

**MIXED JURISDICTION LAW BEYOND THE PURPORTED  
COMMON LAW-CIVIL LAW DICHOTOMY:  
THE PROPERTY ENDOWMENT IN IRAN**

MARKUS G. PUDER, PH.D.\*

ABSTRACT

Mixed legal systems, which are also referred to as the third legal family, have traditionally been reduced to those featuring interactions between rules, doctrines, methods and practices of the Civil Law and the Common Law. Over the past century, the legal scholarship has explored in great depth the potency of mixtures between the Common Law and the Civil Law—not only for purposes of intra-jurisdictional legal analysis and practice, but also for purposes of supra-jurisdictional private law harmonization initiatives. Legal traditions and sources of law outside the purported Common Law-Civil Law dichotomy, however, have mostly been reduced to receive honorable mentions under a pluralist conception of mixed jurisdictions. This has especially been true for mixtures involving religious law. Newer developments, however, suggest that the status quo in the comparative law narrative, including the narrow conception of mixed jurisdictions, may be eroding. Mixed jurisdictions are by their nature uniquely positioned to make unencumbered contributions in the discussion about pluriversality in the law, but they can only do so if one looks beyond the encrusted

---

\* Dr. Markus G. Puder, The Honorable Herbert W. Christenberry Professor of Law and Faculty Director LL.M. Programs, Loyola University New Orleans College of Law. First Legal State Examination, Ludwig Maximilian University, Munich, Germany; Second Legal State Examination, Munich Upper Court of Appeals; LL.M., Georgetown University Law Center; Ph.D. in Law, Ludwig Maximilian University. Member of the New York State Bar and the U.S. Supreme Court Bar. I wish to express my gratitude to Ms. Raheleh Fard Salimi for her translation assistance and cultural insights.

criteria that have traditionally been deployed for membership in the third legal family.

This Article will therefore make a foray into the mixed law of a jurisdiction far away that has been shrouded in great mystery – the Islamic Republic of Iran. The Iranian “*waqf*” (وقف) – “*owqāf*” (اوقاف) in the plural form – will serve as a case study for a richly textured fabric of mixed law that more than rivals what has traditionally been required for membership in the third legal family. Grounded in Islamic jurisprudence, clothed in legislated law, and housed in a codification, the Iranian *waqf* may be described as a property endowment that detains the endowed property and removes it from circulation, while devoting its utility to a designated purpose. The analysis of the legal framework of the Iranian *waqf* further reveals its unique ability to engage into comparative dialogues – not only with the *waqf* in other Islamic schools of jurisprudence, but also with a host of referents in the worlds of the Common Law and the Civil Law.

#### TABLE OF CONTENTS

1. Introduction.....	137
2. The Iranian Civil Code.....	141
2.1. <i>Architecture</i> .....	142
2.2. <i>Sources</i> .....	143
2.3. <i>Legal Language</i> .....	147
2.4. <i>Perspectives</i> .....	148
3. The Ground Rules Governing the Iranian Waqf.....	149
3.1. <i>Origins</i> .....	149
3.2. <i>Definition</i> .....	151
3.3. <i>Pillars</i> .....	152
3.3.1. <i>Endower</i> .....	152
3.3.2. <i>Object</i> .....	154
3.3.3. <i>Beneficiaries</i> .....	155
3.4. <i>Act of Founding</i> .....	158
3.5. <i>Administration</i> .....	160
3.6. <i>Termination</i> .....	164
3.7. <i>Perspectives</i> .....	164
4. Comparative Conversations.....	167
4.1. <i>Dialoguing with Other Islamic Schools of Jurisprudence</i> .....	167

4.1.1. Waqf Contract .....	169
4.1.2. Delivery of Possession .....	169
4.1.3. Ownership of the Object.....	170
4.1.4. Legal Nature of Waqf.....	171
4.2. Dialoguing with the Common Law and the Civil Law	172
4.2.1. Trust .....	172
4.2.2. Foundation.....	177
4.2.3. Establishment .....	180
4.2.4. Fiduciary Property and Fiduciary Management .....	181
4.2.5. Usufruct .....	184
4.2.6. Other Vessels.....	185
4.2.7. Perspectives .....	187
5. Conclusion .....	188

## 1. INTRODUCTION

Mixed legal systems, which are also referred to as the third legal family,<sup>1</sup> have traditionally been reduced to those featuring interactions between rules, doctrines, methods, and practices of the Civil Law and the Common Law.<sup>2</sup> Over the past century, legal scholarship has explored in great depth the potency of mixtures between the Common Law and the Civil Law not only for purposes of intra-jurisdictional legal analysis and practice,<sup>3</sup> but also for

<sup>1</sup> VERNON V. PALMER, *Introduction to the Mixed Jurisdiction, in MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY* 1, 14 (2001).

<sup>2</sup> Vernon V. Palmer, *Mixed Legal Systems – The Origin of the Species*, 28 TUL. EUR. & CIV. L. F. 103, 104–12 (2013); see also Maurice Tancelin, *Introduction to THE SCOPE AND INTERPRETATION OF THE CIVIL CODE OF LOWER CANADA* 1, 1 (Frederick P. Walton ed., 1980) (explaining the scope of the Code and offering the principal rules for its interpretation); Robert Warden Lee, *The Civil Law and the Common Law – A World Survey*, 14 MICH. L. REV. 89, 89–92 (1915) (describing the diffusion of Civil and Common Law across the globe and the influence of one upon the other in various subjects of law.); William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 679 (2000) (providing Walton’s “classic definition” of a mixed jurisdiction).

<sup>3</sup> For the scholarly triad dubbed “Southern, Northern and Double Crosses,” see generally SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA (Reinhard Zimmermann & Daniel Visser eds., 1996) (containing literature analyzing the influence of English common law and continental civil law on the development of private law of South Africa); A HISTORY OF PRIVATE LAW IN SCOTLAND (Kenneth Reid & Reinhard Zimmermann eds., 2000) (tracing the history

purposes of supra-jurisdictional private law harmonization initiatives.<sup>4</sup> Legal traditions and sources of law outside the purported Common Law-Civil Law dichotomy,<sup>5</sup> however, have mostly received honorable mentions under a pluralist conception of mixed jurisdictions.<sup>6</sup> This has especially been true for mixtures involving religious law, which, for the legal landscape of the United States, has been described as “a square peg that doesn’t fit well in the round hole of American law.”<sup>7</sup> Newer developments, however, suggest that the status quo in the comparative law narrative, including the narrow conception of mixed jurisdictions, may be eroding. For example, the nascent branch of decolonial law promises to overcome “the epistemic assumptions of the modernity [and] coloniality matrix.”<sup>8</sup>

---

and development of Scottish private law); Reinhard Zimmermann, *Double Cross: Comparing Scots and South African Law*, in *MIXED LEGAL SYSTEMS IN COMPARATIVE PERSPECTIVE: PROPERTY AND OBLIGATIONS IN SCOTLAND AND SOUTH AFRICA* 1, 1-33 (Reinhard Zimmermann & Daniel Visser eds., 2004) (discussing the connections between Scottish and South African law rooted in Roman-Dutch law).

<sup>4</sup> JAN SMITS, *Introduction: Mixed Legal Systems and European Private Law*, in *THE CONTRIBUTION OF MIXED LEGAL SYSTEMS TO EUROPEAN PRIVATE LAW* 1, 7 (2001).

<sup>5</sup> James R. Gordley, *Common Law und Civil Law: Eine überholte Unterscheidung [Common Law and Civil Law: An Outdated Distinction]*, 1 *ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT* [J. EUR. PRIV. L.] 498, 498 (1993) (Ger.).

<sup>6</sup> Palmer, *supra* note 2, at 112 (“[P]luralism’s broader pursuit of legal phenomena . . . is focused not only to customary law, tribal law, and religious law recognized by the state, but also on the unrecognized and unofficial laws which escape state control and constitute the living law.”); see also Esin Örucü, *What Is a Mixed Legal System: Exclusion or Expansion?*, 3 *J. COMP. L.* 34, 51-52 (2008) (providing maps used to illustrate a wider understanding of mixity); Palmer, *supra* note 2, at 118-20 (sorting the expanded circle of mixed jurisdictions into ten categories of legal mixtures, including: (1) Mixed Systems of Civil Law and Common Law (fifteen jurisdictions); (2) Mixed Systems of Civil Law and Customary Law (twenty-one jurisdictions); (3) Mixed Systems of Civil law and Muslim Law (eleven jurisdictions); (4) Mixed Systems of Civil Law, Common Law and Customary Law (three jurisdictions); (5) Mixed Systems of Civil law, Common Law and Customary Law (five jurisdictions); (6) Mixed Systems of Civil Law, Common Law and Muslim Law (eight jurisdictions); (7) Mixed Systems of Common Law and Customary Law (twelve jurisdictions); (8) Mixed Systems of Common Law, Muslim Law and Customary Law (six jurisdictions); (9) Mixed Systems of Common Law, Muslim Law and Civil Law (five jurisdictions); (10) Mixed Systems of Talmudic Law, Civil Law and Common Law (one jurisdiction)).

<sup>7</sup> *Cataloguing Religious Law*, *FCIL NEWSL.*, Feb. 1995, at 6.

<sup>8</sup> Lena Salaymeh & Ralf Michaels, *Decolonial Comparative Law: A Conceptual Beginning*. 86 *RABELSZ* 166, 178 (2022); see also *Decolonial Comparative Law*, MAX PLANCK INST. FOR INT’L & COMPAR. PRIV. L., <https://www.mpipriv.de/decolonial> [<https://perma.cc/K5BB-U222>] (announcing Lena Salaymeh’s and Ralf Michaels’ long-term collaborative research project) (last visited Mar. 10, 2023). For earlier

Mixed jurisdictions are by their nature uniquely positioned to make unencumbered contributions in the discussion about pluriversality in the law, but they can only do so if one looks beyond the encrusted criteria that have traditionally been deployed for membership in the third legal family. This Article will therefore make a foray into the mixed law of a jurisdiction far away that has been shrouded in great mystery – the Islamic Republic of Iran. The Iranian “*waqf*” (وقف) – “*owqāf*” (اوقاف) in the plural form – will serve as a case study for a richly textured fabric of mixed law that more than rivals what has traditionally been required for membership in the third legal family. Grounded in Islamic jurisprudence and clothed in legislated law, the Iranian *waqf* may be described as a detention of property that removes the endowed thing from circulation, while setting free its utility in the pursuit of a designated purpose.

Generally speaking, the property endowment ranks among the best-documented economic, social, and cultural phenomena explored in the scholarly literature about Islamic law and civilization.<sup>9</sup> In Muslim societies, the *waqf* has served as a traditional mechanism of continuous charity to alleviate poverty and support places of worship and education.<sup>10</sup> Other motivations may have included favoring certain descendants and shielding private property from inheritance rules, taxation, confiscation, and adverse claims.<sup>11</sup>

Western comparative law scholarship has exhibited a particular focus on the Anglo-American trust to capture the essence of the

---

discussions of decolonial research projects and identity in the political sphere, see Mónica Gonzáles García, *Towards a Decolonial Horizon of Pluriversality: A Dialogue with Walter Mignolo on and Around the Idea of Latin America*, 17 *LUCERO* 38, 38–42 (2006) (presenting a transcribed conversation with Walter Mignolo discussing the process of decolonization in use of language and history of decolonization in the works of Edward Said and prior authors).

<sup>9</sup> Jürgen Paul, Book Review, 54 *DIE WELT DES ISLAMS* [WORLD ISLAM] 275 (2014) (Ger.). For a historical tour through time and space, see generally MURAT ÇIZAKÇA, *A HISTORY OF PHILANTHROPIC FOUNDATIONS: THE ISLAMIC WORLD FROM THE SEVENTH CENTURY TO THE PRESENT* (2000) (describing the history of *waqfs* in the Islamic world temporally from the birth of Islam and geographically from Morocco to the Philippines).

<sup>10</sup> Hossein Esmaeli, *Property Law and Trusts (Waqf) in Iran*, in *RESEARCH HANDBOOK ON ISLAMIC LAW AND SOCIETY* 178, 194 (Nadirsayah Hosen ed., 2020).

<sup>11</sup> CHRISTOPH WERNER, *VAQF EN IRAN: ASPECTS CULTURELS, RELIGIEUX ET SOCIAUX* [WAQF IN IRAN: CULTURAL, RELIGIOUS, AND SOCIAL ASPECTS] 167 (2015) (Fr.); ANN BLACK ET AL., *MODERN PERSPECTIVES ON ISLAMIC LAW* 208 (2013).

Islamic property endowment.<sup>12</sup> Some have argued that the Islamic waqf was instrumental in the rise of the English trust.<sup>13</sup> Others have offered that erroneously deployed analogies with trust law misguided colonial courts in their jurisprudence with regard to Islamic property endowments.<sup>14</sup> Somewhat surprisingly, however, the Iranian waqf has not been the subject of extensive legal scholarship outside the closely-knit Iranian community, especially with regard to the “post-classical” era in Iranian history. Notwithstanding the challenges associated with language barriers and access to government resources, this Article endeavors to shift the visor to the dimensions of mixity wrought into the legal framework governing the Iranian waqf. In pursuit of this leitmotif, we will offer a trans-contextual and cross-comparative discussion of this framework, starting with the repository of the waqf—the Civil Code (*qānūn-e madanī*) of the Islamic Republic of Iran (hereinafter, the Iranian Civil Code).

---

<sup>12</sup> For recent literature, see HAMID HARASANI, TOWARD THE REFORM OF PRIVATE WAQFS: A COMPARATIVE STUDY OF ISLAMIC WAQFS AND ENGLISH TRUSTS (2015) (reconciling Islamic law and English trust law in the areas of perpetuities and ownership).

<sup>13</sup> Monica M. Gaudiosi, Comment, *The Influence of the Islamic Law of WAQF on the Development of the Trust in England: The Case of Merton College*, 136 U. PA. L. REV. 1231, 1231 (1988).

<sup>14</sup> For critical appraisals of examples from colonial jurisprudence, see James N.D. Anderson, *Waqf in East Africa*, 3 J. AFR. L. 152, 152 (1959) (“[T]here can be no branch of the law in which Muslim peoples who are subject to the jurisdiction of British courts, or courts trained in English traditions, have been made to suffer so many frustrations—by the judicial infusion of alien ideas, by misinterpretation or basic ignorance of the Islamic doctrines, and even by what can only be termed a rigidity of mind which ill-accords with this illustrious tradition—as in the law of waqf.”); HELMUT JANSSEN, DIE ÜBERTRAGUNG VON RECHTSVORSTELLUNGEN AUF FREMDE KULTUREN AM BEISPIEL DES ENGLISCHEN KOLONIALRECHTS [THE TRANSFER OF LEGAL CONCEPTS TO FOREIGN CULTURES USING THE EXAMPLE OF ENGLISH COLONIAL LAW] 135 (2000) (“[W]ährend die Rechtsprechung vorgeblich islamisches Recht anwandte, übertrug sie tatsächlich Vorstellungen des englischen Rechts auf die Fromme Stiftung. [[T]he jurisprudence purported to apply Islamic Law; in fact, however, it transferred ideas of English law to the Pious Foundation.]”).

## 2. THE IRANIAN CIVIL CODE

The ground rules for the Iranian waqf are housed in the Iranian Civil Code.<sup>15</sup> Absent a referent that can be ascertained with absolute certainty, civil law in Iran broadly stands for the domain encompassing the civic and social relationships in a person's life, as contrasted with the codes of conduct that are imposed by the government through public law and criminal law.<sup>16</sup> At first blush, the presence of a codification ostensibly invokes the orbit of Civil Law. In Anglo-American comparative law literature, the codified civil law variant has conventionally been understood to denote a legal family with civil codes in the Romano-Germanist mold.<sup>17</sup> This, however, is not the case in Iran. Rather, in form and substance, Iranian civil law in general and the waqf in particular reveal uniquely Iranian features of mixity that are not amenable to being sorted into a single monolithic bin.

Iran's codification trajectory started over a century ago with the Constitutional Revolution, which unfolded between 1905 and 1911 and led to the establishment of a parliament and a constitutional monarchy.<sup>18</sup> It took almost another thirty years for the Iranian Civil Code to emerge, which occurred in three thrusts between 1928 and 1935.<sup>19</sup> The long incubation period reflected a lengthy stakeholder

---

<sup>15</sup> QANUNI MADANI [Civil Code] 1314 [1935] [hereinafter Iranian Civil Code], arts. 55–91 (Iran).

