but many, therefore, it is difficult to respect each *wāqif's* wish regarding the appointment of the administrator. In addition, the management of the Waqf arises with the idea of establishing the Waqf company before the establishment of the company or after it (Al-Maymān, 2009, p.206; Al-Amin,1999, p. 36).

[285] I have mentioned this tradition in previous pages.

However, the structure of the business corporation along with the culture of the Waqf company gave the founders of the Waqfs the supervisory authority and right to oversee the performance of the trustees through specific standards of accountability, transparency[286], and integrity. This added an entirely new layer onto the way that existing Waqfs operate (Al-Muhanā, 2012, p.201).

The CEO's [287]and the board of directors of Waqf are the trustees (*mutawallī*) of that Waqf and possess the authority to manage the operation of the Waqf. These trustees are given their authority by the relevant state-religious authorities (Ramli, 2014, pp.162-164). The assembly of the Waqf company is very similar to a general financial corporation. The trustees have the notable voting power and exercise control over the entirety of the Waqf's assets. Accordingly, the trustees are in charge of making the decisions relevant to the way that the Waqf is managed, the way in which it develops, and its operations broadly. The structure of these companies is very much centralised in their organisation and thus there will be a central body implementing targets and standards across all the levels of management which ensures that each level functions as the trustees and founder of the endowment expect them to.

Before I begin to adapt the jurisprudence of Waqf for the administration of the Waqf company, I would like to give a brief introduction about the structure of the management of the joint stock company and the limited liability company in general. [288]

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[286] **Transparency**: "a situation in which business and financial activities are done in an open way without secrets, so that people can trust that they are fair and honest". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/transparency, accessed: 30/4/2021.

[287] **CEO**: Chief Executive Officer "the main person responsible for managing a company, who is sometimes also the company's president or chairman of the board". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/ceo?q=CEO+, accessed: 30/4/2021.

[288] This is needed because the structure administrative for these companies is responsible for making rules managing a company, and because the company's work and activities is only done by its. On the other hand, the management structure of the joint stock company and limited liability in Waqf company, will take the responsibility of the management of the waqf same as the *nāẓir* in classical *fiqh*. Therefore, this brief overview will have helped us to make the correct jurisprudential adaptation about how can be adapted the management structure for the board of directors in the Waqf company by the rulings of *Naẓārah* (administration) of *fiqh* of the Waqf, and how concordance with the opinions of the classical scholars.

The administrative structure of these companies is divided into the following:
1- Board of Directors, that implements the decisions of the General Assembly[289] and the ways in which it has been developed to invest and so on, and its members are appointed by the General Assembly whether the members of the Board of Directors are shareholders or others (Al-Muhanā, 2012, p.201).
2- Board of Trustees[290], includes all standing shareholders and considered as the highest authority in the company that has the powers to issues all decisions related to the company.

3- The supervisory body[291]: a committee whose task is to scrutinize the work of the board of directors or the executive management of the Waqf company, which is a body linked to the General Assembly and submits its report periodically (Ibid).

This brief overview of the management structure of the joint stock company and limited liability, it is evident that these three aforementioned administrative bodies in the waqf company take the responsibility of the management of the Waqf same as the *nāẓir*. Also, the administration of the Waqf has the status of a basic characteristic to combine these bodies, because the company's work and activities is only done by these three bodies, otherwise the general law of companies shall invalidate this company (Al-Sanhūrī, 1993, Vol.5, p.421). As for the General Assembly, it is made up of standing shareholders. The purpose is to have the General Assembly active in the performance of its tasks, where the standing shareholders are self-motivated (Ibid).

General Assembly has the authority to scrutinize and assets the performance of board of trustees. It serves as a very effective institutional presence in the Waqf company.

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[289] A general assembly here is the highest governing body in company, composed of shareholders of a company (Al-Fazi'ī, 2016, p. 51).
[290] **Board of Trustees**: "a group of people who are responsible for making rules and financial decisions on behalf of a not-for-profit organization". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/board-of-trustees?q=Board+of+Trustees, accessed: 30/4/2021.
[291] **The supervisory body**: "in large companies in some countries, a group of people who meet regularly to approve the decisions of the company's board of directors". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/supervisory-board, accessed: 30/4/2021.

According to the *Shāfiʿī* and *Ḥanbalī* Schools and the accepted view in the *Ḥanafī* School, a *wāqif* can even designate himself as the *nāẓir* (Al-Kubaiysī, 1977, vol. 2, p.76). This is based on the example of ʿUmar, who designated himself as the *nāẓir* in his lifetime, and after him, Ḥafṣah (Ibid). The shareholders are owners of this company. This is based on the previously stated opinion that the ownership of the Waqf shares will be retained by the *wāqif* shareholders in the Waqf company. In addition, according to the *Mālikī* School it allows the waqf to be made for a limited period of time and is revocable in some cases. So, by applying this on the shares of the Waqf company, it requires the return of the Waqf share to the ownership of shareholder or to their heirs by the end of the term. As for the Board of Directors, it takes the status of the *nāẓir* of the Waqf. Therefore, there are number of similarities between the board of directors in the company and the rulings of *naẓārah* (administration) of *fiqh* of the Waqf, such as:

1- It is allowed that the founder of the Waqf could be an administrator. This is similar to the board of directors which permit one of the *wāqif* shareholders or others to be part of it. The jurists agree that a *wāqif* is allowed to appoint one *nāẓir* or more than one (Abū Zahra, 1959, p. 98). The decision will be taken if two *nāẓir* are appointed at the same time. This is the view of the *Shāfiʿī* and *Ḥanbalī* Schools and Abū Ḥanīfa. However, in case a *wāqif* stipulates that the *naẓārah* to be entrusted to the wisest among his *nāẓir's* and both proved wise, they both assume the *naẓārah* jointly. Either of them may give a special or general permission to the other (Ibid). Analogically, these can be applied to the board of directors of the Waqf company, and regardless of the multiplicity of the members, it can be considered as one unit that represents the shareholders of the Waqf company management. This is because the decisions of the company are subjected to the voting procedures of an absolute majority, which prevents one individual from acting alone.

2- The *Ḥanafī*, *Mālikī* and *Shāfiʿī* Schools consider that the *wāqif* can replace the *nāẓir* at any time without providing a reason. This is because he is an agent to *wāqif* and agency can be unilaterally terminated (Ibn-ʿĀbidīn, 1994, vol. 4, p.340; Al-Shirbīnī, 1958, vol. 2, 394; Al-Dusūqī, 1992, Vol.4, p.77). The *Shāfiʿī* School, however, make a distinction: if the *nāẓir* was appointed because of the *wāqif's*

stipulation in his declaration, in this case he cannot be removed without any justifiable reason (Al-Shirbīnī, 1958, vol. 2, 394). The *Ḥanbalī* School suggests a totally opposite view. They believe that the *wāqif* does not have any authority to remove the *nāẓir* without any justifiable reason at all unless it was stipulated that he will have the power to remove without presenting any justifiable cause (Al-Bahutī, 1982, vol. 4, p.273) Likewise, the general assembly has right to appoint or remove directors from the board of directors.

3- Appointment of the board of directors is akin to the appointment of employees. Therefore, the board of directors has the right to take the remuneration[292] or salary for this kind of job. It may be in the form of a fixed sum or a percentage of the income of the company after defraying the necessary expenses for the maintenance and proceeds of the company. This is customary in the joint stock companies. The *nāẓir's* remuneration is determined in similar fashion (Khaznah, 2016, p. 183). The jurists are in agreement that a *wāqif* is permitted to make a stipulation in his declaration about his remuneration[293]. It can be a fixed amount, or it can be a specific ratio from the proceeds of the waqf property. This would not only serve the purpose of payment to the *nāẓir* but will also fulfill the stipulation of *wāqif* too. If the *nāẓir* thinks that his pay is very low, he can apply to the judge to increase his wage. He may increase taking into the consideration the customary practice (Al-Zarqā, 1997, p. 199). The evidence for this can be found by resorting to the declaration of ʿUmar when he said, "There is no sin for one who administers it if he eats something from it in a reasonable manner." (Ṣaḥīḥ Muslim, Hadith no:1631). Many other evidences can be found where other prophetic Companions too gave remunerations to the *nāẓir* (Abū Zahra, 1959, p. 375).

4- Board of directors or administrator will not be held liable for any loss or damage as long as they acted in good faith and in the best interest of the company. They will only be questioned in cases of negligence and transgression. The rule is same with

[292] **Remuneration**: "payment for work that has been done or services that have been provided". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/remuneration?q=remuneration+, accessed: 30/4/2021.
[293] Al-Zarqā mentions a number of scholars, such as Ibn al-Qayyim, Ibn ʻAbd al-Barr, al-Nawawī, Ibn Ḥājar,I bn al-Humām and others, to prove his claim that there is unanimous agreement among jurists that on this issue (Al-Zarqā, 1997, p. 199).

the *nāẓir* (Al-Rājḥi, 2016, p. 45). Regarding the body that performs the task of surveillance of management are consistent with the *fiqh* of Waqf. The *wāqif* should make sure that a reasonable surveillance is being conducted over the *nāẓir* to ensure good performance and prevent loss and damage. The jurists unanimously agree[294] that a *nāẓir* may be compensated for his time and effort, and his compensation in the form of salary or percentage (Al-Kubaiysī, 1977, vol. 2, p. 80). This body is entitled to its remuneration from the Waqf company just as *nāẓir* is paid the salary, because both are the part of the waqf administration.

The question that still remains unanswered is regarding the power of general assembly to change or modify the memorandum of association of the company. The law in Saudi Arabia (and some other Arab countries) grants this authority to the general assembly (Al-Jabr, 1996, p.134). Do the rulings of *fiqh* too grant this right to this body?

To answer to this question, it is worth remembering as previously stated that the stock is a secure financial paper that represents a common or *(shuyūʿ)* share in the company itself because of its juristic personality, but does not represents an undivided share in its assets. So, these assets are owned by the company while the stock is owned by shareholders. Consequently, it is permissible to change the memorandum of association or modify it with regard to the status of the assets and the way they manage its investment. This is permissible as long as it achieves the public interest of the company, and its effect is reflected in the form of increase in the company's income or rise of the value of its shares. So far, nothing is problematic in relation to the authority of the General Assembly to make amendments in the memorandum of association of the company, but the issue arises if the conditions of the Waqf that were decided in the memorandum of association are changed. Changes in type of investment, or the beneficiaries or changes in the types of Waqf shares with regard to their temporality or perpetuity in the company and the like are questionable matters (Khaznah, 2016, p. 181).

[294] Al-Kubaiysī mentions a number of scholars, such as al-Sarakhsī, al-Shawkānī, Ibn-ʿĀbidīn, al-Mardāwī,Ibn Rushd and others, to prove his claim that there is unanimous agreement among jurists in this issue (Al-Kubaiysī, 1977, vol. 2, p. 83) .

The answer to the above objection, the stock is owned by the *wāqif's* shareholders. This does not come within the authority of the general assembly. Therefore, it is not permissible for the general assembly to change the memorandum of association or modifying it regarding the temporality or perpetuity of the Waqf shares. Moreover, it cannot amend the types of investments and the status of beneficiaries. These abovementioned amendments are not be covered by the authority of the general assembly of the company.

8- Legal Entity of the Waqf company

Another challenge is related to legal entity of the Waqf company.[295] Strict legislative measures determine the terms under which Waqf companies were established in Muslim countries, such as Turkey, Malaysia and Kuwait (Abd Ghadas and others, 2017, p.122). In Saudi Arabia, companies are obliged to register under the Companies Act.[296] This recognizes their status as an official corporate body,[297] although the bill of non-profit has yet to be promulgated.

Legally, a corporate body is independent from its founder or director. It is empowered to sue or be sued in its corporate name and is decreed as having perpetual succession. It is legally permitted to purchase, acquire, obtain and sell movable and immovable property. As a corporation, it may assign, surrender, convey, yield, charge, reassign, mortgage, transfer or demise any such property or dispose of it by other means. Hassan and others (2012, pp. 191-198) state that it is granted authority to deal with any of these properties or any interest therein. The case of Saloman v Saloman & Co Ltd 1897 determined the

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[295] Legal entity or legal personality both refers to the ability to exercise legal rights and responsibilities under a specific legal framework, such as entering into contracts, own property, suing, and being sued et cetera (Smith, 1982, pp.283–299). Legal personality is a necessary condition to legal capacity (Kornhauser, 2010, p.14). Therefore, the ability of any legal individual to amend (enter into, pass, etc.) rights and obligations, requires legal personality (Smith, 1982, pp.283–299).
An owner of legal entity is named as a person (Fisher, 191, p.40). As claimed by Fisher, the persons can be divided to two types: firstly: natural persons (also known as physical persons), secondly: a non-human being is referred to as juridical persons (also known as juridic, juristic, artificial, lawful, or fictitious persons, entities such as companies that are regarded as though they were persons in law (Fisher, 191, p.40). Human beings gain legal personality when they are born, but juridical persons acquire it when they are incorporated according to legislation (Kornhauser, 2010, p.21).

[296] Saudi Companies Law 2015, Article no:9.

[297] **Corporate body**: "an organization such as a company or government that is considered to have its own legal rights and responsibilities". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/body-corporate?q=corporate+body, accessed: 30/4/2021.

doctrine in English common law of the separate legal entity (Zuryati, others, 2009, p. 139). The ruling established that even though Mr Saloman had control over the company, he was neither his agent nor his trustee. This establishes that there are two forms of person recognized by law. The first is the human being, the natural person; the second is the artificial person, which includes any being, other than humans, having rights and duties as accepted by the law. This definition includes the corporations. Consequently, in a corporation, there is a distinction between the company which is known as a legal entity and those individuals controlling it. Changes of faces will not affect the identity of the company. These doctrine needs scrutiny in the light of Sharīʿah and law. This is debatable whether the corporate legal personality, as in effect an artificial entity, is acceptable under Waqf rules in Islamic law (Abd Ghadas and others, 2017, p.121).

An 'artificial person' (the company as a corporate body) as defined under the conventional corporate structure, has limited powers, but these do include the power to sue and be sued and the right to hold property in its own name (Al-Rājḥī, 2016, p.55).

Khaznah demonstrated that *Al-shakhṣiyah al-iʿtibāriyah*, the 'artificial person', is a central doctrine for debate among contemporary Muslim jurists (Khaznah, 2016, p. 150). There is a long-standing divergence among Islamic scholars, debating the concept of this artificial person. Nyazee observes that modern scholars believe that this doctrine is known to Islamic law, whereas others doubt this belief (Nyazee, 2016, p. 340). However, Nyazee observes that the principle of recognition under Sharīʿah does not automatically mean that, in consequence, all institutions are legal entities. The execution of such a concept under Sharīʿah is complex and each case requires separate analysis. For example, in order to issue securities, a business corporation needs to meet established structural criteria, particularly in respect of being free from *ribā*, or usury, and to meet the standard of structures laid down as requirements for conducting business in Islam. It is opined by Muṣtafa al-Zarqā that the theory of *fiqh*, known as *al-dhimmah*, justifies the existence of the legal entity other than the human being (Al-Zarqā, 1997, pp. 163-164). *Al-Dhimmah*, according to the *Shāfiʿī* School has attributes of a human being with *al-ilzām*, or duties, together with *al-iltizām*, or obligations (Al-Kabāshī, 1989, p. 106). This definition is confirmed by al-Sarakhsī as the

attribute of a person accepting duties and obligations (Al-Sarakhsī, 1987, vol. 13, p. 99). Al-Sarakhsī observes that the jurists of the *Mālikī*, *Ḥanbalī* and *Ḥanafī* Schools have accepted this definition, where *ahliyyah*, (obligation and capacity) are included in the concept (Al-Durayb, 2008, p 89; Khaznah, 2016, p. 150; Abd Ghadas and others, 2017, p.122). However, the definition has different implications in comparison to those discussed and expounded by jurists during the early development of *fiqh*. Most of the *fuqāha'*, (the Muslim jurists), accept the existence of something that is other than the human beings and which is entitled to some rights and responsibilities (Abd Ghadas and others, 2017, p.122). The discussion among Islamic scholars not only contemplates the notion of the artificial person itself, but its possible obligations and responsibilities with respect to Islamic law too. The existence of the artificial person is recognized by Islamic jurisprudence in relation to hospitals and Waqf,[298] as *Sharikāt* (companies) and as *al-dhimmah*, which have certain rights and obligations (Al-Kabāshī,1989, p. 112). He also observed that the concept of the artificial person also encompasses the rights and obligations similar to those of human beings, further sanctioned by the Egyptian Civil Law in section no: 53 (Abd Ghadas and others, 2017, p.124), which states that the artificial person is granted full rights except those rights which pertain solely to human beings. Al-Zuḥaylī claims that acceptance of the legal status of artificial person and the associated concepts in Sharīʿah are endorsed by most of the Muslim jurists (Al-Zuḥaylī,1997, p.221). However, this is not a unanimous opinion of all Muslim jurists. There is a group of scholars who

[298] Detailed examination of legal entity by Uusmani showed that the Waqf appears to have been regarded as a separate legal entity by Classical Muslim jurists, who have ascribed to it qualities analogous to those of a physical person (Uusmani, 2002, pp.154-155). This can be illustrated briefly by two notable examples made by the classical fuqaha' (Muslim jurists) on the subject of Waqf .

To begin with, if a property is bought with Waqf money, the property does not immediately become a part of the Waqf. Instead, the property that purchased will be considered as an estate has owned by Waqf according to the jurists .

Second, the jurists have stated unequivocally that money donated to a masjid as a charity does not become part of the Waqf, but rather transfers to the masjid's possession .

These examples demonstrate that Muslim jurists have approved the Waqf's ability to own property. While a Waqf is obviously not a physical person, but it has been considered as such human in terms of possession (Al-Kasānī, 1997, vol.4, p.234, Al-Zarqā, 1997, p.331, Al-Dardīr, 1995, vol.5, p.181, Al-Māwardī, 1999, vol.8 , p.503,, Ibn al-Qayyim,1993, vol.2, p.287,Uusmani, 2002, pp.154-155).

oppose this concept. They are of the view that *al-dhimmah* is an *ilzām*, which is real and cannot be fictitious, because according to *al-Bazdawī* and *al-Nawawī*, Sharīʿah is only imposed upon real people for rights and obligations (Al-Kabāshī, 1989, p. 115). *Al-Tahānawī* also considered that *al-dhimmah* relates to human attributes and artificial bodies do not have relevance to the meaning of obligation and liability (Nyazee, 2016, p. 345; Abd Ghadas and others, 2017, p.125).

However, there is an illustration of a non-human entity being liable to take on responsibilities. Al-Sarakhsī makes the observation that *al-dhimmah* was offered to the mountains, but they rejected it on the belief that they could not fulfil the obligations, whereas the same offer was accepted by humans (Al-Sarakhsī, 1987, vol. 13, p. 100). This is referring to the Qur'an when Allah asked the heavens, earth and mountains to take on the responsibility of being witnesses to the Oneness of God. Allah says in the Qur'an: "Indeed, we offered the Trust to the heavens and the earth and the mountains, and they declined to bear it and feared it; but man [undertook to] bear it. Indeed, he was unjust and ignorant" (Qur'an, 33:72).

Al-Dhimmah is granted by Allah alone and is a trust resulting from covenant. By definition, an *ʿahd* is a trust between Allah and the servant of Allah, therefore it is only possible to covey it to a natural person (Nyazee, 2016, p. 345; Abd Ghadas and others, 2017, p.121). Unlike the common law, the standing of legal person in Islam cannot be given to entities other than humans (Abd Ghadas and others, 2017, p.122).

The hypothesis of the artificial person and the corporate personality is accepted in general terms by modern Islamic jurists but with the proviso that it cannot equate to complete acceptance of the doctrine presented by common law.[299] Nyazee suggested a middle way. He suggested that it is possible through the ruler to assign a limited *dhimmah* to a non-human body, according to certain terms. These terms include that no religious duties are expected to be performed by an artificial person. It will not be subject to any religious duties. Therefore, there is no duty to Zakat or *ṣadaqah* and no religious obligation on this artificial person, because these obligations are manifestation of the relationship of mankind

[299] This opinion was adopted by Islamic *Fiqh* Academy. On Mar 6-11, 2004, the Council of the International Islamic *Fiqh* Academy of the Organization of Islamic Cooperation held its fifteenth session in Muscat (Sultanate of Oman), in accordance with resolution No. 140 (6/15). see the official website of Islamic *Fiqh* Academic available at: https://www.iifa-aifi.org/ar/2157.html,(accessed: 30/4/2021).

with Allah only. However, *ʿaql* in some form must be related to the artificial person. It may be a single person or a group of persons, such as a board of directors.

Thirdly, property held by the artificial person must be held in dual ownership, even though it will be held in its name, on behalf of the members of the artificial person, because of *khalṭ* (the amalgamation of capital). Subject to the permission granted by its members, the corporate body may have total rights of disposal and transaction of the property. There is a need for some adaption of the company's obligations, board of directors and the members who possess the *ʿaql*, in order to meet common law doctrine, according to Nyazee. He further states that there should be dual ownership and liability in Sharīʿah corporations, to avoid recourse to independent legal entities, because an artificial person cannot in effect own and manage properties nor be arrested or held responsible for the default of third parties (Ibid).

9- Dissolution of the Waqf company

Another challenge is related to the dissolving of the Waqf company. Another important matter regarding Waqf is its dissolving. Al-Jabr defined dissolution as "is the end of the lawful ligament in a partnership that was bringing partners or owners together" (Al-Jabr, 1996, p. 217). However, according to the free dictionary, dissolution of a company can be defined as follows "The dissolution of a corporation is the termination of its existence as a legal entity. This might occur pursuant to a statute, the surrender or expiration of its charter, legal proceedings, or Bankruptcy".[300]

The definition of dissolution in the free dictionary, that I referred to in the English legal context, is more accurate than Al-Jabr's definition that I mentioned to in the Saudi legal definition. According to Al-Jabr's definition, a company and partnership can persist even if there are no more ligaments among the partners that kept them in the bond of partnership. One such example is when one of the partners cease to exist or opt out of the ligament of the partnership or company, and company will still continue.

[300] The Official Website of the Free Dictionary , Available at: http://legal dictionary.thefreedictionary.com/dissolution, [Accessed on: 11/9/2020].

As far as Sharīʿah is concerned, the issue of dissolution the partnership is not an agreed upon matter (Al-Khayyāṭ, 1994, p. 403). Rather it is a contentious matter. Partnership in Sharīʿah is a non-binding contract. It will be considered dissolved if any partner or partners withdraws. Unless the company or partnership was decided to be time bound or withdrawal from one partner would cause harm to the rest of partners, in these two situations partner will not be allowed to withdraw from partnership or company. Moreover, death, bankruptcy or insanity too will be a reason of dissolution of partnership. In other words, the loss of legal capacity will lead to end of the partnership. Other partners cannot act on the deceased's partner behalf without the permission of heirs (Ayub, 2013, p.319; Al-Khayyāṭ, 1994, p. 403; Al-Sanhūrī, 1993, Vol.5, p.599). As mentioned earlier, if partnership was intended for a certain time period, the expiration of this time will cause the partnership to end automatically. In the same way if it was formed for a specific venture, performance of that purpose will lead to end of the company (Al-Ṭayyār, 2010, 167) If the capital of the company is lost, the company will be deemed terminated too. Likewise, the misconduct or inappropriate behavior (*alʿazl)* on the part of any partner too will lead to end the partnership. Other partners have the right to dispose of him in this case (Al-Khayyāṭ, 1994, p. 404).

According to the al-Hesain, the causes of dissolution [301] of partnership and dissolution of a company are same and Sharīʿah does not differentiate between the two. He argues in his doctoral research that the main focus of Sharīʿah is upon the legal terms and conditions agreed upon by the partners. The Tradition of Prophet Mohammed says: "Muslims must keep to the conditions they have made, except for a condition which makes unlawful something which is lawful, or makes lawful something which is unlawful" (Sunan al-Tirmidhī, Hadith no:1352). This entails that whether it is partnership or company, any participation in a business venture will depend upon the terms and conditions of the

[301] **Dissolution**: "the act or process of ending an official organization or legal agreement". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/dissolution?q=dissolution+, accessed: 2/5/2021.

agreement. Moreover, customary laws, law of land and international law are also applicable if they do not violate the principles of Sharīʿah (Al-Hesain, 2017, p.206).

On the other hand, the majority of jurists maintain that the Waqf is an indispensable deal, it cannot be revoked and the capital cannot be spent. It has to be endowed for good and the proceeds to be used in charity. Moreover, there is a considerable number of jurists such as Al-Nawawī, Ibn Qudāmah and others who do allow the dissolution of Waqf under certain circumstances regardless of the rules of perpetuity and irrevocability (Al-Nawawī, 1988, vol. 16, p. 259; Al-Khaṣṣaf, 1904, p. 127; Niẓām, 1983, vol. 2, p. 357; Ibn Qudāmah, 1994, vol: 6, p.221) .However, according to Abū Ḥanīfa's opinion, the ownership of the endowed property (*mawqūf*) belongs to the *wāqif*, thus rendering it revocable (*ghayr lāzim*). This way it is akin to a loan (*ʿariya*h) (Ibn al-Humām, 1995, vol. 6, p.191). In addition, a founder can get Waqf cancelled by *qāḍī* if he is poverty-stricken. This view is adopted by *Ḥanafī* School. If the property is damaged or destroyed to the extent that it can no longer be used for the benefit of the beneficiaries as desired by the founder, the Waqf can be dissolved in this situation too (Ibn ʿĀbidīn, 1994, vol. 6, p.520). Al-Shaybānī maintains that remnants of the destroyed property will revert to the founder or his heirs. Ibn ʿĀbidīn asserts that there are some of the jurists holds the position that alternative uses of the property must be explored and if no such possibility is found, only then Waqf should be dissolved and reverted to the founder (Ibid). As previously mentioned, the *Mālikī* School allows temporary Waqf which can be for certain time and specific beneficiaries. Waqf will stand extinct once time is lapsed or the last beneficiaries expires. The property of Waqf will revert to the founder or to his heirs. Moreover, Waqf can be revoked in case the founder had earlier stipulated in his Waqf deed that he would redeem the Waqf in case of need (Al-Ṣāwī, 1988, vol. 2, p. 296-297).

According to the classical jurisprudential rulings of Waqf and partnership in Islamic law, it would be possible to adapt these rulings on the Waqf company. Thus, causes of dissolve of the company regarding the personal element such as bankruptcy or insanity or death of any partner are not possible in the Waqf company. The reason is that the suitable model

for the Waqf company according to jurisprudential rulings of Waqf is joint stock or limited liability companies.

Moreover, it is an agreed upon matter among the jurists that the Waqf is not revocable in cases where personal elements are involved even if it is related to the *wāqif*, *nāẓir* or beneficiaries.[302] Thus, there is no impact on the Waqf company in terms of causes pertaining to the personal elements. This is in contrast to companies dependent on contracting partners that have purposefully merged both financial and physical commitment in the operation of their company. Therefore, if one of the partners decided to discontinue the company, the company will immediately be liquidated[303] (Al-Hesain, 2017, p.209). The modern idea of a financial company, on the other hand, totally disregards the personal element. In today's financial company, partners are only linked by their financial shares, which determine their financial responsibilities (Ibid; Al-Sanhūrī, 1993, vol.5, p. 598).

In other words, each shareholder cannot be held liable for the company's day-to-day operations or for debts that exceed its assets.

However, the causes of dissolution of joint stock or limited liability companies are as follows:

First reason is the expiration of the company. If it is stipulated that the partnership is for a limited time in memorandum of association, or in case of the company being for a specific purpose, in both cases the company will be dissolved with the time expires or when that purpose is achieved (Al-Ḥumayd, 1999, 167; Al-Hesain, 2017, pp.222-230). The loss of Company’s Capital can be another reason. Partnership will be dissolved if the partnership capital is exhausted. All of the capital or the most of it or bankruptcy will lead to the dissolving of the partnership. Company can be dissolved by mutual consent. When all partners in the company agree to wind up the company, it will be dissolved mutually. Lastly

[302] Al-Zuḥaylī mentions a number of scholars, such as al-Kasānī, al-Dardīr, al-Māward, al-Qarāfī, Ibn ʿAbd as-Salām, Ibn Ḥazm, Ibn Ḥājar,Ibn al-Mundhir and others, to prove his claim that there is a consensus among classical juristss that (Al-Zuḥaylī, 1997, p.321, Ibn al-Mundhir, 1994, p.65)

[303] **Liquidated**: “if a business liquidates or is liquidated, it is closed so that its assets can be sold to pay its debts”. See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/liquidate?q=liquidated, accessed: 2/5/2021.

it can be terminated by court. Company can be wound up by a judicial decree[304] in case where enough justifiable reasons are present (Al-Khayyāṭ, 1994, p. 405; Al-Sanhūrī, 1993, vol.5, p. 600).

If any of the above-mentioned causes is present in Waqf company, the Waqf company will be dissolved in accordance with the law of the state, provided that it is not inconsistent with principles of Sharīʿah. As the Waqf company have the legal framework form of company, therefore, the legal form for the company will be end, but Waqf assets of Waqf company will not be terminated (I mean the legal framework form of the company will be dissolved but the Waqf assets that are composed capital of the Waqf company will not be revoked).

However, the query that should be answered is what will happen with the Waqf assets after dissolving of the Waqf company? The assets of the waqf company can be dealt in to two ways:

Firstly: If any of the abovementioned causes take place and company is wound up, be it any other cause or because it was meant to be temporary by the *wāqif's* shareholders. Therefore, the financial value of share after liquidation of the company will return to the ownership of shareholder or to their heirs. This is in accordance to Abū Ḥanīfa's opinion, the ownership of the endowed property (*mawqūf*) belongs to the wāqif as well as the *Mālikī* School that allowed temporary Waqf.

Secondly: If it has been stipulated in the memorandum of association or articles of association to make the Waqf shares as perpetual. Also, if the *wāqif's* shareholders mean that the ownership of the Waqf shares is transferred to Allah in perpetuity when they made application for shares. Thus, the financial value of the shares will be transferred to any other Waqf company that has similar aims as the previous one. According to the view of most jurists who believe that the ownership of the Waqf belongs to Allah. This is based on the fundamental principle that the nature of Waqf is absolute and perpetual (*lazīm*), i.e. this cannot be changed, so any attempt to transfer ownership through any procedures such as selling it, or allowing it to be inherited, or presented as a gift are deemed as being

[304] **Judicial decree**:" a document ordered by a court of law or a judgment that is made in a court of law that something must happen". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/decree, accessed: 2/5/2021.

impermissible. In this situation the dissolving for the Waqf company, the Waqf shares in the perpetual Waqf company, the Islamic Waqf rulings of *Istibdāl* (exchange of the Waqf assets) should be applied. This will elaborate in this succeeding section.

10- Exchange of the Waqf assets in the Waqf company

The exchange of Waqf assets in a Waqf company is another controversial subject. The term *Istibdāl* refers to when a property is bought in exchange for a Waqf property (Abū Zahra, 1959, p. 177 Haji Abdullah, 2005, p.167), and it is not to be confused with the closely related term *Ibdāl*. *Ibdāl* refers to when the original waqf property is sold with other property or money (Al-Kubaiysī, 1977, vol. 2, p.155; Haji Abdullah, 2005, p.167). Therefore, *Ibdāl* must take place before *Istibdāl*. Selling the original Waqf property is therefore represented by *Ibdāl* while the purchase of new property to replace the original Waqf is represented by *Istibdāl* (Abū Zayd, 1996, p. 152). There is some controversy surrounding this term as it can be considered offensive, bearing in mind that the perpetuity of Waqf is one of the fundamental concepts of the law of Waqf, meaning that its ownership cannot be transferred by any contract (Al-Kubaiysī, 1977, vol. 2, p.155). The practice of *Istibdāl* appears to contradict this principle and jurists have discussed it at length. Regardless of the lack of written evidence for the legitimacy of *Istibdāl*, some jurists defend its permissibility because they are focusing on keeping the concept of Waqf beneficial and relevant as specified the *wāqif* (Haji Abdullah, 2005, p.168).

Compared with other Schools of law, the *Ḥanafī* School takes a very liberal view of *Istibdāl* and it has paid attention to this in depth. *Ḥanafī* jurists allow *Istibdāl* to be carried out in three specific cases, and each one will be discussed here separately. The first case is when it is specified by the *wāqif* in his Waqf deed that he will be entitled to do *Istibdāl* or directly that he might purchase a new property in order to replace the original Waqf property. Most *Ḥanafī* scholars take the view that this is a valid act and therefore *Istibdāl* is lawful when it was the original intent of the *wāqif*, even if the original Waqf is still in place (Ibn ʿĀbidīn, 1994, vol. 6, p. 583; Ibn al-Humām, 1995, vol. 6, p. 211).

It has been argued that such a view contradicts the principles of irrevocability and perpetuity inherent in Waqf, because a condition allowing *Istibdāl* revokes the Waqf. However, Abū Zahra disagrees with this as he argues that perpetuity does not only exist in the physical existence of an object, but also in the maintenance of the usufruct and therefore the benefit to the beneficiaries. The principle of perpetuity is therefore maintained, provided that the new waqf property continues to provide benefit in the same manner as the original property. If this is the case, the condition allowing *Istibdāl* can be considered to be valid. Abū Zahra goes further to state that this view supports the idea of prioritising the condition of the wāqif and even if the original Waqf is still in place, therefore if the *wāqif* specified this he will be allowed to do *Istibdāl*, he is simply exercising his right of trusteeship (*wilāyah khaṣah*) (Abū Zahra, 1959, pp. 179-180). There is justification for this view in the rulings of the *Ḥanafī* School of law, which previously confirmed that it was legal to pay Zakat with the value of the property by replacing the property itself (Ibn al-Humām, 1995, vol. 2, p. 199). The issue of *Istibdāl* can be treated in the same way, in that the property's value can represent the property and be used in the same way as the property could. This is indeed the actual meaning of *Istiḥsān*, which is a firmly accepted source of Islamic Law in the *Ḥanafī* School. Specifying *Istibdāl* does not therefore contradict any of the *Ḥanafī* School's rulings.

