

BOOK REVIEW

TOWARD THE REFORM OF PRIVATE WAQFS: A COMPARATIVE STUDY OF ISLAMIC WAQFS AND ENGLISH TRUSTS

Harasani, H. (2015). *Toward the Reform of Private Waqfs: A Comparative Study of Islamic Waqfs and English Trusts*. Leiden, Netherlands: Brill - Nijhoff.

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In *Toward the Reform of Private Waqfs: A Comparative Study of Islamic Waqfs and English Trusts*, Hamid Harasani bridges what may seem like two discordant systems of theory (and ultimately practice). He masterfully explains how a study of Islamic *awqāf* and English trusts lays the groundwork for reform in these areas to allow Muslims to practice wealth-management that complies both with their religious decrees and with English common law. By detailing the two largest impediments – the issues of the use/refusal of perpetuity requirements and definitions of ownership – Harasani argues that it may be possible for Muslim adherents living under English common law to have access to a pathway that allows them to “utilize property in a way that transcends personal benefit and benefits the community” (p. 168).

As a doctoral thesis, Harasani methodically lays out his work, beginning with the research problem, its aims, and the context within which they lie. The reader is provided with an understanding of how the topics of Islamic *awqāf* and Muslims’ desires to create them are of importance. A waqf, as later defined in Chapter 2, is a wealth planning tool and a “mechanism whereby a Muslim, even after his death, can get as much reward as possible in the afterlife” (p. 94). Harasani helps the reader to understand that for a Muslim, “...law is all encompassing;

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DOI: 10.2979/muslphilcivisoc.3.2.04

touching all areas of life” (p. 16). This can be a challenge when Islamic law (non-state law) is in contradiction to English common law (state law); the non-state law is permissible and rewarded by God, but the state law forbids (at least in part) elements of the practice. Harasani argues that by understanding each legal system’s history, interpretations, and flexibility, there may be a way to reconcile the current points of friction between Islamic waqf law and English trusts law.

Chapter 2 delves into the details of the waqf system as it stands today (or at least in 2014). Harasani provides an overview of the waqf system’s definitions, foundations, and central principles. The author expands upon his earlier discussion of *ijtihad* (a jurist’s independent reasoning) for interpreting and understanding where the practice and goals of creating *awqāf* originated. There is a hierarchy of authority or determining authenticity when it comes to interpreting God’s law. At the top of this hierarchy is the *Qur’an*, the direct word of God, and is followed by the Sunnah (prophetic sayings), *Ijmā* (consensus of scholars), and finally *Ijtihad*. Harasani notes that each of the four schools of law have similarities and differences, strengths and weaknesses, when it comes to understanding the creation and implementation of *awqāf*. The author argues for the use of the *Hanbalī* School of thought due to its strong reliance on hadith and having the “most systematic and logically expounded” discussion of waqf practices of the four schools (p. 56). Harasani goes on to outline five conditions that the *Hanbalī* School necessitates for waqf creation - the condition most salient to the primary point of discussion for the remainder of the book being that a waqf is “unconditional, perpetual, inalienable, and irrevocable” (p. 65). Subsequently, after outlining the five main criticisms most often waged against Islamic waqf law, Harasani spends considerable time detailing two primary critiques – perpetuity and inalienability/ownership – in Chapters 3 and 4, respectively.

According to Harasani, three of the four schools of law cite perpetuity as a condition for valid waqf creation. Harasani provides the reader with a sense that the four schools are a sort of continuum, with *Hanafī* thought being most stringent (and most cited), *Mālikī* thought providing the greatest flexibility in applying perpetuity or not, and the *Shāfi’ī* and *Hanbalī* schools forming a middle ground. However, why is the issue of perpetuity important and how does it conflict with English common law? Part of Harasani’s argument is in the definition of waqf - a literal translation of one hadith as “imprison the capital and liquidate the fruit.” Understanding the purpose of a *Waqf* is to set aside property for a charitable or pious function (p. 47). The reader is led to understand that the creation of a waqf is the transfer of property to God for use for