<sup>16</sup> Keyvan Tabari, *Law and Modernization: A Brief History of Iranian Civil Law*, COLLECTED WORKS KEYVAN (May 28, 2010), <https://tabarionline.com/category/jurisprudence/law-and-modernization-iranian-civil-law/> [https://perma.cc/BEJ8-QYJU].

<sup>17</sup> *What is the Civil Law?*, LSU LAW, <https://www.law.lsu.edu/clo/civil-law-online/what-is-the-civil-law/> [https://perma.cc/H9SV-2NPV] (last visited Apr. 2, 2023).

<sup>18</sup> Said Amir Arjomand, *Constitutional Revolution*, ENCYCLOPEDIA IRANICA (Oct. 28, 2011), <https://www.iranicaonline.org/articles/constitutional-revolution-index> [https://perma.cc/5GAM-3BEJ]. See generally Ervand Abrahamian, *The Causes of the Constitutional Revolution in Iran*, 10 INT'L J. MIDDLE E. STUD. 381 (1979) (discussing theories of revolution, early nineteenth-century Iran, the impact of the West, the bourgeoisie, the intelligentsia, the crescendo from protest to revolution, the revolution, the struggle for the constitution, and revolutionary ideas versus revolutionary classes).

<sup>19</sup> Naser Yeganeh, *Civil Code*, ENCYCLOPEDIA IRANICA (Oct. 21, 2011), <https://www.iranicaonline.org/articles/civil-code> [https://perma.cc/96F4-3SWP] ("The first volume was signed into law on 18 Ordibehēšt 1307 Š./8 May 1928 and the next two between 6 Bahman 1313 Š./26 January 1935 and 8 Ābān 1314 Š./30 October 1935.").

process of balancing the inputs from the religionists (*motesharrein*) and the modernists (*motejaddedin*).<sup>20</sup>

After the Islamic Revolution of 1979 and in pursuance of the mandate under the Constitution of the Islamic Republic of Iran of 1979 (hereinafter, the Iranian Constitution) that all laws and regulations must be based on Islamic criteria (*mavazin-e-eslami*),<sup>21</sup> several of the older provisions in the Iranian Civil Code were disregarded, changed, or canceled.<sup>22</sup> But, otherwise, the Iranian Civil Code, as a colorful blueprint designed to guide people's day-to-day lives, continues to be alive and well. This may in large measure be owed to the creative solutions found for its architecture, sources, and language.

### 2.1. Architecture

The Iranian Civil Code consists of 1,335 articles which are organized into three volumes: a first book on property,<sup>23</sup> a second book on persons,<sup>24</sup> and a third book on evidence in substantiation of claims.<sup>25</sup> A short preamble covers assorted general topics such as the promulgation, effects, and operations of the laws.<sup>26</sup> The tripartite structure of the Iranian Civil Code is reminiscent of the Gaian trinity, which slices and dices the legal universe into the personal sphere (*de personis*), the real world (*de rebus*), and relationships between and among subjects and objects (*de actionibus*).<sup>27</sup> This ostensibly exhaustive classification, which has been described as representing "one enduring expression of the metaphysical foundations of social thought,"<sup>28</sup> is typical for the

---

<sup>20</sup> Tabari, *supra* note 16.

<sup>21</sup> QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980] [hereinafter Iranian Constitution], art. 4; *see also* Tabari, *supra* note 16.

<sup>22</sup> Yeganeh, *supra* note 19.

<sup>23</sup> Iranian Civil Code, *supra* note 15, arts. 11–955.

<sup>24</sup> *Id.* arts. 956–1256.

<sup>25</sup> *Id.* arts. 1257–1335.

<sup>26</sup> *Id.* arts. 1–10.

<sup>27</sup> Gaius, I GAI INSTITUTIONES OR INSTITUTES OF ROMAN LAW BY GAIUS 13 (Edward Poste trans., E. A. Whittuck ed., 4th ed. 1904) ("Omne autem ius quo utimur uel ad personas pertinet uel ad res uel ad actiones. [The whole of the law by which we are governed relates either to persons, or to things, or to actions]").

<sup>28</sup> Donald R. Kelly, *Gaius Noster: Substructures of Western Social Thought*, 84 AM. HIST. REV. 619, 621 (1979).



codifications following the structural matrix and internal logic of the French Civil Code of 1804.<sup>29</sup> Interestingly though, the Iranian Civil Code starts with the property sphere.

## 2.2. Sources

The principal sources of the Iranian Civil Code include Islamic jurisprudence (*feqh*), foreign law, and custom and usage (*‘orf wa ‘adat*).<sup>30</sup> This combination of ingredients reflects the composition and expertise of two drafting commissions, which included representatives from the body of learned scholars (*‘olamā*) as well as government officials with exposure to continental law.<sup>31</sup>

Literature has compared the process of codifying Islamic law in the Iranian Civil Code to William Blackstone’s work in the Common Law, except that the sources used by the drafting commissions were not court decisions but doctrinal commentaries prepared by Ja’farī Emāmīeh Shi’ite master jurists (*fuqaha*).<sup>32</sup> Their fingerprints are visible throughout the codification, especially in the areas relating to property and contract, marriage, divorce, inheritance, wills, religious donations, and guardianship.<sup>33</sup> The Ja’farī school, which is named after the Seventh Shi’ite Imam, Ja’far al-Sādiq,<sup>34</sup> came to dominate in Iran after the Safavid conversion of Iran—a process that took place from the 16th through the 19th centuries and turned Iran from a Sunni space into a fortress of Twelver Shi’a Islam.<sup>35</sup> The primary ideological difference between Sunni and Shi’a

---

<sup>29</sup> Yeganeh, *supra* note 19.

<sup>30</sup> *Id.*

<sup>31</sup> Yeganeh, *supra* note 19 (listing the members who served on the commission as Ali-Akbra Dāvar, Moṣṭafā ‘Adl (Manṣūr-al-Saltāna), Moḥsen Ṣadr (Ṣadr-al-Aṣrāf), Naṣr-Allāh Taqawī, Moḥammad Fātemī, Sayyed Kāzem ‘Aṣṣār, Moḥammad Borūjerdī ‘Abdoh, Shaykh ‘Ali Bābā, and Shaykh Moḥammad ‘Ali Kāshī).

<sup>32</sup> Tabari, *supra* note 16.

<sup>33</sup> Yeganeh, *supra* note 19 (“[E]verything appertaining to these subjects were drawn up according to religious law and were frequently taken directly from such works of *feqh* as *Ṣarāye ‘al-Eslām* by Moḥaqqueq Ḥelli, *Lam’a* and the commentary on it known as *Ṣarḥ-e lam’a* by the *shāhidāyn* (the two martyrs, i.e., Ṣams-al-Dīn Moḥammad b. Makkī and Zayn-al-Dīn ‘Āmeli), and *Makāseb* by Shaikh Mortazā Anṣārī.”).

<sup>34</sup> Tabari, *supra* note 16.

<sup>35</sup> See generally RULA ABISAAB, *CONVERTING PERSIA: RELIGION AND POWER IN THE SAFAVID EMPIRE* (2004) (exploring the causes and impact of Safavids’ adoption of Shi’i Islam as the official faith of the Safavid Empire).

involves questions of religious authority and the leadership of all Muslims in the wake of the death of the Prophet, with the Sunni following the Prophet's closest companion—Abu Bakr—and the Shi'a following the Prophet's cousin and son-in-law—'Ali.<sup>36</sup> Twelver Shi'a Islam professes that the Twelve Imams who succeeded the Prophet were without sin and free from error.<sup>37</sup> The Iranian Constitution expresses Iran's commitment to the Twelver Ja'farī School.<sup>38</sup>

According to the Ja'farī school, jurisprudence, which is understood as the “precise and profound deducing of Islamic regulations of actions from the relevant sources,”<sup>39</sup> and root principles of jurisprudence (*usul ul-feqh*), which “study . . . the rules to be used in deducing the Islamic laws,”<sup>40</sup> are all about identifying the Sharī'ah—“the divine legislation of Islam”<sup>41</sup> that is to be followed by Qur'ānic command. Shi'ite jurists look to four sources or proofs (*adillat ul-arba'ah*)<sup>42</sup> for declaring and construing legal rules. The Qur'ān, or Book of God, ranks first,<sup>43</sup> followed by the Sunnah, which comprises the traditions concerning the words, silent assertions, and actions of the Prophet.<sup>44</sup> In addition to the two primary sources, consensus (*ijma*), which embodies the unanimous

<sup>36</sup> Kim Knott & Matthew Francis, *What's the Difference Between Sunni and Shi'a Muslims?* CTR. FOR RSCH & EVIDENCE ON SEC. THREATS (May 3, 2016), <https://crestresearch.ac.uk/comment/whats-difference-sunni-shia-muslims/> [https://perma.cc/EW2C-4LLF].

<sup>37</sup> MOHAMMED M. RAHMAN, *THE TWELVE IMAMS OF ISLAM: SUCCESSOR OF PROPHET MOHAMMED* PBUH (Mar. 24, 2021), <https://www.researchgate.net/publication/350345036> [https://perma.cc/U4GM-Q4EW].

<sup>38</sup> Iranian Constitution, *supra* note 21, art. 12.

<sup>39</sup> AYATOLLAH MORTEZA MOTAHARI, *JURISPRUDENCE AND ITS PRINCIPLES* 4 (Salman Tawhidi trans. 1981).

<sup>40</sup> *Id.* at 7.

<sup>41</sup> MOTAHARI, *supra* note 39, at 3; *see also* Mohammed M. Rahman, *Everything about the Shariah Law* 5–6 (Dec. 2020) (unpublished manuscript) (available online at <https://www.researchgate.net/publication/346934817> [https://perma.cc/KD8Q-5E8C]) (introducing the relationship between Sharia Law and those worshipping the Islamic faith). For a discussion of the multiple meanings of Sharī'ah and the transmutative coloniality associated with the Anglicized term Sharia, *see* Lena Salaymeh, *Decolonial Translation: Destabilizing Coloniality in Secular Translations of Islamic Law*, 5 J. ISLAMIC ETHICS 250, 258–59 (2021) (discussing the Anglicized term “sharia” and the colonial and secular influences associated with the translation).

<sup>42</sup> MOTAHARI, *supra* note 39, at 7–8.

<sup>43</sup> *Id.* at 8.

<sup>44</sup> *Id.* at 8–9.

view of the learned scholars,<sup>45</sup> and reason (*'aql*), meaning that “if in a set of circumstances reason has a clear rule, then that rule, because it is definite and absolute, is binding,”<sup>46</sup> complement the suite of proofs. Shī'ites generally consider independent or original interpretation (*ejtihād*) to be an ongoing process that is reserved for the Imams.<sup>47</sup> This is why the continual exposition and reinterpretation of doctrine, which has been a hallmark of Shi'a Islam, must be considered part and parcel of what the drafters codified in substance.

In their contemplation of additional sources of law for the Iranian Civil Code, the drafters also sought guidance from continental law to address certain contemporary exigencies.<sup>48</sup> The bulk of the legal imports came from the French Civil Code.<sup>49</sup> Occasionally, the drafters also consulted the Swiss Civil Code, the Belgian Civil Code and Justinian's Digest.<sup>50</sup> For example, freedom of contract<sup>51</sup> and obligations incurred without contract<sup>52</sup> were inspired by Roman and French civil law.<sup>53</sup> The laws governing domicile, nationality, and the execution of foreign laws and deeds in Persia were framed pursuant to modern European notions of private international law,<sup>54</sup> a discipline which is also known as conflicts of law in Anglo-American vernacular.<sup>55</sup>

---

<sup>45</sup> *Id.* at 9–10.

<sup>46</sup> *Id.* at 10–11 (examining (*qiyas*), which is employed as a proof by other jurisprudential schools and deemed by Shi'ites as “pure conjecture”).

<sup>47</sup> Irshad Abdal-Haqq, *Islamic Law – An Overview of Its Origin and Elements*, 7 J. ISLAMIC L. & CULTURE 27, 59–63, 60 n.177 (2002).

<sup>48</sup> Yeganeh, *supra* note 19.

<sup>49</sup> Tabari, *supra* note 16.

<sup>50</sup> Yeganeh, *supra* note 19.

<sup>51</sup> Iranian Civil Code, *supra* note 15, art. 10. See generally Wayne Barnes, *The French Subjective Theory of Contract: Separating Rhetoric from Reality*, 83 TUL. L. REV. 359, 360 (2008) (“[I]t also serves many of the philosophical underpinnings of contract law, such as . . . freedom of contract, and personal autonomy.”).

<sup>52</sup> Iranian Civil Code, *supra* note 15, arts. 301–04; see also Abu Al-Qasim Alidoust, *Unjust Enrichment in Iranian Legal System in Comparison to Unlawful Seizure of Property*, 23 FIQH 7 (2017) (comparing Iran's prohibitions on unjust enrichment with the concept of unlawful seizure in other legal systems) (Iran); Nasrin Alipour, *A Comparative Study of the Rule of Unjustified Enrichment in Egypt and Iran*, 1 INT'L J. ADVANCED STUD. HUMAN. SOC. SCI. 209, 217 (2012). (“So, the first chapter (from the responsibilities which comes without contract) and is too general should be corrected.”).

<sup>53</sup> Yeganeh, *supra* note 19.

<sup>54</sup> *Id.*

<sup>55</sup> Elliot E. Cheatham, *Sources of Rules for Conflict of Laws*, 89 U. PA. L. REV. 430, 430–34 (1941).

The predilection for French civil law has been explained by the literature with a combination of factors.<sup>56</sup> Widely considered a document of enlightenment with a long track record of having influenced legal thought and practice in many corners of the world, the French Civil Code enjoyed great prestige in Iran.<sup>57</sup> Its translation into Persian was available to the drafters.<sup>58</sup> Moreover, two of the drafters, including the Minister of Justice, had studied in France.<sup>59</sup> At the time, Iranian expats residing in Paris exerted considerable political influence in Iran,<sup>60</sup> and among the foreign languages spoken by Iranians, French ranked first.<sup>61</sup>

Finally, the framers of the Iranian Civil Code gave custom, usage, and practice significant roles in constructing legal rules and filling normative gaps.<sup>62</sup> Yet, while making numerous references to custom, usage, and practice,<sup>63</sup> the Iranian Civil Code does not actually identify where to find such a custom, usage or practice, what it says, and how it may inform a particular case or series of cases. It appears however, that the custom, usage or practice would have to be local in character and somewhat temporally entrenched.<sup>64</sup> This then would raise the question of whether judges could view their own judgements as precedents rooted in custom, usage or practice.<sup>65</sup> Under the Iranian Constitution, however, a judge confronting the absence of codified law is bound to find a solution

---

<sup>56</sup> DARYA ALIKHANI CHAMGARDANI, DER ALLGEMEINE TEIL DES IRANISCHEN SCHULDVERTRAGSRECHT: IM SPANNUNGSVERHÄLTNIS ZWISCHEN REZIPIERTEM FRANZÖSISCHEN RECHT UND TRADITIONELLEM ISLAMISCHEN RECHT [THE GENERAL PART OF IRANIAN CONTRACT LAW IN TENSION BETWEEN ADOPTED FRENCH LAW AND TRADITIONAL ISLAMIC LAW] 2-3 (2013) (Ger.).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 2 (stating that the translation was commissioned by Shah Nasreddin who held office between 1848 and 1896).

<sup>59</sup> *Id.* (identifying those two drafters as Minister of Justice Alī-Akbra Dāvar, who served as chairman of the commission, and Tehran law professor Moṣṭafā ‘Adl).

<sup>60</sup> *Id.* (referring to the activities of the *Cercle juridique et économique des Iraniens résidents à Paris* between the late 1920s and the late 1930s).

<sup>61</sup> *Id.*

<sup>62</sup> For a reference to Article 3 of the Code of Civil Procedures (*Ā ‘in-e dādrasī-e madani*), enacted in 1318 Š./1939, see Yeganeh, *supra* note 19.

<sup>63</sup> Iranian Civil Code, *supra* note 15, arts. 54, 68, 132, 141, 164, 204, 225, 279, 332, 336, 342, 426, 486, 508, 521, 542, 555, 632, 639, 646, 666, 676, 950, 1044, 1065, 1091, 1107, 1131, 1273.

<sup>64</sup> Yeganeh, *supra* note 19.