The second case of *Istibdāl* considered to be valid by *Ḥanafī* scholars is if the original Waqf property has no longer fulfils its original purpose of benefiting the beneficiaries very well, e.g., because it has fallen into disrepair or its value has fallen greatly with the passing of time. As a result, less profit can be made from it, therefore in this case of *Istibdāl* can be approved by a judge (Ibn ʿĀbidīn, 1994, vol. 6, pp. 583 - 584). Ibn ʿĀbidīn maintains that clearly by saying that even if the wāqif has not specified that *Istibdāl* is allowed, a judge can rule that it is permissible, provided that: a) the property is in a state of complete disrepair; b) there is no profit that could be spent on maintaining the Waqf; and c) the selling of the Waqf have to involve no fraud (Ibid).

It is clear from these provisions that in the view of the *Ḥanafī* School, *Istibdāl* is only permitted under strict circumstances, and that these must be adhered to. Their rulings fit with the original non-transferable nature of Waqf, and they only allow *Istibdāl* when absolutely necessary because the property can no longer benefit the beneficiaries by being

used profitably. In keeping with this cautious approach, one additional provision was added by al-Tarabūlsī – that *Istibdāl* can only be approved by a very pious judge. This addition was deemed necessary at the time as there were cases of misconduct relating to Waqf property (Al-Ṭarabulsī, 1981, p. 36).

The third case in which *Istibdāl* is permitted is when the *wāqif* did not specify that *Istibdāl* would be allowed, and the original Waqf property still functions, but actually another property has been identified that could be purchased in exchange for the Waqf property in order to make it more beneficial. However, Ibn ʿĀbidīn comments that if *Istibdāl* has not been stipulated by *wāqif*, although exchanging the Waqf property 'is much better in terms of usufruct and benefit. In this case, the *Istibdāl* is invalid according to the strongest view in the School (Ibn ʿĀbidīn, 1994, vol. 6, p. 586).

It would seem from this report by Ibn ʿĀbidīn this type of *Istibdāl* is not permissible, because the original Waqf property is still functioning, but there is no consensus on this point in the *Ḥanafī* School. Abū Yūsuf argues that it is lawful for the same reason that the first case is lawful – i.e. the principle of perpetuity is maintained because the new Waqf property continues to provide benefit. Ibn ʿĀbidīn, on the other hand, takes the opposite view and maintains that the original waqf property can only be changed when it is absolutely necessary, and this necessity is lacking in this case. The *nāẓir* cannot therefore turn to the second stage (Ibid). Ibn al Humām is in agreement with this view (Ibn al-Humām, 1995, vol. 2, p. 212).

Moving on from the *Ḥanafī* point of view of *Istibdāl* we now consider the *Mālikī* School stance on the matter. The *Mālikī* School scholars are split into two camps regarding *Istibdāl*. The first opinion differentiates between immovable and movable property when considering the permissibility of *Istibdāl*. There is only one very specific circumstance under which immovable property can be lawfully subject to *Istibdāl* and this is for the extension of mosques, graveyards or public roads. For these purposes, Waqf beneficiaries can even be forced by the authorities to sell the Waqf and replace it with other property (Al-Dardīr,1995, vol. 2, p. 308). This opinion is held by the majority of *Mālikī* scholars (Abū Zahra, 1959, p. 172). This is based upon the principle that public interest is of primary concern, where it should be prioritised. Therefore, if not performing *Istibdāl* it

would create more difficulties to public, which is against Islamic teachings, which emphasise the importance of making things easy for people (Ibid). This is the only case where *Istibdāl* is permitted, because as stated by Ahmad bin Yaḥya al-Wansharisi this practice involves transactions in another person's property without asking for his consent, even if it ultimately benefits the Waqf (Al-Wansarīsī, 1981, vol. 7, p. 134). This is one of Mālik points of views, as stated in *al-Mudawwana (*Al-Ṣāwī,1988, vol. 2. p. 308*)*.

Those from the *Mālikī* School who hold the above opinion are against *Istibdāl* with immovable property, but not when dealing with movable Waqf property – here it is permissible. Movable property refers to items such as livestock, clothes, weapons etc. If these items become useless, it is permissible to sell them and use the proceeds of the sale to purchase new items in exchange for the original Waqf ones. If the money from the sale will not cover the cost of purchasing a new item, it should at least be used purchase a part of it, or if this is impossible, the money can be given as *ṣadaqah* (Al-Ḥaṭṭāb, 1992, vol.6, p. 42).

An example of this would be a ruined mosque. The rubble or debris that remains can either be used to construct another mosque, or if it is too damaged, for this it can be sold and the proceeds used towards the construction of a new mosque, on the same site or somewhere else (Al-Mawāq, 1999, vol. 6, p. 42). This differentiation between movable and immovable waqf property is based on the fact that immovable property, although damaged, is still viewed as having the potential of being mobilised to produce benefit. However, the same is not true for movable property (Abū Zahra, 1959, p. 173). Over time these items will deteriorate further until they are worth nothing and therefore can provide no benefit, and the Waqf is lost. *Istibdāl* is therefore the right choice for these objects (movables), in order to preserve the Waqf.

Within the *Mālikī* School, a minority hold a second opinion about *Istibdāl*. In this view, if Waqf property has fallen into disrepair to the point that it provides no benefit, then a judge can rule that *Istibdāl* is allowed (Al-Dardīr, 1995, vol. 2, p. 308). This opinion aligns with that of the *Ḥanafī* School, but it goes against one of the School's legal principles. The *Mālikī* School very much bases its assertions over what constitutes authentic Islamic Law

by looking at the praxis of the people or scholars of Medina, and this view held by the minority does not reflect the Medinan praxis (Ibid). Although the Medinans did not state that the practice of *Istibdāl* was unlawful, they still did not practice it. This lack of alignment with Medinan practice is why only a minority of *Mālikī* School scholars agree with this second opinion.

Jurists from the *Shāfiʿī* School agree that it is not permissible to sell a mosque in exchange for another, even if it has become derelict. The reason behind this is that the site of a mosque can be used in the future for prayer or *iʿtikā*f (a spiritual retreat for Muslims at a mosque), therefore it has potential for future restoration. Accordingly, the property owned by the derelict mosque should be preserved until such a time that a mosque is built again on that site. The exception to this is if, for whatever reason, there is no chance that a mosque will be built again there. In this case, any property belonging to the old mosque can be transferred to the nearest available mosque. If there is danger to life due to the mosque's bad condition, a judge can approve its demolishment and the rubble can be re-used in the construction of another mosque, as near as possible to the site of the original one (Al-Shirbīnī, 1958, vol. 2, p.392).

With reference to property that is not a mosque, the *Shāfiʿī* School jurists hold two different opinions – a strict one and a more liberal one. The first opinion, held by the majority, is similar to that held by the majority of the jurists in the *Mālikī* School. In other words, it is strictly against the concept of *Istibdāl*, even if the property is at the point of collapse. The basis for their argument is the need to maintain the Waqf's perpetually (*idāmah li al-waqf*), meaning that its status cannot be transferred (Al-Jamal, 2001, vol. 3, pp. 590 - 591). The Waqf must be protected, and in this opinion, this means preserving its original substance. Therefore, regardless of the Waqf property's condition, even if totally deteriorated, selling it is prohibited. Some items may seem beyond use, like tree stumps or worn mosque mats, but even these can be used by being leased[305] – however, under no circumstances can they be sold, even though, in the case of dried trees, they could only be used for fuel. This *Shāfiʿī* opinion is therefore extremely strict. It emphasises that the property belongs to the beneficiaries of the Waqf for their benefit, but they have to benefit from it in any possible

[305] In the past they can used for many things, for example, use it as a planter by hollowing out and put some flowers. Also, they can used to produce a furniture such as: table, chair and many things.

way other than selling it. To do so would contravene the law of Waqf. The only acceptable exception is Waqf animals that are weak, and they can be sold and the proceeds of the sale used to buy another animal in exchange. This exception exists because weak animals are no longer able to benefit the beneficiaries of the Waqf, and they are therefore differentiated from other types of properties (Ibn Ḥājar, 1979, vol. 6, p. 283). From this discussion, we can conclude that Waqf property which is in a condition where it can be used (at any level) for benefit cannot be sold in exchange for other property. This is the established point of view of the majority of *Shāfiʿī* School jurists (Al-Jamal, 2001, vol.3, p.590).

A different opinion is held by the second group of *Shāfiʿī* jurists. With the sole exception of a mosque, they believe that Waqf property can be sold if it is no longer of any use to the beneficiaries. So, in the previous example, old mosque mats and dried tree could be sold in order to ensure that there is no waste, and the proceeds from the sale will be regarded as still being part of the original Waqf (Ibn Ḥājar, 1979, vol. 6, p. 283). This is a practical approach to the issue that takes into account the Waqf's original purpose, and it takes a less strict approach to the principle of Waqf perpetuity. The Waqf was made with the intent of benefiting mankind, therefore when it can no longer perform this function itself, actions to continue its benefit in another way are permitted. One of these ways would be to exchange the property for another or for money by selling it, and then its benefit is at least perpetuated in some way and it is not wasted. Therefore, the principle of the perpetuity of Waqf is not violated by the sale of the Waqf property, rather, it protects the Waqf property from being lost at no cost. This case can be happened when a property can no longer provide any benefits.

The opinion of jurists from the *Ḥanbalī* School is much more lenient than that of most *Shāfiʿī* and *Mālikī* jurists. They agree with the majority of jurists from the other Schools on the point that a waqf cannot be sold if it is still performing its function. However, if the state of the property has deteriorated to such an extent that it can no longer function, then it can be sold in exchange for another property. Furthermore, if the condition of the property is such that the waqf beneficiaries can no longer derive any benefit from it, as in the example of a derelict mosque situated in an area that is no longer highly populated, it

can be sold and the money can be utilised to build the same somewhere else. This is in line with the minority opinion of jurists from the *Shāfiʿī* and *Mālikī* Schools. The *Ḥanbalī* School also permits the sale of a mosque that needs to be expanded, but there is no room for the expansion due to the mosque is in an area where the population density is high. This is provided that the money from the sale goes towards the construction of another mosque (Al-Bahūṭī, 1982, vol. 4, p. 292; Ibn Qudāmah, 1994, vol. 6, p. 225). This is a novel concept in Waqf law as all the other Schools see mosques as an exception in their approval of *Istibdāl*.

The *Ḥanbalī* School scholars also agree that if a mosque is in such a bad state of repair that it has to be demolished, the rubble and any remaining furnishings should be re-used in another mosque if possible, rather than selling them, since this would retain the original Waqf beneficial without replacing it for another. Other property that is no longer of any use, such as broken trees, can also be sold, provided that the proceeds are spent on something that maintains the original purpose of the Waqf. It is argued that in this way the perpetuity of the Waqf is continued and the original stipulation by the *wāqif's* is honoured. *Ḥanbalī* jurists claim that this is not contrary to the principles of Waqf or the Tradition 'It is not to be sold' (*la yubāʿ*) because this Tradition referred to a different context, i.e., a Waqf that was still functioning. It is therefore permissible for Waqf property to be sold in exchange for another property when its condition has deteriorated to such a point that the beneficiaries can no longer benefit from it, because this maintains the benefit and perpetuity of the Waqf. These jurists also emphasise that a Waqf is made for the purpose of benefiting the beneficiaries, not with the intention of holding onto the actual property regardless of its condition. Practicing *Istibdāl* in this way therefore upholds this purpose (*maqṣad*) of the Waqf (Al-Bahūṭī, 1982, vol. 4, p. 292; Ibn Qudāmah, 1994, vol. 6, p. 225).

The position of the *Ḥanbalī* School is somewhere between the strict interpretation of most *Mālikī* and *al-Shāfiʿī* jurists, and the more lenient approach of some jurists in the *Ḥanafī* School. They address the matter between adhering to the literal sense of the *naṣṣ* (text)and adhering to the concepts mentioned by the *naṣṣ* (text). As discussed in an earlier section, the majority of the *Ḥanafī* School agree with this approach. It is the most useful way of

dealing with Waqf property as over time all property deteriorates to some degree and it will eventually no longer function as intended. If this solution left, the Waqf would actually go to waste and will be no longer exist, so *Istibdāl* is the only way to prevent this from happening and ensuring that the Waqf's purpose is upheld. This view is best explained by referring to a statement made by al-Maqdasī's on this matter:

"Ibn ʿAqīl says that a Waqf is perpetual, but if the property cannot be kept in its original form, we can maintain its original purpose, that is, to make a Waqf continuously beneficial by acquiring another property in replacing the original one. To keep sticking to the original unproductive property is tantamount to disregard the original purpose of the Waqf" (Al-Maqdasī, 1994, vol. 6, p. 243).

The discussion presented here demonstrates the degree of disagreement over *Istibdāl* among the four Schools of law. The most practical approach is taken by the *Ḥanafī* and *Ḥanbalī* Schools, which do not see the original principle of Waqf as being totally against *Istibdāl*. On the other hand, a more cautious and less liberal approach is taken by jurists from the *Mālikī* and *Shāfiʿī* Schools, who give precedence to the general legal principle for Waqf [306](*uṣūl*) over practicality.

Let us now turn to the issue of exchange of the Waqf assets in the Waqf company. The issue of *Istibdāl* is highly imperative for the continuity and sustainability of the Waqf company. The *Istibdāl* in the Waqf company is to sell shares in the Waqf company in exchange for other shares in the Waqf company. The establishment of *Istibdāl* in the Waqf company can also be allowed, if it is for the benefit of Waqf, its beneficiaries, and is in the best interest of the public (*maṣlaḥah ʿāmah*). In addition, when there is a loss of profits or a decrease in nominal value of the shares it is better to sell the shares in order to preserve the continuity of the Waqf company. It is possible, therefore, that the Islamic Waqf rulings of *Istibdāl* (exchange of the Waqf assets) should be applied. When has been stipulated in the memorandum of association or articles of association to make the Waqf shares as perpetual. Especially, if the Waqf company will be dissolved. Thus, the financial value of the shares will be transferred to any other Waqf company that has similar aims as the

[306] Waqf is a perpetuity contract, and it cannot be revoked.

previous one. This is based on the opinion of the *Ḥanbalī* School that offers a very lenient view. In addition, the matter of *Istibdāl* should be stated in the company's articles of association. This is permissible on the basis of Hadith which states: "Muslims are committed to their conditions" (Sunan al-Tirmidhī, Hadith no:1352). This Hadith shows in the last part that the *wāqif's* condition that has to be observed must not be in conflict with the Sharīʿah "...except a condition that allows what has been forbidden or forbids what has been allowed..." (by Sharīʿah). Almost all of the Waqf issues are rational (*Ijtihād*). The permissibility of the *Istibdāl* of Waqf that the classical jurists have discussed can be extended to the waqf company by analogy. *Istibdāl* in the waqf company can be legitimized by Sharīʿah through the tool of analogy which is an accepted source of Sharīʿah as discussed in the chapter one.

11- The Zakat on the Waqf company

Another challenge is related to the zakat on the Waqf company. An important issue related to Waqf company is regarding the obligation of Zakat. Are Waqf companies liable to pay Zakat or not? Zakat is an important obligation upon people, the question is it obligatory upon artificial/legal persons? Will companies pay Zakat or not? For this reason, it is important to examine zakat in the context of legal persons (Al-Nasser and others, 2012, p. 220).

Zakat is the third pillar of Islam and plays a vital role in Islamic society. Alongside other objectives of Zakat, one of the prime aims is the socioeconomic welfare of the weak segments of society (Wahab and others, 2011, p.43). In contrast to the taxation system, Zakat is consumable only by needy and financially weak people of society (Foster, 2010, p.273). It is obligatory upon those Muslims who have wealth reaching '*niṣāb'*. It is an annual commitment and is only payable if the wealth is owned by a Muslim for an entire year. The collectable Zakat depends upon the type of assets that the individual Muslim

owns. It will be 2.5% if the amount is in cash whereas if it is agricultural produce, it will be one tenth if it is irrigated[307] by rain and one fifth, if it is irrigated by manual means.

Likewise, it is different for gold, silver and merchandise. Now the question is about the companies whether they will be required to pay or not. There is no unanimous opinion of Muslim contemporary jurists in this regard. The opinions of jurists are divided into three point of views regarding the obligation of the companies to pay Zakat. First group attributes the complete capacity (*ahliyyah*) to the company and are of the opinion that it is obligatory upon the company to pay Zakat. If the fortune of the company reaches to niṣāb, Zakat will be liable on the company regardless of the value of *niṣāb* in the individual shareholders. It will be payable according to the nature of the business activity of the company and will not be dependent upon the intention of the shareholders (Mohamad, Abdul Hamid, 2012, p. 488; Shabīr, 1997, p.123). Therefore, the company should pay Zakat by combining the shares of all shareholders and considering it as one person's wealth. Wahbah al-Zuḥaylī, al-Būṭī, Ibn Jibrīn, al-Albānī and others are in favour of this view (Mohamad and others, 2012, p. 488; Al-Rifāʿi, 2013, p.256). Whereas the second view does not accept full capacity of the company and reject *ahliyyat al-adā* (the capacity for performance of duties) only recognizes *ahliyyat al-wujūb* (the capacity for acquisition of rights). According to this view actual obligation to pay Zakat is upon shareholders, but it may be assigned to the company's management to pay the Zakat on behalf of the shareholders. This view was accepted by many modern Islamic jurists[308] and International Islamic *Fiqh* Academy.[309] So, the company may be assigned to pay Zakat on behalf of shareholders if it was incorporated in company's articles of association. It may be assigned if it is approved by general assembly (Al-Khathlān, 2011, p.223). Moreover, if the law of the land demands from companies to pay Zakat, in this

[307] **Irrigated**: "to supply land with water so that crops and plants will grow". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/irrigate?q=irrigated, accessed: 3/5/2021.
[308] For example, al-Zuḥaylī, al-Zarqā, ala-Bassām, Ibn Bayyah, al-Zarqā and many others (Al-Khwayīṭr, 2005, p.186).
[309] On Dec 22-27, 2001, the Council of the International Islamic *Fiqh* Academy of the Organization of Islamic Cooperation held its thirteenth session in Kuwait, in accordance with resolution No. 121 (3/13). see the official website of Islamic *Fiqh* Academic available at: https://www.iifa-aifi.org/ar/2093.html,(accessed: 3/5/2021).

case, company will be bound to pay Zakat. For instance, in Saudi Arabia, companies are supposed to pay Zakat. It may be payable by the company if it gets authorization from the shareholders (Al-Ḥumayd, 1999, 288).[310]

These previous viewpoints are based on two evidences: first, evidence for their views is a general Quranic verse, Allah says: "O you who have believed, spend from the good things which you have earned and from that which We have produced for you from the earth. And do not aim toward the defective therefrom, spending [from that] while you would not take it [yourself] except with closed eyes. And know that Allah is Free of need and Praiseworthy". (Qur'an, 2:26). Al-Khayyāṭ claims that Muslim jurists also explained, the meaning of the word ("which you have earned") to mean all sorts of lawful human endeavours, whether in the form of trade, industry, agriculture, or the like, whether performed individually or in a group such as a company (Al-Khayyāṭ, 1994, p.278). Second evidence: is the Tradition narrated by "Ibn Umar that: The Messenger of Allah said: "For forty sheep, one sheep up to one hundred and twenty. If there is one more. Then two sheep, up to two hundred. If there is one more, then three sheep, up to three hundred. If there are more than that, then for every hundred one sheep. Do not separate combined flock and do not combine separate flocks for fear of *Sadaqah*. Each partner (who has a share in the flock) should pay in proportion to his shares. And the Zakat collector should not accept any decrepit or defective animal, nor any male goat, unless he wishes to." (Sunan Ibn Majah, Hadith No: 1807). On the basis of this Hadith, it is possible to infer those members of a company or team are considered one without being isolated from one another (Al-Khathlān, 2011, p.227).

Third view entails that if law of the land makes mandatory upon corporation to pay Zakat, in this situation corporation will be asked to pay. Al-Mawdūdi, al-Qarḍāwī, and al-Shubayli has adopted this viewpoint (Mohamad and others, 2012, p. 488).

[310] Saudi companies are subject to a 2.5 percent annual flat fee under the Zakat Collection Law (Alanzi, 2020, p.6).

The researcher believes that the third viewpoint is the most accurate with regards to Zakat payment as a legal requirement rather than a religious obligation. This is because, according to the Constitution's limits, the government which enforce such a duty whether or not it is in accordance with Islamic law. He believes that Zakat is an obligation upon natural person and not on juristic person (artificial person). Artificial person is not within the scope of legal capacity in religious obligations.

This is because the basis for this justification has many reasons. Firstly, the viewpoint is based on the quoted Quranic verse. So, my enquiry is whether the word "O. You who have believed..." refers to something other than humans. (I am excluding genies and angels because they are not out of my scope to this discussion). Moreover, I do not agree if the Hadith cited can be as evidence helps us come to the conclusion that a corporation is required to pay its own Zakat as just a separate legal entity. The Hadith, in my opinion, explains how the Zakat is calculated while the "money" is not separate or indistinguishable.

Secondly, it is worth remembering that the concept of a separate legal entity was created by statute to foster corporate growth by encouraging owners to engage in an enterprise without being individually responsible for the enterprise under tort[311] or contract law (Mohamad and others, 2012, p. 490). Having corporations pay Zakat, in my opinion, goes against the idea of a legal personality. Moreover, so when a corporation is required to pay its shareholders' zakat, it should also be required to pay all of the shareholders' debts, which is also a requirement under Islamic law. To my view, the company does not have to pay the Zakat of its shareholders as well, this is because the Zakat is a religious obligation personally.

The matter to be discussed here now is regarding the Waqf. Are Waqfs liable to pay Zakat or not? Moreover, what will be the status of Waqf company in this regard? There are broad

[311] **Tort**: "an action that is wrong but can be dealt with in a civil court rather than a criminal court". See the official website of the Cambridge dictionary, available at:
https://dictionary.cambridge.org/dictionary/english/tort?q=tort
accessed: 2/5/2021.

opinions among jurists on this issue. Abū Ḥanīfa and Shāfiʿīs are of the opinion that the Waqf is not liable to the Zakat at all (Ibn-ʿĀbīdīn, 1994,vol. 4, p.320; Al-Māwardī, , 1999, vol. 6, p.500). This standpoint is based on the reason that the beneficiaries from the Waqf do not own the Waqf property; therefore, they do not have to pay the Zakat because the obligation of paying the Zakat is based on owning the property (Al-Kasānī, 1997, vol.6, p.290). It should be remembered that one of obligatory conditions of Zakat is that the ownership must completely belong to a particular individual (Al-Kubaiysī, 1977, vol; 2, p.210). According to this the Zakat is not applicable in assets or property that does not belong to a specific person. This condition is absent here. In contrast, the *Mālikī* School is of the opinion that the Waqf is liable to the Zakat. This viewpoint is widely accepted in the School (Ibn-Rushd ,1969, vol. 2, p. 298). In addition, this was accepted by some of the *Ḥanafī* and *Ḥanbalī* jurists as well (Ibn al-Humām, 1995, vol. 6, p.220; Al-Bahūṭī, 1982, vol. 2, p.276). The rationale behind this opinion is that the Zakat is based on income and the value of all of one's possessions (Ibn Qudāmah, 1994, vol. 6, p.33). Considering that the *Ḥanafī* School believes that the ownership of the full property belongs to *wāqif* (founder) and Waqf is considered property of him, Zakat will be payable by him.

Based on this the *wāqif* should pay the Zakat on his property. If the Waqf belongs to several people, then each person is liable to pay Zakat which must be deducted from each one's share. Therefore, if the Waqf reaches the *niṣāb* (fixed amount) and a *hawl* (the one year in which the property is held in possession of its owner has elapsed) then the Zakat becomes obligatory on the Waqf.

The third opinion is mostly accepted by *Ḥanbalī* School (Ibn-Qāsim, 1976, vol.3, p.420) and was acknowledged by some of the *Mālikī* and *Shāfiʿī* jurists too (Al-Dardīr, 1988, vol. 3, p.380; Al-Shirbīnī, 1998, vol. 2, p. 301). This view suggests that if a Waqf was dedicated to specific beneficiaries and the generated income reached the quorum (*niṣāb*), then the Zakat will be obligatory on them. In contrast, the unspecified beneficiaries will not be asked to pay Zakat out of what they receive no matter if it reached or did not reach the *niṣāb*. This standpoint is based on two reasons: First evidence for their view is a general prophetic Tradition where Prophet said: "On a land irrigated by rain water or by natural

water channels or if the land is wet due to a nearby water channel *ʿushr* (i.e. one-tenth (*tithe*)) is compulsory (as zakat); and on the land irrigated by the well, half of an *ʿushr* (i.e. one-twentieth) is compulsory (as zakat on the yield of the land). " (Ṣaḥīḥ al-Bukhārī, Hadith no:1483). Second: the beneficiaries that are identified in the Waqf deed have the right of usufruct on the property even if they do not have full ownership on it and this is sufficient to make the Zakat obligatory on them by analogy on the Zakat of a rented land. As for the fact that Zakat is not asked from the unspecified beneficiaries, because the Waqf was not dedicated to anyone specific from them. Thus, it is permissible to allocate or deprive some of them in the Waqf. Also, this is because the Zakat has been created as a support for the needy, it is therefore important that the payer of the Zakat is not in need of it (Ibn Qudāmah, 1994, vol. 6, p.34).

The researcher finds the first opinion to be the strongest one. This is because the basis for this justification is twofold. Firstly, for the obligation of Zakat to materialize requires a specific person to own the property. Ownership is the central point here. The beneficiaries from the Waqf do not own the Waqf property. Even in according to the view that the *wāqif* still retains ownership they do not have access or the right of usufruct (*manfaʿ*) from the waqf, therefore ownership is not established and thereby the obligation to pay Zakat drops.

Secondly, this because of the Waqf has a separate juridical personality and has limited liability. Therefore, that Zakat is an obligation upon natural person and not on juristic person (artificial person). Artificial person is not within the scope of legal capacity in religious obligations. Moreover, excluding the Waqf from the obligation to pay Zakat encourages the people to make it. Also, it shows flexibility in Waqf, an area of law which lacks details in prophetic instructions and is open to scholastic reasoning.

Thirdly, the opinion that state the Waqf is liable to the Zakat or the *wāqif* should pay the Zakat on his property, it can be objected by pointing out that the practice of the Companions, whereas it was not narrated from them they pay the Zakat on the Waqf. This is supported by one of the most important Tradition of ʿUmar who acquired a land at

Khaybar. This Tradition provided the foundation for the main principles of the law of Waqf. This Tradition did not mention any obligation to pay Zakat on the Waqf. Although the Waqf has been dedicated to specific beneficiaries.

By applying these jurisprudential rulings on the Waqf company, the researcher asserts that Zakat is not applicable upon the Waqf company regardless of the fact that it reached or did not reach the *niṣāb*.

Conclusion

The concept of a Waqf company is something new to Islamic law. It is an idea developed by modern Muslims scholars in the hope of restarting a once vital funding institution of an Islamic society. Like with all new ideas it faces challenges to conform to the Sharīʿah. The structures and multiple types of companies meant that modern Muslim scholars sought identify the problems with the structure of these companies and how an Islamic solution to the issues raised can be found. In general, there were two approaches. One was a rather liberal approach to adopt any form of companies as a Waqf company, regardless of problems or issues of conformity with Islamic law. Their approach was to allow any type of company/ies without any careful considerations. The other approach was a cautious one. The latter group was the subject of scrutiny and discussion in this chapter in order to identify which company formation or structure best suits the Waqf company model. Modern scholars differed on some issues are agreed and others. Their endeavor was twofold: firstly, to adapt the company structure so that it conforms to the Sharīʿah; and secondly ensure that the company structure conforms to the civil law of that country. Priority was given to the company conforming to the Sharīʿah and at times dispensations

were sought to adapt it to civil law. The approach modern scholars took to dealing with these challenges were to try and justify the opinions by proving its concordance with the opinions of the classical scholars. This meant that one single School of jurisprudence was not enough to solve the challenges of modern times. Rather, the opinion of multiple scholars and Schools were sometimes required to justify the opinion. There are some cases were all the schools had to be abandoned and independent *Ijtihād* had to be made in order to come to solution.

Further to this, this chapter dealt with the issues and challenges faced by the Waqf company. Despite the influential role of Waqf and Waqf companies in the socioeconomic prosperity of Muslim communities, these challenges hinder the prospects of the Waqf companies. In this chapter, I have tried to discuss these issues and give a solution in order to mitigate the challenges faced by the Waqf companies keeping in view the purview of Sharīʿah**.**

Regarding the memorandum of association, it is drawn up by the partners' agreement. By virtue of this agreement, approval is issued for the establishment of the company and the statute is approved by the General Assembly of the joint stock company**.** The Waqf constitution is comprised of stipulations regarding creation of the waqf; administration of the Waqf, development, investment, the appointment of a *nāẓir* , the manner for transferring the responsibilities from the *nāẓir* to others, the designation of beneficiaries and the distribution of the Waqf and so on. The Waqf deed is the law that is the Memorandum of Association or the company's statute, therefore no contract or regulation can be made that contravenes it. When the Waqf company is established and it acquires ownership of multiple Waqf assets as its capital like shares and cash, it seems plausible to formulate an ample and inclusive Waqf deed that would include new assets and would present a new model of waqf deed. It should contain memorandum of association, company's statute of Waqf and define the terms of functions between all parties to the Waqf company i.e. executive management, board of trustees and general assembly. Thus, it regulates the relationship between different elements of resources. Therefore, there is no

dissociation between the memorandums of association in the Waqf company from the Waqf deed

.

Regarding borrowing for the Waqf company, the Researcher is of the view that a Waqf company can borrow from other entities if it is not possible to fulfil the need through Waqf's proceeds and there is no option of raising funds through issuance of new shares while the Waqf is facing loss and the value of shares is so declined that it is not possible to raise enough money through issuing new shares.

As far as lending from the Waqf company is concerned the fundamental rule is that lending the shares of the Waqf joint of stock company is not permissible when there is no benefit or necessity of lending. This goes against the principle of the law of Waqf which requires the subject of the Waqf to be permanent. In addition, the kind of lending that is prevalent in the market is akin to the short sales while short sales where a person sells a commodity without fully acquiring the ownership is not permissible in Sharīʿah.

As for the mortgaging, the researcher is of the view that in principle it is not permissible to mortgage the shares of the Waqf company or its profits. The reason for this is that the mortgage of the shares leads to the disruption of the shares in the Waqf company on one hand. On the other hand, mortgaging the dividends of the shares is not permissible. The reason is that the shareholder who is the owner for this share is the current debtor and not the company. Which means the debt is on the *wāqif* and not upon the Waqf itself. In this way, mortgage can be risky for the property of waqf. However, it can be an exception to the general rule. There can be temporary Waqf shares for this purpose. Mortgaging the temporary Waqf shares would be permissible**.** Trading of shares in stock market some are tradeable, and some are not depending upon the nature of the Waqf**.**

Another important issue that is discussed in the chapter is regarding the personality of Waqf company. I have concluded that Nyazee's opinion is more appropriate to adopt as he suggested a middle way. He suggested that it is possible through the ruler to assign a limited *al-dhimmah* to a non-human body, according to certain terms. These terms include that no religious duties are expected to be performed by a fictitious person. However, *ʿaql* in some

form must be related to the fictitious person. It may be a single person or a group of persons, such as a board of directors. Third, property held by the fictitious person must be held in dual ownership, even though it will be held in its name, on behalf of the members of the fictitious person, because of *khalṭ* (the amalgamation of capital). Subject to the permission granted by its members, the corporate body may have total rights of disposal and transaction of the property. There is a need for some adaption of the company's obligations, board of directors and the members who comprise the *ʿaql*, in order to meet common law doctrine There should be dual ownership and liability in Sharīʿah corporations, to avoid recourse to independent legal entities, because an artificial person cannot in effect own and manage properties, nor be arrested or held responsible for the default of third parties.

The matter of *Istibdāl* is critical to the Waqf company's continuity and long-term profitability. The *Istibdāl* in the Waqf company is to sell shares in the Waqf company in exchange for other shares in the Waqf company. The establishment of *Istibdāl* in a Waqf company can be permitted if it is for the good of the Waqf and its beneficiaries, as well as in the public interest.

Regarding the matter of Zakat, I am of the view the ruling of Zakat is not applicable upon the Waqf company regardless of the fact that it reached or did not reach the *niṣāb*. This chapter shows the dynamic nature of Muslim scholars to find solutions to problems and confront challenges. It is with the attitude and endevour to find solutions to problems Muslim scholars have produced such outcomes.