the greater community, which takes the rights of the property out of the hands of God's followers and creates its perpetual nature. Because the hadith does not specify the length of imprisonment, the four schools of law have interpreted the perpetual nature in different ways. Perpetuity is one of the primary points of contention between Islamic waqf law and English trusts law. English trusts law appears to prohibit perpetuity, but the reasons for doing so vary according to Harasani's research. Harasani explores various case law to demonstrate multiple rationales for the rule against perpetuities – from concerns to protect free markets and democracy from the removal or concentration of assets in the hands of the few to the sheer feasibility of managing a trust or waqf that spans generations indefinitely.

In Chapter 4, Harasani turns his focus to the second point of conflict between the two systems and discusses how each defines and understands the topic of ownership. Starting with what he terms theological considerations, Harasani reiterates that the creation of a waqf puts God in the role of owner of the property, leaving the named individual(s) to serve in the capacity of a "trustee" (p. 153). Harasani's discussion includes detailed outlines of types, objects, and modes of acquisition of not only property, but also property rights. He also reviews theories put forward by different Islamic jurists and British colonial stances throughout history. In his comparative methodological approach, Harasani turns the reader's attention then to the definition and practices of ownership as supported by English common law, particularly regarding trusts. Ownership in this realm is just as subjective as it is in Islamic law. According to Harasani, trust ownership is more about establishing possession than it is about determining actual ownership because, as Harasani quotes Honoré, "to own is transitive" (p. 177). Because "trusts' general purpose is managing property in a way that limits the control to the hands of a single or multiple persons or entity," it can be argued that a trustee is not an owner, but essentially an elected individual to serve on behalf of the property's benefit (p. 189). Harasani also spends time detailing how the idea of a split ownership structure that separates legal and beneficial ownership can create grounds for further conversation between these two legal systems. These points help to demonstrate that the gap between Islamic waqf law and English trusts law may not be so wide in regards to ideas on ownership.

As he states throughout the book, Harasani believes that reform is possible and Islamic waqf law and English trusts law can be reconciled if both sides were to agree to reconsider the matters of perpetuity and inalienability/ownership. In regards to the issue of perpetuity, Harasani suggests that if either side were willing to rethink the interpretation of

each's perpetuity requirements or if English trusts law were willing to make an exception for *awqāf* specifically, then one interpretive hurdle would be cleared. A similar argument is made for reconciling the matter of ownership; if conversation can be had as to which approach is best represented by the matter at hand, then "in theory, there is room for congruence, but it remains to be seen whether this congruence will ever be realized in practice" (p. 222).

Despite the potential to limit his audience due to his work's legal perspective and language, Harasani makes his writing easily understood by non-legal scholars without oversimplifying the subject matter. Harasani is thorough and thoughtful in his consideration of how to proactively explore how two seemingly disparate fields of law may actually be closer than originally thought to "achieve workability" if they acknowledge each system's strengths and are open to exploring reinterpretations of established law. As I lack sufficient knowledge of these two legal systems and of the political context within which this conversation would occur, I would suggest that these topics be considered as part of the viability of Harasani's proposal. If concern must be found in Harasani's writing, it would be in the disconnect between his focus on the *Hanbalī* School's perspective on the Islamic understanding of *awqāf* and his suggestion that reconciliation may look to the *Mālikī* School to address the issue of perpetuity. I assume this disconnect is because of the authority and authenticity attributed to the *Hanbalī* School's Arabic writings as opposed to other schools' increased distance and subsequent decreased authority having not been written in the language of God. However, this is only my assumption and does not detract from the strength of the overall argument and purpose of the book. Harasani's work is commendable and provides scholars and practitioners a foundation to continue a theoretical discussion that could have immeasurable benefits for Muslims living in non-Muslim majority nations, especially concerning Islamic wealth planning and management.

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