<sup>65</sup> *Id.*

in accordance with authoritative Islamic sources and authentic judicial opinions (*fatwās*) of the theologians (*mojtaheds*).<sup>66</sup>

### 2.3. Legal Language

The drafters of the Iranian Civil Code succeeded in producing a concise, clear and elegant document in the Persian language.<sup>67</sup> It should be noted, however, that over time, a staggering number of loanwords from legal Arabic<sup>68</sup> and many artificial Arabicate neologisms calqued on French and Ottoman Turkish<sup>69</sup> have come to supplement the legal lexicon of Persian. Yet, purification initiatives to use Persian terms and vocabulary, which coincided with the codification's drafting window, proved too inconstant and unsystematic.<sup>70</sup> In light of the challenges rooted in law and language, some drafters even feared the Iranian Civil Code was too ambitious and advanced for a general population that still exhibited elevated illiteracy rates,<sup>71</sup> and which, in their view, had not yet developed a societal culture of asserting legal rights and abiding by legal obligations.<sup>72</sup>

From today's perspective, the Arabo-Persian confluence in word and script makes the Iranian Civil Code a unique monument of mixity not only in law, but also in language. To the uninitiated eye, the non-indigenous legal vernacular may look Persian. This is due to the use of the Arabic script in Persia and its adaptive ability to

---

<sup>66</sup> *Id.*

<sup>67</sup> Tabari, *supra* note 16; Yeganeh, *supra* note 19.

<sup>68</sup> Éva M. Jeremiás, *Iran*, in *ENCYCLOPEDIA OF ARABIC LANGUAGES & LINGUISTICS* (2011), [https://referenceworks.brillonline.com/entries/encyclopedia-of-arabic-language-and-linguistics/iran-EALL\\_COM\\_vol2\\_0055?s.num=0&s.f.s2\\_parent=s.f.book.encyclopedia-of-arabic-language-and-linguistics&s.q=iran](https://referenceworks.brillonline.com/entries/encyclopedia-of-arabic-language-and-linguistics/iran-EALL_COM_vol2_0055?s.num=0&s.f.s2_parent=s.f.book.encyclopedia-of-arabic-language-and-linguistics&s.q=iran) [<https://perma.cc/6A74-PEHG>] (last visited Feb. 8, 2023). For a historical discussion of the context of Iranian language policy, see Katarzyna Marszałek-Kowalewska, *Iranian Language Policy: A case of Linguistic Purism*, 22 *INVESTIGATIONES LINGUISTICAE* 89 (2010).

<sup>69</sup> John R. Perry, *Persian*, in *ENCYCLOPEDIA OF ARABIC LANGUAGES & LINGUISTICS* (2011), [https://referenceworks.brillonline.com/entries/encyclopedia-of-arabic-language-and-linguistics/persian-EALL\\_COM\\_vol3\\_0253?s.num=15](https://referenceworks.brillonline.com/entries/encyclopedia-of-arabic-language-and-linguistics/persian-EALL_COM_vol3_0253?s.num=15) [<https://perma.cc/AUU3-T5UF>] (last visited Feb. 8, 2023).

<sup>70</sup> Hossein Ghanbari & Mahdi Rahimian, *Persian Language Dominance and the Loss of Minority Languages in Iran*, 8 *OPEN J. SOC. SCIS.* 8, 12-13 (2020).

<sup>71</sup> Tabari, *supra* note 16.

<sup>72</sup> *Id.*

transcribe Persian.<sup>73</sup> In reality, Arabic and Persian are associated with two distinct language families.<sup>74</sup> Persian is an Indo-Iranian language and belongs to the Indo-European language family, while Arabic is part of the Semitic branch of the Afro-Asiatic language family.<sup>75</sup>

The current language policy of Iran is found in the Iranian Constitution.<sup>76</sup> It declares that Persian is the official language and script of Iran as well as the *lingua franca* of its people. Therefore, Persian must be used not only in all official government communications, but also in the school system.<sup>77</sup> In addition, however, the Constitution emphasizes that, because of its status as the language of Islam and its omnipresence in the Persian literature, Arabic must be taught throughout the national curriculum.<sup>78</sup> Still, the Arabic language is not widely mastered by the general population beyond certain elite circles that rely on Arabic as a medium to sustain their intellectual networks.<sup>79</sup>

#### 2.4. Perspectives

To this day, the Iranian Civil Code ranks among the few civil law codifications in Islamic countries that is directly connected to the sources of Islamic law.<sup>80</sup> In keeping with the immutable command

---

<sup>73</sup> Perry, *supra* note 69; see also Jeremiás, *supra* note 68 (“This script has 32 letters, 28 taken over from Arabic and 4 new letters supplied with three dots to denote Persian phonemes that are missing in Arabic.”).

<sup>74</sup> *Languages of Iran*, BRITANNICA, <https://www.britannica.com/place/Iran/Languages> [https://perma.cc/BC5Y-TTPX] (last visited Feb. 8, 2023).

<sup>75</sup> *Id.*

<sup>76</sup> Iranian Constitution, *supra* note 21, arts. 15–16.

<sup>77</sup> *Id.* art. 15.

<sup>78</sup> *Id.* art. 16.

<sup>79</sup> See generally *Iran Releases English, Arabic Translations of Law on Free Access to Info*, ISLAMIC REPUBLIC NEWS AGENCY (Oct. 9, 2018), <https://en.irna.ir/news/83060079/Iran-releases-English-Arabic-translations-of-law-on-free-access> [https://perma.cc/WR5H-6UVW] (showing an example of the Islamic Republic’s commitment to the Arabic language in the public space.).

<sup>80</sup> Ghorbal Ali Pourmarjan, *Nota del Committente [Client’s Note]*, in *ISTITUTO CULTURALE DELLA REPUBBLICA ISLAMICA DELL’IRAN A ROMA, CODICE CIVILE DELLA REPUBBLICA ISLAMICA DELL’IRAN [CULTURAL INSTITUTE OF THE ISLAMIC REPUBLIC OF IRAN IN ROME, CIVIL CODE OF THE ISLAMIC REPUBLIC OF IRAN]* viii (Raffaele Mauriello trans., 2015) (It.).

of the Iranian Constitution,<sup>81</sup> the Iranian Civil Code is the only codification that is strictly committed to the principles of Ja'fari Shi'ism.<sup>82</sup> Yet, independent of the substantive imports and grafts rooted in foreign law, jurists steeped in legal history and comparativist milieus will experience a warm and fuzzy sense of familiarity when studying the various legal provisions of the Iranian Civil Code, especially in the realms of property and obligations. This is due to the transcendental rationality exuded by the Iranian Civil Code in general and, as the following sections endeavor to further illustrate, the Iranian waqf in particular.

### 3. THE GROUND RULES GOVERNING THE IRANIAN WAQF

The core of the rules governing the Iranian waqf has been declared in the Iranian Civil Code. Over time, the codified rules were supplemented by separate legislation. What has been noted earlier with regard to the Iranian Civil Code being anchored in Ja'fari jurisprudence is particularly true for the Iranian waqf.

#### 3.1. *Origins*

In the absence of a direct mention in the Qur'an, the legitimacy of the waqf has been derived from the traditional sayings of the Prophet and the consensus among the jurists.<sup>83</sup> Among the Prophet's sayings that have been most widely invoked is the one cited by Ali ibn Abi Talib, the first Imam of Shi'ism and cousin, son-in-law and companion of the Prophet:<sup>84</sup> "[w]hen a man dies, only three deeds will survive him: alms, which continue to be paid; knowledge, which generates profit; and a child praying upon his soul."<sup>85</sup> Another saying cited by Ali ibn Abi Talib declares that

---

<sup>81</sup> Iranian Constitution, *supra* note 21, art. 12.

<sup>82</sup> Pourmarjan, *supra* note 80.

<sup>83</sup> Martin Schulte, *Teil D (Kirchliches Stiftungsrecht) [Part D (Law Governing Foundations: Churches)]*, in *STIFTUNGSRECHT—KOMMENTAR [LAW GOVERNING FOUNDATIONS—COMMENTARY]* 467, 468 (Christian Stumpf et al. eds., 2018) (Ger.).

<sup>84</sup> *Ali*, BRITANNICA (Jan. 1, 2023), <https://www.britannica.com/biography/Ali-Muslim-caliph> [<https://perma.cc/66NG-XHLR>].

<sup>85</sup> Kayhan Jafar-Shaghghi, *The Development of the Legal Parameters of the Waqf Institution in Contemporary Iran and Its Socioeconomic Impact* 216 (July 2013) (Ph.D. dissertation, University of St Andrews) (on file with author).

giving alms through property that has been set aside and locked up for this purpose is a way to store up wealth credit for the next life.<sup>86</sup> But, notably, the actual word *waqf* does not appear in either saying.<sup>87</sup> The first saying speaks of the voluntary giving of alms or charity (*sadaqeh*) and the second saying adds the notion of voluntarily “detaining” or “locking up” the property (*habs*).<sup>88</sup>

An earlier tradition involves the Prophet’s instruction to ‘Umar ibn al-Khattāb, the second caliph and father-in-law and companion of the Prophet, regarding a piece of land received by ‘Umar in connection with the Battle of Khaybar and considered by him as his most precious possession.<sup>89</sup> After the Prophet had directed ‘Umar to surrender and tie up his property for purposes of giving its produce as alms, Umar turned the property into a voluntary act of almsgiving on the condition that “it shall not be sold, nor given away, nor inherited, and its usufruct should be spent . . . on the poor, the relatives [of the Prophet] . . . and those who fight in God’s wars . . . .”<sup>90</sup>

The earliest mention of the word *waqf* in Shi’ite sources is said to have occurred in Sheikh-e Mufid’s famous book *al-Muqna’ah* as an appendage to the chapter covering alms and charity.<sup>91</sup> Attempts have also been made in the literature to connect the development of the *waqf* to pre-Islamic influences.<sup>92</sup> Independently, the legitimacy

---

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 216–17.

<sup>88</sup> *Id.* at 217.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 217; Schulte, *supra* note 83, at 468.

<sup>91</sup> *Waqfs: Iran*, ISLAMICMARKETS, <https://islamicmarkets.com/education/waqfs-iran> [<https://perma.cc/3SWN-LJLN>] (last visited Feb. 8, 2023).

<sup>92</sup> See Jafar-Shaghghi, *supra* note 85, at 44 (“The institution did not have to be developed from scratch because various ancient peoples— Persians, Egyptians, Turks, Jews, Byzantines, Romans and others— had developed similar structures.”). For the Becker-Cahen debate as to the significance of the *piae causae* in Byzantine law for the development of the *waqf*, see ABDUL QADIR, *WAQF: ISLAMIC LAW OF CHARITABLE 3* (2004) (stating that Carl Heinrich Becker’s assertion that the practice of placing urban real estate under a *waqf* in Egypt was influenced by the *piae causae* under Byzantine law, as evidenced by structural similarities to the Coptic pious endowment of urban real estate in Egypt, countered by Claude Cahen with the argument that outside Egypt, there was no such restriction of *waqf* operations to urban real estate); see also Avisheh Avini, Comment, *The Origins of the English Trust Revisited*, 70 TUL. L. REV. 1139, 1157 n.146 (referring to a lecture by Dr. Anahit Perikhanian entitled “Iranian Pious Foundations and the Origin of the *Waqf*” and to a special department in the Sassanid Chancery exclusively devoted to the “registration, management, supervision, and occasionally, trusteeship, of such endowments”).



of the waqf in Iran has received the endorsement from Ayatollah Khomeini as a fine tradition with roots in ancient history.<sup>93</sup>

### 3.2. Definition

According to the Iranian Civil Code, the waqf consists in the surrender and detention of a property, while devoting its benefits to a pious purpose.<sup>94</sup> The property's non-transferability in perpetuity constitutes a central feature of the Iranian waqf.<sup>95</sup> In line with established Ja'farî jurisprudence, this means that the endowed property is no longer amenable to being sold or donated inter vivos or mortis causa.<sup>96</sup> The characteristic of perpetuity distinguishes the Iranian waqf from the Iranian *habs*, a temporary endowment for a limited number of people that reverts back to the endower after the expiry of the designated period.<sup>97</sup> Contrariwise, other jurisprudential schools speak of the waqf and the *habs* interchangeably.<sup>98</sup>

Finally, the term waqf is a direct and unmodified borrowing from the Arabic original in law and language.<sup>99</sup> The definition of the Iranian waqf further displays the drafters' knack for lingo-legal

<sup>93</sup> Jafar-Shaghaghi, *supra* note 85, at 222.

<sup>94</sup> Iranian Civil Code, *supra* note 15, art. 55.

<sup>95</sup> Motahari, *supra* note 39, at 43–44; Werner, *supra* note 11, at 36.

<sup>96</sup> 2 IMAM JA'FAR AL-SADIQ, ISLAMIC LAW: ACCORDING TO JA'FARI SCHOOL OF JURISPRUDENCE 113 (2012).

<sup>97</sup> Motahari, *supra* note 39, at 44.

<sup>98</sup> See HERWIG BARTELS, DAS WAQFRECHT UND SEINE ENTWICKLUNG IN DER LIBANESISCHEN REPUBLIK [THE LAW OF WAQF AND ITS DEVELOPMENT IN THE REPUBLIC OF LEBANON] 5 n.6 (1967) (using the term “*habs*” (حَبْس) or “*hubs*” (حُبْس) or “*hubus*” (حُبُوس) mainly used in the Maghreb) (Ger.). For a translation choice confirmatory of interchangeable usage, see HANS WEHR, A DICTIONARY OF MODERN WRITTEN ARABIC 153 (1976) (stating that “inalienable property the yield of which is devoted to pious purposes”).

<sup>99</sup> For the Arabic root verb “w-q-f” (*wa-qa-fa*), see WEHR, *supra* note 99, at 1091–92 (using the words “stop,” “stunt,” “detain,” “arrest”). In older English and French literature, the word used for waqf was “vakouf” which connotes the Turkish word “*vakıf*” from the era of the Ottoman Empire. See, e.g., SAMUEL WHITE BAKER, CYPRUS AS I SAW IT IN 1879, at 471 (1879) (describing a tithe levied on vakouf lands to fund maintenance of mosques and other religious foundations); Fuad Köprülü, *L'Institution de Vakouf, Sa Nature Juridique et son Évolution Historique* [The Institution of Waqf: Its Legal Nature and Historical Evolution], in 2 VAKIFLAR DERGISI [FOUND. MAG.] 3, 3 (1942) (using the term “*Vakıf müessesesi*” to describe foundations) (Turk.).

creativity as they express the idea of devoting a property to pious uses (*tasbil*) through a one-word Arabicate calque that comes from Ottoman Turkish.<sup>100</sup>

### 3.3. Pillars

The Iranian waqf rests on three pillars (*arkan-e waqf*).<sup>101</sup> This triad includes the endower (*vaqef*), the object (*mowquf*), and the beneficiaries (*mowquf'aleyh*) of the property endowment.<sup>102</sup>

#### 3.3.1. Endower

For the first pillar, the Iranian Civil Code declares that the endower must have the legal capacity to contract and make valid transactions.<sup>103</sup> In addition, the endower must be the owner of the property destined for the endowment.<sup>104</sup> Both prongs – the proper qualification and background as well as the requisite power of disposition – are designed to guard against system failures.

In addition to not being under indictment for prodigality or under declaration of insolvency, the endower must be a sane and trustworthy adult who is capable of making reasoned decisions regarding property management and financial affairs.<sup>105</sup> Jurisprudence has debated a minimum age that qualifies for adulthood.<sup>106</sup> With regard to the gender and religion of the endower, the law has been construed in favor of inclusivity. Consequently, women and non-Muslims are not as such disqualified from establishing a waqf.<sup>107</sup> Other controversies have

---

<sup>100</sup> تسبیل – *tesbil*, OTTOMAN TURKISH – ENGLISH TURKISH DICTIONARY, <https://osmani.ahya.net/english-turkish-dictionary-15761.html> [<https://perma.cc/R5CT-SFWV>] (last visited Apr. 2, 2023).

<sup>101</sup> Werner, *supra* note 11, at 36.

<sup>102</sup> *Id.*

<sup>103</sup> Iranian Civil Code, *supra* note 15, art. 57.

<sup>104</sup> *Id.*

<sup>105</sup> Ja'far al-Sadiq, *supra* note 96, at 113; Jafar-Shaghghi, *supra* note 85, at 65 n.88.

<sup>106</sup> Jafar-Shaghghi, *supra* note 85, at 66 n.89 (“Mohaqeq Helli and Allameh Helli both argue against a ten-year-old child being allowed to establish a waqf; Sheikh Mohammad Hassan Najafi, on the other hand, argues that a ten-year-old child is old enough.”).