Chapter Six

The Waqf Companies in Saudi Arabian Civil Law

Introduction

Sharīʿah is engraved in the very fabric of Saudi society. The foundation of Islam was laid well over fourteen hundred years ago in Saudi Arabia. Burton remarks that the characteristic of generosity was well established in the Arabs even before the advent of Islam (Burton. 1990, p. 145) Islam channelled it in more sophisticated fashion.[312] Mandatory *ṣadaqah* and voluntary *ṣadaqah* were highly encouraged. Some rules were fixed and rest were left flexible (Al-Jazīrī , 2000, p.156).[313] Waqf was one of the means of voluntary *ṣadaqah* encouraged by Sharīʿah. Initially it was in simple form. It changed into many shapes with the passage of time. Consequently, many different entities were formed through Waqf (Sabit and others, 2005, p.14). Al-Maymān point out that the experts of Sharīʿah, classical and contemporary, wrote a lot about it providing plenty of detailed rules and regulations. While the classical jurists focused on developing Waqf rules based on what they could deduce from the Hadith, the contribution of the contemporary scholars was to expand on the classical work and make it relevant to modern times (Al-Maymān, 2009, p.14). Waqf has always existed in Arabia from the time of the Prophet Muhammad and his Companions to modern times (Al-Salwūmi,2013, p.4). Therefore, Waqf is a very important part of the religious philanthropic nature of the Saudi people. It played very important role in the socio-economic conditions of Saudi

[312] The aim of this comment is sought to relate it to the culture of charity.

[313] *ṣadaqah* is of two types; i.e. obligatory or mandatory such as zakat (quasi-tax on wealth) and non-obligatory or voluntary *sadaqah*. The non-obligatory *ṣadaqah can* be further sub-divided to two types; i.e. absolute or non-absolute (Abdullah, 2017, p. 47). If it is non-absolute, *ṣadaqah* has three types: (a) it entitles the beneficiaries to benefit from the usufruct only e.g. *manfaʿ* (gift of usufruct); or (b) ownership is transferred to the beneficiary on the condition of its equivalent repayment; or (c) ownership is suspended with the recurring benefits being allocated to the chosen beneficiaries. The latter form is the same as the waqf (Ibid). The actual difference between a deed of waqf and an absolute *ṣadaqah* can be seen by looking at technical and legal details. In absolute *ṣadaqah*, complete ownership is transferred, while waqf permits the beneficiary to enjoy its benefits only (Al-Shaybānī, 1997, vol. 5 pp. 249-283; al-Shāfiʿī, 1993, vol. 4, p. 129). Thus, waqf covers both poor and rich people in terms of bestowing benefits, but absolute ṣadaqah is limited in its scope, being able to benefit only poor people, or to be used for pious reasons (Al-Shaybānī, 1997, p. 263). Regardless of which form they take, all of the above are good deeds that Muslims are encouraged to carry out – the Prophet said: 'Give presents to each other for the increase of your love' (Al-Bayhaqī, 2001, vol. 6, p. 169).

society. Since 2008 there has been a shift in the trend of Waqf from the traditional form of waqf to a modern form intended to be more productive and more beneficial. This new form of Waqf is known as Waqf companies. At present, the Waqf companies are in operation in Saudi Arabia. It is operated through huge companies and as well as through the traditional set-up of Waqf. This chapter will look at the contemporary forms of Waqf in Saudi Arabia and the legal system which supports it. Al-Jabr observes that there is a consensus among Saudi legal experts that the Waqf or non-profit organisation fall under the classification under civil law (Al-Jabr, 1996, p. 201).[314] Obviously, as we will see the provisions of the Saudi Civil Law did not address the Waqf company in detail, and therefore other parts of Islamic law will be resorted to. This is based on the general principle among Saudi legal experts asserts that in the light of absence of civil law provisions on any cases, it would need to resort to use the rules and principles of Islamic law to fill this gap (Al-Marzwūqi, 2014, p165; Al-Jabr, 1996, p. 120). Therefore, this chapter will present the scholarly debate amongst Saudi scholars regarding the Waqfs companies, legal system of Saudi Arabia is explicated. It is later followed by the contemporary situation of Waqf in Saudi Arabia.

[314] Alanzi found out that there are some opinions that claim that the Kingdom of Saudi Arabia has not been affected by any of the Western legal principles, whether in its legislation or regulations since its establishment until the present time. (Alanzi, 2020, p.5). However, following the fall of the Ottoman Empire and the establishment of the Kingdom, Baamir (2008) claims that the West had a significant influence on Saudi law. He claims that during France's rule of Egypt and other Arab countries in the 18th and 19th centuries, the French legal system was forced on them, resulting in their colleges studying French law rather than their own law. The result was a duality of law within the Kingdom for those young Saudi legal scholars who got their instruction in nations such as Egypt, Lebanon, and France. Furthermore, many of the Saudi Kings' advisers were Egyptians or Syrians by birth, background, or education, and their nations were heavily impacted by the French legal system. The Egyptian laws, which are verbatim translations of French laws, were introduced by those consultants. All of this legislation, however, must not clash with Islamic law principles in order to be accepted in Saudi Arabia (cited by Alanzi, 2020, p.3). A good example of this can be found in 1930s, in the laws passed by the Council of Deputies (1932) and the Council of Ministers (1933) specialised courts have implemented new laws, the majority of which are based on Western legal principles such as the Saudi Companies Law, issued by Royal Decree No. (M/6) dated July 20, 1965. This law was based on the Egyptian company law, which was derived from the French company law (1953). Some religious jurists have, on the other hand, fought against the application of these human-made regulations. As a result, the Sharīʿah courts and the Commercial Court Regulation rejected to apply these laws (Vogel, 1999, cited by Alanzi, 2020, p.3). Nevertheless, some scholars argues that there is no objection to adopting these laws and apply them as long as they do not conflict with Islamic law (Al-Marzwūqi, 2014, p167). For example, traffic law, visa laws, work permits, building regulations and the like, all of which have been made into ‘law’ by man and not based on Qur’anic or Sunnah precepts. These types of laws are considered Sharīʿah in so much as it falls under a category of law known as *al-siyāsah al-sharʿiyyah*. These are rules implemented by the ruler for the best interest of people and governance. These laws must be in the spirit of being to protect people from harm and bring about the best benefit for them.

An Overview of Saudi Arabian Legal System

The discussions about law, legal systems and sub-divisions of law are contentious amongst contemporary Muslim scholars.[315] Modernity, nation statehood, colonisation and similar phenomena have influenced this debate.[316] Some scholars like ʿAbd al-Wahhāb Khallāf, Abū Zahra have attempted to divide Sharīʿah into sub-divisions in order to mirror western laws and legal systems (Khallāf, 2002, pp. 32-33).[317] However, Saudi scholars like Ibn Bāz, IbnʿUthaymeen and Ibn Jibrīn have resisted this and insisted that Sharīʿah is one law and includes everything and there is no need to divide it into parts (Al-Marzwūqi, 2014, p.37). However, it should be noted that since 1980 there has been some change in attitude towards this and for the sake of practicality divisions of Sharīʿah has been made, although it is not as suggested by the aforementioned scholars (Alanzi, 2020, p.2). Rather, the sub-categorisations is superficial for the sake of practicality, and in reality it is considered to be one law and that is the Sharīʿah law.

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[315] It is important to remember that the Islamic philosophy does not necessarily bind by Muslim scholars' views *(fatāwā*) on all topics related to exclusively religious deeds and viewpoints as law (Kabanni, 2017). Nevertheless, if the views are connected to transactions or laws enacted by the government, they become statutory. As a result, the fatwa can take numerous forms of its own by spanning a wide range of scenarios, whereas a judge's ruling establishes his or her authority in each individual case (Vogel, 1999; Alanzi, 2020, p.6).

[316] Although the Saudi legal system is founded on Islam law, that is implemented in its full in family law (child custody, inheritance, covering marriage and divorce), business, trade, and investment regulations have taken a dissimilar route. These regulations, in contrast to the former, were formed separately of Sharīʿah, but do not violate with any of Islam's concepts or principles. Western-style law, particularly French law, had a big effect on the development of Saudi commercial law. The appropriate secular regulations were frequently modelled after Egyptian law, which is founded on French law (Al Sewilem, 2012, p.121). According to Alshowish viewpoint, adopting laws from other jurisdictions or employing western economic concepts to regulate various business and any others activities in such a way that these regulations do not conflict Sharīʿah principles, it might be a time-saving shortcut in the high-speed race to investment and financing. This method has the potential to fill the gap between current business situations and the ability to cope with new notions. Given that globalisation has reduced the globe to the size of a tiny hamlet, it is necessary to stay current with new concepts and commercial transactions (Alshowish, 2016, 205).

[317] Alhowaimil point out that “Due to the specialist nature of Islamic jurisprudence and the complexity often associated with the in-depth analysis, Islamic jurisprudence of this nature has been split into multiple different fields, with experts specialising in one area. These fields include economic, political, criminal, theological, marital and etiquettical.” (Alhowaimil, 2013, p.57).

Saudi Arabia has a fairly sophisticated legal system that combines Islamic law rules with modern civil law. When there is any absence of legal texts which was issued by legislative bodies, then the courts will apply the Islamic law to resolve the issues before it.[318] As a result, Islamic law is a primary source for filling legal loopholes[319] and interpreting the rules (Alanzi, 2020, p.2). Its unique history, culture and politics have given it a distinctive character. Unlike secular legal systems, religion and law are not dealt separately in Saudi system. Its unique history, culture and politics have given it a distinctive character. Unlike secular legal systems, religion and law are not dealt separately in Saudi system. Sharīʿah

[318] Saudi leaders recognised early on in the Kingdom's history that law is an inescapable requirement for a civilised society and its people to thrive (Vogel, 1999, cited by: Alanzi, 2020, p.3). Therefore, the King Abdul Aziz who reigned from 1932 to 1953, was the first to introduce modern legislation into Saudi Arabia (Al Sewilem, 2012, p.110). It is worth noting that the king Abdul Aziz succeeded in dealing with a concern from some Muslim scholars at that time by creating a positive balance by borrowed some of these Western laws to the extent that it does not conflict with Sharīʿah. This was done by relying on the *Ḥanbalī* school of thought who is one of the most liberal in term of contractual responsibilities and the freedom of a person to establish contracts which adds to the ease with which the monarch has issued Royal Decrees on commercial law and others. This is based on largely owing to the opinion of *Ḥanbalī* scholar Ibn Taymiyyah, who said that contracting is valid until the Qur'an or the sunnah expressly ban it (Al Sewilem, 2012, p.105).
Therefore, adopting some of the positive laws has clearly been a strategy utilised by Saudi Arabian lawmakers, either from Western law, such as French or English law, or from nearbyArab nations with highly developed law systems, such as Egypt (Puig, Gonzalo Villalta, and Bader Al-Haddab, 2013, p.123; Alshowish, 2016, p.221). The question here is whether these laws and legal systems are really in compliance with Islamic law rules,, which are considered to be the supreme law of the Kingdom of Saudi Arabia. Consequently, the most remarkable question still is 'to what extent does Islamic law accept new ideas and adapt to them.
It is critical to respond to the question of Sharīʿah coverage, or, in other words, what areas of life can be covered through Sharīʿah. The significance of this question in this context is to comprehend the origins of Islamic law on the one hand, and Sharīʿah ability for modernization on the other. As a result, the most important question is: to what extent is Islamic law capable of absorbing new ideas?
First and foremost, Islamic law, in Foster's viewpoint, has a broader scope than Western legal systems. Islamic law encompasses all parts of life, from religion, morals, and ethics, to government, business, and the law. Islamic law offers a person with a full way of living (Foster, 2006, p.384; Alshowish, 2016, p.140). There are numerous texts from the Qur'an and Sunnah (prophetic sayings) that organise various elements of life, and the longest verse in the Qur'an is verse 282 from surat Albaqarah, which deals with trading. This verse governs the parties' debt-for-a-set-period contract, as well as the registration and some exclusions (Alshowish, 2016, p.140). The *Fiqh*, which uses the primary and secondary sources of Islamic law from the 14th century, including the principles Ijtihād, is the way for Sharīʿah to adapt and keeps up with this quickly changing modern world in all parts of life (Ali,2010, p.121; Alshowish, 2016, p.141).
To sum up, this previous comment has shown that, the Islamic law might be considered as Saudi Arabia's national law, taking into mind the capacity and adaptability of *'fiqh'* (Islamic jurisprudence) to adapt new rules and regulations as long as that do not conflict Sharīʿah principles.

[319] **loophole**: "to supply land with water so that crops and plants will grow". See the official website of the Cambridge dictionary, available at:
https://dictionary.cambridge.org/dictionary/english/loophole?q=loopholes,
accessed: 4/5/2021

encapsulates both religion and legal codes. Therefore, it has been suggested that the word Sharīʿah is more appropriate to describe Saudi law than the word *qānūn'* (law). The latter has secular connotations that excludes religion altogether and only includes manmade laws (Puig and others, 2013, p.123). A number of scholars[320] use the word '*niẓām'* instead of '*qānūn'* to connote 'law' too. Therefore, it is argued that using the term 'law', itself, may not be appropriate when discussing Saudi Arabia and the Sharīʿah due to the underlying intricacies and sensitivities of the jurists and the local population (Koraytem, 2000, p.63). There is a scholarly view that only Allah has the right to legislate and no one else has the right to make laws and this is a belief held by the vast majority of Saudis and therefore the word *qānūn* is not used in Saudi Arabia (Hanson, 1987, p.289). It should be noted here that there are elements of man-made-laws in Saudi Arabia.[321] For example, traffic law, visa laws, work permits, building regulations and the like, all of which have been made into 'law' by man and not based on Qur'anic or Sunnah precepts. These types of laws are considered Sharīʿah in so much as it falls under a category of law known as *al-siyāsah al-sharʿiyyah.*[322] These are rules implemented by the ruler for the best interest of people and

[320] For example, al-Bassām, al-Ṭarīqī,Ibn Jibrīn, al-Jabr, Ibn Bāz, Ibnʿ Uthaymeen and others (Al-Jabr, 1996, p. 24).

[321] According to George Sfeir, who observed, "Justified by the demands of changing economic conditions and expanding business relations, these statutory enactments have succeeded in supplementing a substantial segment of the traditional legal structure without, however, abrogating any of the Sharīʿah rules." (Sfeir, 1988, p.729). As a result, a temporally legal system has emerged, which is autonomous but not totally independent of the Sharīʿah (Al Sewilem, 2012, p.105). So, as previously stated, the Islamic law pervades the Basic Law in every way, both openly and implicitly. Therefore, the Saudi legal system has been considered a dual system (Al Sewilem, 2012, p.83).
This can be illustrated briefly by Vogel who observed: In Saudi Arabian law, there is a duality, he provided a fair account of the duality: Other than Saudi Arabia, most Islamic states have a split legal system, with one portion based on man-made, positive law (*al-Qānūn al-Waḍaʿī*) and the other on Islamic law. The first is usually in the form of extensive codes comparable to those used in European civil law systems, while the second is usually in the form of Islamic law, which is also codified. The common law system offers the fundamental or residual law, whereas Islamic law is unique, additional, and limited in scope. The bodies that apply the law, such as positive law tribunals and religious law courts, are divided in a similar way. Saudi Arabia has a dual legal system as well, however the responsibilities of the two parties are reversed. The main feature of positive law is secondary in terms of constitutionality and scope, while the Islamic component of the legal system is considered essentially and dominant (Vogel, 1997, pp.275-276; Al Sewilem, 2012, p.106). Al Sewilem showed that this interpretation gives a clear understanding of duality as "the conceptual division of something into two opposed or contrasted elements", as well as the emphasis that duality of a legal system refers to the "existence of such opposing and contrasting aspects, norms, principles, and substantive laws within the same legal system." (Al Sewilem, 2012, p.106).

[322] According to a definition provided by Abd al-Wahhāb al-Khallāf (1977, p.4), *al-siyāsah al-sharʿiyyah* is "a flexibility in judgment given to a person in authority to take action based on the needs of the community (ummah), as long as it is not against any principle of Sharīʿah". (Cited by Lukman Thaib and others, 2014, p.2761). While for Lukman Thaib and others *al-siyāsah al-sharʿiyyah* refers to "knowledge of Islamic

governance. These laws must be in the spirit of being to protect people from harm and bring about the best benefit for them.[323]

Despite these arguments, the researcher believes that there is no issue in using either of the two terms i.e. '*niẓām'* or *qānūn* as both of them lead to one meaning, that is the legal system. There is no harm in employing these terms interchangeably unless Sharīʿah is infringed as a basic framework. In Islamic history we can see that some Muslim jurists such as Ibn Taymiyyah, Ibn Qayyim, Ibn Rajab and Ibn Ḥajar and others[324], used the word *qānūn* (law) to mean the legal system that is derived from the religious teaching of Islam (Muḥammad ʿAbd al-Jawād, 1998, p.38; Al-Marzwūqi, 2014, p.25). Another difference regarding legal system of Saudi Arabia and other countries is the separation of public law and private laws. Moreover, in most of the countries, Waqf or non-profit organisation are dealt by civil law.[325] But no such distinctions are present in Islamic legal traditions (Asasriwarnia and others, 2018, p. 3; Al-Qahtani, 2018, p. 352).

The traditional Saudi view is that the laws in Islam depend on the subject of the law and that can be divided into two types. If the laws are related to the worship man does for Allah, then it is devotional acts (*ibādāt*) which refers to an individual's relationship with Allah. The second type is laws which refer to human dealings with each other; this is known as (*muʿāmalāt*) (Ibid). Sharī'ah, on the other hand, according scholars such as ʿAbd al-Wahhāb Khallāf (2000, pp.32-33), includes: (1) family law (*Aḥkām al-aḥwāl al-shakhṣiyyah)*; (2) civil law (*Aḥkām al-madaniyyah*) (3) criminal law (*Aḥkām al-jināiyyah*)

states or countries that specifically discusses details the systems of governance, with the view to better mankind and avoid various harms that may arise in the community or nation" (Lukman Thaib and others, 2014, p.2761).

[323] The scope of *al-Siyāsah al-Sharʿiyyah* according toʿAbd al-Wahhāb al- Khallāf is the studying of different laws and legislations required to suitably regulate in a state, in order to benefit the people and to assist in the fulfilment of diverse community needs that in accordance with the Sharīʿah (ʿAbd al-Wahhāb al- Khallāf, 1977, p.4). On the other hand,ʿAbd al-Wahhāb al-Khallāf concludes that the fundamental goal of studying *al-Siyāsah al-Sharʿiyyah* is to learn how to form a national organisation to show that Islam is a just political system that aims to help humanity (ʿAbd al-Wahhāb al- Khallāf, 1977, p.5). Therefore, understanding of *al-Siyāsah al-Sharʿiyyah* gives insight into life's dynamic and how Muslims' demands might be lawfully addressed.

[324] These are a group of the great scholars of Islam who lived in the seventh century AH corresponding to the thirteenth century AD. They have many contributions from books on jurisprudence, hadiths, interpretation, history, and in a large number of Islamic studies.

[325] **Civil law** "is the part of the legal system that deals with people's relationships, property, and business agreements, rather than with criminal activity" See the Official Website of Cambridge Dictionary, available at: https://dictionary.cambridge.org/dictionary/english/civil-law, accessed: 1/2/2021].

(4) Procedural law (*Aḥkām al-murāfaʿāt*) (5) constitutional law (*Aḥkām al-dustūriyyah*) (6) International law (Aḥkām al-duwaliyyah) and (7) Economic and monetary law (*Aḥkām al-iqtiṣādiyyah wa-al-māliyyah*). Al Sewilem showed that the western legal traditions would tend to split economic and monetary law into a public and private provision, but no such distinction exists in Islamic law. In Islamic law, the private/public provisions are instead considered interrelated and complementary (Al Sewilem, 2012, p.107).

The corpus of both traditions is therefore similar in that they cover what we would call civil law. Both legal traditions make inter-human transactions and human-state interactions subject to the regulation of the law. Thus, systems of 'civil codes'[326] or conceptions of civil law can exist under a framework of Islamic law. The marked difference comes with the extra layer of interactions between humans and Allah within the Islamic paradigm. It is because of this view of law that differences in the particular arrangements and categorisations of law arise (Asasriwarnia and others, 2018, p.8).[327] On the other hand, Saudi law is based on a merging of Islamic rules and contemporary civil law. The Islamic law is based on real Godly teachings that are adaptable to changing circumstances, expanding, and open to change and implementation at any time and in any environment (Alanzi, 2020, p.3). However, the country's lawful system is evolving into a more modern one. A good example of this can be found in practically, the law that is related generally to aspects of human life with each other is regulated by law, it has been known as an Islamic civil law as long as it based on the Islamic law (Al-Marzwūqi, 2014, p.67).

[326] **Code**: "a set of rules or laws ". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/code?q=codes,
accessed: 4/5/2021.

[327] Besides that, *al-Siyāsah al-Sharʿiyyah* recognises the importance of human thinking by creating the rule that every thinking has to be observed if it does not conflict divine precepts and is generally recognised or practiced within a society. Allah has commanded this obligation in the Qur'an "O you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and best in result." (Qur'an,4: 59). (Lukman Thaib and others, 2014, p.2761). It is worth mentioning in this context that any of man-made-laws can have Islamic values or be classified as *al-Siyāsah al-Sharʿiyyah* if it fits the following six conditions: - 1: These principles should be in accordance with the Islamic law. 2: equality and fairness is preserved. 3: It does not overburden the society. 4: It supports justice. 5: It can promote development and preventing damage. 6: It is formed by consensus (Lukman Thaib and others, 2014, p.2761).

Position of the Islamic Law in Saudi Arabia

The Saudi Arabia, as an Islamic state, uses the Qur'an and Hadith as essential sources of its legal system, and *fiqh* as well is drawn from these fundamental sources to address modern-day problems. Furthermore, these sources are considered as the basis codes of Saudi civil law. Where civil law provisions are allowing various phrases and rules of law to be established as needed and to benefit the people as long as the principles of Islamic law will be always respected in all developments period (Alanzi, 2020, p.4). Therefore, it is an ideal example to see how the adoption and application of Sharīʿah is practically done. The courts enforce laws passed by the government, who is, generally[328] bound by the legal limits of the Sharīʿah when making its laws. The underlying principle behind the law is that the underlying principle behind the law is that" the courts in the issues that are presented before them, it will follow the Shariah laws in line with what is stated in the Qur'an and the Sunnah, as well as the legislations decreed[329] by ruler that do not conflict the Qur'an or the Sunnah.". As all laws in Saudi Arabia are based on Islamic *fiqh*, therefore, it is not necessary for the legal profession in the country to be well acquainted with common law precedent or civil codes. Instead, those in the legal profession[330] conduct investigation into the views of experts on the application and interpretation of Islamic law known to *fuqāha* (jurists) (Al-Jabr, 1996, p. 34).

The Foundation of Saudi Arabia Legal System: Non-Separation of Law and Sharīʿah

The separation of legal institutions and religion, as seen in Western countries, is not something that is found in Saudi Arabia. *Imām* Muḥammad ibn ʿAbd al-Wahhāb (who was an Islamic religious scholar) and *Imām* Muḥammad ibn Sauʿd (the founder of Saudi the State) aimed to create a new political entity in the mid-1700s that was devoted to spread

[328]This is because of the Saudi Arabia's global role there are a few aspects of laws and government which dispute the Sharīʿah. The government ignores this in order to satisfy the need for it to play a global role in trade and other sectors. However, the vast majority of Saudi Arabian law is Sharīʿah compliant, based largely on *Ḥanbalī* jurisprudence (Al-Hesain, 2017, p.10).

[329] **Statutes decreed**: "An authoritative order having the force of law". see the official website of the free dictionary, available at: https://www.thefreedictionary.com/decreed, accessed: 4/5/2021.

[330] **Legal profession**: "the body of individuals qualified to practice law in a particular jurisdiction". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/legal+profession, accessed: 4/5/2021.

the message of the Qur'an (Karl, 1991, p.22).[331] The aim to continue this movement forms the foundation of the government of Saudi Arabia, as well as the basis for much of their support (Al-Jabr, 1996, p. 10).

King Abdul Aziz ibn Saud, who was the founder of the Kingdom of Saudi Arabia in 1902, held on to the religious doctrines of his predecessors[332] of adhering to the teachings of the Qur'an and Sunnah of the Prophet Muhammad (Karl, 1991, p.22). Therefore, the foundational principle upon which the Saudi legal system is based is the protection and upholding of the rule of Islam (Koraytem, 2000, pp. 63-69). Seaman (1979, p.413) mentioned, "The Kingdom of Saudi Arabia is distinguished from other Islamic countries by the continuing, strong influence of its special heritage that based on Islamic law, which provides insight into the evolution of the current legal and political structure". This principle is apparent throughout the Basic Law of Governance of the Kingdom. The government holds Islam as its religion and uses it as a framework to outline the Islamic

[331] *Muḥammad ibn ʿAbd al-Wahhāb al-Tamīmī* (1703-1792), he was an Islamic scholar, activist, reformer, theologian and religious leader from *Najd* in central Arabia, and is regarded as the movement's eponymous founder. David observes that "*Muḥammad ibn ʿAbd al-Wahhā* and his followers believe that they have a religious obligation to spread the call (in Arabic, da'wa) for a restoration of pure monotheistic worship." (David, 2006, p.8). *Imām Muḥammad ibn Sauʿd* (1687–1765), he was the founder of first Saudi the State. Between 1727 through 1765, he was in power (Ibid). In the early 1740s there was an agreement between *Muḥammad ibn ʿAbd al-Wahhāb* and *Imām Muḥammad ibn Sauʿd,* that resulted in the first Saudi State (1744-1818) was created. So, in general speaking, the historic agreement between *Imām Muḥammad ibn Sauʿd and Muḥammad ibn ʿAbd al-Wahhāb*, the founders of the first Saudi kingdom, might be considered as the foundation of the agreement to have Sharīʿah as the state's law and forming the legal framework of the first Saudi state (Alshowish, 2016, p.205). This idea has maintained throughout the period of the second Saudi state and keep continues to apply to the modern Saudi Arabia. Furthermore, the family of the first Saudi State's founder continues to rule the monarchy, while *Muḥammad ibn ʿAbd al-Wahhāb* dynasty continues to oversee the Islamic institution (Ibid; Al Sewilem, 2012, p.107).

On the other hand, it is true that Islam as a religion and Islamic law originated on the Arabian Peninsula many centuries before any of the present gulf countries, included Saudi Arabia, existed. This, however, might be questioned, since some argue that Sharīʿah missed its authority in several regions of the Muslim world over particular time in history, particularly the Arabian Peninsula, before *Muḥammad ibn ʿAbd al-Wahhāb* (Stoddard, 1921, p.22; Alshowish, 2016, p.142). Furthermore, some writers have referred to *Muḥammad ibn ʿAbd al-Wahhāb* as a "reformer." (Stoddard, 1991, p.22; Alshowish, 2016, p.204). According to Lothrop Stoddard, the Muslim world reached its lowest point of decrepitude in the eighteenth century, which was followed by *Muḥammad ibn ʿAbd al-Wahhāb* movement, which may be considered as the start of a great revival (Ibid).

[332] According to many historians, this new country, dubbed 'KSA,' may actually be the third Saudi state. The Ottoman Empire destroyed the first Saudi nation, which ruled from 1744 to 1818. The second nation started around 1824 and lasted until the last decade of the nineteenth century, when King Abdulaziz's father was forced to relocate with his family to Kuwait in the range of 1891 and 1892 (Alshowish, 2016, p.14).

guiding principles for legislation.[333] Saudi law states that it uses the Qur'an and Sunnah as its constitution and aims to act in accordance with them employing the principles of *shūrā* (consultation), justice, and equality (Basic Law of Governance, Article 1). The state aims to implement the Sharīʿah, whilst encouraging good actions, shunning evil actions, and fulfilling their responsibilities to call towards Allah (Basic Law of Governance, Articles 7-8). Saudi law also states that the courts must act in accordance with the Sharīʿah primarily, and secondarily with the relevant Royal Decrees[334], (Basic Law of Governance, Article 23). Islam is also established as being the authority within the country and it commands that its citizens pay allegiance to the monarch, so as not to contradict the injunctions of the Qur'an and Sunnah (Basic Law of Governance, Article 67).

Saudi Arabia's legal relationships are governed by religion or by what we may call the 'rule of traditional law'[335] (Mattei, 1997, p. 45). This is a fundamental expectation for Muslims to observe, because Allah clearly states in the Qur'an, "Verily, this is my way leading straight: follow it" (Qur'an, 6:153). Hallaq rightly noted that, 'While it is true that the Qur'an is primarily a book of religious and moral prescriptions, there is no doubt that it encompasses pieces of legislation' (Hallaq, 1997, p. 3).[336] Islam provides guidance in all spheres of life and it has strict commandments regarding public conduct (Ibid). Thus, Islam is not just a state-endorsed religion in Saudi Arabia. Indeed, it is a religion which affects all aspects of life; its effects can be seen in every side of human behaviours.[337]

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[333] Basic Law of Governance issued by Royal Decree No. A/90, dated 27/8/1412 AH (1 March 1992).

[334] **Royal Decrees**: "an order given by a king or queen". See the official website of the Merriam-Webster dictionary, available at: https://www.merriam-webster.com/dictionary/royal%20decree, accessed: 4/5/2021.

[335] The term '**traditional law'** is used by Black's Law Dictionary (2004) to refer to "customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws". See, Garner, Bryan A. "Black's Law Dictionary 7th Edition." St. Paul, MN: West Group (2004).

[336] Moral prescriptions are linked with human behaviors and morality, particularly the distinction between good and evil or right and wrong behaviors. For an example, the Qur'an states sincerity and good intentions while outlawing fraud and deception. On the other hand, the term legislation in Islam refers to obligations which includes that a person is owed to Allah such as: religious practices and those that the person is owed to other human beings such as: personal and social issues, or transactions (Hallaq, 1997, p. 6).

[337]This idea is firmly established in the Basic Law of Governance, which recognises Islam as the Kingdom's religion and establishes Islam's all-encompassing position in the legal Saudi systems. A good example of this can be found in the Basic Law of Governance that has clarified the Saudi constitution is the Qur'an and the Sunnah, and the government draws its power from the Holy Qur'an and the Prophet's tradition, and based its acts on the principles of justice, consultation and equality in line with the Islamic

Jurisprudence in Islamic law has a greater breadth than jurisprudence in Western systems. Religious matters, such as prayer, fasting, and Zakat, are discussed as serious legal matters in the Kingdom as they based on careful Islamic understanding; they are not secondary issues.[338] Thus, it is the Sharīʿah that governs the life of Saudi society (Tibi, 1991, p. 19).

A brief illustration of related authorities that contribute to the formation of Saudi Arabia's legal and regulatory framework

Legislation in the KSA must not conflict with the Public Policy and the Constitution provided by Sharīʿah. In order to ensure this, a specific process must be followed when legislation is to be passed.[339] This procedure is briefly mentioned as follows:

law. Moreover, the Basic Law states that the state defends Islam, performs the Sharīʿah, and encourages individuals to do good and avoid evil, as well as to fulfil their obligations in response to God's command (Al Sewilem, 2012, pp.87-88). On the other hand, in terms of the Islam effect on Saudi people life behaviors. This can be illustrated briefly by the charity that is deeply ingrained within Saudi culture from religious and social angles. The religious perspective comes from the Islamic injunctions making charity something of a religious duty for Muslims, and the social angle is that of charity long being seen as virtuous, but expected social behavior (Alhidari, 2014, p.29).

[338] The evidence to prove that the Islamic law has a far broader reach in comparison to Western systems of law is that Islamic law directs a person's relationship not just with his or her neighbours and the state, as most other legal systems do, but also with Allah and one's own conscience. A good example of this can be found in daily prayers (*ṣalāt*) almsgiving (*zakāt),* fasting (*ṣawm*), and pilgrimage (*hajj*) and so on, these religious practices are considered an integral part of Islamic law, and they frequently take up in the first chapters in classical jurisprudence literature. The Islamic law is concerned with ethical norms as well as legal regulations, stating not only what a person is legally allowed or obligated to do, but also what someone must to do or avoid from doing in conscience. As a result, some acts are classed as praiseworthy (*mandūb*), meaning that their performance brings divine favor and their omission heavenly disfavor, while others are classified as blameworthy (*makrūh*), implying the inverse. Nonetheless, there is no legal penalty of punishment or reward, nullity or validity in either situation. The Islamic law is therefore more than just a legal system; it is also a complete rule of ethics that encompasses both private and public activity. (Coulson, Noel James and Shamsy, Ahmed El. "Sharīʿah". Encyclopedia Britannica, 24 Jan. 2021, https://www.britannica.com/topic/Shariah. Accessed 25 January 2022.).

[339] In Saudi Arabia there are number of aspects influence and contribute to the Waqf company legislation. The governmental system, for instance, whether democracy or absolute monarchy, will have a significant impact on the environment. On the other hand, while dealing with issues concerning Waqfs and Waqf Company, the legal authorities such as: the Council of Senior Scholars, the Council of Ministers, the Consultative Council (*Majlis Al-Shūrā*) and court system have a direct influence. In addition, the regulatory mechanisms utilised to issue Waqf company laws and deal with other relevant matters, such as Royal orders, Royal decrees, and Subsidiary Regulations, must be considered in this context.

1- The Monarchy System[340] and the Role of The King

To begin with, it is necessary to point out that Islamic political law did not define what exactly the state must do. Rather, the Caliph was given the responsibility of two things: protecting the religion of Islam and managing the affairs of this world (Al-Māwardī, 2008, p. 10). The latter description provides guidelines for Muslim leaders to see what they need to do in order to serve the people the best. Hence, what was not seen as a priority then may be a priority now.

