

Istanbul Network for Liberty Lecture March 17, 2014

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Private Sector Provision of Welfare in Early Islam: the Waqf*

Abstract

Waqfs have been a distinctive feature of welfare provision in Islamic societies for many centuries. However, there is a common perception that *waqfs* were not conceived during the lifetime of Muhammad. A recent study of Islamic institutional history, for example, asserted *waqfs* were an “institutional choice, which appears to have been made about a century after Muhammad.”¹ From this perception derives an inference that *waqfs*, therefore, are not germane to Islamic conceptions of civil institutions. The following remarks take issue with this perception and inference.

A further inference from the assertion that *waqfs* originated a century after the death of the Prophet is that *waqfs* at their inception were constituted to address societal conditions of that particular period and hence were ill suited to adapting to societal needs not foreseen at the time.

I argue *waqfs* originated in provisions made by Muhammad, and that proceeding from these provisions there emerged in early Islam an innovative legal conception of property rights, namely fiduciary ownership. Placing the origins of *waqfs* in Muhammad’s lifetime, by implication, supports the assertion that early Islam was a catalyst for the self-sustaining evolution of formative institutions of civil society, in sectors such as education and health. A corollary of the assertion that *waqfs* originate in Muhammad’s policy measures, is that the view civil society in Islam was stagnant from the outset is mistaken.

I argue that the conception of *waqfs* was implied by the introduction of *zakat*.

My remarks will also show *waqfs* were forerunners of trusts in Common Law and point out the historical juncture from which onward jurisprudential thinking in Islam and Christendom diverged. I will close by showing *waqfs*, however, have continued to prove adaptable to new needs for provision of welfare.

Providing Welfare through *Zakat* and *Waqf*

Preliminary remarks on the differences between *zakat* and *waqf* should precede a discussion of the beginnings of the *waqf* sector. The Koran prescribes poor relief as a core social duty and makes explicit references to *zakat* as a means of delivering philanthropy. *Waqfs*, on the other hand, do not feature in the Koran. The absence of express Koranic endorsement of *waqfs* has encouraged the inference that these did not emerge until long after Muhammad had died. Cahen (1961) wrote the history of *waqfs* had yet to written, and even now the question when *waqfs* first appeared is not settled.²

Zakat and *waqfs* serve the same end, namely to provide welfare. Where they differ, however, is in how they are funded. *Zakat* consists of an annual levy assessed on wealth and the proceeds from *zakat* fluctuate in parallel with the wealth from which it is sourced. Therefore, the amounts available for

¹ Kuran: *The Long Divergence*, 110

² Cahen, 38

disbursement vary year by year and consequently it is difficult to budget funding over the long term. Funds for *zakat* are raised and spent in the short term.

A *waqf*, on the other hand, meets the need for providing philanthropy in the long term. A *waqf* consists of a distinct asset, for example, an orchard or a building, which produces an income, for example, a harvest or rental income. The income from the *waqf*'s asset base is applied to meet needs that recur, for example, salaries of teaching staff.

Both *zakat* and *waqf*, however, follow the same requirement; according to Yaacov Lev "Islamic charity was a sacred charity, a form of worship, rather than a form of altruistic behaviour."³

Legal framework of a *Waqf*

Because the lifespan of a *waqf* may be longer than that of the donor, a legal agreement needs to set out the rights and duties of all parties concerned. Three parties are involved in setting up a *waqf*: the donor; the manager; and the beneficiaries. The donor is required to pass assets to the *waqf*; the manager must be at arm's length from the donor; and the *waqf*'s deed must stipulate how funds are to be used. The legal framework settles other points, such as the manager's salary; complaints procedures; and what should happen in case the original purpose of the *waqf* falls away (income never reverts to the donor and as a general rule, income is applied to poor relief).

The Foundation of the *Waqf* Sector by Muhammad and his Companions

Because a *waqf* derives its funding from income generated by a capital asset, it follows that no *waqfs* could come into being as long as Muhammad and his adherents owned only moveable assets. But once Muhammad and his Companions came into possession of fixed assets, the first *waqfs* were created.