<sup>107</sup> *Id.* at 63.

revolved around the endower's state of health and mind. If the endower establishes a waqf during a terminal illness, the endowed property may not exceed one-third of the estate.<sup>108</sup> Furthermore, if the endower is found mentally incapacitated, the waqf will not be enforced, subject to the exception of the endower having acted in a lucid interval.<sup>109</sup> Similarly, the waqf will not be enforceable if the endower has been subjected to duress and undue influence, or if the endower's true intention was to circumvent rules of inheritance or shield property from creditors and tax authorities.<sup>110</sup>

The requirement that the endower must have the power of disposition with regard to the property destined for a waqf<sup>111</sup> forestalls the deliberate or accidental conversion of somebody else's property into a waqf.<sup>112</sup> In similarity to the Romanist "nemo dat" rule,<sup>113</sup> an endower who proceeds without being the actual owner or having the permission from the true owner cannot establish an enforceable waqf.<sup>114</sup> The prevailing opinion among Ja'fari jurists, however, has been that, if the actual owner does not protest, the waqf could still be enforced on the basis of a tacit ratification.<sup>115</sup>

Finally, the Iranian Civil Code, which contemplates the model of an endower as a single natural person, does not offer any detail with regard to the question of whether a group of persons or a legal entity qualify as being an endower.<sup>116</sup> In practice, however, most of the post-revolutionary waqfs in Iran have been established by the state.<sup>117</sup> There are also examples of waqfs created by groups with a common commercial interest.<sup>118</sup>

---

<sup>108</sup> *Id.* at 63–64.

<sup>109</sup> *Id.* at 64.

<sup>110</sup> *Id.* at 62–66.

<sup>111</sup> Ja'far al-Sadiq, *supra* note 96, at 113.

<sup>112</sup> Jafar-Shaghghi, *supra* note 85, at 66.

<sup>113</sup> For Louisiana's version in the law of sales, see LA. CIV. CODE ANN. art. 2452 (1993) (stating that "[t]he sale of a thing belonging to another does not convey ownership").

<sup>114</sup> Jafar-Shaghghi, *supra* note 85, at 66.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 67.

<sup>117</sup> *Waqfs: Iran*, *supra* note 91 ("The largest . . . is the Bunyad-i Mustaz'afan, which took over the confiscated properties of the Pahlawi family.").

<sup>118</sup> *Id.* ("One of these is the Sazman-e Eqtesad-e Islami [Islamic Economic Organisation] founded by the bazaar merchants.").

### 3.3.2. Object

For the second pillar, the Iranian Civil Code declares that only property susceptible to being enjoyed without a depletion of its substance may be placed into a waqf, independent of whether the thing is movable or immovable or whether it is held in indivision or divided shares.<sup>119</sup> The disqualification of property that wears out over time is designed to avoid a violation of the waqf's perpetuity feature.<sup>120</sup> A property is further disqualified from being endowed when its utility is permanently granted to another.<sup>121</sup> This follows from a pair of rules in the Iranian Civil Code that allow the endowment to proceed when the utility of the property is only temporarily granted to another or when landed property is burdened by predial servitude, in which case the servitude will not be prejudiced.<sup>122</sup> Moreover, a waqf that could harm the endower's creditors is subject to their permission.<sup>123</sup>

According to the Iranian Civil Code, endowments in pursuit of unlawful purposes are null and void.<sup>124</sup> Whether an intention of nearness to God (*qorbat*) is a condition of the waqf has been the subject of debate.<sup>125</sup> The Iranian Civil Code further adds that, if it is objectively not possible to take up and surrender possession of the property, the waqf is null and void; but if it is only the endower who is unable to take up and surrender possession of the property, the waqf is enforceable.<sup>126</sup> This requirement ensures that the property is one generally fit for commercial circulation. Moreover, the use of the property must not be unlawful.<sup>127</sup> Also, only physical things are eligible, as opposed to claims and services.<sup>128</sup> Furthermore, the property must be known and specified at the time the waqf is established.<sup>129</sup> Finally, certain things considered accessories and

---

<sup>119</sup> Iranian Civil Code, *supra* note 15, art. 58.

<sup>120</sup> Jafar-Shaghghi, *supra* note 85, at 93.

<sup>121</sup> *Id.* at 66.

<sup>122</sup> Iranian Civil Code, *supra* note 15, art. 64.

<sup>123</sup> *Id.* art. 65.

<sup>124</sup> *Id.* art. 66.

<sup>125</sup> Motahari, *supra* note 39, at 44.

<sup>126</sup> Iranian Civil Code, *supra* note 15, art. 67.

<sup>127</sup> See Iranian Civil Code, *supra* note 15, art. 66 (stating that any unlawful endowments are null and void).

<sup>128</sup> Jafar-Shaghghi, *supra* note 85, at 83.

<sup>129</sup> *Id.* at 87.

appurtenances of the property are swept into the ambit of the waqf.<sup>130</sup>

Against the backdrop of inclusivity offered by the Iranian Civil Code's declaration that a property may be eligible for a waqf independent of whether it is movable or immovable or whether it is held in indivision or divided shares,<sup>131</sup> several case groups have been discussed, especially those involving parts of a property, co-owned property, and cash. Topical verdicts have erred on a liberal construction of allowing the waqf to proceed. Thus, parts of a property arising in the wake of horizontal divisions, such as a floor of a house, or vertical divisions, such as the house on a piece of land, have been deemed eligible for a waqf, notwithstanding the potential for conflict among various interested parties.<sup>132</sup> Moreover, properties held in indivision have likewise been considered eligible for a conversion into a waqf, although the conversion initiated by one of the co-owners without the permission from the other co-owners would take the entire property out of commercial circulation.<sup>133</sup> If one part of an undivided property is subject to a waqf and the other part of the property is not, a separation is permissible.<sup>134</sup> But once a property has been converted into a waqf a division among the beneficiaries is not allowed.<sup>135</sup> Finally, despite traditional prohibitions on usury and interest, gold and silver, cash and, in the wake of more recent developments, bonds and shares are eligible for being converted into waqfs.<sup>136</sup>

### 3.3.3. Beneficiaries

The Iranian Civil Code offers strict eligibility criteria for the beneficiaries of a valid property endowment. Thus, a waqf for the benefit of a non-existent person is invalid, unless the person is a

---

<sup>130</sup> Iranian Civil Code, *supra* note 15, art. 68.

<sup>131</sup> *Id.* art. 58.

<sup>132</sup> Jafar-Shaghaghi, *supra* note 85, at 83–85.

<sup>133</sup> *Id.* at 85–86.

<sup>134</sup> Iranian Civil Code, *supra* note 15, art. 597; *see also* Ja'far al-Sadiq, *supra* note 96, at 115.

<sup>135</sup> Iranian Civil Code, *supra* note 15, art. 597.

<sup>136</sup> Jafar-Shaghaghi, *supra* note 85, at 91–92; Sayyed Mohammad Sayyad Husseini et al., *Study of Cash Waqf and Its Impact on Poverty (Case Study of Iran)*, ATL. REV. ECON., 2014, at 1, 7.

successor to a beneficiary in being.<sup>137</sup> In this light, the designation of an unborn child as the immediate beneficiary is not enforceable.<sup>138</sup> If the endowment is confected for a group of beneficiaries, which includes persons who do not exist as well as persons in being, the waqf is valid as to those in being and invalid as to those who do not exist.<sup>139</sup> This means that, if the endower institutes a waqf for the children and after them for the grandchildren, the property endowment will be enforceable.<sup>140</sup> Relatedly, a waqf with a beneficiary that is not identified or identifiable is not valid.<sup>141</sup> But even when the beneficiaries are identifiable, certain beneficiaries are disqualified because they are deemed incapable of acquiring, because they lack possessional power<sup>142</sup> or exhibit character flaws.<sup>143</sup> Special disqualifications include non-believers without Muslim relatives,<sup>144</sup> foreign nationals,<sup>145</sup> and those afflicted by a terminal illness, unless there is a designation of different classes of beneficiaries.<sup>146</sup>

As a general rule declared by the Iranian Civil Code to arbitrate what has been a controversial debate, a waqf in favor of the endower is null and void, independent of whether the designation is made for the endower's lifetime or for the time after the endower's death.<sup>147</sup> This situation not only arises when endowers appoint themselves as the sole beneficiary, but also when they include themselves in a group of beneficiaries or when they use the waqf as a payment vehicle to satisfy their obligations.<sup>148</sup> A classical case arises when endowers direct that after their death, the proceeds shall

---

<sup>137</sup> Iranian Civil Code, *supra* note 15, art. 69.

<sup>138</sup> *See id.* art. 957 (stipulating that fetus enjoys civil rights on the condition of being born alive); *see also* Ja'far al-Sadiq, *supra* note 96, at 113.

<sup>139</sup> Iranian Civil Code, *supra* note 15, art. 70; *see also* Ja'far al-Sadiq, *supra* note 96, at 113.

<sup>140</sup> Ja'far al-Sadiq, *supra* note 96, at 113.

<sup>141</sup> Iranian Civil Code, *supra* note 15, art. 71.

<sup>142</sup> *See* Jafar-Shaghaghi, *supra* note 85, at 71 (noting that Allameh Heli offers the examples of angels, genies and the devil as not having possessional power).

<sup>143</sup> *See id.* at 71–72 (noting that Ayatollah Yazdi gives the example of a drinker as someone with a bad reputation).

<sup>144</sup> *See id.* at 78 (invoking incentive for conversion as ground for allowing non-Muslim beneficiaries).

<sup>145</sup> *See id.* (arguing that Article 961 of the Iranian Civil Code declares certain exceptions to the rule that foreigners enjoy all civil rights).

<sup>146</sup> *Id.* at 59, 77–78.

<sup>147</sup> *Id.* at 70–71.

<sup>148</sup> Iranian Civil Code, *supra* note 15, art. 72.

go to someone who will pray for them. Iranian law does not allow this type of arrangement.<sup>149</sup>

The Iranian Civil Code distinguishes legislatively between two types of beneficiaries (*moqufon elaih*) – those that are the recipients of a private waqf (*vaqf-e khas* or *vaqf-e ahli*) and those that are the recipients of a public waqf (*vaqf-e-aam* or *vaqf kheyri*).<sup>150</sup> A private waqf is one benefitting individuals or groups of individuals.<sup>151</sup> Contrariwise, a public waqf is destined to benefit people from the general public.<sup>152</sup> In a private waqf, beneficiaries may be designated as either a descendant of the endower or a descendant of a descendant, which means that two or more generations of lineal descendants may qualify as beneficiaries simultaneously.<sup>153</sup> This type of endowment has been referred to as being “for a descent group.”<sup>154</sup> It ensures that, if the beneficiary dies and leaves behind a child, the share will go to the child; but if the beneficiary dies without a child, the share reverts to the surviving beneficiaries of the first generation or their descendants.<sup>155</sup> A public waqf may benefit public utilities as well as individuals.<sup>156</sup> Examples of public utilities include mosques, madressahs, bridges, graveyards, and drinking fountains.<sup>157</sup> An endowment for the poor can be generic or more specific.<sup>158</sup> Typical disputes have involved the identification of beneficiaries and the distribution of proceeds.<sup>159</sup> Property endowments connected to mosques and dedicated to pleasing the Almighty (*fi sabil Allah*)<sup>160</sup> have played a prominent role in practice. Also, in the context of a waqf created for the poor, the endower can conceivably become a beneficiary upon falling into poverty.<sup>161</sup>

---

<sup>149</sup> Ja’far al-Sadiq, *supra* note 96, at 114.

<sup>150</sup> Iranian Civil Code, *supra* note 15, arts. 73-74.

<sup>151</sup> *Id.* art. 73 (mentioning children, relatives, servants, guests and the like).

<sup>152</sup> Jafar-Shaghghi, *supra* note 85, at 79-82.

<sup>153</sup> *Id.* at 72-79.

<sup>154</sup> *Id.* at 68.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 79.

<sup>157</sup> Ja’far al-Sadiq, *supra* note 96, at 112; Jafar-Shaghghi, *supra* note 85, at 79.

<sup>158</sup> Jafar-Shaghghi, *supra* note 85, at 79.

<sup>159</sup> *Id.* at 80-81.

<sup>160</sup> *Id.*

<sup>161</sup> Iranian Civil Code, *supra* note 15, art. 74; *see also* Ja’far al-Sadiq, *supra* note 96, at 114.

### 3.4. Act of Founding

In general, the act of founding a waqf requires an initial declaration of intent by the endower. Although a specific form is not required, the declaration would normally be reduced to writing in a document known as waqf deed (*vaqfnameh*).<sup>162</sup> In the image of a user manual for the waqf,<sup>163</sup> such a document would be crafted so as to avoid ambiguities and disputes. A proper declaration of intent could simply state that the property in question is a waqf.<sup>164</sup> It is not necessary that the waqf formula is pronounced in Arabic.<sup>165</sup> Exceptionally, the declaration of intent may be indirect through conduct.<sup>166</sup> This then would require adducing circumstantial evidence that demonstrates the endower's interest to establish a waqf. A classic example of a waqf without a formula (*mo'atati waqf*) includes the building of a mosque.<sup>167</sup>

The Iranian Civil Code offers detailed rules for the formation and consummation of the waqf.<sup>168</sup> In addition to the endower's offer in any form of words denoting intent, the Iranian Civil Code requires acceptance for the endowment to be constituted.<sup>169</sup> The offer may be accepted by the first generation of beneficiaries or their legal representative, if they are defined.<sup>170</sup> If, however, the beneficiaries are undefined or the waqf is in favor of the public interest, acceptance by the judge is required.<sup>171</sup> Moreover, according to the Iranian Civil Code, perfection of the waqf hinges on delivery.<sup>172</sup> As long as the property has not been delivered the waqf is not complete.<sup>173</sup> Marking a property is not deemed to be delivery.<sup>174</sup> Urgency of delivery is not essential, but as long as the waqf has not been perfected, the endower retains a window in time

---

<sup>162</sup> Jafar-Shaghaghi, *supra* note 85, at 43.

<sup>163</sup> *Id.* at 102, 107.

<sup>164</sup> *Id.* at 102, 104; *see, e.g.,* Ja'far al-Sadiq, *supra* note 96, at 113 ("I have waqf'd this book for the students.").

<sup>165</sup> Ja'far al-Sadiq, *supra* note 96, at 113.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> Iranian Civil Code, *supra* note 15, arts. 56, 59–63.

<sup>169</sup> *Id.* art. 56.

<sup>170</sup> Iranian Civil Code, *supra* note 15, art. 56.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* arts. 59–63.

<sup>173</sup> *Id.* art. 59.

<sup>174</sup> Ja'far al-Sadiq, *supra* note 96, at 113.



for revoking or modifying the declaration.<sup>175</sup> That window closes once the property has been delivered.<sup>176</sup> Delivery is taken by the beneficiaries themselves if they are defined, and delivery to the first generation is sufficient.<sup>177</sup> If the beneficiaries are undefined or the waqf is in favor of the public interest, the administrator or the judge shall take delivery.<sup>178</sup> Finally, for those who do not have the legal capacity to act, delivery is taken by their legal or testamentary guardian; and if the endower is also administrator, then the fact of the endower's taking delivery is sufficient.<sup>179</sup>

Literature has offered that every waqf is subject to three precepts that undergird its enforceability. A waqf cannot deviate from the principle of perpetuity (*elzam*).<sup>180</sup> If the endower limits the period of operation of the waqf to a term or until an unspecified time of its revocation at will, there is no waqf.<sup>181</sup> Conceivably, however, the instruction could be construed as a temporary detention (*habs*), but only if such an arrangement reflects the true intention of the owner.<sup>182</sup> Moreover, the waqf must be unconditionally operational (*tanjiz*).<sup>183</sup> A classic example distinguishes two situations. A declaration by the endower that a certain property will become waqf after the endower's death is disallowed.<sup>184</sup> But a testamentary waqf directing the executor to convert a property into a waqf upon the endower's death is enforceable.<sup>185</sup> Finally, the waqf cannot contain terms or conditions that would lead to its extinguishment (*ta'bid*).<sup>186</sup> This means that a waqf must have a beneficiary and an object that

---

<sup>175</sup> Iranian Civil Code, *supra* note 15, art. 60.

<sup>176</sup> *Id.* art. 61.

<sup>177</sup> *Id.* art. 62; *see also* Ja'far al-Sadiq, *supra* note 96, at 113 (delivery as such not required when the endower looks after property placed into waqf in favor of the endower's minor children).

<sup>178</sup> Iranian Civil Code, *supra* note 15, art. 62. *But see* Ja'far al-Sadiq, *supra* note 96, at 113 (declaration alone suffices for public waqf in favor of mosques, schools and the like).

<sup>179</sup> Iranian Civil Code, *supra* note 15, art. 63.

<sup>180</sup> Jafar-Shaghghi, *supra* note 85, at 111, 112–13; Ja'far al-Sadiq, *supra* note 96, at 113.