In contrast, in terms of Saudi legal system the Royal Decrees are enacted by the King; hence, he is a vital part of the legal system. Politics and religion are heavily bound together in Saudi Arabia, and this is reflected in the country's laws and legislation (Basic Law of Governance, Article 23).[341]

According to the Saudi Basic Law, the King plays three main roles: the leader of the tribes, a religious leader, and the role of the King itself (prime minister of the state and head of the executive branch of the government). Article 55 of the Basic Law states that 'the King carries out the policy of the nation, a legitimate policy in accordance with the provisions of Islam; the King oversees the implementation of the Sharīʿah, the system of government, the state's general policies, and the protection and defence of the country'. Alhowaimil point out that Islamic law outlines the King's authority and responsibilities

[340] **Monarchy System:** "a form of government in which supreme authority is vested in a single and usually hereditary figure, such as a king, and whose powers can vary from those of an absolute despot or there is no limitation on the monarch's power to those of a figurehead". See the official website of Collins dictionary, available at: https://www.collinsdictionary.com/dictionary/english/monarchy, accessed: 5/5/2021.

[341] In the Kingdom of Saudi Arabia, the Royal Order is classified as the top and strongest regulatory instrument. This is because of a number of issues that related to this regulatory instrument. To begin with, the Royal Order is the King's obvious will, personally and independently, as the head of state, and it is unconstrained by any legal or judicial authority. Furthermore, once published, a Royal Order is deemed effective. In general, a Royal Order is used to enact new laws, such as the Basic Law of Governance of 1992 and the Allegiance Law of 2006 (Alshowish, 2016, p.221).

The king's will can also be shown in the Royal Decree. The Royal Decree, on the other hand, is intended to approve a problem that has been brought to the Council of Ministers and the Consultative Council *Majlis (Al-Shūrā*), and to provide a decision on that matter. A Royal Decree, on the other hand, requires the approval of the Council of Ministers, but a Royal Order does not. Additionally, the Royal Decree might be classified as the second type of Saudi legislation. The justification for this is because the Council of Ministers, as a legislative authority, gains the power of this legal instrument (Alshowish, 2016, p.221). Amin maintains that the Royal Decree might help fill the gap between classic legally, morally notions and Saudi Arabia's contemporary needs more rapidly (Amin, 1985, p.315).

(Alhowaimil, 2013, p.65). Importantly, the King is in charge of the people's needs, and he has full ability to issue of Royal Decrees or approve any law as long as it does not conflict with Islamic law (Ibid).

A deeper insight into the relationship between the King's decrees and Sharīʿah is provided by David J. Karl. Royal Decrees can be issued by the King as a way of complementing Sharīʿah and accounting for modern needs, however the Saudi people view the sacred Sharīʿah as the only true law. In response to this view, regulations are known as 'regulations' or 'statutes' while Sharīʿah is always referred to as 'law'. [342]According to Muslim belief, only Allah can make law; thus, any regulations created by the government can only be effective provided they do not contravene Sharīʿah (Karl, 1991, p.144). Consequently, royal decrees are not formal interpretations of Islamic law, but they will be accepted by the courts if they do not violate with Islamic law principles, based on the idea of *al-siyāsah al-sharʿiyyah.* The Council of Ministers, which reviews rules and subsequently proposes them to the monarch, draughts the king's decrees in effect by seeking the opinion of many experts in various fields, including jurists in Islamic law, [343]to ensure that these laws are suitable with Islamic law rules. The rule becomes legislation once a Royal Decree is issued and published in the *Umm al-Qura* (Official Gazette) (Al Sewilem, 2012, p.107). These types of laws are considered Sharīʿah in so much as it falls under a category of law known as *al-siyāsah al-sharʿiyyah.* These are rules implemented by the ruler for the best interest of people and governance. These laws must be in the spirit of being to protect people from harm and bring about the

[342] Al Sewilem showed that there are a few important differences between law and regulation that can be noted. Firstly, the laws before becoming an official law, it must go through the bill process. The law before coming to the king to be approved, a bill must be prepared, sponsored by a lawmaker, discussed, and passed through both the Council of Ministers and the Consultative Council (*Majlis Al-Shūrā*)- if they are authorised for this action. In contrast, a regulation is written by a government agency, ordinarily to perform a certain legislation, and it does not have to go through the same legislative process as a bill. When it comes to regulations, an agency holds a public hearing and then decides whether to approve, change, or reject the regulation. Secondly, regulations mainly apply to individuals who deal directly with the government agency enforcing them, but laws are rules that apply to anyone equally In other words, a law can rule government agencies and including the two legislative institutions - the Council of Ministers and the Consultative Council (*Majlis Al-Shūrā*) acts, but the government agencies cannot draft regulations that would be enforceable to the legislative institutions (Al Sewilem, 2012, p.107; Alshowish, 2016, p.211).

[343] The Islamic law jurists, without a doubt, play an important role in interpreting the Islamic law texts that Saudi Arabia uses as law and legislation the government's acts. Furthermore, the Islamic law jurists have played a significant part in the effective advancement of the Saudi legal system to a great extent (Alshowish, 2016, p.218).

best benefit for them. However, the doctrine of *al-siyāsah al-sharʿiyyah* states that while the King has the ability to make law, however if there is any conflict between Sharīʿah and the King's law, Sharīʿah will prevail.[344]

2- The Council of Senior Scholars *(Majlis Hayʾah Kibār al-ʿUlamā)*[345]

The Council was last formed at the request of King Abdullah Bin Abdul-Aziz in 2008 during a period of judicial and legislative reform. The Council initially comprised of 21 members of the four Schools of Sunni Islam, known as *madhhab* (pl. *madhāhib*)

[344] Expansion of the main sources of legislation and the addition of another source that parallels Islamic law is a controversial issue in in Saudi Arabia. Where some argue that Islamic law should not be the primary source of law, but rather to be one of several (Al Sewilem, 2012, p.92). Therefore, Islamic law should be codified in Saudi Arabia in order to promote a consistent application of the law (Ibid). Moreover, by adopting civil laws from other countries like Western law, it can be contributed to adherence to economic principles, modernization in laws and response to global pressures (Alshowish, 2016, p.207). However, on the other hand, the concept of codification been refused by the majority of Islamic law scholars in Saudi (Esmaeili, 2009, pp.30-31). This is because of the idea of codification of the law is mainly a Western concept that conflicts with the Qur'an and the sunnah, this is because theoretically it is considered legislative in nature, therefore it will be led to take decision-making authority away from the Islamic law scholars and hence will weaken religious sources of law (Ibid; Al Sewilem, 2012, p.92; Vogel, 2000, pp.338–339). According to Noah Feldman, the transition of the Islamic law from a set of doctrines and principles to be found by the scholars' human efforts to a list of doctrines and rules that could be looked up in a code that has created an alteration in the social meaning to the scholars' function as Keepers of the Law. In the classical era, a person asking the question, (Where is the law?) in the Islamic world could be answered only by an interlocutor's pointing to the scholars and saying, (The Islamic law is with them). ّIn contrast, in the second half of the nineteenth century the Ottoman Empire also issued the *Majalla* (1869–1876), which was a selected compilation of Islamic law principles. Following the *Majalla*, the same question might be answered by pointing to the code itself rather than to those empowered to apply it. As a result, codification signaled the end of the scholars' function as Keepers of the Law. The need to codify obviated the necessity for scholars in the conventional sense. It stripped them of their crucial claim to have the last say on the content of the law (Noah, 2008, pp.63-64; cited by: Al Sewilem, 2012, p.92). Alshowish point out that this experience of codifying Islamic law in some Arabic countries such as: Egypt and Kuwait has led to the adoption of civil codes from other sources, such as Western law, and the application of Islamic law principles to only some areas of law, such as inheritance and family law. Obviously, this implies that Islamic law is no longer the primary source of law, but rather one of many (Alshowish, 2016, p.210).

[345] As al-Atawneh points out "In Saudi Arabia, the Board of the Senior *ʿUlamāʾ,* led by the Grand *Muftī,* constitutes the head of the religious pyramid, providing the ultimate decrees on Sharīʿa. The legal status, composition, functions and even the name of the Board are based on a 1971 Royal Decree. Administratively, it is a State agency called *al-Amāna al-ʿĀmma li-Hayʾat Kibār al-ʿUlamāʾ* (the General Secretariat of BSU), directed by a Secretary-General (Amīn ʿĀmm), who is responsible for its administration. A secretary-general of the Board is to be appointed by the Council of the Ministers to be responsible for the Board's administrative system, as well as for coordinating between the Board and the governmental agencies related to. Ordinarily, members of Board of the Senior *ʿUlamāʾ* must be selected from among the Saudi senior *ʿulamāʾ*. However, with certain provisos and the King's approval, non-Saudi *ʿulamāʾ* can become members." (Al-Atawneh, 2010, 2010).

(Alshowish, 2016, p. 227). The appointment of these members was viewed as a positive move, leading to more flexibility in the Saudi legal system. The Council is regarded as the uppermost religious authority in Saudi Arabia, as well as being the only authority with the power to issue a *fatwa* (religious legal opinion) – this is in accordance with the Royal Order, as outlined in 2010, which sought to restrict the issuing of the fatwa to one specific government authority (The Royal Order No. B/13876 on 12/8/2010) (Ibid).[346] The Council's role is to examine any legislation that may conflict with Sharīʿah, and to come to a formal opinion known as a fatwa. According to Saudi Basic Law, Article 45, the Qur'an and the Sunnah of the Prophet Muhammad should be the primary source for *fatwa* (formal religious legal opinion) in Saudi Arabia.[347] The jurisdiction and hierarchy of both the Department of Religious Research and *Fatwa* and the Board of Senior Scholars *ʿUlamā* are set up by the Law. The job of the Council is also to oversee Islamic studies and research conducted by the Permanent Committee for Islamic Research and Legal Opinion so that it can be endorsed with a *fatwa* if necessary.

3- The Consultative Council (*Majlis Al-Shūrā*)

Along with the King and the Council of Ministers, the Consultative Council is another component of the legislative process.[348] This is outlined in Article 67 of the Basic Law of

[346] That is important to remember that the Islamic philosophy does not necessarily bind by Muslim scholars' views (*fatāwā*) on all topics related to exclusively religious deeds and viewpoints as law (Kabanni, 2017). Nevertheless, if the views are connected to transactions or laws enacted by the government, they become statutory. As a result, the fatwa can take numerous forms of its own by spanning a wide range of scenarios, whereas a judge's ruling establishes his or her authority in each individual case (Vogel, 1999; Alanzi, 2020, p.6).

[347] The *al-ʿUlamā,* without a doubt, play a critical role in interpreting the Islamic law sources that Saudi Arabia uses as law and legitimising the government's acts. Furthermore, the *al-ʿUlamā* have played a significant part in the effective advancement of the Saudi legal system to a great extent (Alshowish, 2016, p.256). According to Almajid, some of the challenges to legislative legislation and regulations posed by 'traditional forces,' including the *al-ʿUlamā,* may be linked to ex ante positions expressed before such laws and proposals were studied (Al-Majed, 2008, pp.235-236). Since a result, the *al-ʿUlamā* engagement in legislative circles is critical, because such participation will resolve the problem of refusal to any of new legal solutions (Ibid).

[348] The authority bodies in Saudi Arabia, such as: the Consultative Council (*Majlis Al-Shūrā*), the Consultative Council and the Bureau of Experts at the Council of Ministries is simply intended to apply, augment, and enforce Islamic law. This authority bodies prepare draught laws and their requisite studies, in coordination with the agency associated with each legislation and for legitimising the government's acts, as well as to ensure that these laws are suitable with Islamic law rules (Alshowish, 2016, p.218).

Governance in Saudi Arabia. The Consultative (*Shūrā*) Council is made up of 150 members, 30 of whom are women who are each appointed a four-year term by the King. According to Article 18 of the *Shūrā* Council Law, 'Laws, international treaties and conventions, and concessions shall be issued and amended by Royal Decrees after review by the *Shūrā* Council'. This means that the Consultative Council is empowered to review all Royal Decree legislation, as well as international treaties and conventions. The Council has further powers to make suggestions about new legislation according to needs of the community (Aleisa, 2016, p.20).

4- The Executive Authority

The Executive Authority[349] is answerable to several bodies, including the Council of Ministers, the King, public agencies[350] and various ministries (Ansary, 2008, p.45). Article 44 of the Basic Law dictates that the King has dominance over executive and legislative authorities. The King also chairs the Council of Ministers, which is responsible for examining modifications in drafts of laws. This body fulfils executive and legislative functions (Ansary, 2008, p.47), and has direct executive authority in the country. The Council of Ministers has a bureau[351] of experts through which legislative powers are exercised; this step is the final stage in the enactment[352] of any legislation. From these descriptions, it becomes clear that the legislature and executive authorities overlap one another in a number of ways. This can result in cases where new types of legislation or those that have not previously been discussed in detail in the Qur'an are unfamiliar to the legislative authority (Al-Fadhel, 2010, p. 93; Aleisa, 2016, p.21).

[349]**Executive Authority**: "the branch of government charged with the execution and enforcement of laws and policies and the administration of public affairs; the executive". See the official website of dictionary, available at: https://www.dictionary.com/browse/executive-branch,accessed: 5/5/2021.
[350] **Public agencies**: "a government department that is responsible for a particular activity or to provides a service to other people or organizations". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/agency?q=agencies, accessed: 5/5/2021.
[351] **Bureau**: "A government department or a subdivision of a department". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/Bureau, accessed: 5/5/2021.
[352] **Enactment:** "the act of putting something into action, especially the act of making something law". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/enactment, accessed: 5/5/2021.

5- The Saudi Judicial System

The judicial system of Saudi Arabia is made up of three sections: The Board of Grievances[353], Administrative Courts[354], Sharīʿah Courts, and several quasi-judicial committees [355](Faihan, 2013, 264; Aleisa, 2016, pp.21-22). To non-practitioners, the judicial system in Saudi Arabia can appear complicated; this is because of the number of quasi-judicial committees and the fact that the application of law in reality can differ from the legal texts. Furthermore, the courts and the quasi-judicial committees can often differ on points of law. Over the past several decades the Saudi government has sought to reorganise the country's judicial system, with several regulations being implemented since 1981 to allow recognition of quasi-judicial committees in commercial courts as well as to unify the tasks performed by each section of the judiciary (Council of Ministers' Decree No. (167) on 16/7/1981). An issue, however, is that there is very little evidence of the impact of this legislation, therefore the ambiguities and complex nature of the Saudi judicial system are more apparent to non-practitioners (Aleisa, 2016, pp.21-22).

If the complexity and ambiguity of the judiciary are to be clarified, the position of the Saudi judicial system needs to be clarified first. According to Article 46 of the Basic Law, 'The Judiciary shall be an independent authority. There shall be no power over judges in their judicial function other than the power of the Sharīʿah. The Qur'an and Sunnah forms Sharīʿah, which is the main source of direction for the Saudi courts in all judicial issues. Interpretation of the rules of Sharīʿah for application in the courts is heavily based upon the Ḥanbalī School of Thought, and for cases where the *Ḥanbalī* School does not suffice in specific legal matters, the use of other Schools is permitted (Al-Mhaidib, 1997, p. 14).

[353] The Board of Grievances can be defined as an independent administrative judicial commission that reports to His Majesty the King directly. It has jurisdiction investigate citizens' complaints or over claims against the Saudi government or its officials. It is called in Arabic *Diwān al-miẓālim* too.

[354] **Administrative Courts**: "a court that specializes in dealing with cases relating to the way in which government bodies exercise their powers". See the official website of Collins dictionary, available at: https://www.collinsdictionary.com/dictionary/english/administrative-court,accessed: 5/5/2021.

[355] **Quasi-judicial**: "(Law) denoting or relating to powers and functions similar to those of a judge, such as those exercised by an arbitrator, administrative tribunal, etc.". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/quasi-judicial, accessed: 5/5/2021.

Legislation has to be compatible with the times, and this means that laws must be enacted that are not explicitly outlined in the Islamic texts. For example, the Saudi Courts accept legislation relating to the finance and banking sectors, labour, arbitration[356] and commerce, provided that they are in accordance with Sharīʿah and there are no contraventions. It is stated in Article 48 of the Basic Law that 'the courts shall apply to cases before them the provisions of Islamic Sharīʿah, as indicated by the Qur'an and the Sunnah, and whatever laws which do not conflict the Qur'an and the Sunnah which the authorities may promulgate.'

The Reality and Importance of Waqfs in Saudi Arabia[357]

The charitable instinct is at the core of Saudi society supported by both Islamic and Arab identity. Charity has long been considered as an upstanding virtue in both of these separate but intertwined identities within Saudi Arabia (Kozlowski, 1998, pp. 254-255). By the end of the 1990's the Saudi charity network had an established global infrastructure funding both local projects and responding to various crises in Muslim nations. However, the sector came under close scrutiny following the 9/11 terror attacks, and accusations were made that funds were being misdirected to armed groups (Alhidari, 2014, p. 23). Nevertheless, the Saudi charity sector continued to grow to and carry out a wide range of charitable activities, from community development to providing aid packs in times of crisis (Al-Fawāz, 2009, p.65). As mentioned earlier, charity is deeply ingrained within Saudi culture

[356] **Arbitration**: "a process in which an independent person makes an official decision that ends a legal disagreement without the need for it to be solved in court". See the official website of the Cambridge dictionary, available at: https://dictionary.cambridge.org/dictionary/english/enactment, accessed: 5/5/2021.

[357] So, what was the significance of this legal system summary in the context of the legal and regulatory framework for Waqf company in Saudi Arabia? In other word, how does the above section underpin or link to Waqfs? This overview is essential in order to clarify and understand Saudi Arabia's legal system which is the largest in term of size of Waqfs in the world. Furthermore, the significance of this section in the context of this study is expressed in a number of key points. In order to investigate the Waqf company regulations in a country like Saudi Arabia, it is necessary to throw light on the major features of the regulatory frameworks, such as religion, legal history, the legal system, and related authorities and institutions. In such a wealthy country, a number of aspects influence and contribute to the Waqf company legislation. The governance system, for instance, whether democracy or absolute monarchy, will have a significant impact on the environment. On the other hand, while dealing with issues concerning Waqfs and Waqf Company, the legal authorities such as: the Council of Senior Scholars, the Council of Ministers, the Consultative Council (*Majlis Al-Shūrā*) and court system have a direct influence. In addition, the regulatory mechanisms utilised to issue Waqf company laws and deal with other relevant matters, such as Royal orders, Royal decrees, and Subsidiary Regulations, must be considered in this context.

from religious and social angles. The religious perspective comes from the Islamic injunctions making charity something of a religious duty for Muslims, and the social angle is that of charity long being seen as virtuous, but expected social behaviour (Alhidari, 2014, p.29). The concept of charity thus, takes on a particularly important emotional significance on an individual scale e.g. responding to crises seen on media, as well as a desire for longer term planning for the improvement of deprived communities (Al-Ḍuḥyān, 2000, p. 101). The Islamic influence on Saudi society provides direction for this emotional instinct via providing a wide variety of charitable actions to engage in, including paying off an individual's debts, providing scholarships for education, and supporting religious institutions. Each of these examples can be carried out on a personal level or through an endowment (Waqf).

Historically, Waqfs have fallen under a non-profit status playing a role in the provision of social services (Ibid). Some of the aforementioned examples along with caring for orphans, animal welfare, supporting widows and other vulnerable categories of society, and the maintenance of bridges are examples of what Waqfs support (Oladapo and others, 2016, pp.151-162). A 2010 survey commissioned by Ernst & Young estimated that the global provisions for endowments were worth more than $105 billion (cited by: Abdullah, 2015, p. 355). This figure has undergone significant scrutiny as many Waqfs are managed on individual levels which were not accounted for by the 2010 survey. When factoring in the individually managed Waqfs some have suggested a figure of over a trillion dollars of total market worth. From this $1 trillion figure, $500, $325.2, and $82 billion worth of assets are thought to be based in Saudi Arabia, Malaysia, and Egypt respectively (Abdullah, 2015, p. 255; Al-Salwūmi, 2013, p.143). The size of Saudi Arabia's Waqfs are indeed significant and are the largest in the world, however the size of the endowments relational to the country's Gross Domestic Product (GDP) falls short of some other countries (Al-Ḥumayd, 1999, p.23). The Waqfs sector in Saudi Arabia has come under some criticism regarding a lack of operational professionalism (Shalaby, 2008, p.90) though this criticism has been repeated throughout the Arab world directed to the endowment sectors of various states.[358]

[358] Such as the length of the administrative proceedings to get permission to sell and purchase which may cause to miss opportunities of distinctive investments for the endowment; the weakness of workers'

Arab countries generally have not invested and developed their endowment sectors for a variety of reasons. Of note Kendall suggests that the lack of governmental support for Waqfs is a failure to understand the importance of the sector, and a lack of trust (Kendall ,1995, p. 76)). In the Saudi context, the relationship between the state and charitable institutions has not been sufficiently accommodating to allow the sector to grow healthily as a bona fide third sector (Al Yahya and others, 2011, p.29). For example: The Consultative Assembly of Saudi Arabia (*majlis al-Shūrā*), which is the legislative body of the Saudi government acting in an advisory capacity, have put forward several proposals for the development of the Saudi charitable sector (including Waqfs) though none of the proposals have been seriously considered (Al-Salwumī, 2013, p.154). Since 2013, a new proposal was put forward by the Consultative Assembly that shifted the regulation of Waqfs to an independent commission which led to the establishment of the General Authority for *Awqāf* in 2015 (Alhidari, 2014, p.36).

The Saudi Arabian Authorities in Charge of Waqf Supervision and Regulation

Firstly, I shall present a brief overview regarding the historical background of Waqfs in Saudi Arabia. Following the Kingdoms independence from the Ottoman Empire, the Waqfs previously administrated by the Ottoman Empire were acquired by the Saudi government. In 1927 a proclamation was issued declaring the Ottoman administration of the Waqfs as valid needing no special considerations. This remained the state of affairs for a number of decades (Al-Rāshid, 2019, p.202; Al-Ismāʿil, 2020, p. 167).

King Abdulaziz Ibn Saud appointed judges across the Kingdom to supervise the Waqfs; judges were not appointed for the Waqfs based in the cities of Mecca, Medina and Jeddah instead preferring the special regulations established by the Ottoman Empire. In 1927 however, additional judges were appointed to regulate the administration of awqāf in these

efficiency in the executors bodies in investment fields, affecting negatively their performance. The absence of a special regulation for endowments' stocks in the Capital Market Authority too and so on. Moreover, in Saudi Arabia, the Waqfs industry faces numerous obstacles and challenges that could slow its development. One of these important challenges is the absence of legislatives and regulatory mechanism for the Waqfs in details (Al-Salwūmi, 2013, p. 110). For example, the regulations and higher directives of the Higher Council concerning the endowment sector in Saudi Arabia have not been updated or revised for more than 50 years. A small number of sections have been tweaked since, but no larger scale overhaul of the management and regulation principles have been carried out. In the challenging business environment that Waqfs operate in today, the current outdated set of directives do not allow the sector to grow to its full potential. (Alomair, 2018, p. 40).

cities. In the period between 1927 and 1961 various new decisions and directives were implemented on the awqāf in an additive fashion, until in 1961 the Ministry of Pilgrimage and *Awqāf* was formed via a decree from the King. The Ministry consolidated and updated the existing laws, and made arrangements for guidelines for the administration of Waqfs in a formal and structured fashion (Alomair, 2018, p.34). In 1966, the Higher Council of *Awqāf* was then created to oversee all the Waqfs in the entirety of the Kingdom. [359]

The current situation of the endowment sector in Saudi Arabia carries a proportion of uncertainty with it. The current rules and regulations for *awqāf* were first issued in 1966 and were followed up by the Council's executive regulations[360] in 1973 by the Higher Council of *Awqāf* (Alomair, 2018, p. 40). Thus, we find that the regulations and higher directives of the Higher Council concerning the endowment sector in Saudi Arabia have not been updated or revised for more than 50 years. A small number of sections have been

[359] The composition of the Higher Council of *Awqāf* can be found below:

1. President – The minister of pilgrimage and Waqfs
2. Vice-president – The Deputy Minister of Pilgrimage and Waqfs. The minister has two particularly important direct subordinates:
    a) The deputy assistant for executive affairs, who manages the departments of the,
        - Administration of investment
        - Administration of finance
        - Administration of procedural issues
        - Administration of technology
    b) The deputy assistant for endowment properties, who manages
        - Administration of endowment properties
        - Administration of libraries
        - Administration of charitable affairs
        - Administration of consultations and cases
3. Member – A trained Islamic legal scholar to be assigned by the ministry of justice
4. Member – The deputy minister of finance and National economy
5. Member – The head of the historical artifact department within the ministry of knowledge
6. Member – 3 specialists who are referred to royal assent by the President of the Council

The 1966 decree appointed the Minister of the Pilgrimage and Waqfs office as the general supervisor of the endowments (known in Islamic legal terminology as *nāẓir*, or a *mutawallī*). The decree additionally assigned duties to the separate members and divided the structure of the Council into 6 broad departments, which are as follows:

1. Administration of endowment income and financial affairs
2. Administration of investment management
3. Administration of libraries
4. Administration of procedural issues
5. Administration of charitable matters
6. Administration of endowment properties

[360] a rules or directives made and maintained by an authority (Alomair, 2018, p.35; Al-Salwūmi, 2013, p.10; Al-ʿAbdu al-minʿim, 2019, p. 100).

tweaked since, but no larger scale overhaul of the management and regulation principles have been carried out. In the challenging business environment that Waqfs operate in today, the current outdated set of directives do not allow the sector to grow to its full potential.

The Ministry of Islamic Affairs, Dawah and Guidance has the primary responsibility for the Waqfs in the Kingdom, as the head of the Higher Council of *Awqāf* later on was assigned to the Minister of Islamic Affairs (Al-Salwūmi, 2013, p.167; Al-ʿAbdu al-minʿim, 2019, p. 204). The Ministry has come under heavy scrutiny for its administration of Waqfs affairs. One reason being, despite its premier status regarding Waqfs affairs, the officially kept records is deficient (Al-Rāshid, 2019, p.69).[361] There has been no general survey commissioned by the Ministry to assess the number of Waqfs assets, the size of Waqfs investments, or even whether or not the assets that are said to belong to a specific Waqf are actually in the ownership of that Waqf. Theft of Waqf assets has occurred since the creation of the Waqf which has not been accounted for (Ibid). One reason for the sluggish and inefficient supervision of Waqfs is the centralised format of the Ministry of Islamic Affairs (Al-Ismāʿil, 2020, p.39). The Ministry is a hierarchical bureaucracy with the relative importance of tasks being delegated to the correspondingly important Member all the way up to the highest levels (Ibid). This method of administration and management is a real barrier to the efficient supervision of Waqfs affairs in the Kingdom as it limits the complete regulation of the *Awqāf* to the Higher Council of *Awqāf*. Subsequently, the continued revision of Waqfs administration is solely dependent on the Higher Council's capability to deal with bureaucratic stumbling blocks.

Oddly, the Saudi state themselves along with private individuals have acknowledged the importance of Waqfs. Individuals who wish to establish their Waqfs have been approaching the Ministry of Commerce and Industry rather than the Ministry of Islamic Affairs. Understanding the inability of the ministry of Islamic affairs, the ministry of commerce and Industry has allowed individuals to register awqāf as regular companies with them.

[361] Such issues may lead to the public is very hesitant to invest in it and it does not perform to its full potential. This is because of lacking in principles of justice, accountability and transparency which is risky for the legal status of the Waqf and may hamper its existence in perpetuity.

The ministry has gone so far as to establish some Waqfs boards within the Chambers of Commerce found in the Kingdom. These boards have advised and supported business people to establish their Waqfs with their ministry instead of the ministry of Islamic affairs (Alomair, 2018, p. 25).

Disapproval of the way that the Ministry of Islamic Affairs have handled the Waqfs came ahead in 2015. The Saudi Cabinet decided to establish an authority independent of the Ministry of Islamic Affairs to manage the Waqfs. On the 24th June, 2015, the Ministry of Islamic Affairs themselves declared the establishment of the independent authority at a speech within the Chamber of Commerce in Mecca, citing recognition of the important need for the sector for Waqfs affairs to be independent. The organisation has its own Governor who holds the rank of a Minister. So far though, the new body has not yet acted in any way and is locked in a review stage (Alomair, 2018, p. 28).

The Regulatory Framework of the Waqf Company in Saudi Arabia

State bodies generally in Saudi Arabia do not possess databases holding information about the Waqfs, hence data and information in the KSA is incomplete and arduous to find. This has made it more difficult for the researcher to provide an overview of the status of Waqfs in the Kingdom of Saudi Arabia. Given that the researcher has operated in the Waqfs affairs field for a number of years though, he has been able to draw on his general information and experience combined with personal contacts to try and bridge this gap.

Generally speaking, the majority of Waqfs in the KSA are established for the foundation and running of mosques. The creation of schools dedicated for the teaching of the Islamic sciences (*madrasah)* is another common choice alongside the establishment of Waqfs for the destitute and impoverished (Al-Salwumī, 2013, p.38). Traditionally speaking, mosques and those in poverty have generally been the favoured recipients of funds from Waqf. These Waqfs are all supervised by the Ministry of Islamic Affairs though there are some Waqfs which are operated by singular individuals and managed by a single individual (*wāqif* in Islamic legal terminology), and do not take on any kind of institutional format.[362]

[362] The Saudi Arabian Ministry of Islamic Affairs, Dawah and Guidance (The Official Website) Regulations and laws No:49, Available at: https://www.moia.gov.sa/Rules/Pages/default.aspx [Accessed: 8/1/2021].

Regarding to Waqfs created in the future, it is important that future needs of the community are anticipated. Recently, a renewed sense of general awareness and the increase in the number of Waqf institutions have brought the importance of Waqfs to the fore. This increase in institutions is not just Saudi based, it is replicated across the Muslim world with various states realising the importance of Waqfs and their utility in fighting poverty. Thus far though, the current structure of Waqf administration has not kept up to date with the ever growing and increasingly varied nature of Waqfs (Al-Ḍuḥyān, 2000, p.23). To help combat this, the Ministry of commerce and industry, as previously stated, has allowed entities or persons who have founded Waqfs to register with them so that they can operate according to regular company laws.[363]

The first Waqf company in Saudi Arabia was established in 2014 on behalf of Al-Rājḥī Sulaimān, this Waqf company operates as a limited liability company, and is valued at $16 billion.[364] This particular Waqf company began by registering with the Saudi Ministry of Commerce and ran as a regular organisation operating under the general umbrella of business law. Another organisation known as the *Al-Mu'assasah al-Subay'y al-Waqffiah* institution (with an estimated worth of around $5 billion) registered with the Ministry of Labour and Social Affairs and was established in 2015.[365] Hence, the researcher believes that this delay in the establishment of the Waqf company is due to the lack of a singular active independent body that regulates all Waqfs assets, although this would prove to be a more difficult task for Saudi Arabia given its significantly larger scale of Waqfs assets.

The current affairs of the Waqfs sector in Saudi Arabia are ill defined. This is due to a lack of a competent authority to regulate the Waqfs, issue laws regarding the Waqfs, and to manage the relationship between the endowment institutions and stakeholders. The biggest problem facing further development and improvement of the Waqfs sector is thus, the lack of a clear legislative and managerial structure. Some progress has been made with the establishment of the aforementioned General Authority for *Awqāf* which was founded on

[363] The Saudi Arabian Ministry of Commerce (The Official Website) Regulations and laws No: 102, Available at: https://mci.gov.sa/en/pages/default.aspx, [Accessed: 8/2/2021].
[364] Al-Rājḥi Sulaimān Waqf Company (The Official Website of Al-Rājḥī Sulaimān Waqf company) Available at: https://rm.org.sa/ [Accessed: 13/2/2021].
[365] *Al-Mu'assasah al-Subay'y al-Waqffiah* (The Official Website of *Al-Mu'assasah al-Subay'y al-Waqffiah*) Available at: https://asf.org.sa/en [Accessed: 19/2/2021].

December 8th 2015 and so it is clear then that the Saudi government acknowledges that this organisational gap exists. The 'General Authority' has the responsibility to manage all Waqfs assets across the Kingdom, including public and private Waqfs.[366] This is a marked change from the pre-existing conditions; this general authority would have the sole responsibility for all and every facet of the Waqfs across the nation, from the financial to the administrative (Alomair, 2018, p. 201). The General Authority though, is still in a review stage. The Authority is thoroughly assessing the needs of the Waqfs sector and has not yet taken action (Ibid). As a result of this lack of activity the Waqfs companies which have been registered with the Ministry of commerce and the Ministry of labour and social affairs have faced some additional regulatory difficulties. The conceptualisation of the Waqf company has not yet been addressed academically from both a legal and an Islamic perspective. The additional clash between many bodies that have responsibilities for managing, administrating, and regulating Waqfs activates has caused jurisdictional difficulty. There have been some interdepartmental disputes between the two ministries and the General Authority for *Awqāf* because of this lack of clarity. To facilitate the co-operation of differing state bodies, the researcher suggests that the General Authority for *Awqāf* should be the government body solely in charge of the needs of endowment activities to avoid any additional tension.

A Critical Review of Saudi Arabia's Waqf Regulatory Framework

1- A Bill of Non-profit Organisations:

The Waqfs institutions can broadly be classed as a non-profit organisation in nature (Al-Jabr, 1996, p. 203). The Waqfs are generally geared toward the benefit of society at large, or a specific group in society rather than for the advantage of its founders. Non-profit associations are recognisable by the lack of a profit-making motive for their owners (Alhidari, 2014, p.34). Waqfs are largely varied meaning that a particular Waqf institution is characterised by the specific actions that the Waqf was established to carry out. Some Waqfs are founded by a specific individual (known as the *wāqif*) for the purpose of looking after the affairs of a specific family becoming a Waqf *al-ahlī* (family endowment). This is

[366] The law of Saudi Arabian General Authority for *Awqāf* (The Official Website) Article no: 2, available at: https://www.awqaf.gov.sa/ar/Regulations, [Accessed: 8/12/2020].

similar to a private corporation. These Waqfs are better conceptualised as private corporations rather than non-profit organisations, because of this duality and combination of the characteristics of Waqfs, it is thus necessary for an appropriately suitable regulatory framework to address both non-profit, and Private Corporations. Alomair draws attention to the fact that Waqfs operating in the Saudi Arabia share characteristics with (a) non-profit organisations and (b) for-profit organisations (Alomair, 2018, p. 182).