That Muhammad was familiar with provision of welfare from a fixed asset is shown by a *hadith* that describes Muhammad once scolded his grandson Hassan when he spotted the boy sucking fruit from a tree that had been given over to provide food for the poor. Muhammad told Hassan "Don't you know you are not to eat *sadaka*?"⁴ This *hadith* established Muhammad was already conversant with the concept of *waqfs* even if he did not use the term. Indeed many *hadiths* used the terms *waqf* and *sadaka* interchangeably. Claude Cahen pointed out that an analogous blurring of the meaning of terms occurred in the case of taxes on non-Believers, *jiza* and *kharaj*. The former was levied on annual income and the latter on the yield from farm land, but in *hadiths* also these two terms are used without distinguishing between their source.⁵

The Prophet may have formed the first *waqf* when a certain Muqairiq bequeathed to him seven properties in Medina, wishing he apply the income of same to poor relief. Muqairiq's bequest constituted what was the first *waqf*, but for the time being remained an isolated instance. The opportunity to set aside assets to provide welfare on a larger scale presented itself when Muhammad and his Companions took possession of extensive land holdings after the conquest of Khaybar.

Prior to the conquest of Khaybar, Muhammad only disposed of booty that consisted of moveable assets. Now, however, he set precedents for granting land ownership tied to conditions how grantees were to use proceeds from land ('usufruct'). *Hadiths* single out Umar as the first Muslim who endowed *waqfs*; traditions vary whether this occurred at Muhammad's or Umar's instigation.⁶ By the time Muhammad died, four years later, the concept of *waqfs* was no longer unfamiliar; around this time Muhammad's Companion Amr al As recommended to a certain Muslim wishing to settle his estate to reserve a portion for use as *sadaka*.⁷ The first two caliphs, Abu Bakr and Umar, enhanced the range of

³ Lev, 144

⁴ Gil (1998), 128

⁵ Cahen, 45

⁶ Gil (1998), 126

⁷ Gil (1998), 127

applications of *waqfs*. Abu Bakr created a *waqf* the beneficiaries of which were his descendants. Umar again featured in the early evolution of *waqfs* following the conquest of Egypt; Umar at this point had become caliph and *ex officio* was entitled to one fifth of the resulting booty that he committed to a *waqf* for the benefit of the commonwealth of Muslims.⁸

The origins of the *waqf*, then, lie in pragmatic applications of the Koranic instruction to provide charity, which can be traced to actions taken by the Prophet. The differentiation between the two terms *waqf* and *zakat* emerged after the practice of vesting capital assets had evolved.

This explanation for the origin of *waqfs* differs from that given, for example, by Kuran (2005) according to which *waqfs* were derived from Roman law.⁹

Flexibility of *Waqfs*

Waqfs ring-fenced assets from interference by external authorities, including that of the state. Maya Shatzmiller has pointed out that in the Western Islamic Empire, in Spain and Morocco, the revenues of *waqfs* and of the state were held in separate treasuries until the fifteenth century.¹⁰

Conventions of *waqf* practice emerged over time. It was common practice to dedicate to *waqfs* portions of estates, and donations comprising a third of an estate were common. Given the wealth in the hands of elites, endowments of charitable institutions could be considerable. In Jerusalem, a sixteenth century *waqf* was funded by revenues of 26 villages. Istanbul in the eighteenth century afforded soup kitchens daily serving some 30,000 meals. At the time of Turkey's foundation in 1923, *waqfs* owned three quarters of arable land.¹¹ These examples show *waqfs* were capable of evolving to meet needs that could not have been foreseen by early Islamic society.

However, it has been argued that the provision of welfare through *waqfs* blocked the evolution of institutional frames that matched the needs of a dynamic society. Kuran perceives in the prolific occurrence of *waqfs* in medieval Islam a contrast with the legal conception of the corporation, which occurred in contemporaneous Europe.¹² However, arguably the inception of the corporation in Europe is itself derived from the *waqf*.