<sup>181</sup> Muhammad J. Mughniyya, *The Five Schools of Islamic Law: Waqf*, AL-ISLAM, <https://www.al-islam.org/five-schools-islamic-law-muhammad-jawad-mughniyya/10-waqf> [<https://perma.cc/PS2Z-WZ8P>] (last visited Mar. 10, 2023).

<sup>182</sup> *Id.*

<sup>183</sup> Jafar-Shaghghi, *supra* note 85, at 111, 113–16.

<sup>184</sup> Mughniyya, *supra* note 181; Ja'far al-Sadiq, *supra* note 95, at 113.

<sup>185</sup> Mughniyya, *supra* note 181.

<sup>186</sup> Jafar-Shaghghi, *supra* note 85, at 111, 116–17.

embodies perpetuity and continuity.<sup>187</sup> A classic example distinguishes a waqf in favor of the poor and a waqf in favor of earthquake victims.<sup>188</sup> The waqf in favor of the poor is deemed enforceable because one can always find poor people in society.<sup>189</sup> But the waqf in favor of earthquake victims is considered in jeopardy because the waqf could run out of beneficiaries.<sup>190</sup>

### 3.5. Administration

In practice, when the waqf has more than one beneficiary, an endower will typically arrange for its administration by installing an administrator (*mutavalli*) and possibly a supervisor (*qazi*), laying down the rules for appointing the successors of the administrator, distributing the profits yielded by the property, and charging the expenses for its upkeep, repairs, and exploitation.<sup>191</sup> Again, the Iranian Civil Code provides a detailed set of rules governing the administration of the waqf property. These cover both situations addressed by the endower and those not addressed by the endower. In general, endowers enjoy considerable margins of maneuver with regard to organizing the administration of the waqf.

According to the Iranian Civil Code, endowers may reserve to themselves the role of sole administrator, either for life or for a specified period of time.<sup>192</sup> Endowers may further appoint co-administrators to manage the property either independently or jointly with the endower.<sup>193</sup> In the alternative, endowers may completely assign the administration of the property to one or more persons, with the instruction to administer either independently or jointly.<sup>194</sup> Finally, endowers may provide that they themselves or those previously appointed may nominate an administrator, and endowers are free to make any arrangement in this regard as they see fit.<sup>195</sup> If there are two or more administrators and one of them dies, the remaining administrator(s) take over the deceased

---

<sup>187</sup> *Id.* at 116–17.

<sup>188</sup> *Id.* at 117.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 30, 127, 146, 154–67.

<sup>192</sup> Iranian Civil Code, *supra* note 15, art. 75.

<sup>193</sup> *Id.* art. 75.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

administrator's responsibilities either automatically or, if provided in the act of founding, under the condition of approval from the others; and after the death of one of those administrators, the judge shall appoint a person to combine with the survivors in the discharge of acts of administration.<sup>196</sup> Finally, endowers may also install a supervisor for purposes of approving all acts of administration.<sup>197</sup>

The Iranian Civil Code further offers great detail with regard to the lifecycle of the administrator's tenure. Upon being nominated, the administrator will still have to accept the appointment.<sup>198</sup> Once the administrator accepts, a withdrawal is foreclosed; but if the administrator refuses, the nomination is deemed to never have occurred.<sup>199</sup> Any approval on the part of the beneficiaries, however, is not required. Neither the endower nor the judge has the power to remove an administrator appointed in the act of founding.<sup>200</sup> If, however, such a right is provided in the act of founding and the administrator's dishonesty becomes apparent, the judge shall place a fiduciary at the administrator's side.<sup>201</sup> Also, administrators who lose any of the qualifications identified in the act of founding will be dismissed.<sup>202</sup> In general, by the nature of their office, administrators must have the capacity to act and contract, in addition to being trustworthy and sufficiently skilled.<sup>203</sup>

If the endowment is made in favor of the public and the endower has not appointed an administrator, the administration of the property shall conform to the views of the Guardianship of the Islamic Jurisprudents (*velayat-e faqih*).<sup>204</sup> When the endower has made arrangements for managing the property, the administrator is bound to carry them out.<sup>205</sup> In the absence of such arrangements, the administrator is held to act like a prudent mandatary for

---

<sup>196</sup> *Id.* art. 77.

<sup>197</sup> *Id.* art. 78.

<sup>198</sup> *Id.* art. 76.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* art. 79.

<sup>201</sup> Iranian Civil Code, *supra* note 15, art. 79; *see also* Jafar al-Sadiq, *supra* note 96, at 115 (explaining that in case placing a fiduciary is not possible, the judge shall have the power of replacement).

<sup>202</sup> Iranian Civil Code, *supra* note 15, art. 80.

<sup>203</sup> Jafar-Shaghghi, *supra* note 85, at 166–67 (providing an example of endower having required that mutawalli be Muslim and Iranian and mutawalli subsequently converts to other religion or adopts different nationality).

<sup>204</sup> Iranian Civil Code, *supra* note 15, art. 81.

<sup>205</sup> *Id.* art. 82.

purposes of repairing, leasing, and maintaining the property as well as for collecting and dividing the profits.<sup>206</sup> Also, the administrator is not generally positioned to delegate the power of administration to another party, unless the endower has authorized the delegation in the act of founding.<sup>207</sup> If, however, the act of founding does not require direct administration by the administrator in person, the administrator is free to appoint an agent.<sup>208</sup> In terms of the administrator's remuneration, the endower may set aside a portion of the profits yielded by the property;<sup>209</sup> and if there is no provision in this regard, the administrator is entitled to fair compensation for the work undertaken on behalf of the property.<sup>210</sup>

The Iranian Civil Code further establishes rules with regard to charging expenses incurred for the property and distributing profits yielded by the property. In the absence of specific instructions by the endower, the expenses for repair and improvements of the property as well as those incurred for producing profits shall take precedence over the rights of the beneficiaries.<sup>211</sup> The endower may provide for the division of the profits generated by the property among the beneficiaries in equal or unequal shares.<sup>212</sup> In the alternative, the endower may leave the distribution of those profits to the discretion of the administrator or a third party.<sup>213</sup> Once the profits have been produced from the property and each beneficiary's portion has been determined, the beneficiaries may take possession even if the administrator withholds permission, unless the endower has made the administrator's authorization a prerequisite.<sup>214</sup> In the case of a waqf that has been confected for the benefit of the public, the profits of the property shall be expended on public works of charity, either when it is unknown how the profits are to be expended<sup>215</sup> or when it is impossible to expend the profits in the way and manner established by the endower.<sup>216</sup>

---

<sup>206</sup> *Id.* art. 82.

<sup>207</sup> *Id.* art. 83.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* art. 84.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* art. 86.

<sup>212</sup> *Id.* art. 87.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* art. 85.

<sup>215</sup> *Id.* art. 91.

<sup>216</sup> *Id.*

Finally, the Iranian Civil Code addresses circumstances when, by way of exception from the waqf's fundamental characteristic of inalienability, the sale of the property is allowed. One overarching exception requires a dispute among the beneficiaries that raises the specters of bloodshed or ruin of the property.<sup>217</sup> In addition, the Iranian Civil Code contemplates the destruction of the property as a whole or in part. A sale is permitted when the entire property falls into ruin or there is fear that it may be ruined in a way that it is no longer amenable to being enjoyed, provided it is impossible to repair the property or no one is on hand and ready to repair it.<sup>218</sup> Classic examples feature houses that are dilapidated and orchards that are unproductive.<sup>219</sup> Another situation opening the door to a sale of the property involves its partial ruin. If a part of the property falls into ruin or reaches a point where it is no longer amenable to being enjoyed, then the affected part shall be sold.<sup>220</sup> But if the partial ruin is such that the remainder of the property cannot be enjoyed either, then the property shall be sold in its entirety.<sup>221</sup> With respect to the possibility of a sale, the property shall be changed in a way that approximates, as closely as possible, the original intention of the endower.<sup>222</sup> Modern jurists have even argued that a sale or exchange should be permissible if a "better" property is acquired (*istibdal*).<sup>223</sup>

Acts of disposition other than the sale—such as the mortgage and the lease—are not directly addressed. But from the general inalienability characteristic, it may be deduced that mortgaging the property is not permitted.<sup>224</sup> This is because, in the case of a default on the underlying loan, the lender will foreclose on the property.<sup>225</sup> For the lease, traditional rules exhibit more leniency.<sup>226</sup> Thus, in the case of a private waqf established by the endower in favor of successive classes of descendants, the administrator is allowed to lease out the property as a way to achieve this purpose, and this lease may even survive the administrator.<sup>227</sup> If there is no

---

<sup>217</sup> *Id.* art. 349.

<sup>218</sup> *Id.* art. 88.

<sup>219</sup> Jafar al-Sadiq, *supra* note 96, at 114.

<sup>220</sup> Iranian Civil Code, *supra* note 15, art. 89.

<sup>221</sup> *Id.* art. 89.

<sup>222</sup> *Id.* art. 90.

<sup>223</sup> *Waqfs: Iran*, *supra* note 91.

<sup>224</sup> Jafar-Shaghghi, *supra* note 85, at 175.

<sup>225</sup> *Id.*

<sup>226</sup> Jafar al-Sadiq, *supra* note 96, at 114.

<sup>227</sup> *Id.*

administrator and the first class of beneficiaries has leased out the property, the lease ceases with the death of these beneficiaries, unless the next class of beneficiaries gives their endorsement of the lease.<sup>228</sup> In practice, however, the combination of long-term leases with small annual rents has caused problems with tenants blocking and potentially taking over lands under a waqf.<sup>229</sup>

### 3.6. Termination

Due to the perpetuity characteristic of the waqf, the Iranian Civil Code has not codified any grounds for the termination of a waqf. Even in the case of the property being ruined or damaged, the Iranian Civil Code provides for a sale, rather than having whatever remains of the property return to the endower or the endower's heirs.<sup>230</sup> If the waqf, however, does not meet the applicable validity requisites established by law or the endower makes arrangements that are incompatible with the nature of the waqf, the ruler or religious magistrate may declare the waqf null and void.<sup>231</sup> In contrast to a waqf, a habs, by its temporary nature, terminates when the last designated beneficiary dies or when the specified period expires.<sup>232</sup>

### 3.7. Perspectives

After the Iranian Revolution in 1979, the Iranian Parliament nullified the sales of waqf properties effectuated by the Shah.<sup>233</sup> According to estimates, eighty per cent of the properties were recouped and resurrected as waqf.<sup>234</sup> In 1984, a law was passed that moved oversight functions into the Awqaf and Charity Affairs Organization (*Sazman-e owqaf va omur-e kheyriye*, or "ACO").<sup>235</sup> The law further declared each waqf a legal entity with corporate status

---

<sup>228</sup> *Id.*

<sup>229</sup> *Waqfs: Iran*, *supra* note 91 (recalling the Ottoman *icareteyn* waqfs).

<sup>230</sup> Iranian Civil Code, *supra* note 15, art. 89.

<sup>231</sup> Jafar-Shaghghi, *supra* note 85, at 177.

<sup>232</sup> See Motahari, *supra* note 39, at 44 (distinguishing habs from waqfs based on the length of their validity).

<sup>233</sup> *Waqfs: Iran*, *supra* note 91.

<sup>234</sup> *Id.*

<sup>235</sup> Werner, *supra* note 11, at 52-53.

that is managed and represented by its administrator or, in the absence thereof, the ACO.<sup>236</sup> In 1986, two cabinet decrees were added that provided for government intervention, reduced allowable long-term leases, identified categories of proper expenditure, and allowed revenues from permitted sales to be used for the purchase of stocks and bonds, which would then be folded into the waqf itself.<sup>237</sup> Still, there exists some controversy as to whether a corporation or a partnership, rather than a single person, could qualify as an endower.<sup>238</sup>

Empirical data suggest that nine-tenths of the property endowments in Iran are run by the ACO, with one tenth being managed by administrators and subject to the supervision of the ACO.<sup>239</sup> Within the property endowments run by the ACO, there is an even split between “income generation” and “usage” endowments.<sup>240</sup> It has been observed that many of the property endowments have been established for family, thereby preventing the fragmentation of agricultural land under the rules of inheritance law.<sup>241</sup> The vast majority of the deeds have been drafted in Persian, followed by Arabic and Armenian.<sup>242</sup> It has further been noted that virtually all of the property endowments are devoted to local citizens, with just a few having been established for the whole country.<sup>243</sup> In practice, most public utilities such as mosques, schools, hospitals are accessed by locals.<sup>244</sup> Also, endowers may have wished to benefit their friends and neighbors within their own community.<sup>245</sup> In addition to the ACO, two other types of waqf administrations operate in Iran—administration by autonomous institutions for the holy shrines of the Prophet’s progeny members<sup>246</sup> and administration by private trustees or joint private and public custodians, typically for hospitals and cultural properties.<sup>247</sup>

---

<sup>236</sup> *Waqfs: Iran*, *supra* note 91.

<sup>237</sup> *Id.*

<sup>238</sup> See Jafar-Shaghghi, *supra* note 85, at 61 (stating that “[t]here is no provision in the law for a group of people or a corporation to establish a waqf”).

<sup>239</sup> KAZEM SADR & AMIRHOSSEIN KARBALAEI, A COMPARATIVE STUDY OF WAQF PROPERTIES DEVELOPMENT IN IRAN AND MALAYSIA 5 (2016).

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 4–8.

<sup>247</sup> *Id.* at 4–5, 8–11.

In practice, the Persian term “bonyad” (بنیاد), which literally translates to “base, root, origin and foundation,” has also been used for what is in substance a waqf.<sup>248</sup> Although some bonyads have deployed waqf-like deed clauses,<sup>249</sup> bonyads are typically not structured according to the code-based and traditional jurisprudential rules governing the waqf. Rather, bonyads are organized as parastatal or para-governmental foundations that are distinct from the private sector and state-owned enterprises.<sup>250</sup> In the wake of the property nationalization scheme pursued by the Iranian government with the arrival of the Islamic Revolution in 1979, bonyads came to hold substantial revenue-generating assets.<sup>251</sup> The income streams derived from these assets, along with charitable contributions, have allowed the bonyads to finance and deliver a wide range of social and cultural services, especially for low-income groups, families of martyrs, former prisoners of war, rural dwellers, households without guardians, and the disabled.<sup>252</sup> Bonyads have thus assumed the roles and functions typically associated with the welfare state and the social safety net.<sup>253</sup> With the passage of time, bonyads have grown into large, for-profit conglomerates that control businesses, landed properties, cash instruments as well as debt and equity securities. It has been estimated that the vast networks of socio-economic activities pursued by the bonyads, which proceed through informal intervention and outside direct government control and corporate governance accountability, make up a considerable chunk of Iran’s gross domestic product.<sup>254</sup> The

---

<sup>248</sup> HOOSHANG AMIRAHMADI, *THE OXFORD ENCYCLOPEDIA OF THE MODERN ISLAMIC WORLD* 234 (John L. Esposito ed., 1995).

<sup>249</sup> Ryuichi Sugiyama, Book Review, 18 *ANNALS JAPAN ASS’N MIDDLE E. STUD.* 113, 114 (2018) (reviewing CHRISTOPHER WERNER, *VAQF EN IRAN: ASPECTS CULTURELS, RELIGIEUX ET SOCIAUX [WAQF IN IRAN: CULTURAL, RELIGIOUS, AND SOCIAL ASPECTS]* (2015)). For more details, see Werner, *supra* note 11, at 52-57 (establishing the differences between a waqf and bonyad through historical analysis).

<sup>250</sup> Ali A. Saeidi, *The Accountability of Para-Governmental Organizations (bonyads): The Case of Iranian Foundations*, 37 *IRANIAN STUD.* 479, 480 (2004); Suzanne Maloney, *Agents or Obstacles? Parastatal Foundations and Challenges for Iranian Development*, in *THE ECONOMY OF IRAN: DILEMMAS OF AN ISLAMIC STATE* 149, 149 (Parvin Alizadeh ed., 2000).

<sup>251</sup> Saeidi, *supra* note 250, at 479.

<sup>252</sup> *Id.* at 488 (noting bonyad contributions to the Martyrs’ Foundation (Bonyad-e Shahid), the Imam Khomeini Relief Aid Committee, the Oppressed and Disabled Foundation, the Housing Foundation, and the Fifteenth of Khordad Foundation).

<sup>253</sup> *Id.* at 487-94.

<sup>254</sup> Maloney, *supra* note 250, at 163; OFF. OF INT’L RELIGIOUS FREEDOM, U.S. DEP’T OF STATE, 2021 REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: IRAN (2021).



waqf and the bonyad overlap when a waqf is wrapped into the portfolio of a bonyad. In this sense, the waqf and the bonyad have come to co-exist as centerpieces of the economic transformation ushered in by the Islamic Revolution.