The Saudi government has been taking an increasingly attentive perspective regarding Waqfs. Considering its importance, the Ministry of commerce and industry has been working toward a comprehensive evaluation of global and regional practices of non-profit organisations. A thorough review of the experience in places such as the US, the UK, and Malaysia have contributed in drafting a non-profit organisations act.[367] This Act was referred to the Ministry of commerce for review and in 2016 the Ministry made the draft Act available on their official website and requested a general call for responses and feedback.[368] However, after the establishment of the General Authority for *Awqāf*, no further developments occurred towards its adoption, nor were any comments made regarding it.[369]

Although lawmakers in the Ministry of commerce and industry in Saudi Arabia have just suggested the adoption of the new non-profit organizations bill since 2016 which the Waqf company is part of, and they have asked the advice from experts in the Waqfs sector in order to improve the bill before it is issued it as the official law. However, there are weaknesses in the framing of some of its articles. Firstly, there is vagueness as it did not specify the authority responsible for implementing this law, whether it is the Saudi Ministry of commerce or the General Authority for *Awqāf*. Article 2 of the Saudi non-profit organizations' bill 2016 entails a very wide discretion which allows the companies to take

[367] The Saudi Arabian Ministry of Commerce (The Official Website) Available at: https://mci.gov.sa/en/pages/default.aspx, [Accessed: 10/1/2021].
[368] The Saudi Arabian Ministry of Commerce (The Official Website) Available at: https://mci.gov.sa/en/pages/default.aspx, [Accessed: 10/1/2021].
[369] This is owing to the relatively new setup of the General Authority for Awqāf on the one hand, and the fast changes in the economic environment for Waqfs on the other. Moreover, according to Almajid, some of the challenges to legislation and regulations posed by 'traditional forces,' including the related legal authorities such as: the Council of Senior Scholars, the Council of Ministers, the Consultative Council (*Majlis Al-Shūrā*) and court system have a direct influence, may be linked to ex ante positions expressed before such laws and proposals were studied (Al-Majed,2088, pp.235-236).

any forms without taking into account the provisions of the nature of the Waqf as some of these forms are not suitable for it. Secondly, this bill addresses the Waqf company only in a single article which is Article number 25. The said article in the new bill of non-profit organisations involves that the Waqf company is treated like other non-profit companies under this law. The management processes are not explained in detail in this article for Waqf company in this bill. In the general intention, the Waqf is similar to a non-profit organisation though in practice these Waqfs do place a significant importance on expanding their own assets whether by investment or ensuring that the Waqf is sufficiently profitable to further their aims (Al-Rāshid, 2019, p. 278).

This type of activity is generally common for Waqf and thus the need for official regulation which addresses both the commercial and charitable activities is underscored. The practice of Waqfs in Saudi Arabia is markedly different from general non-profit organisations.[370] Non-profit organisations that are looking to expand their investment portfolio do so, by investing heavily in realty (Al-Ismāʿil, 2020, p.290). The Saudi Waqfs on the other hand have a fairly diverse investment net, covering a variety of sectors including banking, agriculture, and industry. The investments of general non-profit organisations are therefore relatively low risk (Al-Shaḥāta, 2012, p.67). The General Authority of *Awqāf* must take into account these notable differences when they do draft legislation and create standards which address the needs of Waqfs particularly. In terms of board of trustees' members rewards, the Saudi non-profit organisations bill 2016 did not specify any articles about it. Al-Ismāʿi point out that the reward is necessary for the board of trustees' representatives to

[370] The Waqfs is different from non-profit organisations in a number of respects. Waqf covers both poor and rich people in terms of bestowing benefits, but non-profit organisations are limited in its scope, being able to benefit only poor people, or to be used for pious reasons. Moreover, the Waqfs must be register in the Sharīʿah courts, whereas this is not required in the non-profit organisations. A different feature between the Waqfs and the non-profit organisations, that a Waqf cannot be revoked while the non-profit organisations can be. Also, the non-profit organisations are allowed to take one of the forms of *the sharikat al-ashkhāṣ* (companies based on finances) and secondly *sharikat al-ashkhāṣ (*this type of the company is not based upon the capital investment rather it is dependent on the skills and goodwill of the partners). By contrast, the Waqf should not take one of the forms of the *sharikat al-ashkhāṣ.* This is due to the overlapping of the legal status of a natural person from the shareholders with the juridical personality of the company, due to this fact, there is no way to separate the liability of the company from the liability of its shareholders in such companies, thus each shareholder will be held responsible for the day-to-day affairs and for the debts of the company (Al-Khayyāṭ, 1994, vol.2, p.13). As this type of partnership is basically dependent upon the relationship of the partners (Khaznah, 2016, p. 148), therefore, they are jointly liability for the company's debt on the basis of full personal responsibility (Ibid).

continue to work effectively. He also argues that many Waqfs have ceased due to a lack of reward for the trustee(s)' job (Al-Ismāʿil, 2020, p. 189).

Also, the researcher found that all articles of the Saudi non-profit organisations bill did not address any provisions of Islamic law and did not include feedback or evaluation from professional Muslim jurists. This is problematic as Article 1 of the Saudi constitution, known as the *al-Niẓām al-Asāsī lil al-Ḥukm* (the Basic System of Governance), stipulates that the source of law in the Kingdom is the Qur'an and the Sunnah.

The researcher believes that the creation of an independent Sharīʿah council is necessary to address the aforementioned matters. This is because the absence of legislatives and regulatory mechanism for the Waqfs has resulted in a lack of clarity and made laws difficult to predict. Therefore, this Sharīʿah council is important to ensure that the supervision of the Waqf companies would comply with Sharīʿah. The board should include a research centre specialising in the activities of Waqfs companies. Additionally, to aid in the operation of Waqfs internationally the board would be accredited by premier organisations in the field of Islamic finance such as the Islamic Development Bank (IDB), the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), the Islamic International Foundation for Economics & Finance (IIFEF), the Council of the International Islamic *Fiqh* Academy of the Organization of Islamic Cooperation and the Council of Senior Scholars in the Kingdom of Saudi Arabia. The researcher thinks it to be of prime importance, that a law should be promulgated in Saudi Arabia regulating the actions of Waqfs companies, and that such a bill should accommodate and address the diverse opinions of the different Islamic Schools of jurisprudence.[371] Such a bill would have to be drafted and assessed with the input of Sharīʿah scholars, Islamic economics, and be in accordance with the broad principles of the Sharīʿah.

[371] Due to the lack of such as law, there are many Sharīʿah boards and various interpretations from Islamic scholars about the Waqf company. These conflicting opinions raises the possibility that there would be damage done to the Waqf company in the case that the opinion chosen is not suitable for that Waqf which in turn leads to a loss of donor/investor's confidence about whether existing new method of Waqf is compliant with Islamic law principles or not. Therefore, adopting such a law that unites opinions will be helped to solve this problem.

2- Evaluation of the Waqf company legislation in Saudi Arabia

Historically, Saudi Arabia has the biggest number of Waqfs in the Muslim world *(*Al-ʿAbd al-Salām, 2002, p. 29). So, this encouraged the government to pay attention to investment and development in the Waqfs sector. However, in Saudi Arabia, the Waqfs industry faces numerous obstacles and challenges that could slow its development. One of these important challenges is the absence of legislatives and regulatory mechanism for the Waqfs in details (Al-Salwūmi, 2013, p. 110).

It has been emphasised by individuals like *Ibn Manīʿ*, who holds a position on the Council of Senior Scholars in the KSA, that one of the key issues which has contributed to the delayed conceptualisation of Waqfs companies is the lack of a single regulatory system and the accompanying legal legislation (Al-Rājḥī, 2016, p. 67). Some donors in the Kingdom choose to establish their waqf company with the Ministry of Labour and Social Affairs as a non-profit organisation, while others choose to register with the Ministry of Commerce as a regular company.[372] Different Waqfs companies have thus developed some practices which are not compatible with other Waqfs companies because of this issue. Therefore, I will highlight in this section, the reality of Waqfs companies by comparing the two ministries' systems.

As previously discussed, the lack of a unified management structure for Waqfs in the Kingdom is perhaps its greatest barrier to growth. The lack of the management structure is due to an absence of an overall active regulatory body in Saudi Arabia to issue and enforce standards for Waqfs. This has given rise to different Waqfs companies implementing different regulatory standards for themselves, which may differ wildly from the other. The current process for establishing Waqf company in Saudi Arabia is via the drafting of a 'Waqf deed'.[373] The deed spells out what assets are in the ownership of the Waqf company with specific reference to amounts of cash, shares, and property. This Waqf deed is similar in composition to the articles of association and the memorandum of association that forms the constitution of a modern-day company. The deed thus covers the relationship between the different elements of the Waqf like the principles of management, company's statutes,

[372] Middle East Newspaper on the 13 Feb. 2018, Riyadh, Issue: 2928.
[373] The Saudi Arabian Ministry of Commerce (The Official Website) Regulations and laws, Article No:102, Available at: https://mci.gov.sa/en/pages/default.aspx, [Accessed: 8/2/2021].

the methods of distribution of funds, and the general structure of the Waqf company. Once the drafting of the deed is complete, registration should be with a Sharīʿah Court in order to ensure the safety and maintenance of the Waqf's assets.[374]

The practice of inclusion of company's statutes is because of the fact that Saudi courts have not been made familiar with a waqf deed presented in such a contemporary formation. The Waqf deed is fundamental for the operation of the Waqf company; it plays an important role in the management and commercial dealings of the Waqf as its primary regulatory base (Alomair, 2018, p. 150). Accordingly, the Waqf deed must be formed adhering to legal and Islamic principles related to the operation and composition of the Waqf. It should be ensured that the Waqf deed includes provisions for future significant changes in the company, or in the environment where the Waqf company operates. There have been instances in history where the Waqf deed played an important role in preserving the Waqf, and conversely instances where it curbed the existence of the Waqf (Al-Muhanā, 2012, p. 56).[375] According to Alomair, the strong foundation could have been one of the most important reasons behind the decline of the Waqfs (2018, p.197). The Waqfs Committee within the KSA Chamber of Commerce and Waqfs and other official bodies have all commissioned many researchers in order to design the proper models of a Waqf deed.[376] Some of these models have been reviewed, published, and even been shared with businessmen so that it could reduce the number of difficulties associated with the drafting of a Waqf deed. To illustrate the point, the greatest problem currently facing a board of trustees in Saudi is that the government bodies regulating the Waqfs have requested the Waqf deed to include provisions authorising the board of trustees to carry out specific actions (Al-Rāshid, 2019, p. 210). Resultantly, sometimes this causes issues that lead to the matters to be referred to the courts which negatively impact the running of the Waqf company (Al-Ismāʿil, 2020, p. 80). Another issue that caused many additional difficulties

[374] The Saudi Arabian Ministry of Justice (The Official Website) Regulations and laws, Article No:39, Available at: https://www.moj.gov.sa/ar/pages/default.aspx [Accessed: 8/2/2021].

[375] For example, the Waqf deeds were examined the income registers of the waqf al-Haramayn in Algiers under the Ottoman Empire, from 1667-68 to 1829-30, and discovered that these registers appear to provide comprehensive information about the Waqf's endowed assets was stated in detail (Siraj, 2012, p.34).

[376] The Saudi Arabian Ministry of Commerce (The Official Website) Available at: https://mci.gov.sa/en/pages/default.aspx, [Accessed: 8/1/2021].

is that the Waqfs had to face in the past was limited powers of board of trustees. Author of the trusts[377] used to curb the powers of board of trustees limiting their capacity to deal with the issues. These restrictions were made through Waqf deeds.

Though the general practice of the Waqfs in most of the Muslim world is to draft Waqf deeds, there is no such compulsion in Saudi Arabia for the Waqf Company or individuals to register the Waqf deed in the Sharīʿah courts (Ibid). Despite the fact that there is no legal provision to register a Waqf deed in Saudi Arabia, still not getting Waqf registered may lead to many legal and moral stumbles. The Saudi stock market authority does require all corporations, including Waqfs companies, to issue a basic company statute and to evidence their Waqf assets by the Sharīʿah courts.[378] There exists some differences for the registering of Waqf company between the Saudi ministries as previously indicated. The Ministry of Commerce requires from Waqf Company operating within the Waqf sector to prepare a Waqf deed (Al-Rāshid, 2019, p. 215), but The Ministry of Labour and Social Affairs does not require any Waqf deed.[379]

Legally, not registering the Waqf in a Sharīʿah court, makes it possible for the Waqf owner or director to sell, replace, or otherwise modify the assets of said Waqfs (Al-Rājḥī, 2016, p.59). Such an action is not generally admissible except under very stringent conditions and by the order or permission of a judge of a Sharīʿah court (Ibid). Therefore, in the opinion of the researcher, the Waqf assets of the Waqf company should be registered with a Sharīʿah court ensuring that the assets of the Waqfs are protected and that it operates according to the principles of Sharīʿah. Moreover, I believe that not registering the assets of the Waqf company with a court is risky for the legal status of the Waqf and may hamper its existence in perpetuity. The legal relationship between Waqfs companies and the Saudi Ministry of Commerce and Industry have been established fairly recently. The registration of Waqfs with the Ministry was a product of the lack of government's legislation regarding the legal status of the Waqf company. This general practice of registration with other

[377] **Author of the trusts**: "The person who creates the trust is the settlor, also known as the author of the trust". See the official website of the free dictionary, available at: https://legal-dictionary.thefreedictionary.com/trust, accessed: 6/5/2021.

[378] The Saudi Arabian Ministry of Commerce (The Official Website) Regulations and laws, Article No:123, available at: https://mci.gov.sa/en/pages/default.aspx, [Accessed: 8/2/2021].

[379] The Saudi Arabian Ministry of Labor and Social Development (The Official Website) Regulations of Non-profit Organizations, Article No: 23, Available at: https://mlsd.gov.sa/en/procedures [Accessed: 2/1/2021].

government departments is only a temporary fix for the larger procedural problem of Waqfs companies as something of a stop-gap solution. For the Waqfs registering with the ministry and dealing with other government agencies, the Waqf has to be registered under the umbrella of company law. Therefore, the legislation enforced on regular business companies would be very similar to the regulation being enforced on the Waqfs companies. To deal with this issue, the Ministry of Commerce formulated a special system for dealing with some of the issues of Waqfs companies to address the greater number of Waqfs registering with them. The number of Waqfs registering with the Ministry of Commerce is as high as 416 up till 2016.[380]

The Saudi Ministry of Commerce has made some progress in recognising some of the legal statutes. This too has impacted Waqfs positively and attracted many *wāqif's* who wished to establish Waqfs companies to get registered with the Ministry. Three of the positive changes are as follows: (a) Waqfs operating in the public sphere are exempted from the annual Zakat tax deductions; (b) Senior management of Waqfs is allowed to work independently without the need to refer many decisions and processes to courts of Islamic law. (c) The Waqf company must be viewed as a commercial entity in its nature of operation and thus must be allowed sufficient flexibility to deal with challenges and changes. The Ministry's requirement for the Waqf deed from a Sharīʿah court for `Waqf to register with them[381] (the benefit of a Waqf deed has been previously mentioned). Although these are positive indicators, it still lags behind. One such example is the incompatibility of some of the laws and regulations of the Ministry with the very nature of a Waqf. The Saudi company system required that a company stipulates a maximum life for their operation,[382] whereas a Waqf is supposed to exist in perpetuity. Another difficulty regarding the registration of Waqfs is that the regulation of the Waqf essentially stops with its registration and the renewal of its licence. Moreover, the mechanism of accountability is not very sophisticated for private Waqfs. The Waqf company is obliged to renew their business licence with the Ministry on a yearly basis and observe the operating regulations

[380] The Saudi Arabian Ministry of Commerce (The Official Website) Available at: https://mci.gov.sa/en/pages/default.aspx, [Accessed: 22/12/2020].
[381] The Saudi Arabian Ministry of Commerce (The Official Website) Regulations and laws, Articles No: 110,112,113, Available at: https://mci.gov.sa/en/pages/default.aspx, [Accessed: 1/3/2021].
[382] The Saudi law company (2015), Article No: 67.

as stipulated by the Ministry of Commerce or the body they otherwise registered with.[383] However, Waqfs are not actually compelled to file any reports to the body that they initially registered with that could prove the integrity of their operations (Alomair, 2018, p. 220). Thus, despite waqf being registered with the government, there is still lack of surveillance regarding the operation of Waqfs (Al-Rāshid, 2019, p.220). No government body actually obliges that Waqfs must properly discloses their operations (Al-Ismāʿil, 2020, p. 110).

Another important government institution related to the establishment of Waqf company is the Ministry of Labour and Social Affairs. Waqfs have to follow their regulations even though they were formulated for non-profit organisations and do not bear any special provisions of Waqfs. For instance, it is not required by Ministry of Labour for Waqfs to register their Waqf deed (Al-Rāshid, 2019, p.189). The Ministry of Labour has two separate systems for the registration of non-profit organisations. Waqfs are only addressed in a single provision by both of them. That provision relates to the right of the Ministry of Labour and Social Affairs to manage Waqfs in case these organisations cease activities or shut down.[384] It does not outline any framework regarding the management or operations Waqfs nor demands the Waqfs to be registered with the courts or the issuance of the Waqf deed. There have been cases where an organisation has sold their assets to a Waqf company in order to pay off the cost of their administrative expenses. This practice is not considered one that is accordant with the principles of the Waqf in Islamic law (Al-Muhanā, 2012, p.123).

Unlike the Ministry of commerce, the Ministry of labour and social affairs have better mechanism of accountability and transparency. Under the Ministry of labour, the Waqfs have to make sure their practices are in adherence to the laws regulating charity work and other third sector work.[385] In the aftermath of the September 11th attacks in 2001 the Saudi government imposed stricter financial regulations upon all non-profit institutions to prevent these groups from being involved in any alleged extremist activities by scrutinising

[383] The Saudi Arabian Ministry of Commerce (The Official Website) Regulations and laws, Articles No:132, Available at: https://mci.gov.sa/en/pages/default.aspx, [Accessed: 1/3/2021].
[384] The Saudi Arabian Ministry of Labor and Social Development (The Official Website) Regulations of Non-profit Organizations, Article No:33, Available at: https://mlsd.gov.sa/en/procedures [Accessed: 2/1/2021].
[385] The Saudi Arabian Ministry of Labor and Social Development (The Official Website) Regulations of Non-profit Organizations, Article No:39, Available at: https://mlsd.gov.sa/en/procedures [Accessed: 2/1/2021].

them (Alhidari, 2014, p. 37). For Waqfs who are registered with the Ministry of labour, compliance with all of these laws is an obligation and consequently, Waqfs registered with the Ministry of labour have a relatively higher level of financial accountability then the Waqfs registered with other ministries.[386]

3- The Judicial System of Waqfs in Saudi Arabia

As Saudi law is based on Islamic law, the role of the court is pivotal with regards to Waqfs. The Sharīʿah courts are considered representatives and enforcers of the 'rights of Allah' (Al-fwāz, 2009, p.123). As Al-ʾAshqar points out, registering the Waqf with a Sharīʿah court actually gives it a sort of immunity from state intervention (Al-ʾAshqar, 2012, p.67). Historically, the judge of a Sharīʿah court played a very important role in regulating the trustees and management of the Waqf (Ibid). Later on, it was reduced to the cases that brought before the court (Al-Ismāʿil, 2020, p. 220). At present, no particular provision maps out the mechanism of judge controlling the Waqfs. Rather, the law restricts the relationship between the Saudi courts and Waqfs to only three things: (a) the court issues a Waqf deed for the registration of the Waqf with the ministry; (b) to settle any dispute concerning the Waqf, and (c) to implement the procedures that are in the court's remit to carry out. These include but are not limited to, the replacement of Waqf assets, the sale of the Waqf, and the initial registration of the Waqf.[387] However, there is a lack of frequent and easy communication and flexibility between the Waqfs and the judiciary (Al-Ismāʿil, 2020, p.229). It is because of this reason that the judiciary is still keeping transaction records and procedural documents in hard copy form instead of electronic copies (Al-Rājḥī,

[386]It is worth mentioning in this context that I should speak about the reasons form some donors in the Kingdom choose to establish their waqf company with the Ministry of Labour and Social Affairs as a non-profit organisation. Firstly, the speed of the administrative proceedings to get permissions to sell and buy, which may be important opportunities for investments for the Waqf. Secondly, unlike the Ministry of commerce, the Ministry of Labour and Social Affairs have better mechanism of accountability and transparency. Under the Ministry of Labour, the Waqfs must make sure their practices are in adherence to the laws regulating charity work and other third sector work. Thirdly, the Ministry of Labour and Social Affairs does not request the presence of a large capital to establish the Waqf company. Fourthly, the charitable nature of Waqf is fundamental in Waqf company that registered with the Saudi Ministry of Commerce, whereas the Ministry of Labour and Social Affairs has allowed to any lawful act which provides benefit to the inhabitants of Earth, be they humankind or animals is a worthy cause for Waqf company. Fifthly, it is not required by Ministry of Labour for Waqfs to register their Waqf deed under the Sharīʿah courts. So, in case of any disputes the Waqf company will be referred to its laws to resolve it rather than refer to the Sharīʿah court (Al-Rāshid, 2019, p.220; Al-Ismāʿil, 2020, p. 278)

[387] The Saudi Arabian Ministry of Justice (The Official Website) Regulations and laws, Article No:49, 50, 51, Available at: https://www.moj.gov.sa/ar/pages/default.aspx [Accessed: 10/2/2021].

2016, p. 48). They even lack the basic information regarding Waqfs like, their number, composition of the board, and their locations (Al-Rāshid, 2019, p.198). Furthermore, Waqfs do not actually have to adhere to the court's mechanisms of control and accountability as the law only compels them to refer to the court in cases of disputes where the involvement of judges are required (Al-Ismāʿil, 2020, p. 231). The researcher is of the view that in order to solve these issues, the Ministry of Justice should first create databases related to the Waqfs and then develop mechanisms for accountability. The latter of which would have to be a joint effort between the state departments involved, the Waqfs, and the courts. Secondly, the Ministry of Justice shall work on setting uniform rules for judges when dealing with issues of Waqfs and their developments, and these rules shall limit judges' juristic reasoning and their jurisprudential preferences which sometimes vary from one judge to another so much so that they contradict each other which lead to the confusion in legal decisions. Thirdly, the Ministry of Justice should develop and simplify the administrative and judicial procedures related to the Waqfs sector in a way which serves that sector according to modern management systems using modern technology fully exploiting automation processes. Fourthly, the Ministry of Justice shall seek to cooperate with universities, and research and studies centres and government or private agencies related to the Waqfs sector in order to develop legislation in accordance with the latest developments, creating the uniformity among diverse regulations, and to fulfil endowers' desires or jurisprudential choices adopted by the Ministry.

The Waqf Company Practice in in Saudi Arabia: Criticisms and Suggestions

Aforementioned discussion elucidates that regulatory and supervisory framework is deficient and not fulfilling the needs of Waqfs. Some of the provisions of this framework prove to be stumbling block for Waqfs instead of being Waqf-friendly while at other instances, it is extremely deficient and does not guide properly. After identifying some of the issues of the current system in detail, the researcher aims to conclude the chapter by providing recommendations.

As mentioned earlier, one of the main problems is the lack of a unified supervisory and legislative framework for the establishment for the waqf company. Al-Rzinyaī comment that the current structure of regulations in the Kingdom is a stumbling block and do not

allow the waqf company to be established in an efficient manner.[388] This lack of efficiency clearly has a negative impact on the management and operations of Waqfs. As a result, investors do not consider Waqfs companies worth investing.

To solve this issue, it is necessary that the lack of regulatory and legislative frameworks for Waqfs is addressed by the promulgation of new legislation. This legislation must include the regulations according to Islamic Law of Waqf. Such legislation must be issued by the General Authority for Waqfs as they are made the highest authority for legislation. It would be beneficial for the General Authority for *Awqāf* to consider the following points:

1) Any legislation regarding the establishment of the waqf company in KSA must adhere to the rules and requirements of Islamic law. This stems from the stipulation in Article 1 of the *Niẓām al-aṣāsī lil ḥukm* (the Basic System of Governance), which clearly states that the constitution of the KSA is the Qur'an and the Sunnah which in practice makes up the general principles of the Sharīʿah. This means that practices, aims, and foundation of any new Waqfs must be in accordance with these principles.
2) The Saudi government must appoint a Sharīʿah committee to scrutinize the regulations according to Sharīʿah. This would ensure that the supervision of the waqf companies would comply with Sharīʿah. No such committee exist in Kingdom so far. In other countries like Malaysia (Al-Shamrani, 2014, p.140), there does exist a central Sharīʿah Advisory Council which appoints Sharīʿah Committees. It is also possible if the General Authority of *Awqāf* takes the responsibility and plays the role of Sharīʿah Advisory Council too.
3) It would be also beneficial for the Saudi General Authority for *Awqāf* to adopt the guidelines of regional or global bodies active in the field of rules. This includes the Islamic Financial Services Board (IFSB) and the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI). All of these have significant experience regarding Waqfs. The bodies of other countries also have much to offer for the standardisation of Waqf legislation. *Awqāf* Public Foundation of Kuwait had formulated five guidelines which were put to recommendations regarding the structure

[388] Al-Rzinyaī, Aḥmad. 2013. Interview about a Saudi Wqif. Albilad Newspaper [online] available at: http://albiladdaily.net/news.php/?action=show&id=126295 [accessed 23/11/2010].

of an endowment company. These guidelines cover the issues like adherence to Islamic jurisprudence, ownership and other provisions. These guidelines have been adopted by countries such as Malaysia. Sharīʿah Advisory Council (SAC) of the Malaysian Bank Negara, and the Sharīʿah Advisory Board of the Securities Commission have adopted the recommendations and opinions of the AAOIFI (Al-Shamrani, 2014, p.140; Al-Muhanā, 2015, p.76). It would also be beneficial for the General Authority of *Awqāf* to deliberate on adopting the guidelines and resolutions by the bodies like the Council of Senior Scholars in the KSA and the Islamic *Fiqh* Academy (IFA).

There are additional criticisms on the regulation of Waqfs. The fact that a central Sharīʿah supervisory committee does not exist is a real problem. If the waqf company is presenting itself as both Islamic in character and a new model of Waqfs, it could result in a decrease of public trust in the Waqf if it was not in fact in adherence to the principles of Islamic law. It is urged that the central authority for Waqfs should consider the establishment of a central Sharīʿah regulatory board specialised in Waqfs to enforce its resolutions and formulate basic rules for Waqfs Institutions (Ibid). Though some International financial institutions do possess their own Sharīʿah Advisory Boards which adhere to the rules of some international bodies like the AAOIFI and the IFSB, there are tangible benefits in the establishment of a central board specialised in Waqfs. Without a central Sharīʿah Advisory Board specialised in Waqfs, there is a strong possibility that the separate committees of Waqfs may adopt contrary Islamic rulings. These conflicting opinions raises the possibility that there would be damage done to the Waqf company in the case that the opinion chosen is not suitable for that Waqf which in turn leads to a loss of donor/investor's confidence. This has happened in the past with Waqfs like the Al-Rājḥi Sulaimān Waqf Company (Al-Rāshid, 2019, p. 190) where the conflicting opinions were divided into two camps.

These differences of opinions arose because the Waqf company needed liquid funds such as cash to use in its capital which is considered contradictory to the principle of immovable property as the only subject matter of Waqf (Al-Rāshid, 2019, p.195). Moreover, the juristic concept of Waqfs company is against the fundamental concept of perpetuity and inalienability of the believed by the majority of classical jurists. This complicates the situation further. The first opinion was adopted by al-Bassām , al-

Shubayli, al-Ṭarīqī, al-Khathlān and others, who stated that the model of the Waqf company were Sharīʿah compliant (Al-ʿAbdu al-minʿim, 2019, p.220). [389] The other opinion was adopted by al-Fawzān, al-Shinqṭī, Ibn Jibrīn, al-Ahmad and others, who adopted the view that the Waqf company is not permissible, because this model of the Waqf is non-compliant with the principles that have been stated by the majority of classical jurists in the past (Al-Ismāʿil, 2020, p.180). Moreover, one of particular conditions for the validity of the creation of waqf is that the *wāqif* (founder) of the Waqf be only one person, because these kinds of contracts are based upon disposing off the property, so the *wāqif* must have the full legal rights of alienation [390](Ibn-ʿĀbidīn, 1994, vol. 4, p.340: Al-Bahūṭī, 1982, vol. 4, p.251).

A serious weakness with this argument, however, is that Waqf can be made of jointly owned property has been discussed by classical jurists. Such a Waqf is valid if all of the joint owners make the Waqf simultaneously and to the same *nāẓir*, because then all of the owners' shares are part of the waqf and the beneficiary can take possession of the property (Al-Sarakhsī, 1987, vol. 11, p. 38). Also, according to the *Shāfiʿīs*, *Ḥanbalīs* Schools and Abū Yūsuf consider that divisible or not divisible property that is jointly owned can be made subject of a Waqf because no damage occurs by dividing the property, so the beneficiary can still take possession of it (al-Zayʿlai, 1998, p. 326; Ibn Qudāmah, 1994, vol. 6, p. 238).

Kuran claims that the strict view from some contemporary Islamic scholars do not recognise a Waqf company as a Waqf. Traditional Islamic Law recognises individuals and not corporations or institutions which can create and deal the Waqfs (Kuran, 2004, p.251). This is because they are doubt the existence of legal entity other than the human being which is entitled to some rights and responsibilities. They belief the Waqf's does not have any ability to own property or to do any things. Also, the concept of the juridical personality of the modern corporation is affiliated with the idea of limited liability. So,

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[389] This viewpoint is based on the legal maxim that the original rule in financial matters in Islamic law is of permissibility. Thus, the Waqf company should be a permissible mode as long as it does not contradict any commandment or prohibition of Islamic law (Al-ʿAbdu al-minʿim, 2019, p.220). As a matter of fact, any new model for Waqfs can be agreeable as long as it does not infringe with any essential principle in the text of the Qur'an, the Sunnah or the consensus of Muslim scholars.

[390] **Alienation**: "The act of transferring property or title to it to another". See the official website of the free dictionary, available at: https://www.thefreedictionary.com/alienation, accessed: 5/5/2021.

how can the Waqf company adapt as a non-human body therefore how can be sued or sue, or how can make it contracts and hold property in its name, or how can be separate the company's liabilities from that of its owners (the co-owners)?[391]

However, such explanations tend overlook the fact that can the juristic personality be the subject for the Waqf. Al-Zarqā point out that the existence of the artificial person is recognized by Islamic jurisprudence in relation to Waqfs (Al-Zarqā, 1997, pp. 163-164). For example, if a property is bought with Waqf money, the property does not immediately become a part of the Waqf. Instead, the property that purchased will be considered as an estate has owned by Waqf according to the jurists. This example shows that Muslim jurists have approved the Waqf's ability to own property. While a Waqf is obviously not a physical person, but it has been considered similar to human in terms of possession (Al-Kasānī, 1997, vol.4, p.234, Al-Zarqā, 1997, p.331, Al-Dardīr, 1995, vol.5, p.181, Al-Māwardī, 1999, vol.8, p.503, Ibn al-Qayyim,1993, vol.2, p.287, Uusmani, 2002, pp.154-155). However, *ʿaql* in some form must be related to the artificial person. It may be a single person or a group of persons, such as a board of directors. On the other hand, it is argued that the *wāqif* wants to create a Waqf in the form of a company which means he only wants to use the legal framework of the company. In fact, the Waqf company is only a new model for Waqf asset management. In the light of the above discussion, the researcher recommends the establishment of a Sharīʿah Advisory Commission for the Waqf investments in the General Authority for *Awqāf* called the Commission Sharīʿah Advisory Council of the Waqf investments to regulate and supervise the new forms of the Waqfs in general and the Waqf company in particular in Saudi Arabia.[392]

[391] Al-Zāmil, Muḥammad ibn Aḥmad, 2017. Workings of Endowment Companies and their Impact in Growing its Material Assets, a paper has been submitted in "the second conference for regulating and development endowments" that was held on 14/02/2017. in Intercontinental Hotel in Riyadh.
[392]For more details about how to enact laws and regulations related to the waqf company in Saudi Arabia, the researcher has discussed legislative and regulatory framework for the waqf company from the perspective of Islamic law in the previous chapters.