Gaudiosi has examined the statutes of Merton College cast in Oxford in 1264, one of Europe's earliest instances of a trust, and found: "Were the Merton documents written in Arabic, rather than Latin, the statutes could surely be accepted as a *waqf* instrument."¹³ The jurisprudential frame for corporations occurred around this time, in 1252 when the Vatican issued the legal definition of a *universitas* as an entity with rights and duties distinct from those of its members.¹⁴

Trusts and corporations evolved in Europe, but not in Islam. This divergence in institutional evolution has been deemed symptomatic of inherent stagnation

⁸ Gil (1998), 128

⁹ Kuran (2005): "Just as the Church did not invent its corporate identity from scratch, so the *waqf* did not emerge in an institutional vacuum. The concept of a trust was present in Roman law; and pre-Islamic peoples of the Middle East used it in various forms." 800

¹⁰ Shatzmiller (2001), 61

¹¹ Kuran (2001), 849-50

¹² "The *waqf* became Islam's main organizational form for providing social services at a time when western Europe started to use the corporation to many of the same ends." Kuran (2005), 802

¹³ Gaudiosi, 1254-55

¹⁴ Dewey: "For example, the "fiction" theory of the personality of corporate bodies, or *universitates*, was promulgated if not originated, by Pope Innocent IV (1243-1254)."

in Islamic social institutions. Arguably, however, the correspondences in legal structures between *waqfs* and trusts may not be coincidental; rather, trusts may be an instance where Islamic templates were assimilated by European jurists.

The religious nature of *waqfs* has been thought to have precluded a crossover from Islamic to non-Islamic jurisprudence. Gaudiosi, describing the template for *waqfs*, wrote: "The terms set forth by the founder could not violate any of the tenets of Islam. Thus, a *waqf* for the construction of a church or synagogue would be invalid, as would a trust for any institution propagating doctrines inimical to Islam."¹⁵ Gaudiosi's observation is not borne out, however, by empirics.

Waqfs were a legal instrument the use of which Islamic authorities permitted to non-Muslims. An explicit extension of the right to endow *waqfs* was made in the case of a city with a large non-Muslim population, Jerusalem. An early Muslim manual of law stated: "If a Christian makes his land or his house *waqf* and prescribes that their revenue be spent for repairs in Jerusalem or to buy oil for its lamps or any (other) of its needs" (it is permitted) ... also, Jews have in this respect the same rights as the Christians."¹⁶ It follows, therefore, that the construction of a *waqf* was known to non-Muslim jurists.

A corollary issue is why trusts in Europe could make a gradual transition into corporations, whereas such dynamism in conceptual casting of a legal framework was absent in Islamic societies. It would appear the creation of the *universitas* marks a fork in the road from whence Europe progressed towards new forms of legal entities, whilst Islam, on the other hand, stagnated.

This notion, too, is arguably misconceived, for two reasons. The first has been cited above – *waqfs* were designed to provide welfare on a substantial scale and thus demonstrated their capacity to outgrow original limitations. A second is the emergence of *waqfs* in the present. Specific examples are cited by Ismail, who points out Malaysian law sets terms for *waqfs* endowed with cash.¹⁷

Conclusion

I have shown *waqfs* originated in the era of Muhammad and from inception developed dynamically. The assertion that *waqfs* did not come into being until a later stage of Islamic history and were caused by societal needs of a particular era, therefore, is wrong.

I have also shown that it is wrong to use *waqfs* as an example for institutional stagnation in Islam contrasting with dynamism in Europe, for two reasons: first, because Europeans were exposed to *waqfs* in Jerusalem, where they were authorised to introduce them, and in Europe the first trusts replicated the very structure of *waqfs*; second, because *waqfs* outgrew small scale and even in the present are a malleable instrument for welfare provision.

¹⁵ Gaudiosi, 1237

¹⁶ Gil (1984), 157

¹⁷ Ismail, 341: Pertinent regulations have been passed by the State Islamic Religious Council and by regional states (Penang, Pahang, Johor, Terengganu and Malacca).

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