#### 4. COMPARATIVE CONVERSATIONS

The analysis of the legal framework governing the Iranian waqf has revealed the amenability of Ja'farî Shi'a doctrine to being seamlessly woven into organic civil law cloth that sees eye-to-eye with the great codifications elsewhere in the world. In addition, the Iranian waqf exhibits a unique ability to engage in comparative conversations about alternative legal solutions found elsewhere for the isolation, management, and disposition of assets in the pursuit of designated purposes—whether in the jurisprudence of other Islamic schools or in the Civil Law and the Common Law.

##### 4.1. *Dialoguing with Other Islamic Schools of Jurisprudence*

The Iranian Constitution itself accords a certain space of autonomy to other Islamic schools of jurisprudence—the Hanafis, the Shafi'is, the Malikis, the Hanbalis, and the Zaydis—for the performance of their rites and matters of religious education, affairs of personal status and related litigation.<sup>255</sup> The Hanafis, the Shafi'is, the Malikis, and the Hanbalis make up the four Sunni schools of jurisprudence,<sup>256</sup> and Zayidism is a branch of the Shi'a.<sup>257</sup> Prior to the entrenchment of Twelver Shi'a Islam, Iran was largely under the aegis of the Shafi'i and Hanafi schools of jurisprudence.<sup>258</sup>

---

<sup>255</sup> Iranian Constitution, *supra* note 21, art. 12.

<sup>256</sup> See generally MOHAMMAD H. KAMALI, *SHARI'AH LAW: AN INTRODUCTION* (2008) (introducing the most important scholars, texts and applications); MOHAMMAD H. KHAN, *THE SCHOOLS OF ISLAMIC JURISPRUDENCE: A COMPARATIVE STUDY* (1991) (including eminent scholars and basic texts for each school and a selection of particular juristic devices and methodologies favored in each).

<sup>257</sup> Adam Zeidan, *Zaydiyyah*, *ENCYCLOPEDIA BRITANNICA* (Feb. 8, 2022), <https://www.britannica.com/topic/Zaydiyyah> [<https://perma.cc/A9SH-KC8U>].

<sup>258</sup> Nurit Tsafir, *The Beginnings of the Hanafi School in Isfahan*, 5 *ISLAMIC L. & SOC'Y* 1, 1 (1998).

The Shafi'i school, which was founded by Muhammad ibn Idris ash-Shafi'i, is the oldest among the Sunni schools.<sup>259</sup> Known for its unquestioning acceptance of the traditions concerning the words, actions and silent assertions of the Prophet, it predominates in eastern Africa, parts of Arabia, Malaysia, Indonesia, as well as among the Kurds.<sup>260</sup> The Hanafi school, which is the most widespread of the Sunni schools, was founded by Abu Hanifa an-Nu'man ibn Tabit, a jurist and theologian of Persian origin<sup>261</sup> who is widely considered a *tabi'i* (someone who met or had sight of a companion of the Prophet).<sup>262</sup> Known for its heavy reliance on systematic reason in the absence of precedent, it is followed in Central Asia, India, Pakistan, Turkey and the countries of the former Ottoman Empire.<sup>263</sup> The Maliki school, which was founded by Malik ibn Anas, dominates throughout northern and western Africa, in Sudan, and certain Persian Gulf states.<sup>264</sup> It considers the consensus of the people of Medina a valid source of law.<sup>265</sup> The Hanbali school, which was founded by Ahmad ibn Hanbal, is suspicious of the use of speculative reasoning as a lever to overrule traditions and earlier precedent.<sup>266</sup> It is widely disseminated on the Arabian Peninsula, especially in Qatar and Saudi Arabia.<sup>267</sup> Finally, the Zaidi school, which is named after Zayd ibn 'Alī, does not follow the dogma of the infallibility of Imams.<sup>268</sup> It has a considerable following in Yemen.<sup>269</sup> In their waqf jurisprudence, the five schools and the Ja'fari school exhibit numerous differences, especially in their treatment of the waqf contract, the delivery of possession, the ownership of the waqf object, and the legal nature of the waqf.

---

<sup>259</sup> Noah Tesch, *Shāfi'ī*, ENCYCLOPEDIA BRITANNICA (Apr. 10, 2018), <https://www.britannica.com/topic/Shafiiyah> [https://perma.cc/BYW2-BG8R].

<sup>260</sup> *Id.*

<sup>261</sup> Noah Tesch, *Abū Ḥanīfah*, ENCYCLOPEDIA BRITANNICA (Feb. 10, 2023), <https://www.britannica.com/biography/Abu-Hanifah> [https://perma.cc/944V-EGQ8].

<sup>262</sup> *Was Imam Abu Hanifah a tabi'i*, ISLAMIC PORTAL (Oct. 12, 2016), <https://islamicportal.co.uk/was-imam-abu-hanifah-a-tabii/>.

<sup>263</sup> *Id.*

<sup>264</sup> Noah Tesch, *Mālikī*, ENCYCLOPEDIA BRITANNICA (Apr. 10, 2018), <https://www.britannica.com/topic/Maliki-school> [https://perma.cc/QAC5-ABQW].

<sup>265</sup> *Id.*

<sup>266</sup> Ahmed El Shamsy, *Hanbali School*, ENCYCLOPEDIA BRITANNICA (Apr. 10, 2018), <https://www.britannica.com/topic/Hanabilah> [https://perma.cc/C7W2-MELX].

<sup>267</sup> *Id.*

<sup>268</sup> Zeidan, *supra* note 257.

<sup>269</sup> *Id.*

#### 4.1.1. Waqf Contract

All schools appear to agree that an enforceable waqf presupposes some kind of a contract, but they differ as to whether the contract should be classified as unilateral or bilateral. In a unilateral contract, only one party makes a promise and waives the acceptance by the other party.<sup>270</sup> But in a bilateral contract, both parties to the contract reciprocally agree to the terms and conditions and both parties promise to perform their respective obligations.<sup>271</sup>

Among Shi'ite jurists, three opinion camps have emerged.<sup>272</sup> A first group of jurists considers the waqf to be a bilateral contract, regardless of whether it is public or private.<sup>273</sup> The counter position advanced by a second group of jurists classifies the waqf as a unilateral contract independent of its type.<sup>274</sup> Finally, the intermediary opinion offers that a family waqf is a bilateral contract and that a public waqf is a unilateral contract.<sup>275</sup> The four Sunni schools concur that a public waqf does not require an acceptance.<sup>276</sup> According to the Maliki and most Hanafi jurists, the private waqf likewise is a unilateral contract.<sup>277</sup> In contrast, the Shafi'i jurists lean towards requiring acceptance for a private waqf.<sup>278</sup>

#### 4.1.2. Delivery of Possession

In general, several dates may be considered decisive for completing, ratifying and consummating the waqf – the date of the declaration and production of the deed, the date of acceptance of the endower's promise by the beneficiary, and the date when the possession of the object is delivered by the endower to the beneficiary or the administrator.

---

<sup>270</sup> For an example of a definition of unilateral contract in the code of a mixed jurisdiction, see LA. CIV. CODE ANN. art. 1907 (1984) (stating when a contract is unilateral).

<sup>271</sup> See *id.* art. 1908 (1984) (defining a bilateral contract).

<sup>272</sup> Jafar-Shaghghi, *supra* note 85, at 125.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 126.

<sup>275</sup> *Id.*

<sup>276</sup> Mughniyya, *supra* note 181.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

Contrary to the Ja'faris, which require the delivery of the object to the beneficiary or the administrator for purposes of perfecting the waqf, the Shafi'is and the Hanbalis allow a waqf to be completed with the pronouncement by the endower.<sup>279</sup> The Malikis, however, augment the Ja'fari position by requiring that, beyond the sole taking of possession, the object must remain in the possession of the beneficiary or the administrator for one year; otherwise, the waqf is not binding.<sup>280</sup>

#### 4.1.3. Ownership of the Object

Although the waqf is considered a kind of contract, it has not been situated under a known form of contract.<sup>281</sup> Jurisprudents have therefore differed in their answers as to what occurs in terms of ownership when a property is converted into a waqf. Among the Shi'a jurisprudents, four positions have crystalized.<sup>282</sup> Under a first construction, the endower remains the owner of the waqf property.<sup>283</sup> A second stream of jurisprudence argues that the ownership transfers from the endower to the beneficiary.<sup>284</sup> According to a third camp, ownership depends on whether the waqf is private or public, with the ownership of a private waqf inuring to the beneficiary and the ownership of a public waqf transferring to God.<sup>285</sup> The fourth group of jurisprudents asserts that ownership, independent of the type of waqf, belongs to God.<sup>286</sup> Finally, and arguably due to the legislative conferral of corporate status, the waqf itself is positioned to own the waqf property in its capacity as a legal person.

In the Sunni schools, splits among opinions as to ownership of the waqf property occur along similar lines. The Malikis offer that ownership of the waqf property remains with the endower even though the endower is barred from using the property.<sup>287</sup> According

---

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> Jafar-Shaghghi, *supra* note 85, at 128-29.

<sup>282</sup> *Id.* at 129.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> Mughniyya, *supra* note 181.

to the Hanafis and Shafi'is, the waqf property has no owner.<sup>288</sup> The Hanbalis declare that the ownership of the property transfers to the beneficiary.<sup>289</sup>

#### 4.1.4. Legal Nature of Waqf

Prior to the enactment of special legislated law equipping the waqf with legal personality, the determination of the legal nature of the waqf was subject to much controversy. At the outset, the concept of the legal person had been unknown in classical Islamic law.<sup>290</sup> Technically, legal personality denotes a juristic construct allowing an entity to enjoy its own legal rights and obligations that are distinct from those held by the natural persons who constitute the entity.<sup>291</sup> Due to its configuration as an “institution of permanence” (*Dauerinstitution*),<sup>292</sup> literature approximated or analogized the waqf to a legal person even before the arrival of conferral legislation.<sup>293</sup>

For purposes of bringing the waqf into the modern era, legislation conferring corporate status upon the waqf has emerged in many corners of the Islamic world independent of a particular school of jurisprudence. Several jurisdictions refer to this

---

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> Timur Kuran, *The Absence of the Corporation in Islamic Law: Origins and Persistence*, 53 AM. J. COMPAR. L. 785, 823 (2005).

<sup>291</sup> See generally Bryant Smith, *Legal Personality*, 37 YALE L.J. 283 (1928) (explaining that to confer legal rights and legal duties is to confer legal personality).

<sup>292</sup> Ansgar Hense, “Religiöse Stiftungen” in *Multireligiöser Gesellschaft: Religionsverfassungs- und Stiftungsrechtliche Problemübersicht* [“Religious Foundations” in *Multi-Religious Societies: An Overview of the Problems of Religious Constitution and Religious Foundation Law*], in NON PROFIT L. Y.B. 2005, at 15, 37 (W. Rainer Walz et al. Schmidt eds., 2005) (Ger.).

<sup>293</sup> Doris Behrens-Abouseif, *The Waqf: A Legal Personality?*, in GOTTES EIGENTUM FÜR ALLE ZEITEN? ISLAMISCHE STIFTUNGEN VON DEN ANFÄNGEN BIS ZUR GEGENWART [GOD’S PROPERTY FOR ALL TIME? ISLAMIC FOUNDATIONS FROM THE BEGINNING UNTIL THE PRESENT] 55, 55 (Astrid Meier, Lucian Reinfandt & Johannes Pahlitzsch eds., 2009); Jan-Peter Hartung, *Die fromme Stiftung [waqf]: Eine islamische Analogie zur Körperschaft?* [The Pious Foundation [Waqf]: An Islamic Analogy to the Corporation?], in DIE VERRECHTLICHTE RELIGION: DER ÖFFENTLICHKEITSSTATUS VON RELIGIONSGEMEINSCHAFTEN [THE JURIDICAL RELIGION: THE PUBLIC STATUS OF RELIGIOUS COMMUNITIES] 287, 287 (Hans G. Kippenberg & Gunnar F. Schuppert eds., 2005) (Ger.).

contemporary version of the waqf as the corporate waqf.<sup>294</sup> The Civil Code Afghanistan regulates the waqf as a private legal person in the law of persons,<sup>295</sup> declaring that “[the waqf] has legal personality that is established by its charter.”<sup>296</sup> In the United Arab Emirates, a federal waqf law has come online that, in addition to making the waqf an independent legal entity, allows the endower, the beneficiary and the manager to be corporate bodies.<sup>297</sup> The law also makes clear that the ownership and possession of the property subject to the waqf are transferred to the entity.<sup>298</sup>

#### 4.2. *Dialoguing with the Common Law and the Civil Law*

The Iranian waqf connotes a host of referents in the worlds of the Civil Law and the Common Law. Some features are shared, others are distinct. The discussion that follows presents a selection of somewhat kindred property institutions found in other jurisdictions.

##### 4.2.1. *Trust*

The Anglo-American trust is the Common Law’s flagship institution for isolating, managing, and disposing of property. It embodies a relationship that results from the transfer of title to the trust property by the settlor to the trustee who is entrusted with administering it for the benefit of another.<sup>299</sup> Under the classic locution of divided ownership, the trust functions through the separation of formal ownership in the trustee and beneficial

---

<sup>294</sup> Haslinda Yusoff & Faizah Darus, *Corporate Waqf: Discovering the Primary Challenges*, 18 J. MUAMALAT & ISLAMIC FIN. RSCH. 96, 99 (2021) (Malay.).

<sup>295</sup> CIVIL LAW OF THE REPUBLIC OF AFGHANISTAN [AFGHAN CIVIL CODE] [CIVIL CODE], arts. 338, 343–402 (Afg.).

<sup>296</sup> *Id.* art. 344.

<sup>297</sup> Habib Al Mulla & Mazen Boustany, *The New UAE Federal Waqf Law – Is It a Trust Law*, LEXOLOGY (July 6, 2018), <https://www.lexology.com/library/detail.aspx?g=933a755c-b5f1-4166-8a94-26680474da4b> [<https://perma.cc/Z964-4PT8>].

<sup>298</sup> *Id.*

<sup>299</sup> Henry Hansmann & Ugo Mattei, *Trust Law in the United States: A Basic Study of Its Special Contribution*, 46 AM. J. COMPAR. L. 133, 134 (1998). For a code definition, see LA. STAT. ANN. § 9:1732 (1964).

ownership in the beneficiary.<sup>300</sup> As a general rule, trusts do not have legal personalities. The primary focus of the trust may not necessarily consist in charity. In addition to performing charitable, religious, and educational work, trusts play increasingly important roles in estate planning, project finance, commercial structures, asset securitization, and pension schemes.<sup>301</sup>

In American practice regarding charitable trusts, two variants have emerged – the charitable lead trust (“CLT”) and the charitable remainder trust (“CRT”). Both involve a donation of cash or other property to an irrevocable trust. Under the CLT variant, a named charity receives an income stream from the trust for a term of years, with the remainder being distributed to the non-charitable beneficiaries after the term ends.<sup>302</sup> The donor will receive a charitable donation tax deduction that is equal to the payments that go to the charity.<sup>303</sup> Under the CRT variant, the donor receives an income stream from the trust for a term of years or for life and the named charity receives the remaining trust assets when the trust term ends.<sup>304</sup> At the time the CRT is funded, the donor receives an immediate income tax charitable deduction calculated according to the value of the assets destined for the named charity.<sup>305</sup>

Mixed jurisdictions have struggled with incorporating trust law into their codified frameworks. In North America, the mixed jurisdiction of Quebec’s predicates its trust (*fiducie*) on the conceptual alternative of being treated as an autonomous patrimony (*patrimoine d’affectation*) that is owned by no one and that is distinct from the patrimonies of the settlor, trustee and beneficiary.<sup>306</sup> In addition to finding a rationalization for reconciling the trust with the

---

<sup>300</sup> Markus G. Puder & Anton D. Rudokvas, *How Trust-Like Is Russia’s Fiduciary Management? Answers from Louisiana*, 79 LA. L. REV. 1071, 1072 (2019).

<sup>301</sup> *Id.* at 1072–73.

<sup>302</sup> , *Leverage Your Philanthropy with Today’s Low Interest Rates Using a Charitable Lead Trust (“CLT”)*, SCHWAB CHARITABLE STRATEGIES GRP. (Mar. 2022), <https://www.schwabcharitable.org/public/file/P-12104941> [<https://perma.cc/8366-2MPK>].

<sup>303</sup> *See id.* (explaining that the donor gets an immediate income tax deduction).