Challenges Faced by the Sharīʿah Supervisory Board in Waqf Company

The function of a Sharīʿah Regulatory Board in the Waqf company is an extremely important one. As the Waqf in Saudi Arabia is essentially an Islamic endeavour, the Sharīʿah Advisory Boards are crucial to the success of the Waqfs. These Sharīʿah Advisory Boards issue legal rulings (*fatwa*), provide resolutions to issues, and ensure that the activities of the Waqfs observe the structures of Islamic law. The Sharīʿah Advisory Boards additionally ensure that all the financial dealings and transactions of the Waqfs are in compliance with the Sharīʿah. The Sharīʿah Advisory Boards have their own challenges to face which impede the effective carrying out of their duty. Some of these issues are as follow:

1- Ineffectiveness of Action

The entire purpose behind the existence of the Sharīʿah Advisory Board is to ensure that all of the activities and operations of the Waqfs are in strict compliance with the principles of Sharīʿah. Were the Sharīʿah supervisory boards effective in their duties, there would not be a multitude of the Waqfs companies showing shortcomings in their Sharīʿah compliance. The fact that some Waqfs do have these compliance failures suggest that the way in which the Sharīʿah supervisory boards operate to carry out their auditing or inspection of the operations of the Waqfs is indeed inadequate (Al-ʿĀnī, 2018, p. 43). This gives rise to the possibility that members of the Waqfs could in fact perform acts which are not in accordance to the principles of Islamic law and in some cases, these could be glossed over on purpose, or by accident and the Sharīʿah Advisory Boards would not be aware of the violations (Al-Faziʿī, 2016, p. 62). In cases where this does go undetected, it could initiate practices of avoidance of the regulations of the Sharīʿah Advisory Board. The violations only continue because the system which Sharīʿah Advisory Boards use to supervise the awqāf are very much insufficient (Khaznah, 2016, p. 175). This can be evaluated from the frequency of the meeting of the Sharīʿah Advisory Board. In some Waqfs institutions the Sharīʿah Advisory Boards only convene around 12 meetings annually, or 1 meeting on a monthly basis.[393] In this researcher's opinion, a single meeting

[393] The Regulation of Sharīʿah board of the Statute of Al-Rājḥi Sulaimān Waqf company, 2016. Unpublished documents.

per month is inadequate to ensure that the Waqfs companies follow the principles of Islamic law. To resolve this issue, the Sharīʿah audit units should be established. Such units should be both within the organisation and external. The members of this should be minimum three in number and must be appointed by the Sharīʿah Advisory Board. Their activities, audit of the transactions and the operations of the company, must be reviewed quarterly and must be regularly reported to the Sharīʿah Advisory Board to ensure that the Waqf company is adhering to the principles of Islamic law. The reports would be broad, covering the entire range of the Waqf's operations from the accounts and operations to the commencement of the meetings of the Board of Directors. Sharīʿah Advisory Board must be made completely independent so that the conflicts of interests are avoided.

2- Poor Adaptation of Sharīʿah Advisory Boards of Technical and Practical Issues

If a Sharīʿah body is not able to properly carry out an audit or inspection of the Waqf company, this inability would have a knock-on effect on the issuance of legislation. A Sharīʿah board would not be able to issue an accurate *fatwa* if the reality of a particular Waqfs companies' operation was improperly assessed (Al-Ismāʿil, 2020, p. 198).

The establishment of a scientific centre which is dedicated to the research and practice of investment in Waqfs would go some way in remedying this issue. Such an entity would support the development and growth of this emerging industry. The centre would also aid in the creation of training centres which would specialise in education supporting Waqfs companies. These training centres could offer to run programmes for the improvement of the practical and technical shortcomings of Sharīʿah bodies. To accredit these boards they could additionally issue professional qualifications on the completion of a course.

For *fatwa* councils and Sharīʿah Advisory Boards to be successful the researcher would suggest that at least one member of the entity should combine a wealth of experience with Islamic financial transactions and should have a doctorate in the field of Waqf finance. Such a combination would give someone the ability to understand the current challenges facing Waqfs and would equip them to compete with traditional businesses in a Sharīʿah compliant manner.

3- The Absence of an overall Sharīʿah Supervisory System

There are some Waqfs companies which do not wish to find suitable a supervisory system for Sharīʿah Boards to utilise in making sure that the members and the different organs of the organisation adhere to Sharīʿah regulations (Al-Rāshid, 2019, p. 201). If there are defined and distinct regulations that Islamic financial institutions are supposed to adhere to, it becomes easier for the general workforce of an organisation to abide by them and it additionally allows Sharīʿah Advisory Boards to better enforce the standards.

The AAOIFI and the Kuwait *Awqāf* Public Foundation in particular have made tremendous efforts to formulate improved legal provisions for all Islamic financial institutions and for Waqfs companies in particular. The researcher believes that their role in creating these legal standards should be acknowledged as an example of a particularly good entity.

4- Proliferation of Sharīʿah Boards and Different Rulings

There are some researchers like Dr. Sahar Nasr who believe that a major challenge is the number of Sharīʿah boards. This is because it hinders the consistency of some products and also gives rise to uncertainty regarding whether or not a product or transaction process is truly Islamic. The Waqfs are becoming a more like a corporate sector, but it is still dispersed and fragmented. In this situation, it becomes more crucial that efforts are made to resolve any ambiguity regarding the adoption of Islamic rulings. This would necessitate a greater level of cooperation from the Sharīʿah Advisory Boards (Nasr, 2011, p. 14).

The researcher believes that if an independent Sharīʿah board is established that specialised in Waqfs law within the General Authority for *Awqāf* which would oversee all areas of Islamic financial institutions, there would be a greater amount of homogeneity in rulings. This central body would oversee the Waqfs, the Sharīʿah Boards of the Waqfs, and would be in charge of redrafting all provisions of the law regarding Waqfs in general and the Waqf company in particular to make it Sharīʿah-compliant.

Every member of the Sharīʿah Boards attached to Waqfs should be selected by the central Sharīʿah board of the General Authority for *Awqāf*. This central board should co-operate with the Council of senior scholars in the KSA and the AAOIFI to develop solutions to Waqfs issues. This is the strongest recommendations of the researcher to the reader(s)

hoping that the recommendations will be appreciated and taken up by the relevant authorities.

Conclusion

In previous chapters we discussed the concept of Islamic law and Sharīʿah as well as the source of its law, and that it has primarily two main components known as primary sources and secondary sources. After defining what we mean by those terms we defined the meaning of Waqf in Islam and how it was understood during the classical period as well as how it is understood in contemporary times with modern scholars. We discussed its historical inception and the Islamic rules and laws regarding Waqf. The evolution of Waqf throughout the years is a natural part of an institution not heavily regulated by Islamic law, because the main aim objective of this voluntary act of worship was to promote goodness in society by funding it. The Waqf companies is the modern invention of the evolution of Waqf. However, this invention was not free from complications. This led to a discussion of identifying what a company is, its nature and structure in order to see if a Waqf company can be concordant to Islamic legal values. The modern world created hundreds of company forms and structures. This meant that it was important to identify which structure or type of company is the most suitable for a Waqf company. After establishing that, it was important to investigate the challenges Waqf companies face in terms of set-up and structure between a modern legal framework and Islamic legal values. Bringing this to an end was the discussion of how Waqf companies would operate within the Saudi civil law system and the challenges it faces to operate under Islamic law which is the country's legal system. Because the Saudi legal system is based on Islamic law means that all of its modern laws must conform to values and precept of Sharīʿah. Therefore, it was seen as most apt to discuss and defined Sharīʿah in the initial stage of this research and then discuss the system and process of legislation in Saudi Arabia when discussing the operation of Waqf companies within the legal framework of Saudi Arabia. The absence of a legal framework

means that Waqfs companies struggle to function more effectively and be regulated and scrutinized for accountability and compliance to Islamic Sharīʿah.

The impacts of Sharīʿah are deeply engraved in the very fabric of Saudi society. This is because of the very obvious reason of initiation of Islam from this place. For this, the institution of Waqf and other modes of charities are an important part of life for the Saudis. The administration of Waqfs went through supervisions of different administrations. During the Ottoman Caliphate, it was under the supervision of Ottomans. Later on, it passed to Saudi Government. Like administration, it passed through the phases of transformations too. It went through different developments and have finally taken the shape of Waqfs companies in Saudi Arabia. Despite these advancement in forms, the regulatory framework of Waqfs companies is not yet very sophisticated. Although there are some good indicators, but it still lags way behind in this regard. Resultantly, the general public is very hesitant to invest in it and it does not perform to its full potential. It can benefit the society at large and can be vital in improving the socio-economic conditions of the Saudi society. For this reason, the researcher has, in this chapter, highlighted the gaps in regulatory framework and proposed recommendations.

This chapter reveals that lack of a unified supervisory and legislative framework for the establishment for the Waqfs company is a major loophole in this regard. It still has to go a long way to achieve the evolution to a much sophisticated and refined version of Waqf company. Efficient Sharīʿah committees should be appointed in order to evaluate if Waqf companies are working according to Sharīʿah or not. Moreover, *fatwa* committees should adopt one opinion from various jurisprudential rulings as official legal opinion of the Kingdom so that all Waqfs companies and courts of law can follow. This will eliminate the multiplicity of judgments and forms of waqf companies and improve the trust of Muslim investors. Sharīʿah regarding Waqf must be adopted uniformly on all Waqfs companies. This chapter further recommends the improvement of regulatory framework that the Kingdom should consider the recommendations of regional and international bodies and incorporated in the national legislations.

Chapter Seven

Conclusion of The Thesis

Introduction

The Waqf is considered as one of the most important financial instruments for socio-economic welfare of Muslim Societies. It has very strong roots in Muslim societies due to its contributive character. At present, the tradition of the Waqf is very much alive and has adapted to modern trends. For this reason, it is said about Waqf that it has a magnificent history, a slightly complex recent past and a prosperous future. The modern model of Waqf is also in transitory phase and continuously evolving. The last decade is truly remarkable in this regard. Consequently, contemporary model of Waqf tailored itself to the structure given by modern corporate sector and accepted temporality, and intangibility in the basic features of the Waqf. Moreover, it has adapted to the paradigm of institutional *mutawallī* instead of individual one. This thesis covered all these areas and scrutinized all these changes in the light of classical Islamic Law. One of the key goal of this study was to explore whether the existing practices of Waqf companies corresponded to and agree with the Classical Sharīʿah of Waqf. The key points drawn from the critical literature review and comparative analysis are summarised in this final chapter of the thesis. The main findings covered in Chapters One, Two, Three, Four, Five, and Six will be revealed. It also makes suggestions for reforming and developing Saudi Arabia's current laws and regulations regulating Waqf practices. As a major contribution to research knowledge, it then study provides the first comprehensive assessment of the practices of Waqf companies from a legal perspective in KSA, it offers useful insights to the relevant Waqf authorities in order to improve the practices of Waqf companies in the KSA. This study consisted of six chapters excluding this concluding chapter. The first chapter presented the Introduction and research questions, as well as explaining aims and objectives of the research with regard to the significance of the research. It also covered the research method, as well as the scope and limitations of the study. This chapter provided contribution of the thesis as well as explored existing literature about the topic. The thesis outline was also discussed in this chapter. Chapter Two provided a brief overview of the meaning of Sharīʿah or Islamic law.

It also analyzed Islamic law in relation to Waqf, i.e. the foundations of Waqf concepts, in light of primary and secondary Islamic law origins, including the Holy Qur'an, prophetic Sunnah, and classical *fiqh* literature. In this regard, it was noticed that a vast majority of Waqf jurisprudence and the rules stipulated from classical jurists regarding Waqf is distinguished by analogy based (*Ijtihād*) derivation that is not without their solid foundation in Islamic law. Furthermore, chapter two discussed the evolutional process, the function of *Ijtihād* and the output of derived rulings of classical Waqf. This chapter demonstrated that, in addition to applying the set rules of *uṣūl al-fiqh* (legal theory of *fiqh*), classical jurists placed a high value on the analogy-based methodology (*Ijtihād*) in deriving the law of Waqf.

The background of this research's third chapter looked at the theoretical framework of Waqf from both a jurisprudential and legal standpoint. The aim of this chapter was to use document analysis to discuss the available literature about the origin, jurisprudential structure, and socio-economic roles of Waqf in historical terms. The Waqf jurisprudential structure was discussed in this chapter in a descriptive method, that is, by explaining what the framework of Waqf-jurisprudence is rather than delving into why and how it was formed in the first place. This chapter has also shown that the institution of Waqf was discovered to have arisen solely within an Islamic perspective. Although, there were various endowment institutions in pre-Islamic Arabia similar to Waqf that may have affected the Waqf concept in various ways. However, no adequate proof that the idea of Waqf was acquired from any previous establishment. Generally speaking, the Waqf's detailed peculiarity appeared in the second century after *hijra* has a result of the creation its distinctive jurisprudential features and theoretical framework evolved that granted the Waqf its Islamic identity.

This chapter provided a comprehensive and critical analysis of the definition of the Waqf according to the classical and contemporary *fiqh* and their consequential effects regarding the types of Waqf and difference between Waqf and other mechanisms of charity. It was evidenced that there had been differences of opinion among the jurists regarding aforementioned issues. Different jurists adopted different principles for dealing such issues that led to the variety of the opinions. One of the common grounds in this regard is about

the ownership of Waqf property. There is almost unanimity of opinion that it belongs to Allah. The conclusion reached in this chapter was that the rules of waqf are established through employment of juristic reasoning (*Ijtihād*) mostly. Therefore, modern Muslim jurists can do *Ijtihād* and adopt different models of Waqf that maximize its benefits to society. In doing so, they should be very cautious about the reasons and nature of the differences of the jurisprudence developed by classical jurists and seek guidance while developing new models.

The chapter four maps out a better understanding of how the formation of the Waqf company can be from the perspective of Islamic law. Historical evolution and different transformations of Waqf model is discussed in order to crystalize the concept of Waqf and its contemporary forms. It becomes evident from this section that mechanism for transformation of classical Waqf to Modern Waqf company is present. This chapter has examined the literature on the concept of companies or sharing/partnership in the classical books of *fiqh* and discussed the validity of companies in contemporary Islamic jurisprudence. It is done by employment of *Ijtihād* for determining the legality of these new forms of businesses. This chapter has identified the concept of a Waqf company too as it is a relatively most recent concept. Therefore, various researchers have defined the Waqf company according to their own understanding. After analyzing the definitions according to contemporary academic work, I have presented my preferred definition. Furthermore, I evaluated different models of companies and elaborated the one that is best and most suitable to be a Waqf company model.

This chapter has responded to the fundamental research question of the thesis, to wit, "To what extent the traditional waqf may be adapted to the Waqf company in the light of the Integral-Pillars (*Rukn*) of Waqf? *Wāqif* (the donor/founder), *mawqūf* (the wealth designated for the waqf), *sighah* (The legal statement) and *mawqūf 'alayhī* (beneficiaries) are the four main ingredients of a Waqf company. Absence of any of the aforementioned elements will render the Waqf invalid. This chapter has explored the essential features of Waqf with the purpose of applying it upon modern Waqfs companies. The Waqf company has to align itself with two different mechanism. It has to make sure that it is not violating the fundamental concepts of classical Waqf and it is matching the current model of companies too.

The chapter five presented the concerns of contemporary academic researchers about the Waqf company paradigm, that is to say, the most important issues and challenges that are being faced by waqf companies from the perspective of Islamic law. There are differences of opinion among the contemporary Muslim jurists regarding the permissibility of the Waqf company. This are inconsistent *fatāwas* (is a legal edicts in Islam) regarding of the Waqf company which is one of the main reason for lack of prosperity of Waqf companies. This chapter has discussed the opinions of some Muslim jurists who prohibit the modern form of the Waqf company. I have discussed and analyzed their arguments keeping in view the Islamic law and modern structure of the Waqf company. In this chapter, I have tried to discuss these issues and gave a solution in order to mitigate the challenges faced by the Waqf companies.

A short outline of the Saudi legal framework was provided in chapter six. In this chapter I have clarified how the Kingdom of Saudi Arabia's constitution is structured on Islamic law. All facets of Islamic life including faith and economy are governed by Islamic law. Moreover, all administrative laws of the KSA are ruled by Islamic law. This chapter has explored the reality, importance and historical background of Waqfs in Saudi Arabia. It provided a comprehensive and critical review of the contemporary forms of waqf in Saudi Arabia and the related legal regime in Saudi Arabia. Therefore, it responded to the one of important question of the thesis which is “Does the existing law governing the Waqfs provide suitable solutions to resolve the problems of Waqfs companies?” we will find that the thesis has answered this question in negative. The current legislation governing the regulation of the Waqf company in the KSA is insufficient and needs more work to be well-organized. For this, the chapter has highlighted the gaps in regulatory framework and proposed recommendations.

Findings of the Study

The study's main findings were discussed in all chapters that were related to the research issues, and they can be summarised as follows**:**

One remarkable finding is that the concept of endowment could not have been entirely foreign to pre-Islamic Arabian culture. There is, however, insufficient proof that the Waqf

concept was taken from another institution. This because is all other institutions were different from the exact concept of Waqf .

The current study found that there are epistemological differences of opinion among the jurists in classical and contemporary *fiqh*. Every School theorized the said subject on the basis of principles of their School of law. However, there does exist a unanimous opinion regarding the jurisprudence of Waqf and that is related to the ownership of the property. The classical jurists, however, could not agree whether the ownership of the property was transferred to Allah exclusively or if people still retain the ownership of the property.

Although for most cases and as a matter of principle the most favoured opinion to me was that the ownership of the property did transfer to Allah, but this difference of opinion did provided a leeway to provide dispensations in some case where it was necessary to stipulate that the ownership was still retained by the donor. This is a good example of how juristic opinions can be used as a precedent to justify modern positions which are potentially controversial.

This study finds out that the law of Waqf owes its development to classical Muslim's jurists. Textual evidence, whether from the Qur'an or the Traditions, are too few to give the complete set of law that we find today in the classical books of *fiqh*. For this reason, the development of the legal theory of the Waqf depended on juristic reasoning.

The study further provided a summary of varying interpretations of texts, events and *fiqh* that inculcated a sagacity of flexibility and fluidity of Waqf laws and eradicated the sense of apparent rigidity and unanimity. This, therefore, implies that new models of Waqf can be subsumed as Islamic Waqfs. This is because the texts do not provide a restrictive and prescriptive ordinance to govern Waqf laws. They merely depict the existing Waqf paradigms during that time.

The current study found that the institution of Waqf did not remain stagnant throughout the history, rather it evolved with the passage of time. The simplified form of Waqf passed the test of time, fulfilled the need of the hour, and transformed into the modern-day company due to its adaptability. The Koc Holdings formed the first ever noticed corporate waqf in Turkey and that too was in 1967 (Çizakça, 2011b, pp. 1-42). The Turkish corporation announced that 10,000 of its shares are donated as Waqf and selected its own subsidiary Koc Foundation as the administrator of the Waqf (Çizakça, 2011b, pp. 1-42; Mohammad,

2018, p. 164). The notion of corporate Waqf attracted the interest and attention of scholars once again when a Malaysian corporation, Johor Corporation (JCorp) created a Waqf by dedicating its shares worth RM 200 million in 2006 (Ramli and others, 2013, p. 28). However, the concept of the Waqf company as it is being practiced is still debatable. The model of Waqf company seems remarkably interesting because it evolved rapidly without a valid adaptation and juristic concepts and framework of Islamic law. One interesting finding is that though the concept of Waqf was fairly elucidated by classical jurists, the concept of the Waqf company is relatively new and was not mentioned or discussed in their work. Thus, it is a contemporary jurisprudential concept and requires diligence in the correct jurisprudential adaptation. As it is a relatively new concept, various researchers have defined Waqf cooperation according to their understanding. In the view of the researcher, the Waqf company can be best put in a nutshell as a contract between two or more persons to contribute in an investment project that allows the general public to purchase shares through an IPO by providing a financial share and reserving all or some of the resulting profits even if it is temporary and in permissible means (i.e. the Waqf is dedicated to matters that are permissible and not necessarily considered righteous) and the loss is limited to purchased shares.

This study confirmed that there is a need of scrutinizing different models of the company and evaluation should lead the selection of best suited model. I am of the view the suitable model for the Waqf company according to jurisprudential rulings of Waqf is joint stock or limited liability companies. Therefore, causes of termination of the company regarding the personal element such as bankruptcy or insanity or death of any partner are not valid in the Waqf company.

One of the most significant findings to emerge from this study is that the modern models of the Waqf such as the Waqf company cannot be rejected just because it does not have any similar precedent in the past. As a matter of fact, any new model may be accepted as long as it does not infringe any essential principle in the text of the Qur'an, the Sunnah or the consensus of Muslim scholars. This study has highlighted that the Integral-Pillars (*Rukn*) of Waqf must be fulfilled in the Waqf company when adapted to the general fundamentals and principles of Islamic jurisprudence.

One of most significant findings of this study is the concept of limited liability. It is one of the main issues for jurists for deliberation. The basic principle for jurists is that a person is responsible for his actions and consequent obligations towards others. If he has made a contract with others, he is responsible for the obligations arising out of this contract, no matter how much they value, and this liability is not limited to the amount mentioned in the contract, it is unlimited responsibility even if it envelopes all his wealth. Whereas the concept of the juridical personality of the modern corporation is affiliated with the idea of limited liability, in which, it separates the liability of the company from the liability of its shareholders (the co-owners).

Another important bottleneck is regarding the rule of perpetuity. Some of the classical jurists are rigid in their opinions regarding perpetuity but the researcher believe that there is flexibility in this regard and there does exist a group of few eminent jurists who do not accept perpetuity as a mandatory rule, thus temporary Waqf can be allowed in case of need. I have reached to this conclusion because the rules of the Waqf are based on *Ijtihād* and there is no prevention for modern jurists to exercise it too according to the changing times and needs.

This study has identified that the chain that leads to the establishment and subscription of the Waqf company. It is found that it starts with an idea by the founders, who then complete the technical and legal requisites of formation. An open invitation to the public or private subscription to a limited number of people such as the founders is made. A subscription request represents an application (offer) and allocating the required shares to the subscriber represents acceptance of the offer.

One of interesting findings is that the opinion that is most aligned with a Waqf company is that ownership ought to be for the subscribing donor. This view aligns the rulings of the Waqf company with the objectives of the Waqf. This argument can be supported by the juristic maxim underpinning the validity of any type of waqf that devotes the usufruct to charitable causes. The question of ownership, while being important, should not be a fundamental issue to determine the validity of Waqf (al-Ṣalāḥāt, 2003, p. 63). This rule should be set under the juristic principle that a rule is allowed unless and until evidence is presented that renders it invalid. In the light of this juristic principle, a liberal view should

be adopted when the text favours permissibility, but a rigid standpoint should be taken when the action is prohibited by Scripture .

This study confirmed that the *wāqif* shareholders in the Waqf company must have full legal capacity at the beginning of contract when it is being set up. Thus, the shareholder must have full right of disposal over his share. In other words, they have to be of full age, of sound mind and free (*ʿaqil, bāligh, ḥurr*) and one who has not been declared legally incompetent or insolvent. Also, the Waqf company is not limited to the Muslims only and can even be created by non-Muslims as they are also allowed to make a Waqf (Al-Shirbīnī, 1958, vol. 2, p. 376) and if a valid Waqf is made by them, then that Waqf should be treated similar to the Waqf made by Muslims and they share all the prerequisite stipulations as Muslims do.

The current study found that the share is a document that is deemed to be the evidence of ownership of the shareholder for his undivided share in the assets of the company. Moreover, the stock is a secure financial paper that represents a common or *shuyūʿ* share in the company itself by its juristic personality nor represents an undivided share in its assets. So, these assets are owned by the company while the stock is owned by shareholders (Fawzī, 2013, p. 264; Al-Shabylī, 2014, p. 152). In addition, investment in the Waqf through bonds is not valid due to *ribā*. Muslims cannot get close to Allah by disobedience. So, if it is not valid to invest in the Waqf through it, it is not permissible to make the Waqf of bonds. Moreover, it is noteworthy that the ultimate purpose of a Waqf is an act of worship. Engaging in an act of worship via means which is so profoundly against the core teachings of Islamic business law is contradictory. There is consensus of jurists regarding the prohibition of the *ribā* and beyond the consensus is clear and explicit prohibition of *ribā* in the Qur'an .

This study confirmed that the *wāqif* shareholder has right to benefit from the services provided by the Waqf company, especially in the charitable, where the purpose is public benefit only, especially in the field of education, health, culture and so on. According to this, the *wāqif* can benefit from these services provided by the company like any other beneficiary. This is because the beneficiary here is not specified and the waqf is intended for the general public and he too is amongst the general public.

This study has identified the most important issues and challenges that are being faced by the Waqf company from perspective of Islamic law. This study has shown that the inconsistent *fatāwa* regarding of the Waqf company hinder the prosperity of the Waqfs companies. The research has also shown that the Waqf constitution is comprised of stipulations regarding creation of the Waqf; administration of the Waqf, development, investment, the appointment of a *nāẓir*, the manner for transferring the responsibilities from the *nāẓir* to other, the designation of beneficiaries and the distribution of the Waqf and so on. The Waqf deed is the law that is the Memorandum of Association or the company's statute, therefore no contract or regulation can be made that contravenes it. The current study found that the Waqf company can borrow from other entities if it is not possible to fulfil the need through Waqf's proceeds and there is no option of raising funds through issuance of new shares while the waqf is facing loss and the value of shares is so declined that it is not possible to raise enough money through issuance of new shares. Analysis of the opinions revealed that the original rule is that lending the shares of the Waqf joint stock company is not permissible when there is no benefit or necessity of lending. Secondly, in principle it is not permissible to mortgage the shares of the Waqf company or its profits. However, it is only allowed as a quick fix in dire need. It will be retreated once the situation gets back to normal.

One of interesting findings is that the Waqf company can adopt the international accounting standards, especially the one for non-profit companies with an amendment to eradicate any conflict with the principles of Islamic law. This is because the rules of Waqf are based on *Ijtihād* .The findings clearly indicate that some of the shares in stock market are tradeable while others are not, and this depends upon the nature of the Waqf. Granting the permission to the Waqf company to trade the shares in the stock market is essential for its success as a Waqf company. This study has highlighted that the ownership of assets and shares of the Waqf company belongs to *wāqif* .

Based on this view, it can be said that it is permissible for the *wāqif* of shareholders to trade the shares of the Waqf company in stock market, because the ownership of the Waqf share belongs to this shareholder. As for the temporality of the Waqf company, the *Mālikī* School's opinion may be adopted that allows the waqf to be temporary. According to this opinion, it is possible to stipulate in the memorandum of association that a Waqf is to be

made for a limited time period. Thus, the ownership returns to the shareholders or to their heirs. This will grant the shareholder the right to trade the shares accordingly .

Moreover, trusteeship is among the vital components of the *fiqh* of waqf, as it is the foundation that manages the Waqf (Al-Zarqā, 1997, p. 190). The success and failure of Waqf depends upon the administration of the Waqf. The Waqf company is quite different from the classical forms of waqf prevalent in past. Therefore, it seems more appropriate that the Waqf company follows the legal framework of larger modern corporations who delegate their decision-making power to a specific elected board of directors appointed in part or in full by shareholders.

This study confirmed that the *wāqif* and the Waqf company have independent legal personality. Legally, the Waqf company is independent from its founder or director. It is empowered to sue or be sued in its corporate name and is decreed as having perpetual succession. It is legally permitted to purchase, acquire, obtain and sell movable and immovable property. As a corporation, it may assign, surrender, convey, yield, charge, reassign, mortgage, transfer or demise any such property or dispose of it by other means . An artificial person, the company as a corporate body, as defined under the conventional corporate structure, has limited powers, but these do include the power to sue and be sued and the right to hold property in its own name (Al-Rājḥī, 2016, p. 55).

The hypothesis of the artificial person and the corporate personality is accepted in general terms by modern Islamic jurists but with the proviso that it cannot equate to the complete acceptance of the doctrine presented by common law.

This research finds out that the issue of termination of the Waqf company is not an agreed upon matter. Rather it is a contentious matter. However, according to Abū Ḥanīfa's opinion, the ownership of the endowed property (*mawqūf*) belongs to the *wāqif*, thus rendering it revocable (*ghayr lāzim*). This way it is akin to a loan (*ʿariyah*) (Ibn al-Humām, 1995, vol. 6, p. 191). Therefore, the Waqf company is a non-binding contract. Notwithstanding, the causes of termination of the company regarding the personal element such as bankruptcy or insanity or death of any partner are not possible in the Waqf company. The reason is that the suitable model for the Waqf company according to jurisprudential rulings of Waqf is joint stock or limited liability companies.

One of more significant findings to emerge from this study is the matter of *Istibdāl* which is mandatory for the continuity and sustainability of the Waqf company. The *Istibdāl* in the Waqf company is to sell shares in the Waqf company in exchange for other shares in the Waqf company. The establishment of *Istibdāl* in the waqf company can also be allowed, if it is for the benefit of Waqf, its beneficiaries, and is in the interest of public.

Regarding the matter of Zakat, I am of the view that the rulings of Zakat is not applicable upon the Waqf company. Therefore, if the Waqf is made for specific or unspecified beneficiaries, the Zakat is not applicable upon the Waqf company regardless of the fact that it reached or did not reach the *niṣāb*. This is because the Zakat is an obligation upon natural person and not on juristic person (artificial person). Artificial person is not within the scope of legal capacity in religious obligations.

Regarding the status of Waqf in Saudi Arabia, this study confirmed that religion and law are not dealt separately in Saudi system unlike the secular legal systems. This study finds another interesting fact that there is a consensus among Saudi legal experts that the Waqf or non-profit organisation in KSA fall under the classification under civil law (Al-Jabr, 1996, p. 201). Also, this research finds out that the Qur'an and Hadith as essential sources of Saudi legal system, and the Saudi civil law is drawn from these fundamental sources. One of interesting findings is that there is general principle among Saudi legal experts asserts that in the light of absence of civil law provisions on any cases, it would need to resort to use the rules and principles of Islamic law to fill this gap (Al-Marzwūqi, 2014, p165; Al-Jabr, 1996, p. 120). Historicity has revealed that the Waqf institution went through different developments and has finally taken the shape of the Waqf company in Saudi Arabia. The current study found that the state bodies there generally do not possess databases holding information about the Waqfs, hence data and information in the KSA is incomplete and arduous to find.

The biggest problem curbing further development and improvement of the endowment sector is thus, the lack of a clear legislative and managerial structure. The conclusion reached in this chapter was that there are many laws to regulate and supervise all the Waqfs activities in Saudi Arabia. This study has highlighted that the General Authority for *Awqāf* (the first responsible for the Waqfs regulation of Saudi Arabia) though, is still in a review

stage and has not yet taken action. Obviously, as we have seen the provisions of the Saudi Civil Law did not address the Waqf company in detail, and therefore the rules of Islamic law will be resorted to. These studies confirmed that Saudi Arabia has the biggest number of Waqfs in the Muslim world (Alomair, 2018, p.29). The study further provided that the Waqf assets of the Waqf company should be registered with a Sharīʿah court ensuring that the assets of the Waqfs are protected and that it operates according to the principles of Sharīʿah. Due to that, not registering the assets of the Waqf company with a court is risky for the legal status of the Waqf and may hamper its existence in perpetuity.
One of the very important findings of this research is that the Waqfs sector in Saudi Arabia faces multiple difficulties and challenges, which may act as a barrier to its development. One of these important challenges is the absence of legislatives and regulatory mechanism for the Waqfs in details (Al-Salwūmi, 2013, p. 110).

If I had to sum up the main finding about the evolution of Waqf and the primary dictum which will maintain it as a relevant institution for years to come is that Waqf is a voluntary act of worship and as such the rules of Waqf can be flexible so long as the end game is that it provides funds to maintain charitable deeds.

Contribution

This study would be the first thesis, or at least one of the first, that was taken up exclusively to investigate the new Waqf company model in the Kingdom of Saudi Arabia in light of the new non-profit corporation bill and to what extent it adheres to principles and rules of Waqf in Sharīʿah with critical analysis by studying classical and contemporary Islamic literature.

The researcher has explored the vast treasure of classical Islamic law of Waqf and revisited the works of contemporary jurist. A fair portion was translated in English with analysis, thus enriching the academic literature. Thus, it provides a sound ground for further research. It will help in removing the confusion and provide clarity in the matter. Moreover, this study has focused on the Waqfs sector of Kingdom of Saudi Arabia. Saudi Arabia, as mentioned earlier has multitrillion worth Waqfs. Scrutinizing the regulatory

framework of Saudi Arabia is itself a laborious task. Therefore, it is very significant study for Kingdom. It is equally valid for other countries too.

As per the knowledge of the researcher, there has not been a single academic study that addresses this issue in Saudi Arabia. Therefore, researcher wants this research to be catalyst in this regard. Despite the growing attention being paid towards a 'Sharīʿah compliant Waqf system', the Waqf company from a Sharīʿah perspective has not been covered well in the existing literature. Thus, this thesis attempts to discuss the main issues in an attempt to address this gap.

Recommendations

In the light of aforementioned conclusion, I have formulated a list of recommendations for all stakeholders in this matter. First of all, as the matter of Waqf company is the matter of Sharīʿah compliance, therefore it is mandatory that the issues regarding *Fatāwa* be solved. Saudi Government should constitute a Sharīʿah consultative body under General Authority of *Awqāf* exclusively for the matter of Waqf that would evaluate each matter in the light of Sharīʿah and give verdict regarding its status. Declaring any matter valid or invalid pertaining to Waqfs must be exclusively its prerogative. Thus, the multiplicity of contradictory *fatāwa* that is preventing the Waqfs industry from achieving its full potential should be eliminated. This will eradicate the confusion, mistrust and chaos among the public that wants to be the author of Waqf or wants to be beneficiary of such Waqf. Moreover, there should be a consultative body of economist who should do research regarding the socio-economic situation of the country and should determine the areas where Waqfs companies should be established. They should keep all the record and give recommendation about how Waqfs companies can be formed in those specific areas and what would they need to know and do. It has been the practice among companions of Prophet Muhammad that they used to consult Prophet about the areas where they should make Waqf of the property and Prophet used to suggest them different areas, beneficiaries and modes. This will benefit the entire community at many levels. First of all, it will enlighten the government about the areas that needs attention and will keep the statistics updated. Secondly, it will guide the author about the area that needs his financing and make

his task easier for him for selection. Thus, the background homework is already done for him.

Moreover, it will benefit the public at large as it maximizes the potential of the Waqf. A team of legal consultants should be established too. The duty of legal consultants should be to review the legal framework of the country related to Waqfs. It should identify the lacunas and present recommendations to make up for it. This legal team should keep itself updated with the regulatory framework of other countries who are performing well in this regard and give an insightful overview of non-profit sector. The KSA should benefit from the experiences of other countries. Moreover, this department should build networks with other Muslim countries who are developing themselves in the Waqfs industries. They should hold seminars, workshops and conferences and invite researchers, academicians and people in this industry to do research and share with everywhere. For start, this network can be built with Turkey, Malaysia and Pakistan.

Furthermore, the General Authority of *Awqāf* should establish a fund for scholarship. It should offer the scholarships for Master, Doctorate and Post-doctoral students to conduct research in the Waqfs sector.

This recommendation further entails that a uniform regulatory framework should be introduced in the KSA. This new regulatory framework should be exclusively for addressing the issues of Waqfs. All laws touching Waqfs sector must be revisited, revised and improved. Uniformity should be accomplished. Therefore, a complete guideline should be present for authors of the Waqfs. This new regulatory framework must address all matters from establishment to governance. All companies should be made bound to adhere to this legal framework. This should ease the matter for both stakeholders and not make the matter more complicated. Government should facilitate this sector and encourage them by removing all unnecessary obstacles that hinder the process. Founders should easily set up the Waqfs. companies and public should easily benefit from it. Only in this situation, the sector of Waqfs will be able to improve the socio-economic situation of the country.

Suggestions for Future Research

For start, the study can be taken up for a complete analysis of legal framework of Kingdom of Saudi Arabia. This extensive research should be exclusively for legal framework. Analysis should result in proposing new law. Empirical study of Waqfs companies can be lucrative too. It will enlighten about the mechanism of the contemporary waqf company. Case study of some major Waqfs companies of Kingdom of Saudi Arabia will be beneficial. Comparative study will be beneficial too. Trusts and the Waqfs companies of different countries can be beneficial. Research from economics point of view can be helpful too. Economics, law and politics can be integrated with each other.

Bibliography

The corrections was here, is to remove the numbers that mark each entry of sources used in the bibliography. And I did remove the numbers. Puig, G. V., & Al-Haddab, B. (2013). The protection of minority shareholdersin the gulf cooperation council. Journal of Corporate Law Studies, 13(1), 123-149.

Ab Rahman, A. (2009). Peranan wakaf dalam pembangunan ekonomi umatIslam dan aplikasinya di Malaysia. Jurnal Syariah, 17(1), 113-152.

Ab Rahman, M. F., & Amanullah, M. (2017). The Nature of Temporary Waqf,Its Ruling and Public Interest. Global Journal Al-Thaqafah.

Abbasi, M. Z. (2012). The classical Islamic law of Waqf: A conciseintroduction. Arab Law Quarterly, 26(2), 121-153.

Abd Ghadas, Z. A., & Aziz, H. A. (2017). Legal Framework of Shariah Corporations in Malaysia: Special Reference to Waqf Corporation. Journal of Modern Accounting and Auditing, 13(3), 121-127.

Abdal-Haqq, I. (2002). Islamic law-an overview of its origin and elements. J.Islamic L. & Culture, 7, 27.

Abdul-Karim, S. (2010). Contemporary shari'ah structuring for the development and management of waqf assets in Singapore (Doctoral dissertation, Durham University).

Abdullah Nadwi, M. (2012). A Critical Examination of Waqf ManagementPractices in India: Special Reference to Fiqh of Awqaf.

Abdullah, M. (2015). A new framework of corporate governance for waqf: apreliminary proposal. Islam and Civilizational Renewal, 274(2625), 1-18.

Abdullah, M. (2015). Comparing the Effectiveness of Waqf and English Charitable Trusts‖. Islamic Relief Academy, United Kingdom.

Abdullah, M. (2017). Analysing the Jurisprudence of Waqf and its Socioeconomic Implications vis-à-vis English Trust, (PhD thesis , University of Gloucestershire).

Abdullah, M. (2018). Evolution in Waqf Jurisprudence and Islamic financial Innovation. Journal of Islamic Monetary Economics and Finance, 4(1), 161-

182.

Abdullah, M. (2019). Waqf and trust: the nature, structures and socio-economic impacts. Journal of Islamic Accounting and Business Research.

Abou El Fadl, K. (2005). The great theft: Wrestling Islam from the extremists. San Francisco.

Abū Zahrah, Muḥammad, 1959. *Muḥaḍarāt fī al-Waqf, Cairo; Dār al-Fikr al-ʿArabī.*

Abū Zahrah, Muḥammad, 2006. *Usūl al-Fiqh , Damascus; Dār al-Fikr.*

Abū Zayd, Aḥmad Muḥammad, 1996. *ʾAhamiyat al-Wqaf waʾAhdāfuah, Riyadh; al-Dār al-ʿArabiyyah li-al- Ṭibāʿuah wa al-Nashar.*

Ahmad, A. U. F. (2010). Theory and practice of modern Islamic finance: the case analysis from Australia. Universal-Publishers.

Ahmad, M. (2015). Cash waqf: Historical evolution, nature and role as an alternative to riba-based financing for the grass root. Journal of Islamic Finance, 4(1), 63-74.

Ahmed, H. (2006). Islamic law, adaptability and financial development.

Islamic Economic Studies, 13(2).

Al Kahtani, F. S. B. (2013). Current practices of Saudi corporate governance: A case for reform (Doctoral dissertation).

Al Yahya, K., & Fustier, N. (2011). Saudi Arabia as a humanitarian donor: high potential, little institutionalization. Little Institutionalization (March 17, 2011).

Al- Ābī, Ṣāliḥ ʿAbd al-Samīʿ al-ʾAzharī, 1988. *Jawāhir al-iklīl, sharḥ Mukhtaṣar al-ʿallāmah al-shaykh Khalīl fī madhhab al-īmām Mālik imām dār al-tanzīl, Beirut; Dār al-Fikr.*

Al-Bahūtī, Manṣūr bin Yūnus bin Idrīs, 1993. *Sharḥ Muntahā al-Iirādāt al-Musamā Dāqʾiq Ūli al-Nuhā li-Sharḥ al-Muntahā, Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī.*

Al-Bahūtī, Manṣur bin Yūnus bin Idrīs, 1999. *Khashshāf al-Qināʿ ʿan Matin al-Iqnāʿ ,Beirut; Dār Iḥyāʾ al-Turāth al-ʿArabī.*

Al-Bahūtī, Manṣūr bin Yūnus bin Idrīs,1982. *Al-rrawḍ al-murbiʿ sharḥ zād al-Mustaqniʿ , Riyadh; Maktabat al Riyad al-Ḥaditha.*

Al-Bassām, ʿAbdu Allāh ibn ʿAbdul Raḥmān, 1997. *Taysir Al-ʿAllām Sharḥ ʿUmdat Al-Aḥkām, Riyadh; Dār al- Sālām.*

Al-Bayhaqī, Abū Bakr Aḥmad bin Ḥusayn bin ʿAli, 2001. *Al-Sunan al-Kubrā, Damascus; Dār al-Fikr.*

Al-Būṭī, Muḥammad Saʿīd Ramaḍān, 1965. *Ḍawābiṭ al-maṣlaḥa fī al-Sharīʿah al-Islāmiyyah, Beirut; Muʾassasat al-Risālah.*

Al-Būṭī, Muḥammad Saʿīd Ramaḍān, 1999. *Muḥaḍarāt fī al-Fiqh al-Muqāran, Damascus; Dār al-Fikr.*

Al-Dāraquṭnī, ʿAli bin ʿUmar, 1966. *Sunan al-Dāraquṭnī, Cairo: Dār al-Maḥasin.*

Al-Dardīr, Abū al-Barakāt Aḥmad bin Muḥammad, 1995. *Al-Sharḥ al-Ṣaghīr ʿalā Aqrab al-Masālik ilā Madhhab al-Īmām Mālik, Beirut; Dār Al-Kutub Al-ʿIlmiyyah.*

Al-Dasūqī, Shamsh al-Dīn Muḥammad, 1992. *Ḥāshiyah Al-Dasūqī ʿalā al-Sharḥ al-Kabīr, Cairo; Dār al-Fikr al-ʿArabī.*

Al-Ḍuḥyān,ʿAbd al-ʿAzīz, ʿAbd al-ʿAzīz, 2000. *Idārt al-Waqāf al-Islāmīah al-tājrabah al-Saʿūdīah Namūdhajn , Riyadh; Maktabat AI-Rushd.*

Al-Durayb, Saūʿd ibn Saʿd, 2008. *Al-Ttatnẓīym al-Qaḍāʾī fi al-Qānūn al-Saʿūdī fi Ḍwāʾ al-sharīʿah wa Niẓām al-Sulṭah al-Qaḍāʾyah, Riyadh; Dār al-Hilāl.*

Al-Fadhel, F. (2010). Party Autonomy and the Role of the Courts in Saudi Arbitration Law With Reference to the Arbitration Laws in the UK, Egypt and Bahrain and the UNCITRAL Model Law (Doctoral dissertation).

Al-Fawāz, ʿAbd al-Karīm, 2009. *Al-Ijrāʾ al-Tanẓīmy Li Al-Qiṭāʿ al-khīryāh al-Saʿūdī, Riyadh: Maktabat AI-Rushd Li Al-Nashr Wa Al-Tawziʿ.*

Al-Fawzān, Ṣāliḥ, 2005. "A Summary of Islamic Jurisprudence," Riyadh, Saudi Arabia, Dār al-Maimān .

Al-Faziʿī , Muḥammad ,2016. A Paper presented at the conference known as *ʾAʿmāl Muntadā Qaḍāyā al-Waqf al-Fiqhiyyah al-Thāmin, Taḥta Shiʿār Qaḍāyā Mustajidah wa Tʾaṣyīl Sharaʿyy al-Baḥāth al-ʿIlmiyyah fi al-Muḍuwʿ*

al-Thāniyy Tamwiyl al-Waqāf ʿan Ṭariyq al-ʾIktitāb al-ʿĀm, published by the Ministry of Endowment and Islamic Affairs of Kuwait.

Al-Ghazālī, Abū Ḥāmid Muḥammad bin Muḥammad bin Muḥammad, 2001. *Al-Wasīţ fī al-Madhhab, Beirut; Dār al-Kutub al-ʿIlmiyyah,* edited by Abū ʿAmr al-Ḥusaynī bin ʿUmar bin ʿAbd al-Raḥīm

Al-Ḥaṭṭāb, Abū ʿAbdullāh Muḥammad bin Muḥammad bin ʿAbd al-Raḥmān al-Maghribī, 1992. *Mawāhib al-Jalīl li-Ṣharḥ Mukhtaṣar Khalīl, Damascus: Dār Al-Fikr.*

Al-Ḥumayd, ʿAbd al-Raḥmān, 1999. *Ṭuraq Idārt al-Waqāf fi al-Saʿūdīah wa Subul Taṭwyrah, Riyadh; Maktabat AI-Rushd.*

Al-Īmam Mālik, Mālik Ibn Anas,1992. *Muwaṭṭāʾ al-Īmām Mālik, Beirut; Al-Maktabah al-ʿIlmiyyah,* edited by ʿAbd al-Wahhāb ʿAbd al-Laṭīf, second edition.

Al-Ismāʿil, Ibrāhīm Muḥammad, 2020. *Al-Muʿūqāt al-Niẓāmyah al-Tī Tuwājah al-Awqāf wā wa Sāʾil Muʿālajātuh*, Riyadh; *Muʾassasat sāʿy Li-Taṭwīr al-Waqāf.*

Al-Jabr, Muḥammad Ḥasan, 1996. *Al-Qānūn al-tijārī al-Saʿūdī*, Riyadh; King Fahd Library. ʾ

Al-Jamal, Sulaymān ibn ʿUmar ibn Manṣūr, 2001. *Ḥāshiyat al-Jamal ʿalā sharḥ al-Manhaj*, Beirut; *Dār al-Maʿrifah.*

Al-Jazīrī, ʿAbd al-Raḥmān, 2000. *Kitāb al-Fiqh ʿalā al-Madhāhib al-Arbaʿah,* Cairo; Dār al-Ḥadīth.

Al-Junaydal, Ḥamd, ʿAbd al-Raḥmān, 1985. Naẓariyyah al-Tamalluk fi al-Islām, Jordan; *Dār al-Fikr.*

Al-Juwaynī, Imām al-Haramayn Ḍyiāʾ ul-Dīn ʾAbd al-Malik ibn Yūsuf, 1980. *Al-Burhān fī Usūl al-Fiqh,* Qatar; publisher unknown , edited by ʿAbd al-ʿAẓiym al-Ddiyb.

Al-Kabāshī, Ṭāhā al-Mukāshifī,1989. *Al- Dhimmah wa al-Ḥaqq wa al-Iltizām wa Taʾthīruhā bi al-Mawat fi al-Fiqh al-Islāmī Dirāsah muqāranah*, Riyadh; *Maktabat al-Ḥaramayn.*

Al-Kasānī, ʿAlāʾ al-Dīn Abū Bakr bin Masʿūd bin Aḥmad, 1997. Badāʾiʿ al-Ṣanāʾiʿ fī Tartīb al-Sharāʾʿ, Beirut: Dār al-Fikr.

Al-Khafyīf, ʿAli, 2009. *Al-Sharikat fī Al-Fiqh al-Islāmī Bwḥūth Muqāranah,* Cairo: *Dār al-Kitāb al-ʿArabī*.

Al-Khalīl, Aḥmad, 2013. *Al-ʾAshum wa al-Sanadāt wa Aḥkāmah al-Fiqh al-Islām*, Riyadh; *Dār ibn al-Jawzī.*

Al-Khaṣṣaf, Abū Bakr Aḥmad bin ʿAmrū al-Shaybānī, 1904. *Aḥkām al-Awqāf,* Cairo; *Maṭbʿat Dīwān ʿUmūm al-Awqāf al-Miṣriyyah.*

Al-Khathlān, Saʿad, 2011. *Fiqh al-Muʿāmalāt al-Māliyyah al-Muʿāṣarah,* Riyadh*; Dār Ibn Taymiyyah.*

Al-Khayyāṭ, ʿAbdulaziz ʿAizt, 1994. *Al-Sharikāt fī al-Sharīʿah al-Islāmiyyah wa al-Qānūn al-Waḍaʿī* ,Beirut; *Muʾassasat al-Risālah.*

Al-Khurashī, Abū ʿAbd Allāh Muḥammad ibn ʿAbd Allāh, 2000. *Al-Khurashī ʿalā mukhtaṣar Sīdī Khalīl wa-bi-hāmishihi Ḥāshiyatal-Shaykh ʿAlī al-ʿAdawī,* Beirut; *Dār Ṣādir*

Al-Khwayīṭr, ʿAbd Allāh Aḥmad, 2005. *Al-Muḍārabāh fī al-Sharīʿah al-Islāmiyyah,* Riyadh, *Muaʾssasat al-Risālah.*

Al-Kubaysī, Muḥammad, 1977. *Ahkām al-Waqf fī al-Sharīʿah al-Islāmiyyah,* Baghdad; *Maṭbaʾt Al-ʾrshād.*

Al-Maḥallī, Jalāl al-Dīn Muḥammad bin Aḥmad, 1959. *Kanzū al-Rrāghibyīn Saraḥ Minhāj al-ṭālibīn lil-Īmām Muḥyī al-Dīn al-Nawawī fī fiqh madhhab al-Īmām al-Shāfiʿī,* Cairo*; Maṭbaʿat Muṣṭafā al-Bābī al-Ḥalabī.*

Al-Mardāwī, ʿAlāʾ al-Dīn Abū al-Ḥasan ʿAli bin Sulaymān, 2000. *Al-Inṣāf fī Maʿrifah al-Rājiḥ min al-Khilāf ʿalā Madhhab al-Imām Aḥmad bin Ḥanbal,* Beirut; *Dār Iḥyā' al-Turāth al-ʿArabī* .

Al-Marzwūqi, Muḥammad bin ʿAbdullāh, 2014. *Al-Sulṭah al-Tanẓīmya fi al-Mamlākah Al-ʿrabiyah al-Suʿūdiyya*, Riyadh*; Maktabat AI-ʿubykān.*

Al-Mawāq, Muḥammad bin Yūsuf bin Abī al-Qāsim al-ʿAbdarī al-Gharnāṭī ,1999. *Al-Tāj wa al-iklīl, li-Mukhtaṣar Khalīl*, Beirut; *Dār al-Kutub al-ʿIlmiyyah*.

Al-Māwardī, Abū al-Ḥasan ʿAlī bin Muḥammad bin Ḥabīb, 1999. *Al-Ḥāwī al-Kabīr fī Fiqh Madhhab al-īmām al-Shāfiʿī,* Beirut: *Dār al-Kutub al-ʿIlmiyyah,* edited by ʿAlī Muḥammad Muʿawwid.

Al-Māwardī, Abū al-Ḥasan ʿAli bin Muḥammad bin Ḥabīb, 2008. *Al-Aḥkām al-Sulṭāniyah,* Beirut; *Dār al-Maʿrifah.*

Al-Mawṣilī, ʿAbdu Allāh ibn Maḥmūd, 2005. *Al-Ikhtiyār li-taʿlīl al-Mukhtār ,* Beirut; *Dār al-Kutub al-ʿIlmiyyah.*

Al-Maymān, Nāsar, 2009. *Al-nawāzil al-Fiqhīyah fī al-awqāf*, Riyadh; *Dār ibn al-Jawzī*.

Al-Maymān, Nāsar, 2006. Paper presented at the conference known as *Baḥūth fi Waqf al-Nuqūd wa al-Awrāq al-Māliyyah. ʾAʿmāl Muntadā Qaḍāyā al-Waqf al-Fiqhiyyah al-Thāniyy, Taḥddiyyāt ʿAṣriyyah wa Ijtihādāt Sharʿyyah*, published by the Ministry of Endowment and Islamic Affairs of Kuwait.

Al-Mhaidib, M. I. (1997). Arbitration as a means of settling commercial disputes (national and international) with special reference to the Kindom of Saudi Arabia (Doctoral dissertation, University of Edinburgh).

Al-Mīn, Ḥasan ʿAbdullāh, 1994. *ʾIdārt wa Tathmyr Mumtalkāt al-Awqāf*, Jeddah; *al-Bank al-Islamiyy Lil-Tanimiyah.*

Al-Mīn, Ḥasan ʿAbdullāh, 1999. *Al-Ttaḥqiyq fī Zakāt al-ʾSahūm wa al-Sharikāt* Jeddah; *al-Bank al-Islamiyy Lil-Tanimiyah.*

Al-Muhanā, Khālid, 2012. A*l-Sharikāt al-Fiqhiyyah min Khilāl al-Qānūn al-Saʿūdī,* place of publication and publisher unknown.

Al-Muhanā, Khālid,2015. *Namādhj Jadidah min al-Awqāf al-Naqdīyah al-Muʿāṣarah al-Fiqh al-Islāmī,* Riyadh; *Maktabt al-Rushd.*

Al-Muwsā, Muḥammad, 1997. *Sharikāt al-ʾashkhāṣ*, Riyadh*; Dār ibn al-Jawzī*.

Al-Muwsā,ʿAbdu Allāh, 2006. Paper presented at the conference known as *Baḥūth fi Waqf al-Nuqūd wa al-Awrāq al-Māliyyah. ʾAʿmāl Muntadā Qaḍāyā al-Waqf al-Fiqhiyyah al-Thāniyy, Taḥddiyyāt ʿAṣriyyah wa Ijtihādāt Sharʿyyah,* published by the Ministry of Endowment and Islamic Affairs of Kuwait.

Al-Muwsūʿah al-Fiqhiyyah, 1994. Kuwait; *Dār al-Ṣafwah*, published by the Ministry of Endowment and Islamic Affairs of Kuwait, fourth edition

Al-Nawawī, Abū Zakariyyāh Maḥyī al-Dīn Yaḥyā bin Sharf, 1991. *Rawḍat al-Ṭālibīn waʿUmdah al-Muftīn,* Beirut: *Al-Maktab al-Islāmī.*

Al-Nawawī, Abū Zakariyyāh Maĥyī al-Dīn, 1996. *Al-Majmuʿ Sharḥ al-Muhadhab*, Beirut; *Dār al-Maʿrifah.*

Al-Qalyūbī wa-ʿUmayrah, Shihāb al-Dīn Aḥmad ibn Aḥmad and Shihāb al-Dīn Aḥmad al-Bralasy al-Mulaqqab bīʾUmayrah, 1979. *Ḥāshiyatā al-Imāmayn al-muḥaqqiqayn al-mudaqqiqayn al-Shaykh Shihāb al-Dīn al-Qalyūbī wa-al-Shaykh ʿUmayrah ʿalaā sharḥ Jalāl al-Dīn al-Maḥallīʿalaā Minhāj al-ṭālibīn lil-Shaykh Muḥyī al-Dīn al-Nawawī fī fiqh madhhab al-Īmām al-Shāfiʿī wa-bi-al-hāmish al-sharḥ al-madhkūr*, Beirut: *Dār al-Fikr*.

Al-Qalyubiyy, Samīḥa, 2011. *Al-Sharikāt al-Tijārīyah*, Cairo; *Dār al-Nashr lil-Jāmiʿāt al-Miṣrīyah.*

Al-Qarāfī, Abū al-ʿAbbās Aḥmad bin Idrīs al-Ṣanhājī, 2010. *Al-Furūq wā anwār al-Burūq fī anwāʾ al-furūq,* Riyadh; *Dār al-Sālām.*

Al-Qarāfī, Shihāb al-Dīn Aḥmad bin Idrīs, 1994. *Al-Dhakhīrah fi Furwūʿ al-Mālīkayah,* Beirut: *Dār al-Gharb al-Islāmī.*

Al-Qarḍāwī, Yūsuf, 1997. *Madkhal li-Dirāsat al-Sharīʿah al-Islāmiyyah*, Kuwait; *Dār al-Qalam*, eighth edition.

Al-Qarḍāwī, Yūsuf,1996. *Al-ijtihad fī al-Sharīʿah al-Islāmiyyah*, Damascus; *Dār al-Qalam*.

Al-Qarḍāwī, Yūsuf. (2009). Fiqh Al Zakat. Translated by MD Kahf, 1.

Al-Qāsim, Yūsuf, 2014. *Sharikat al-Shakhṣ al-Wūḥad fi Ḍwāʾ Ḍawābiṭ al-fuqahā Muqāranah bi al-Qawānīn al-Ḥadīthah, Article in Al-Iqtisṣdiah* Magazine, Thursday, April 22, 2014.

Al-Qaṭṭān, Mannāʿ, 1996. *Tārīkh al-Tashrīʿ al-Islāmī al-Tashrīʿ wa al-fiqh,* Riyadh; *Maktabah al-Māʿirf,.*

Al-Qurṭubī, Abū ʿAbdullāh Muḥammad bin Aḥmad al-Anṣārī, 2003. A*l-Jāmiʿ lil-Aḥkām al-Qurʾān,* Riyadh; *Dār ʿĀlam al-Kutub*.

Al-Rājḥi, Khālid, 2016. *Masāʾil al-Waqf al-Naqdīyah al-Muʿāṣarah wa Taṭbīquh fi al-Qānūn al-Saʿūdī* , place of publication and publisher unknown.
Al-Ramlī, Shams al-Dīn Muḥammad bin Abū al-ʿAbbās Aḥmad bin Ḥamzah bin Shihāb al-Dīn, 1995. *Nihāyatul-Muḥtāj ilā Sharḥ al-Minhāj fī al-Fiqh ʿalā Madhhab al-Imām al-Shāfiʿī,* Cairo; *Dār al-Fikr.*
Al-Rāshid, Sulaymān Ibrāhīm, 2019. *Al-Ṣanādyq al-Istithmāryh al-waqfīah wa Taṭbīqah fi al-Qānūn al-Saʿūdī, R*iyadh; *Muʾassasat sāʿy Li-Taṭwīr al-Waqāf.*
Al-Rifāʿi, Ḥusayn, 2013. *Waqf al-ʾAshum aw al-Ṣukūk wa al-Manāfʿ wa al-Ḥuqwūq al-Mʿanawyah,* Jordan; *Dār al-ʿIlm.*
Al-Rzinyaī, Aḥmad, 2013. Interview about Saudi Waqfs, Article in *al-bilād* Newspaper, Sunday, March 12, 2013.
Al-Ṣalaḥāt, Muḥammad, 2016. A Paper presented at the conference known as *ʾAʿmāl Muntadā Qaḍāyā al-Waqf al-Fiqhiyyah al-Thāmin, Taḥta Shiʿār Qaḍāyā Mustajidah wa Tʾaṣyīl Sharaʿyy al-Baḥāth al-ʿIlmiyyah fi al-Muḍuwʿ al-Thāniyy Tamwiyl al-Waqāf ʿan Ṭariyq al-ʾIktitāb al-ʿĀm*, published by the Ministry of Endowment and Islamic Affairs of Kuwait.
Al-Ṣalaḥāt, Muḥammad,1996. *Al-Tajrubah al-Waqfiyah li dawlat al-Īmarāt al-ʿArabiyah al-Muttahiddah, Amārat al-Shāriqah Namudhajan*, place of publication and publisher unknown.
Al-Salwūmi, Muḥammad, 2013. *Aḥwāl al-Awqāf fi Ḍwāʾ fi al-Qānūn al-Saʿūdī,* Riyadh; *Dār al-Hilāl*
Al-Sanhūrī, ʿ Abd al-Razzāq Aḥmad , 1993. *Al-Wasīṭ fī Sharḥ al-Qānūn al-Madanī al-Jadīd,* Cairo; *Al-Maktabah al-ʿAṣriyyah.*
Al-Sarakhsī, Abū Bakr Muḥammad bin Aḥmad bin Abī Sahl, 1987. *Kitāb al-Mabsūṭ*, Beirut; *Dār al-Maʿrifah.*
Al-Ṣāwī, Aḥmad ibn Muḥammad, 1988. *Bulghat al-sālik li-Aqrab al-Masālik ʿalā al-Sharḥ al-Ṣaghīr li-Aḥmad Muḥammad al-Dardīr*, Beirut; *Dār al-Maʿrifah.*

Al-Ṣāwī, Ṣalāḥ, 2000. *Waqafāt Hādiyah ma‘ Fatwā Ibāhah al-Qurūḍ al-Ribawiyyah li-Tamwīl Shirāʾ al-Masākin fī al-Mujtamaʿāt al-Gharbiyyah,* U.S.A.; Islamic Assembly of North America.

Al-Shabylī, Yūsuf, 2014. *Zakāt al-ʾAshum,* Riyadh; *Dār ibn al-Jawzī.*

Al-Shāfiʿī, Muḥammad ibn Idrīs, 1993. *Kitāb Al-Umm*, Beirut; *Dār al-Kutub al-ʿIlmiyyah.*

Al-Shamrani, A. S. (2014). Islamic financial contracting forms in Saudi Arabia: Law and practice (Doctoral dissertation).

Al-Sharbīnī, Shams al-Dīn Muḥammad bin Muḥammad al-Khaṭīb, 1958. *Mughnī al-Muḥtāj Ilā Maʿrifah Maʿānī Alfāẓ al-Minhāj,* Beirut; *Dār Iḥyāʾ al-Turāth al-ʿArabī.*

Al-shāṭibī, Abū Isḥāq Ibrāhīm ibn Mūsā, 2002. *Al-Muwafaqat fī Uṣūl al-Sharīʿah,* Beirut; *Al-Maktab al-Islāmī*

Al-Shawkānī, Muḥammad bin ʿAli bin Muḥammad, 2000. *Arshād al-fuḥul ilā taḥqiq al-ḥaqq min ʿilm al-uṣūl,* Riyadh; *Dār al-Faḍilah.*

Al-Shawkānī, Muḥammad bin ʿAlī bin Muḥammad, 2008. *Nayl al-Awṭār Min Aḥādīth Sayyid al-Akhyār Sharḥ Muntaqā al-Akhbār*, Beirut; *Dār al-Kutub al-ʿIlmiyyah, edited by Muḥammad Sālim Hāshim.*

Al-Shaybānī, Muḥammad bin Ḥasan, 1997. *Sharḥ Kitāb al-Siyar al-Kabīr,* Beirut; *Dār al-Kutub al-ʿIlmiyyah.*

Al-Shiyrāzī, ʾAbī ʾīsḥāq Ibrāhīm bin ʿAli Al-Fayrūzābādī, 1998. *Al-Muhadhab fī Fiqh al-Imām al-Shāfiʿī*, *Beirut; Muaʾssasat al-Risālah.*

Al-Ṣuqiyyah , Aḥmad, 2014. *Istithmār al-Waqāf*, Riyadh; *Dār ibn al-Jawzī.*

Al-suyūṭi, Jalāl al-dīn Abū al-Faḍil ʿAbdu al-raḥmān ibn abi bakr, 1983. *Al-ʾashbāh wā al-nnaẓāʾir fī qawāʿd wā furwūʿ fī fiqh al-shāfiʿiyyah,* Beirut; *Dār al-Kutub al-ʿIlmiyyah.*

Al-Ṭabarī, Abū Jaʿfar Muḥammad bin Jarīr, 1966. *Tārīkh al-Ṭabarī Tārīkh al-ʾUmam wa al-Mulūk,* Cairo: *Dārl al-Maʿārif.*

Al-Ṭarabulsī, Burhān al-Dīn Ibirāhīm bin Mūsā bin Abī Bakr, 1981. *Al-ʾIsʿāffi Aḥkām al-Wqāf,* Beirut; *Dār al-Rāʾid*.

Al-Ṭayyār, ʿAbd Allāh, ʿAbd Allāh al-Mṭalaq, Muḥammad al-Mūsā, 2010. *Al- Fiqh al-Muyassar, Muwsūʿah Hādiyah Tatanāwal Aḥkām al-Fiqh al-Islāmī ba-ʾAslūb Wāḍḥ lil-Mukhtaṣyyn wa Ghyruhm,* Riyadh, *Madār al-Waṭn lli-Nashar.*

Al-Wansarīsī Aḥmad ibn Yaḥyā, 1981. *Kitāb al-bayān al-mughrib fī akhbār al-Andalus wa-al-Maghrib,* Beirut: *Dār al-Kutub al-ʿIlmiyyah*.

Al-Wāqidī, Abū ʿAbd Allāh Muḥammad ibnʿUmar, 1996. *Kitāb al-Maghāzī,* Cairo; *Al-Maktabah al-ʿAṣriyyah*.

Al-Zāmil, Muḥammad ibn Aḥmad, 2013. Workings of Endowment Companies and their Impact in Growing its Material Assets, a paper has been submitted in "the second conference for regulating and development endowments" that was held on 14/02/2017. in Intercontinental Hotel in Riyadh.

Al-Zarkashī, Shams al-Dīn Abī ʿAbdullāh Muḥammad ibn Abdullāh, 1993. *Saraḥ al- Zarkashī ʿalā Mukhtaṣar al-Khiraqī fi al-Fiqh ʿalā Madhhab al-Īmām Aḥmad bin Ḥanbal*, Riyadh; *Maktabat al-ʿubykān.*

Al-Zarqā, Muṣtafā Aḥmad, 1997. *ʾAḥkām al-Awqāf,* Jordan; *Dār ʿAmār.*

Al-Zarqā, Muṣtafā Aḥmad, 1998. *Al-Madkhal Al-Fiqhī al-ʿĀm*, Damascus; *Dār al-Qalam*.

Al-Zaylāʿī, Fakhr al-Dīn ʿUthmān bin ʿAli, 1998. *Tabyīn al-Ḥaqāʾiq Sharḥ Kanz al-Daqāʾiq,* Beirut*; Dār al-Kutub al-ʿIlmiyyah.*

Al-Zuḥaylī, Wahba, 1996. *Al-Waṣāyā wa al-Waqf fī al-Fiqh al-Islāmī,* Damascus; *Dār al-Fikr.*

Al-Zuḥaylī, Wahba, 1997. *Al-Fiqh al-Islāmī Wā Adilatuhū,* Damascus; *Dār al-Fikr*

Al-Zuḥaylī, Wahba, 1997. *Ruʾuyah Ijtihādiyyah fī al-Masāʾil al- Fiqhiyyah al-Muʿāṣarah li-al-waqf*, Damascus; *Dār al- Maktabī.*

Al-Zuḥaylī, Wahba, 1998. *Usūl al-Fiqh al-Islāmī,* Damascus; *Dār al-Fikr.*

Al-ʾAshqar, ʾUsāmah ʿumār , 2012. *Taṭwyr al-Muʾassasah al-waqfīah al-Islāmīah fī ḍawʾ al-tājrabah al-khīryāh al-ghrbīah*, Jordon; *Dār al- nafāʾis.*

Al-ʿAbd al-Salām,ʿAbdullāh, 2002. *Tārīkh al-Waqf bayn al-Muslimīn wa Ghayr al-Muslimīn,* Riyadh; *Dār al-Sālām*.

Al-ʿAbdu al-minʿim, ʿAbd al-ʿAzīz , 2019. *Niẓām al-Waqf fi al-Qānūn al-Saʿūdī Darāsah Muqāranah bī- Qānūn al-Trust al-Birīṭānī*, Riyadh, *Muaʾssasat al-Risālah.*

Al-ʿĀnī, ʾUsāmah ʿAbdu al-Majīd, 2018. *Mutaṭalbāt ʾInshāʾ min Khilāl al-Waqf fi baʿḍ al-Qawānīn al-ʿArabīyah Darāsah Muqāranah fī al-Fiqh al-Islāmī,* Qatar; *Bait Al- Mashura*, Consultations Finance.