<sup>304</sup> *Convert Appreciated Assets into Income with a Charitable Remainder Trust (“CRT”)*, SCHWAB CHARITABLE STRATEGIES GRP. (Jan. 2018), <https://www.schwabcharitable.org/public/file/P-12104960> [<https://perma.cc/FV8V-GWPH>].

<sup>305</sup> *Id.*

<sup>306</sup> Civil Code of Québec, S.Q. 1991, c 64, art. 126 (Can.). For scholarly analysis, see Ronald J. Scalise, *Some Fundamentals of Trusts: Ownership or Equity in Louisiana*, 92 TUL. L. REV. 53, 75–77 (2017) (discussing ownership of trust property at Scotland, South Africa, and Quebec).

notion of unitary ownership, Louisiana had to remove dispositions in trust from the ambit of otherwise prohibited substitutions.<sup>307</sup> Those prohibitions are triggered when a donation of full ownership to the first donee is coupled with the charge to preserve the property and, at death, render it to a designated second donee.<sup>308</sup>

Liechtenstein is virtually the sole civil law jurisdiction that has codified its trust law with the legislative intent to receive the common law template.<sup>309</sup> Still, beyond terminology that refers to ancient Germanic customary law for fiduciary arrangements (*Salmannenrecht*)<sup>310</sup> and in counter distinction to the common law trust, the trustee does not become owner in Liechtenstein, but serves as an “independent legal entity” entitled to administration and disposition.<sup>311</sup> Liechtenstein law recognizes two types of trust relationships – the trusteeship (trust) and the fiduciary relationship (*fiduzia*).<sup>312</sup> But if the arrangement requires that the trustee continuously adhere to the wishes and instructions of the settlor as

---

<sup>307</sup> Puder & Rudokvas, *supra* note 301, at 1078–79.

<sup>308</sup> *Id.* at 1078.

<sup>309</sup> LIECHTENSTEIN COMPANY LAW 173–95 (Bryan Jeeves Obe ed., Bryan Jeeves Obe trans., 2d ed. 1999) (presenting and discussing articles 897–932 of the persons and company law of Liechtenstein) [hereinafter COMPANY LAW]. For scholarly analysis, see Samuel Plachel, *Trusts im Liechtensteinischen Recht* [Trusts in Liechtenstein Law] (May 15, 2009), (LL.M. thesis, University of St. Gallen) (available online at <http://www.justools.ch/fl-trusts.pdf> [<https://perma.cc/77L9-YSBS>]) (analyzing the history and development of trusts under Liechtenstein laws, as well as the various forms of business trusts). See generally HARALD BÖSCH, *DIE LIECHTENSTEINISCHE TREUHÄNDERSCHAFT ZWISCHEN TRUST UND TREUHAND; EINE RECHTSDOGMATISCHE UND VERGLEICHENDE UNTERSUCHUNG AUFGRUND DER WEISUNGSBESTIMMUNGEN DES ART. 918 LIECHT. PGR* [THE LIECHTENSTEIN TRUSTEESHIP BETWEEN TRUST AND TRUSTEE; A LEGAL DOGMATIC AND COMPARATIVE STUDY BASED ON THE INSTRUCTIONS OF ARTICLE 918 OF THE PERSONS AND COMPANY LAW OF LIECHTENSTEIN] (1995) (analyzing the classification of various trusteeships under Liechtenstein law and Art. 918 of the Persons and Company Law of Liechtenstein) (Ger.).

<sup>310</sup> KONRAD BEYERLE, *GRUNDEIGENTUMSVERHÄLTNISSE UND BÜRGERRECHT IM MITTELALTERLICHEN KONSTANZ* [PROPERTY RELATIONS AND CIVIC LAW IN MEDIEVAL CONSTANZ] 13 (1900) (presenting Salmann as an intermediary who mediates and executes the transfer of property by the transferor to the acquirer) (Ger.).

<sup>311</sup> In German, the Persons and Company law of Liechtenstein uses the term “selbständiger Rechtsträger.” *PERSONEN- UND GESELLSCHAFTSRECHT* [PGR] [PERSONS AND COMPANY LAW OF LIECHTENSTEIN] art. 897. *But see* COMPANY LAW, *supra* note 309, at 173 (translating the term with “independent legal owner”).

<sup>312</sup> Harald Bösch, *Trust und Fiduzia im Liechtensteinischen Recht* [Trust and Fiduzia in Liechtenstein Law], 1 *JUS & NEWS* 12, 12–25 (1997).



and when the settlor may from time to time direct, then no trust has been settled; rather, the relationship is a fiduzia.<sup>313</sup>

Another Liechtenstein specialty is the American-inspired trust enterprise or business trust (*Treuunternehmen* or *Geschäftstreuhand*).<sup>314</sup> It exists in two variants – either without legal personality as a real trust enterprise (*eigentliche Geschäftstreuhand*)<sup>315</sup> or with legal personality as a non-real trust enterprise (*uneigentliche Geschäftstreuhand*).<sup>316</sup> Neither variant has a public law character and neither exhibits legal form under private law.<sup>317</sup> The real trust enterprise is defined as a legally autonomous undertaking in the pursuit of economic or other objectives that is managed according to the trust articles by one or more trustees under their own name or company name and that is endowed with its own assets.<sup>318</sup> In contrast, the non-real trust enterprise is equipped with legal personality, provided that the trust articles or formation deed contain express and unambiguous instructions in this regard.<sup>319</sup> The real trust enterprise is structured like an ordinary trust relationship, with the important difference that the trustees do not manage the trust assets for the benefit of beneficiaries but rather for the benefit of the trust enterprise, which in turn is administered in the interest of the beneficiaries.<sup>320</sup> But unlike the ordinary trust, the real trust enterprise comes into existence only if it is properly recorded in the Public Registry as Trust Register.<sup>321</sup> The variant of the trust enterprise with legal personality takes autonomy and independence to yet a higher level.<sup>322</sup> In this regard, it is important to note that it is the fiducially administered enterprise that attains legal personality, as opposed to the fiduciary relationship.<sup>323</sup> In consequence, the trust enterprise now is the legal owner of both the

---

<sup>313</sup> See Norbert Seeger, *The Liechtenstein Trust*, in INTERNATIONAL BUSINESS TRANSACTIONS 1, 22–55 (Dennis Campbell & Reinhard Proksch eds., 2017); see also Bösch, *supra* note 313, at 38 (distinguishing between a fiduzia for purposes of administration and securitization).

<sup>314</sup> COMPANY LAW, *supra* note 310, at 195–306 (showing art. 932a §§ 1–170 of the company law)

<sup>315</sup> *Id.* at 195–96 (showing art. 932a § 1).

<sup>316</sup> *Id.* at 196 (showing art. 932a § 2).

<sup>317</sup> *Id.* at 195–96 (showing art. 932a § 1).

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 196 (showing art. 932a § 2).

<sup>320</sup> Plachel, *supra* note 310, at 43–44.

<sup>321</sup> COMPANY LAW, *supra* note 310, at 199 (showing art. 932a § 7).

<sup>322</sup> Plachel, *supra* note 310, at 47.

<sup>323</sup> *Id.*

trust fund<sup>324</sup> and the trust property,<sup>325</sup> which means that the trustee no longer is a trustee in the technical sense, other than continuing to carry out the settlor's instructions for the benefit of the beneficiary.<sup>326</sup> A trust enterprise may be formed for any feasible purpose that is not unlawful, immoral or dangerous, including the investment of assets, the distribution of income, family welfare, and charity.<sup>327</sup> But if the purpose is to carry out unrestricted commercial activity, the trust enterprise must be formed with legal personality.<sup>328</sup> In practice, the trust enterprise with legal personality dominates. In contrast to Liechtenstein's non-real trust enterprise, its model—the American Business Trust—is generally not equipped with legal personality.<sup>329</sup>

At first blush, the trust and the waqf share the feature of property separation under the auspices of a manager. But there are significant differences. In trust law, the settlor can be, and frequently is, a beneficiary.<sup>330</sup> In contrast, under the Iranian Civil Code, such an arrangement is subject to a stiff bar.<sup>331</sup> Among the four Sunni schools, the Hanafis and the Hanbalis allow the waqf in favor of the endower.<sup>332</sup> Moreover, under the Iranian Civil Code, the administrator of a waqf is not a legal owner, and therefore, is without power of alienation.<sup>333</sup> Thus, even if the locus of ownership of the waqf property has been the subject of much debate in the law governing the waqf, there is no equivalent in Iranian civil law to the notions of legal and beneficial ownership or the surrogate explanations that may be found in mixed jurisdictions.

In comparison to the mandatory rule in favor of perpetuities for the waqf, the common law of trusts distinguishes between non-charitable and charitable trusts with regard to the rules against

---

<sup>324</sup> COMPANY LAW, *supra* note 310, at 209 (showing art. 932a § 22).

<sup>325</sup> See *id.* at 210–11 (showing art. 932a § 25, which notes that trust property is separate property).

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* at 197 (showing art. 932a § 3).

<sup>328</sup> *Foundation of a Trust Enterprise (Trust reg.) in Liechtenstein*, TREUHAND LIECHTENSTEIN, <https://www.treuhand-liechtenstein.li/en/foundations/trust-enterprise-trust-reg/> [perma.cc/L9PN-TS55] (last visited Apr. 2, 2023).

<sup>329</sup> Plachel, *supra* note 310, at 47.

<sup>330</sup> LA. STAT. ANN. § 9:1804 (2014); see also *Three Parties to a Trust and the Doctrine of Merger*, GORDON FISCHER L. FIRM (May 12, 2020), <https://www.gordonfischerlawfirm.com/three-parties-trust-doctrine-merger/> [perma.cc/73PS-5TNJ] (noting that a settlor can wear three hats unless the arrangement runs afoul of merger doctrine).

<sup>331</sup> Iranian Civil Code, *supra* note 15, art. 72.

<sup>332</sup> Mughniyya, *supra* note 181.

<sup>333</sup> Jafar-Shaghghi, *supra* note 85, at 148.

perpetuities, inalienability and excessive accumulations. Take the example of England. In general, non-charitable trusts are subject to the full brunt of these rules.<sup>334</sup> Charitable trusts, however, enjoy an exemption when property passes from one charity to another—for example, on a condition subsequent being broken,<sup>335</sup> and therefore, they could last indefinitely.<sup>336</sup> Yet, charitable trusts are restricted in the period of time during which they may accumulate income.<sup>337</sup> Finally, the perpetual nature of the waqf would not be compatible with a classical English common law rule that, subject to applicable requisites, enables the beneficiaries to arrest the specific performance of the trust and to modify or extinguish the trust, independent of the wishes of the settlor or the trustee.<sup>338</sup> This rule, however, does not apply in the trust law of the United States.<sup>339</sup>

#### 4.2.2. Foundation

For civil law countries, foundations have offered the counter model to the Anglo-American trust. In Switzerland, the foundation (*Stiftung*) operates as a segregated fund dedicated to the pursuit of a specific purpose.<sup>340</sup> Its building blocks include a proper purpose, assets and governance structure. There is much flexibility for the purpose of a foundation, so long as that purpose is not unlawful, immoral or self-serving.<sup>341</sup> It is inadmissible to dedicate a body of

---

<sup>334</sup> Zia Akhtar, *Charitable Trusts and Waqfs: Their Parallels, Registration and Tax Reliefs in the United Kingdom*, 34 STAT. L. REV. 281, 282–83 (2013).

<sup>335</sup> See Perpetuities and Accumulations Act 2009, c. 18, § 2(2)–(3) (Eng.) (noting that the general rule does not apply to an estate or interest created so as to vest in a charity, or to a right exercisable by a charity, on the occurrence of an event if immediately before the occurrence an estate or interest in the property concerned is vested in another charity.)

<sup>336</sup> See *Philippe v. Cameron*, [2012] EWHC (Ch) 1040 ¶ 42–65 (requiring the court to consider the complex interplay between principles of trust law, the ways an unincorporated association holds property gifted to it, and charity law) (Eng.).

<sup>337</sup> See Perpetuities and Accumulations Act 2009, c. 18, § 14 (stipulating a statutory period of 21 years from the date the trustees had the power to or were directed to accumulate income or for the life of the settlor or settlors or for a period set by the court or the charity commission).

<sup>338</sup> *Saunders v. Vautier* (1841) 41 Eng. Rep. 482.

<sup>339</sup> Bösch, *supra* note 313, at 33 n.149.

<sup>340</sup> Schweizerisches Zivilgesetzbuch [ZGB], Code civil [CC], Codice civile [CC] [Civil Code] Dec. 10, 1907, SR 210, RS 210, arts. 80–89c [hereinafter ZGB] (Switz.).

<sup>341</sup> Oliver Sigg & Laura Luongo, *The Swiss Charitable Foundation – A Legislative Update*, IFC REV. (July 4, 2019),

assets with the purpose of generating income for a particular family to finance their normal living expenses. But it is possible to create a family foundation to help the founder's family cope with certain situations in life by paying for the costs of education, succor and other assistance.<sup>342</sup> The rules governing the family foundation replace the family fideicommissa or fee tails,<sup>343</sup> which arise through testamentary dispositions that devolve property over generations according to a fixed order of limited heirs and reversionary heirs.<sup>344</sup>

The law is silent with regard to the nature and scope of the assets dedicated to the foundation. This again gives the founder some leeway, as long as the assets enable the pursuit of the foundation's envisaged purpose.<sup>345</sup> A foundation has only two legally required bodies—the supreme governing body and the auditors. The supreme governing body, which is typically called board or council, maintains the business ledgers.<sup>346</sup> But the general accounting obligation is discharged externally through an independent and chartered auditor.<sup>347</sup> Otherwise, the founder has great flexibility in the realm of the foundation's organization.<sup>348</sup>

The foundation may be created through a public deed of dedication or, in the alternative, through a testament.<sup>349</sup> With the enrollment in the commercial registry, the foundation's autonomous legal personality is activated.<sup>350</sup> Like any juristic person, the foundation acquires the capacity to act once its governing bodies have been established.<sup>351</sup> Upon being properly created, the

---

<https://www.ifcreview.com/articles/2019/july/the-swiss-charitable-foundation-a-legislative-update/> [perma.cc/7HK6-LMAQ].

<sup>342</sup> ZGB, *supra* note 341, art. 335(1).

<sup>343</sup> See *id.* art. 335(2) (noting that “[i]t is no longer permitted to establish a fee tail”).

<sup>344</sup> For scholarly commentary, see Jeffery E. Stake, *Evolution of Rules in a Common Law System: Differential Litigation of the Fee Tail and Other Perpetuities*, 32 FLA. ST. U. L. REV. 401, 410–23 (2005).

<sup>345</sup> Sigg & Luongo, *supra* note 341 (noting that although the Swiss law does not require a minimum initial capital, in practice, the government requires an initial capital of 50,000 Swiss francs).

<sup>346</sup> ZGB, *supra* note 341, art. 83a.

<sup>347</sup> *Id.* art. 83b.

<sup>348</sup> *Id.* art. 83; see also Julie Wynne, *Key Features of Swiss Foundations*, 2017 STEP J. 22 (June 6), [https://froriep.com/wp-content/uploads/Key-features-of-Swiss-Foundations-Julie-Wynne-Froriep-STEP\\_June2017.pdf](https://froriep.com/wp-content/uploads/Key-features-of-Swiss-Foundations-Julie-Wynne-Froriep-STEP_June2017.pdf) [https://perma.cc/EB9D-DAVN] (discussing the founder's freedom to determine the structure and governance).

<sup>349</sup> ZGB, *supra* note 341, art. 81(1).

<sup>350</sup> *Id.*, art. 81(2)–(3).

<sup>351</sup> *Id.*, art. 83(1).

foundation separates from its founder and becomes independent, and the founder's will as documented in the articles of the foundation at the time of its establishment is paralyzed.<sup>352</sup> This means that the founder no longer has the autonomy to revoke the foundation, influence the assets dedicated to it, or change its charter.

As a foundation does not have members and hence, no internal control mechanism, it is subject to government supervision.<sup>353</sup> The relevant authority enjoys important prerogatives. For example, if the assets provided to the foundation are not sufficient, the supervising authority may transfer them to another foundation with a purpose as similar as possible.<sup>354</sup> It may also change the foundation's organization<sup>355</sup> and modify its purpose.<sup>356</sup> Unlike company law, the law of foundations does not recognize any form of self-liquidation.<sup>357</sup> Therefore, the foundation may conceivably last for an indefinite period of time.