Al-ʿumrī, Salmān, 2014. *Thqāfat al-waqf fī al-mujtamʿ al-suʿūdī bīn al-taqlīd wā mūtāṭalbāt al-ʿṣir,* Riyadh; *Dār ibn al-Jawzī.*

Al-Āmidī, ʿAli bin Muḥammad, 2003. *Al-Iḥkām fī Usūl al-Ahkām*, Riyadh; *Dār al-Ṣumaiʿī*, edited by ʿAbd al-razāq ʿafyfī.

Alfityani, T., M., Y. (2014). Waqf in Islam and Others a Comparison Study. International Journal of Humanities and Social Science 4, 10(1), 237- 244.

Alhidari, I. (2014). Investigating individuals' monetary donation behaviour in Saudi Arabia (Doctoral dissertation, Cardiff University).

Ali, A. A. (2010). The Role of Islamic Jurisprudence in Finance and Development in The Muslim World. Company Lawyer, 31(4).

Alnasser, S. A. S., & Muhammed, J. (2012). Introduction to corporate governance from Islamic perspective. Humanomics.

Alomair, M. (2018). Governance and Accountability in Corporate Waqf Institutions in Saudi Arabia (Doctoral dissertation, Royal Holloway, University of London).

Alqahtani, F., & Mayes, D. G. (2018). Financial stability of Islamic banking and the global financial crisis: Evidence from the Gulf Cooperation Council. Economic Systems, 42(2), 346-360.

Amīn,ʿAmrān, 2012. *Al-Waqf wa khaṭr al-Inqirāẓ ʿalā al-ʿAml al-khīryāh*, Riyadh; *Dār Ibn Kathīr*.

Ansary, A. F. (2008). A brief overview of the Saudi Arabian legal system. See http://www. nyulawglobal. org/globalex/Saudi_Arabia. htm.

As-Safi, A. B. (2012). Islamic Jurisprudential Maxims: 114 Maxims Expounded. Al Manhal.

Asasriwarnia M. Jandra. (2018). Comparison Of Legal System: Islamic Law System, Civil Law, and Common Law: UMRAN-International Journal of Islamic and Civilizational Studies 5.2-1.

Ayub, M. (2013). Understanding islamic finance. Gramedia Pustaka Utama.

Baer, G. (1997). The Waqf as a Prop for the Social System (Sixteenth—Twentieth Centuries). Islamic Law and Society, 4(3), 264-297.

Ballantyne, W. M. (1986). Commercial Law in the Arab Middle East: The Gulf States. Graham & Trotman.

Bearman, P. (2005). Encyclopaedia of Islam, Index of Subjects. Brill.

Bees, N. A., Houtsma, M. T., Wensinck, A. J., Lévi-Provencal, E., Gibb, H. A. R., & Heffening, W. (1936). Morea'. The Encyclopaedia Qf Islam, 566-77.

Boyce, M. (1968). The pious foundations of the Zoroastrians. Bulletin of the School of Oriental and African Studies, 31(2), 270-289.

Bryman, A. (2016). Social research methods. Oxford university press.149-

Burton, J. (1990). The sources of Islamic law: Islamic theories of abrogation (pp. 9-11). Edinburgh: Edinburgh University Press.

Candra, H., & Ab Rahman, A. (2010). Waqf investment: A case study of dompet Dhuafa Republika, Indonesia. Jurnal Syariah, 18(1), 163-190.

Cizakca, M. (1998). Awqaf in history and its implications for modern Islamic economies. Islamic Economic Studies, 6(1).

Çizakça, M. (2000). A history of philanthropic foundations: The Islamic world from the seventh century to the present (pp. 2-10). Istanbul: Boğaziçi University Press.

Cizakca, M. (2013, December). The new waqf law prepared by IDB/IRTI and the Kuwait Public Foundation: a critical assessment. In Islamic Wealth Management Inaugural Colloquium, Kuala Lumpur: INCEIF Universit.

Coulson, N. J. (2011). A history of Islamic law. Aldine Transaction. 155-

Creswell, J. W., & Creswell, J. D. (2017). Research design: Qualitative, quantitative, and mixed methods approach. Sage publications.

Crone, P. (2002). Roman, provincial and Islamic law: the origins of the Islamic patronate (Vol. 8). Cambridge University Press.

Crone, P. (2008). „What do we actually know about Mohammed? “. opendemocracy. net.

Deguilhem, R. (2008). The Waqf in the city. In the City in the Islamic World (2 vols.) (pp. 929-956). Brill.

Doumani, B. (1998). Endowing family: Waqf, property devolution, and gender in greater Syria, 1800 to 1860. Comparative studies in society and history, 40(1), 3-41.

Doumani, B. (1998). Endowing family: Waqf, property devolution, and gender in greater Syria, 1800 to 1860. Comparative studies in society and history, 40(1), 3-41.

el-Din, T., & el-Din, S. (1996). The stock-exchange from an Islamic perspective. Journal of King Abdulaziz University: Islamic Economics, 8(1).

Esmaeili, H. (2009). On a slow boat towards the rule of law: The nature of law in the Saudi Arabia legal system. Ariz. J. Int'l & Comp. L., 26, 1.

Ezz Ad-din, S. (2016). Contribution towards Activating the Role of Cash Waqf in Development, a Case Study of some Islamic Countries.

Fawzī , Aṭwī, 2013. *Al-Sharikāt al-tijārīyah fī al-qawānīn al-waḍʿīyah wa al-sharīʿah al-Islāmīyah,* Damascus; *Dār al-Fikr.*

Foster, N. H. (2006). Islamic commercial law: An overview (I). In Dret, (4).166-

Foster, N. H. (2010). Islamic Perspectives on the Law of Business Organisations I: An Overview of the Classical Sharia and a Brief Comparison of the Sharia Regimes with Western-Style Law. European Business Organization Law Review, 11(1), 3-34.

Fyzee, A. A. A. (1974). Outlines of Muhammadan law.

Goolam, N. M. (2006). Ijtihad and its significance for Islamic legal interpretation. Mich. St. L. Rev., 1443.

Haji Abdullah, L. (2005). The classical Islamic Law of Waqf: a comparative approach (Doctoral dissertation, University of Edinburgh).

Hallaq, W. B. (1984). Was the gate of ijtihad closed? International Journal of Middle East Studies, 16(1), 3-41.
Hallaq, W. B. (1997). A history of Islamic legal theories: An introduction to Sunni Usul al-Fiqh. Cambridge University Press.
Hallaq, W. B. (2009). An introduction to Islamic law. Cambridge University Press.
Ḥammad, Nazih, 1995. *Muʿjam al-Muṣṭalḥāt al-Māliyyah wa al-qtiṣādiyyahfī lughat al-Fuqhā,* Damascus*; Dār al-qalm*.
Hanson, M. (1987). The influence of French law on the legal development of Saudi Arabia. Arab Law Quarterly, 2(3), 272-291.
Harasani, H. (2015). Toward the reform of private waqfs: A comparative study of Islamic waqfs and English trusts. Brill.
Hasan, Z. (2010). < Special Feature" Islamic Finance at the Current Stage: Scopes and Issues"> Regulatory Framework of Shari'ah Governance System in Malaysia, GCC Countries and the UK.
Hasanuzzaman, S. M. (1989). Limited liability of shareholders: An Islamic perspective. Islamic Studies, 28(4), 353-361.
Hasbullah, N. A., & Khairi, K. F. (2014). Corporate Waqf As An Instrument For Sustainability Of Economic Well-Being.
Hassan, H., & Alwi, A. (1986). Sales and contracts in early Islamic commercial law. Annexe Thesis Digitisation Project 2016 Block 7.
Hassan, H., Abd Ghadas, Z. A., & Rahman, N. A. (2012). The Myth of Corporate Personality': A comparative Legal Analysis of the Doctrine of Corporate Personality of Malaysian and Islamic Laws. Australian Journal of Basic and Applied Sciences, 6(11), 191-198.
Hassan, M. H. B. (2007). Explaining Islam's special position and the politic of Islam in Malaysia. The Muslim World, 97(2), 287-316.
Hennigan, P. C. (2004). The Birth of a Legal Institution: The Formation of the Waqf in Third-century AH Ḥanafī Legal Discourse (Vol. 18). Brill.
Hoexter, M. (1998). Endowments, Rulers, and Community: Waqf Al-òHaramayn in Ottoman Algiers (Vol. 6). Brill.

ʿIzz al-Dīn, M. Y. (2004). Islamic law: From historical foundations to contemporary practice. Edinburgh University Press.

Ibn al-Humām, Kamāl al-Dīn Muḥammad bin ʿAbd al-Wāḥīd, 1995. *Sharḥ Fatḥ al-Qadīr*, Beirut: *Dār al-Kutub al-ʿIlmiyyah.*

Ibn al-Mundhir, Abū Bakr Muḥammad bin Ibrāhīm al-Naysābūrī, 1994. *Al-Ijmāʿ*, Beirut; *Dār al-Maʿrifah.*

Ibn al-Qayyim, Abū ʿAbdullāh Muḥammad bin Abī Bakr, 1993. *ʾAʿlām al-Muwaqqaʿīn ʿan Rabb al-ʿālamīn,* Beirut; *Dār al-Kutub al-ʿIlmiyyah.*

Ibn Bayyah, ʿAbdullāh bin al-Shaykh Maḥfuwẓ, 2005. *Iʿmāl al-Maṣlaḥh fi al-Waqf,* Beirut; *Muʾassasat Al-rayyān.*

Ibn Ḍawyan, Ibirāhīm bin Muḥammad bin Sālm, 1996. *Manār al-Sabīl fi Sḥarh al-Dalīl ʿalā madhhab al-Īmām Aḥmad ibn Ḥanbal,* Mecca; *al-Maktabah al- Tijāriyyah.*

Ibn Ḥajar, Aḥmad bin ʿAlī Al-ʿAsqalānī, 1979. *Tadhhīb al-Tadhhīb*, Beirut: *Dār al-Kutub al-ʿIlmiyyah*.

Ibn Ḥājar, Aḥmad bin ʿAlī Al-ʿAsqalānī, 2001. *Fatḥ al-Bārīʾ Sharḥ Ṣaḥīḥ al-Bukhārī,* Beirut; *Dār Al-Kutub Al-ʿIlmiyyah*, edited by ʿAbd al-ʿAzīz ibn ʿAbdullāh ibn Bāz and ḥadīthḥ numbered by Muḥammad Fuād ʿAbd al-Bāqī.

Ibn Ḥanbal, al-Īmām Aḥmad, nd. *Musnad al-Īmām Aḥmad bin Ḥanbal*, Beirut; *Dār Ṣādir.*

Ibn Ḥazm, Abū Muhammad ʿAlī bin Aḥmad bin Saʿīd, 1999. *Al-ʾiḥkām fī usūl al-ʿAḥkām, edited by Aḥmad Muḥammad Shākir,* Beirut: *Dār al-Fikr*.

Ibn Ḥazm, Abū Muhammad ʿAlī bin Aḥmad bin Saʿīd, 2001. *Al-Maḥallā bi al-Āthār*, Beirut: *Dār Ibn Ḥazm*.

Ibn Hishām, Abū Muḥammad ʿAbd al-Mālik, 2000. *Al-Sīrah al-Nabawiyyah*, Beirut; *Dār al-Kutub al-ʿIlmiyyah*, edited by Fuʾād bin ʿAli Ḥāfiẓ.

Ibn Manẓūr, Abū al-Faḍl Jamāl al-Dīn Muḥammad bin Mukram, 1999. *Lisān al-ʿArab, Beirut*; *Dār al-Fikr*, 9th edition.

Ibn Nujaym, Zayn al-Dīn bin Ibrāhīm bin Muḥammad, 1997. *Al-Bar al-Rāʾiq Sharḥ Kanz al-Daqāʾiq*, Beirut; *Dār al-Kutub al-ʿIlmiyyah.*

Ibn Qāsim, ʿAbd al-Raḥmān bin Muḥammad bin Qāsim al-ʿAṣimī al-Najdī al-Ḥanbalī,1976. *Ḥāshiyat al-Rrawḍ al-Murbiʿ Saraḥ Zād al-Mustaqniʿ*, placeof publication and publisher unknown

Ibn Qudāmah, Abū Muḥammad ʿAbdullāh bin Aḥmad bin Muḥammad, 1994. *Al-Mughnī, together with Al-Sharh al-Kabīr*, by Ibn Qudāmah al-Maqdasī, Shams al-Dīn Abū Faraj ʿAbd al-Raḥmān bin Abū ʿUmar Muḥammad bin Aḥmad, Beirut: *Dār al-Kutub al-ʿIlmiyyah.*

Ibn Rushd, Abū Walīd Muḥammad bin Aḥmad, 1996. *Bidāyat al-Mujtahid wā Nihāyat al- Maqāṣid*, English translation by Imran Ahsan Khan Nyazee, UK; Garent Publishers, Reviewed by Mohammad Abdul Rauf.

Ibn Taymiyyah, Tāqī ad-dīn Aḥmad ibn Abd al-Ḥalim ibn ʿAbd al-Salam, 1997. *Majmūʿ al-Fatāwā,* Riyadh: Ministry of Islamic Affairs, Dawah and Guidance, edited by ʿAbd al-Raḥmān bin Muḥammad bin Qāsim al-ʿAṣimyī al-Najdyī al-ḥanbalī and his son Muḥammad.

Ibn ʿAbd as-Salām, ʿIzz al-Dīn ʿAbd al-ʿAzīz, 1999. *Qawāʿid al-Aḥkām fī Maṣāliḥ al-Anām*, Beirut; *Dār al-Kutub al-ʿIlmiyyah.*

Ibn ʿĀbidīn, Muḥammad Amīn, 1994. *Ḥāshiyah Ibn ʿĀbidīn ʾala Rad al-Muḥtār ʿala al-Durr al-Mukhtār Sharḥ Tanwīr al-Abṣār*, Beirut*; Dār al-Kutub al-ʿIlmiyyah.*

Ibn ʿĀshūr, Muḥammad Al-Ṭāhir, 2001. *Maqāṣid al-Sharīʿah al-Islāmiyyah,* Jordon; *Dār al- nafāʾis.*

Ibrahim, D., & Ibrahim, H. (2013). The Revitalization of Islamic Trust Institution Through Corporate Waqf. In 4th International Conference on Business and Economic Research Proceedings.

Ibrahim, D., & Ibrahim, H. (2014). The Role of Corporate Waqf in the Development of Islamic Finance.

Ismail Abdel Mohsin, M. (2009). Cash waqf: A new financial product. Prentice Hall.

Jones, W. R. (1980). Pious endowments in medieval Christianity and Islam. Diogenes, 28(109), 23-36.

Joseph, S. (2014). Waqf in historical perspective: Online fatāwā and contemporary discourses by Muslim scholars. Journal of Muslim Minority Affairs, 34(4), 425-437.

Kahf, M. (1998). Financing the development of awqaf property. In seminar on development of awqaf organized by IRTI Kuala Lumpur, Malaysia.

Kahf, M. (1998). Financing the Development of Awqaf Property. Seminar Paper. IRTI.

Kahf, M. (1999, October). Towards the revival of awqaf: A few fiqhi issues to reconsider. In Harvard forum on Islamic finance and Economics (Vol. 1). New York, NY: Harvard University.

Kahf, M. (2003, January). The role of waqf in improving the ummah welfare. In International Seminar on Waqf as a Private Legal Body (pp. 6-7).

Kamali, M. H. (1991). Principles of Islamic jurisprudence (pp. 283-296). Cambridge: Islamic Texts Society.

Kamali, M. H. (1996). Fiqh and adaptation to social reality. The Muslim World, 86(1), 62-84.

Karim, R. (2011). Zakat And Waqf Bank. For Social Development And Improved Management Of Endowments.

Karl, D. J. (1991). Islamic law in Saudi Arabia: what foreign attorneys should know. Geo. Wash. J. Int'l L. & Econ., 25, 131.

Kendall, J., & Knapp, M. (1995). A loose and baggy monster. An introduction to the voluntary sector, 66-95.

Khalil, E. (2006). An Overview of the Sharia'a Prohibition of Riba'in Thomas A. Interest in Islamic Economics: Understanding riba.

Khallaf, A. W. (2000). Perkembangan Sejarah Hukum Islam. Bandung: Pustaka Setia.

Khallāf, ʿAbd al-Wahhāb, 2002. ʿIlm uṣūl al-fiqh, Cairo; Dār al- Shurūq.

Khan, A. (2001). Islam as Intellectual Property 'My Lord! Increase Me in Knowledge.'. Cumberland Law Review, 31, 361.

Khan, L. A. (2011). Contemporary Ijtihad: Limits and Controversies: Limits and Controversies. Edinburgh University Press.

Khaznah,Haytham ʿAbdul al-Ḥamīd, 2016.A Paper presented at the conference known as *ʾAʿmāl Muntadā Qaḍāyā al-Waqf al-Fiqhiyyah al-Thāmin, Taḥta Shiʿār Qaḍāyā Mustajidah wa Tʾaṣyīl Sharaʿyy al-Baḥāth al-ʿIlmiyyah fi al-Muḍuwʿ al-Thāniyy Tamwiyl al-Waqāf ʿan Ṭariyq al-ʾIktitāb al-ʿĀm,* , published by the Ministry of Endowment and Islamic Affairs of Kuwait.

Koehler, B. (2010). Early Islamic charities as catalysts of institutional innovation. Economic Affairs, 30(3), 6-8.

Koehler, B. (2010). Early Islamic charities as catalysts of institutional innovation. Economic Affairs, 30(3), 6-8.

Koraytem, T. (2000). The Islamic nature of the Saudi regulations for companies. Arab Law Quarterly, 15(1), 63-69.

Kozlowski, G. C. (1998). Colonialization of Islam: Dissolution of Traditional Institutions in Pakistan. By Jamal Malik. New Delhi: Manohar, 1996. xiv, 359 pp. $42.00 (cloth). The Journal of Asian Studies, 57(1), 254-255.\

Kuran, T. (2001). The provision of public goods under Islamic law: Origins, impact, and limitations of the waqf system. Law and Society Review, 841-898.

Kuran, T. (2004). Why the Middle East is economically underdeveloped: historical mechanisms of institutional stagnation. Journal of economic perspectives, 18(3), 71-90.

Latiff, A. Z. A., Ismail, C., & Daud, N. (2006). Waqf assets management and its potential toward the enhancement of education for Muslim communityin Malaysia (Pengurusan harta wakaf dan potensinya ke arah kemajuan pendidikan umat Islam di Malaysia). In National Wakaf Seminar.

Layish, A. (1983). The Mālikī Family" Waqf" according to Wills and" Waqfiyyāt". Bulletin of the School of Oriental and African Studies, University of London, 1-32.

Lēv, Y. (2005). Charity, endowments, and charitable institutions in medieval Islam. Univ. Press of Florida.

Maghbub, M. A., & ALHAJAM, A. S. (2018). Proposal Framework of Waqf Institutions' Governance and Its Economic and Social Implications. Uluslararası İslam Ekonomisi ve Finansı Araştırmaları Dergisi, 4(2), 6-16.

Mahamood, S. M. (2006). Waqf in Malaysia: Legal and administrative perspectives. University of Malaya Press.

Mahmood, T. (1988). Islamic Family Waqf in Twentieth Century Legislation: A Comparative Perspective'. Islamic and Comparative Law Quarterly, 8(1), 1-20.

Mandaville, J. E. (1979). Usurious piety: the cash waqf controversy in the Ottoman Empire. International Journal of Middle East Studies, 10(3), 289-308.

Mat Rani, M. A., & Abdul Aziz, A. (2010). Waqf management and administration in Malaysia: Its implementation from the perspective of Islamic Law. Management & Accounting Review (MAR), 9(2), 1-7.

Mattei, U. (1997). Three patterns of law: taxonomy and change in the world's legal systems. The American journal of comparative law, 45(1), 5-44.

Mohamad, T. A. H. (2012). Obligation of Companies to Pay Zakat: Issues Arising from Effects of Separate Legal Entity. The Law Review, 2012.

Mohammad, A. P., Ramazani, B., & Zadeh, M. M. (2017). Personal status and exceptions of the national law enforcement regarding it. Estação Científica (UNIFAP), 7(1), 61-70.

Mohammad, M. T. S. H. (2011). Towards an Islamic social (waqf) bank. International Journal of Trade, Economics and Finance, 2(5), 381.

Mohd. Zain bin Haji Othman. (1982). Islamic Law: with special reference to the institution of Waqf. Prime Minister's Department, Religious Affairs Division.

Mohsin, M. I. A. (2013). Financing through cash-waqf: a revitalization to finance different needs. International journal of Islamic and Middle Eastern finance and management.

Morice, G. T. (1902). Fideicommissa and Trusts. S. African LJ, 19, 149.

Muḥammad, ʿAbd al-Ḥalīm ʿUmar, 2011. *Al-Uṣūl al-Muḥāsabyyah li al-Waqf wa Taṭawūr Anẓīmatah fi Ḍwāʾ Ḍawābiṭ al-Sharīʿah al-Islāmiyyah, A*

Paper presented at the conference known as ʾAʿmāl Muntadā Qaḍāyā al-Waqf al-Fiqhiyyah al-Khāms in Trukey, published by the Ministry of Endowment and Islamic Affairs of Kuwait.

Muḥammad, ʿAbd al-Jawād Muḥammad, 1998. *Al-Taṭwar al-Tashrīʿī fi al-Mamlākah Al-ʿrabiyah al-Suʿūdiyya,* Riyadh; *Dār al-Sālām.*

Müller-Schneider, T. (2013). Jeremy Bentham: An Introduction to the Principles of Morals and Legislation. In Hauptwerke der Emotionssoziologie (pp. 50-54). Springer VS, Wiesbaden.

Nasr, S. (2011). Islamic Finance in the Arab World: Challenges and Prospects. Cambridge Business & Economics Conference (CBEC).

Nasr, S. H. (2005). Islam Religion, History, and Civilization. Harper Collins E-Books, London.

Nāṣyif, Ilyās, 2013. *Muwsūʿat al-Sharikāt al-Tijārīah*, Beirut; *Dār Iḥyāʾ al-Turāth al-ʿArabī.*

Niẓām, Al-Shayk Niẓām al-Dīn al-Barnhābuwriy, 1983. *Al-Fatāwā al-Hindiyyah aw al-Fatāwā al-ʿamkiriyyah ʿalā madhhab al-Īmām Abū Ḥanīfa al-Nuʿmān,* Beirut; *Dār al-Maʿrifah*.

Nyazee, I. A. K. (2005). Outlines of Islamic jurisprudence. Lulu. com. 254-

Nyazee, Imran Ahsan Khan, 2016. Islamic Law of Business organization Corporations, Islamabad, Islamic Research Institute, and International Institute of Islamic Thought.

Oladapo, H., Oseni, R. and Mustafa, O. (2016). A Comparative Analysis of Waqf Institution and Endowment Foundation: Determinants of Sustainability. International Journal of Novel Research in Humanity and Social Sciences, 3(4), pp.151-162.

Othman, M. Z. B. H. (1983). Origin of the Institution of Waqf. Hamdard Islamicus, 6(2), 3-20.

Perikhanian, A. (1983). Iranian society and law. The Cambridge History of Iran, 3(2), 627-80.

Powers, D. S. (1989). Orientalism, colonialism, and legal history: the attack on Muslim family endowments in Algeria and India. Comparative Studies in Society and History, 31(3), 535-571.
Powers, D. S. (1993). The Maliki family endowment: Legal norms and social practices. International Journal of Middle East Studies, 25(3), 379-406.
Qadri, A. A. (1963). Islamic jurisprudence in the modern world: a reflection upon comparative study of the law. Sole agents: NM Tripathi.
Rabb, Intisar A. (2009). 'Ijtihād'. In John L. Esposito (ed.). The Oxford Encyclopedia of the Islamic World. Oxford: Oxford University Press
Rahman, A., & Doi, I. (1984). Shari'ah: The Islamic Law. AS Noordeen, Kuala Lumpur.
Raissouni, A. (2001). Islamic 'Waqf endowment': scope and implications (A. Benhallam, Trans.). Rabat: Islamic Educational, Scientific, and Cultural Organisation, ISESCO, www edition.
Ramli, A. M., & Jalil, A. (2013). Corporate waqf model and its distinctive features: The future of Islamic philanthropy. In Dipresentasikan pada Worlds Universities Islamic Philanthropy Conference di Kuala Lumpur, Malaysia.
Ramli, A. M., & Jalil, A. (2014). Banking model of corporate waqf: An analysis of Wakaf Selangor Muamalat [Model perbankan wakaf korporat: Analisis Wakaf Selangor Muamalat]. Jurnal Pengurusan.
Rashād, Ḥasan Khalīl,1981. *Al-Sharikāt fī al-Fiqh al-Islāmī Darāsah Muqāranah,* Beirut; *Dār al-Rashaīd.*
Regulations & Laws of the Saudi Arabian Ministry of Commerce and Industry (The Official Website of The Saudi Arabian Ministry of Commerce and Industry), Available at:
https://mci.gov.sa/ar/regulations/pages/default.aspx.
Saad, N. M., Kassim, S., & Hamid, Z. (2016). Best practices of waqf: Experiences of Malaysia and Saudi Arabia. Journal of Islamic Economics Lariba, 2(2).

Saad, N. M., Sarif, S. M., Osman, A. Z., Hamid, Z., & Saleem, M. Y. (2017). Managing corporate waqf in Malaysia: perspectives of selected SEDCs and SIRCs. Jurnal Syariah, 25(1), 91-116.

Sabit, M. T., Iman, A. H. M., & Omar, I. (2005). An ideal financial mechanism for the development of the waqf properties in Malaysia. Johor: Reseach Management Centre, Universiti Teknologi Malaysia.

Sadeq, A. M. (2002). Awqaf in Bangladesh. Awqaf Experiences in South Asia, Institute of Objectives Studies, New Delhi.

Sadeq, A. M. (2002). Waqf, perpetual charity and poverty alleviation. International Journal of Social Economics.

Salmond, J. W., & Stallybrass, W. T. S. (1945). Salmond's law of torts: a treatise on the English law of liability for civil injuries. Sweet & Maxwell.

Schacht, J. (1966). Introduction to Islamic Law, Clarendon.275-

Schacht, J. (1984). An introduction to Islamic law.

Seaman, B. W. (1979). Islamic law and modern government: Saudi Arabia supplement the Shari'a to regulate development. Colum. J. Transnat'l L., 18, 413.

Shabīr, Muḥammad ʿUthmān, 1997. *Al-Madkhal Ilā Fiqh al-Muʿāmalāt al-Māliyyah*, Damascus: *Dār Al-Fikr.*

Shaḥāta, Ḥusayn, 2012. *Al-Ḍawābiṭ al-Fiqhiyyah wa al-Uṣūl al-Muḥāsabyyah li-Ṣight Istithmār Amwāl al-Waqf,* Riyadh; *Dār ibn al-Jawzī.*

Shalaby, K. (2008). The kingdom of Saudi Arabia. From charity to social change: Trends in Arab philanthropy, 87-111.

Shalbī, Muḥammad, 1987. *Aḥkām al-Waṣayā wā al-Waqāf*, Beirut; *Dār al-Fikr.*

Shatzmiller, M. (2001). Islamic institutions and property rights: The case of the'public good'Waqf. Journal of the Economic and Social History of the Orient, 44(1), 44-74.

Shiyuti, H. (2012). Issues on Corporate Waqf.

Singer, A. (2013). Giving practices in Islamic societies. Social Research: An International Quarterly, 80(2), 341-358.

Smock, D. R. (2004). Ijtihad: Reinterpreting Islamic Principles for the Twenty-first Century (Vol. 125). United States Institute of Peace.
Smock, D. R. (2004). Ijtihad: Reinterpreting Islamic Principles for the Twenty-first Century (Vol. 125). United States Institute of Peace.
Stoddard, L. (1921). The new world of Islam. C. Scribner's.

Stoop, A. P., & Berg, M. (2003). Integrating quantitative and qualitative methods in patient care information system evaluation: guidance for the organizational decision maker. Methods of information in medicine, 42(4), 458-462.

Su Ye Che. (2015). Corporate Waqf and Humanitarian Agency Collaborative Partnership.

Sulaymān, Sālm, 1986. Qawāʿid al-fiqh al-Islāmī, Karachi – Pakistan, place of publication and publisher unknown.

Tahir, A., M. (2015). Comparative Study of Waqf in Malaysia and Saudi Arabia. Master's thesis. International Islamic University Malaysia.

The law of Saudi Arabian General Authority for Awqāf (The Official Website), Available at: https://www.awqaf.gov.sa/ar/Regulations.

The Official Website of Al-Subayʿī waqf foundation, Available at: https://asf.org.sa/en.

The Official Website of Sulaimān Al-Rājḥī Waqf company Available at: https://rm.org.sa/.

The Regulation of Sharīʿah Board of the Statute of Sulaimān Al-Rājḥī Waqf company, 2016, Unpublished documents.

The Regulation of Sharīʿah Board of the Statute of the Al-Subayʿī Waqf foundation, 2017, Unpublished documents.

The Saudi Arabian Ministry of Commerce (The Official Website) Regulations and laws, Available at: https://mci.gov.sa/en/pages/default.aspx.

The Saudi Arabian Ministry of Islamic Affairs, Dawah and Guidance (The Official Website) Regulations and laws, Available at: https://www.moia.gov.sa/Rules/Pages/default.aspx.

The Saudi Arabian Ministry of Justice (The Official Website) Regulations and laws, , Available at: https://www.moj.gov.sa/ar/pages/default.aspx.

The Saudi Arabian Ministry of Labor and Social Development (The Official Website of The Saudi Arabian Ministry of Labor and Social Development) Regulations of Non-profit Organizations, Available at: https://mlsd.gov.sa/en/procedures.

Thomas, A. S. (Ed.). (2006). Interest in Islamic economics: understanding riba. Psychology Press.

Tibi, B. (1991). Islam and the cultural accommodation of social change.

Westview Press.

Toraman, C., Tunçsiper, B., & Yilmaz, S. (2007, August). Cash awqaf in the Ottomans as philanthropic foundations and their accounting practices. In 5th Accounting History International Conference, Banff, Canada (pp. 9-11).

Traboulsi, S. (2008). David Commins The Wahhabi Mission and Saudi Arabia, Library of Modern Middle East Studies 50 (London: IB Tauris, 2006). Pp. 288. $85.00 cloth. International Journal of Middle East Studies, 40(4), 671-672.

Uusmani, M. T., & Taqī ʻUs̲ mānī, M. (2002). An introduction to Islamic finance (Vol. 20). Brill.

Van Leeuwen, R. (1999). Waqfs and urban structures: The case of Ottoman Damascus (Vol. 11). Brill

Venardos, A. M. (2005). Islamic Financial Products. World Scientific Book Chapters, 62-91.

Verbit, G. P. (2002). The Origins of the Trust. Xlibris Corporation.

Visser, H. (2019). Islamic finance: Principles and practice. Edward Elgar Publishing.

Wafa, S. M. G. W. S. A., & Wafa, B. S. A. (2010, January). Development of waqfs for education in Malaysia. In Seventh International Conference-The tawhidi epistemology: Zakat and waqf economy (pp. 137-153).

Wahab, N. A., & Rahman, A. R. A. (2011). A framework to analyse the efficiency and governance of zakat institutions. Journal of Islamic Accounting and Business Research.

Weiss, B. (1978). Interpretation in lslamic Law: The Theory of Ijtihād. The American Journal of Comparative Law, 26(2), 199-212.

Wicaksono, K. P. (2015). Understanding Islamic Finance: Comparative Analysis on Advantages and Disadvantages between Sukuk and Bonds Understanding Islamic Finance: Comparative Analysis on Advantages and Disadvantages between Sukuk and Bonds.

YARSIHIATER, E. (1982). Encyclopaedia Iranica.

Yildirim, O. (1999). PIOUS FOUNDATIONS IN THE BYZANTINE AND SELJUK STATES: A COMPARATIVE STUDY OF PHILANTHROPY IN THE MEDITERRANEAN WORLD DURING THE LATE MEDIEVAL ERA: The Diataxis of Michael Attaleiate and the Waqfiyya of Celaleddin Karatay. Rivista degli studi orientali, 73(Fasc. 1/4), 27-52.

Yunanda, R. A. (2016). Accountability of Islamic based non-profit sector: the case of waqf organizations. JEBIS (Jurnal Ekonomi dan Bisnis Islam), 2(2), 105-124.

Yūsuf, Ibrāhīm Yūsuf, 2006. *Majālāt Waqfiyyah Muqtaraḥh Litanmiyat Mustadāmah: al-Waqf al-Mʾuqqat*, Mecca, Paper presented at the *al-Buḥuth al-ʿIlmiyyah li al-Muʾtamar al-Thāniyy li al-Awqaf.*

Zakī, ʿUmar, 2006. *Al-Khulāṣt fi Tanẓīm al-Waqāf*, published by the Ministry of Endowment and Islamic Affairs of Kuwait.

Zaydān, ʿAbd al-Karīm, 1976. *Al-Wajīz fī Usūl al-Fiqh*, Cairo; Muʾassasat Qurṭubah.

Zaydān, ʿAbd al-Karīm, 1995, *Al-Madkhal li-Dirāsat al-Sharīʿah al-Islāmiyyah,* Beirut; *Muaʾssasah al-Risālah.*

Zuryati, Z. A., Yusoff, M., & Azrae, A. N. (2009). Separate legal entity under Syariah law and its application on Islamic banking in Malaysia: A note. International Journal of Banking and Finance, 6(2), 139-154.