In comparison to the Swiss family foundation, Austria's private foundation (*Privatstiftung*) can have much broader purposes, including the maintenance of its beneficiaries.<sup>358</sup> But the private foundation cannot pursue a commercial activity, take on the management of a commercial partnership, or be a general partner of a registered partnership.<sup>359</sup> While it is not subject to government supervision,<sup>360</sup> the private foundation must be registered.<sup>361</sup> It must further meet minimum capital requisites.<sup>362</sup> This type of foundation may last for a term of one hundred years, which is renewable for another one hundred years upon a unanimous decision of the beneficiaries.<sup>363</sup>

---

<sup>352</sup> See *id.* art. 86(1) (providing for a way to amend the objects of the foundation "where the original objects have altered in significance or effect to such an extent that the foundation has plainly become estranged from the founder's intentions").

<sup>353</sup> *Id.*, art. 84.

<sup>354</sup> *Id.*, art. 83d(2).

<sup>355</sup> *Id.*, art. 85.

<sup>356</sup> *Id.*, arts. 86, 86a(1).

<sup>357</sup> See *id.* arts. 88–89 (establishing substantive and procedural requisites for dissolution).

<sup>358</sup> HENRY CHRISTENSEN, III, INTERNATIONAL ESTATE PLANNING § 9.08 (Leigh-Alexandra Basha et al. eds., 2d ed. 2021).

<sup>359</sup> PRIVATSTIFTUNGSGESETZ [PSG] [ACT ON PRIVATE FOUNDATION] No. 104/2019, as amended, §§ 1(1)–(2) [hereinafter PSG] (Austria).

<sup>360</sup> CHRISTENSEN, *supra* note 359, § 7(1).

<sup>361</sup> PSG, *supra* note 359, § 7(1).

<sup>362</sup> See *id.* § 4 (setting a minimum requirement of 70,000 euros).

<sup>363</sup> *Id.* § 35(2)(3).

Germany's law of foundations would permit the formation of a foundation with a religious Islamic purpose.<sup>364</sup> The question has arisen as to whether it would be a secular foundation that is affiliated with a religious community under private law or whether a particular foundation could be treated under foundation law as a church foundation, which would presupposes the status of a corporate body under public law.<sup>365</sup> In practice, the term "church" has been given a broad construction beyond the Christian churches.<sup>366</sup>

In light of the principles of separation and paralysis that undergird the foundation, the foundation offers a particularly strong analogue to the waqf. It is therefore not surprising that civil law terminology endeavoring to capture the essence of the waqf has invoked the locution of a "pious foundation."<sup>367</sup>

#### 4.2.3. Establishment

The establishment (*Anstalt*) is a corporate form under private law that is particular to Liechtenstein.<sup>368</sup> Functionally situated between the foundation and the corporation, the establishment in Liechtenstein ranks among the most commonly used legal entities.<sup>369</sup> It may be described as a registered, legally autonomous fund with beneficiaries in the permanent pursuit of a broad range of commercial and other purposes.<sup>370</sup> If the establishment pursues

---

<sup>364</sup> Hense, *supra* note 293, at 38.

<sup>365</sup> *Id.*

<sup>366</sup> See Rafiq A. Tschannen, *Breaking News: Ahmadiyya Muslims in Germany Granted a New Status!*, MUSLIM TIMES (June 7, 2013), <https://themuslimtimes.info/2013/06/07/breaking-news-ahmadiyya-muslim-jamaat-germany-granted-a-new-status/> [<https://perma.cc/WX4S-H4Q3>] (noting that Ahmadiyyah Muslim Jamaat in Hesse was first Islamic religious community that had received church status).

<sup>367</sup> Schulte, *supra* note 83, at 467 ¶ 220.

<sup>368</sup> PGR, *supra* note 310, arts. 534–51. For scholarly exposition, see George E. Gloss, *The Analysis of a Tax Haven: The Liechtenstein Anstalt*, 18 INT'L L. 929, 930–31 (1984) (distinguishing Liechtenstein's private law establishment from the public law variant found in Austria, Germany, Switzerland and Liechtenstein).

<sup>369</sup> *Establishment (Anstalt) Law*, RECHTSANWALTSKANZLEI DR. HARALD BÖSCH [LAW FIRM DR. HARALD BÖSCH], <http://kanzleiboesch.com/en/liechtenstein/establishment-anstalt-law.html> [<https://perma.cc/XB6C-U3SG>] (last visited Jan. 29, 2023).

<sup>370</sup> PGR, *supra* note 310, art. 534.

commercial objectives, a board of auditors is required.<sup>371</sup> Investment and asset management, however, are not deemed to be commercial activities.<sup>372</sup> In practice, establishments frequently serve as holding companies for patents, royalties, or estate assets.<sup>373</sup> Finally, the establishment must be sufficiently capitalized.<sup>374</sup>

The salient feature of the establishment accrues from the dominant position of the founder, which is reminiscent of the revocable trust. At the outset, no more than one founder is needed to create the establishment.<sup>375</sup> Moreover, founders may install themselves as sole beneficiaries.<sup>376</sup> They may also reserve, for themselves, rights typically held by shareholders in a corporation.<sup>377</sup> Furthermore, as bearers of the founders' rights, the founders, or their assignees,<sup>378</sup> serve as the supreme governing body of the establishment.<sup>379</sup> Finally, absent controlling language in the articles of formation, the default rule is that the founders may amend the articles of formation.<sup>380</sup> Compared to the foundation, the establishment is less autonomous because the foundation, once in being, is shielded from these types of instructions. In similarity to the foundation and in contrast to the establishment, the endower of the Iranian waqf is out of the picture once the waqf has been perfected.

#### 4.2.4. Fiduciary Property and Fiduciary Management

Civil law countries have enacted legislation governing temporal vehicles for holding and managing property, in contrast with the perpetuity feature of the Iranian waqf. Examples include Colombia's fiduciary property (*propiedad fiduciaria* or *fideicomiso*

---

<sup>371</sup> Gloss, *supra* note 369, at 940 n.70.

<sup>372</sup> See *id.* ("The administration of property and financial participation in other establishments does not amount to trading or manufacture.").

<sup>373</sup> *Id.* at 935.

<sup>374</sup> *Id.* at 935–36 ("The Anstalt must have capital . . . . In practice, the capital is given at 30,000 Swiss Francs and the sum is paid in full.").

<sup>375</sup> PGR, *supra* note 303, at art. 535(3).

<sup>376</sup> See *id.* art. 545(1bis) (stating that if no third parties are appointed, a bearer of the founder's rights is presumed to be the beneficiary).

<sup>377</sup> Gloss, *supra* note 369, 937–38.

<sup>378</sup> PGR, *supra* note 310, art. 541.

<sup>379</sup> *Id.* art. 543.

<sup>380</sup> Gloss, *supra* note 369, at 933.

*civil*) and Russia's fiduciary management (*доверительное управление имуществом*).

In Colombia, the fiduciary property is a legal tool for transferring assets from a natural or juridical person to another, with the transfer of ownership occurring at the time a suspensive condition established by the owner is fulfilled.<sup>381</sup> The act of founding requires the form of a public deed,<sup>382</sup> and, if immovables are involved, it must be filed for registry.<sup>383</sup> A classic condition would be the founder's death. As long as the condition is pending, the beneficiaries have a mere expectation, but no actual rights to the fiduciary property,<sup>384</sup> and the fideicommissum maybe called off or modified by the founder. In the absence of a fiduciary, and while the condition is still open, the fiduciary property is administered by the founder in a fiduciary capacity.<sup>385</sup> Fiduciary property is subject to a perpetuity period of thirty years, unless the founder's death is the contemplated event for the condition to close.<sup>386</sup> Successive fideicommissa are disallowed.<sup>387</sup> Assets that are mortgaged or pledged qualify as fiduciary property, with the real rights remaining unaffected.<sup>388</sup> But property of the founder that has already been seized is ineligible.<sup>389</sup> Fiduciary property offers a simple process, which does not require the involvement of third parties and comes with considerable advantages.<sup>390</sup> Firstly, assets dedicated as fiduciary property are sheltered and immune from seizure.<sup>391</sup> Moreover, fiduciary property offers a way to avoid succession proceedings; all that is needed are the foundational deed and the death certificate.<sup>392</sup> Somewhat surprisingly, however, the device, which has been long entrenched in codified law, is seldom used in practice.<sup>393</sup>

---

<sup>381</sup> Código Civil [C.C.] [Civil Code] art. 794 (Colom.).

<sup>382</sup> *Id.* art. 796(1).

<sup>383</sup> *Id.* art. 796(2).

<sup>384</sup> *Id.* art. 820(1).

<sup>385</sup> *Id.* art. 807.

<sup>386</sup> *Id.* art. 800.

<sup>387</sup> *Id.* art. 805.

<sup>388</sup> *Preguntas y Respuestas Acerca de la Propiedad Fiduciaria* [Questions and Answers about Trust Ownership], ACCOUNTER (Apr. 3, 2015), <https://accounter.co/boletines/preguntas-y-respuestas-acerca-de-la-propiedad-fiduciaria.html> [<https://perma.cc/E9RM-JDN2>].

<sup>389</sup> *Id.*

<sup>390</sup> *Id.*

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*

<sup>393</sup> *Id.*



Russia's fiduciary management offers a contractual vehicle for a manager to possess, use, and dispose of the founder's property over a certain term without becoming its owner.<sup>394</sup> The contract of fiduciary management, which is executed when the object is delivered, does not transfer the formal legal title to the property from the founder to the entrusted person.<sup>395</sup> Rather, the legal title to the property entrusted into fiduciary management remains with the founder.<sup>396</sup> Under Russian law, a fiduciary manager is not permitted to also be a beneficiary.<sup>397</sup> Natural persons can only exceptionally serve as fiduciary managers when, and to the extent allowable by law.<sup>398</sup> Moreover, only sole proprietors and commercial organizations qualify for the position of fiduciary manager.<sup>399</sup> Property amenable to being placed under fiduciary management includes enterprises, real estate, securities, and exclusive rights.<sup>400</sup> Cash held in accounts is excluded when transferred as standalone property.<sup>401</sup> However, a transfer into fiduciary management of a business does include in its cash flows.<sup>402</sup> Also, any income generated from a property under fiduciary management is included.<sup>403</sup> Finally, fiduciary management is not designed to be a durable arrangement. It is subject to a life span of five years, even if in practice fiduciary management could last longer if the contract is not terminated.<sup>404</sup> Russia's fiduciary management differs from the waqf and the trust in that, by design, it remains subject to revocation by the founder(s).<sup>405</sup> Additionally, by simply refusing to carry out the contract terms, the fiduciary manager can effectively terminate fiduciary management, unilaterally.<sup>406</sup>

---

<sup>394</sup> Puder & Rudokvas, *supra* note 301, at 1087.

<sup>395</sup> *Id.*

<sup>396</sup> *Id.* at 1087-88.

<sup>397</sup> *Id.* at 1089.

<sup>398</sup> *Id.*

<sup>399</sup> *Id.*

<sup>400</sup> *Id.*

<sup>401</sup> *Id.* at 1089-90.

<sup>402</sup> *Id.* at 1890.

<sup>403</sup> *Id.*

<sup>404</sup> *Id.*

<sup>405</sup> *Id.*

<sup>406</sup> *Id.* at 1091.

#### 4.2.5. *Usufruct*

The waqf may be characterized as a means to donate the enjoyment, or usufruct, of a property. But, as the example of Louisiana demonstrates, there exist important distinctions. In Louisiana, a usufruct results from a temporal fragmentation of the owner's three basic faculties: use, fruits, and disposition.<sup>407</sup> One person—the usufructuary—receives the enjoyment of the property for a limited period of time, with another person, the naked owner, retaining the bare ownership of the property.<sup>408</sup> In this bipartite relationship of real rights, subtracted from full ownership,<sup>409</sup> the function of prudent administration falls to the usufructuary as the property belongs to the naked owner who in turn is bound not to interfere with the operations of the usufruct.<sup>410</sup> If the naked owner and the usufructuary were identical, there would be no usufruct, as, under established civil law precepts, a person who would hold all slices and faculties of ownership is the owner of the property.<sup>411</sup> It is not possible for an owner to hold a servitude over her own property.

In contrast to the Iranian waqf, a usufruct may be established for consumables, which means that the usufructuary becomes a functional owner with the prerogative to consume, alienate or encumber these things, while the naked owner receives a credit right contemplating their value or delivery of surrogate things that are of the same quantity or quality.<sup>412</sup> Also, a usufruct does not fully detain and remove the property as it could still be alienated, albeit subject to the usufruct.<sup>413</sup> Furthermore, unlike the Iranian waqf, the usufruct, as a personal servitude of limited duration, is subject to temporal cap. In Louisiana, for example, when the usufruct is established in favor of a natural person, it may last for that person's

---

<sup>407</sup> MARKUS G. PUDER ET AL., *LOUISIANA PROPERTY LAW, THE CIVIL CODE, CASES, AND COMMENTARY* 757–60 (2d ed. 2020).

<sup>408</sup> LA. CIV. CODE ANN. art. 535 (1976).

<sup>409</sup> PUDER ET AL., *supra* note 408, at 759.

<sup>410</sup> *See id.* at 795–96 (providing an overview of the provisions governing the rights and obligations of both players).

<sup>411</sup> *See* LA. CIV. CODE ANN. art. 477 (2011) (“Ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing.”).

<sup>412</sup> LA. CIV. CODE ANN. arts. 536 (1976), 538 (2010), 629 (1976).

<sup>413</sup> *Id.* art. 603 (2010).

life time;<sup>414</sup> and for legal persons, there is a cap of thirty years.<sup>415</sup> Also, a usufruct cannot be converted into a heritable right.<sup>416</sup> While it is possible to create a usufructuary interest shared by several and to establish a usufruct in favor of successive usufructuaries,<sup>417</sup> there is an important limitation.<sup>418</sup> The usufructuary must exist or be conceived at the time an inter vivos transfer is executed or, in the case of a testamentary usufruct, at the time of the testator's death.<sup>419</sup> Finally, a usufruct typically is not a vehicle used to advance general charity. Rather, the usufruct has served as a device for grantors or, in the case of a legal usufruct, the law, to balance the competing interests of the persons involved through a fragmentation of ownership. In this sense, the usufruct assigns distinct roles to the usufructuary and the naked owner. This allocation then avoids the cumbersome governance rules of co-ownership, including the eventuality of a partition and sale of the co-owned property to others.

#### 4.2.6. Other Vessels

Finally, India and Italy offer circumscribed vessels for shoring up the family. Their scope and duration are very limited compared to the sweep of the Iranian waqf. Italy's patrimonial fund (*fondo patrimoniale*) dedicates certain property subject to a temporal cap and India's Hindu Undivided Family (HUF) offers a unitization vehicle made available for tax savings.

In Italy, each or both of the spouses as well a third party may establish, through a public act, a patrimonial fund by dedicating immovables or registered movables to the satisfaction of family needs.<sup>420</sup> Unless the act of founding provides otherwise, the fund assets are owned by both spouses and administered according to rules governing the matrimonial regime of community property.<sup>421</sup>

---

<sup>414</sup> See *id.* art. 607 (1976) (explaining that the right of usufruct expires upon death of the usufructuary).

<sup>415</sup> *Id.* art. 608 (1976).

<sup>416</sup> See *id.* art. 547 (1976) (terminating the interest of one usufructuary inures to the benefit of those remaining usufructuaries).

<sup>417</sup> *Id.* art. 546 (1976).

<sup>418</sup> *Id.* art. 548 (1976).

<sup>419</sup> *Id.* art. 548 (1976).

<sup>420</sup> CODICE CIVILE [C.C.] [CIVIL CODE] art. 167 (It.).

<sup>421</sup> *Id.* art. 168

The assets may not be sold, encumbered, pledged, or otherwise bound, unless permitted in the act of founding or unless both spouses concur and, if minor children are concerned, the court approves the disposition.<sup>422</sup> Creditors may not obtain enforcement against fund assets for debts they knew were not connected to the satisfaction of family needs.<sup>423</sup> Finally, the patrimonial fund terminates if the marriage is annulled or dissolved or its civil effects terminate.<sup>424</sup> In the presence of minor children, the patrimonial fund continues until they reach majority.<sup>425</sup>

India's HUF has been described as a distinct "legal entity embedded in tax, corporate governance and state codification of Hindu personal law."<sup>426</sup> The HUF is a vehicle for saving taxes by creating a family unit and pooling the assets to be treated as a "person" under the tax statutes.<sup>427</sup> It can only be formed by the family.<sup>428</sup> As the High Court of Bombay has explained, family stands for persons who are in the descendants in the direct line of a common ancestor as well as their wives and maiden daughters.<sup>429</sup> Moreover, the HUF requires a legal deed describing its members and its business.<sup>430</sup> It must also be registered.<sup>431</sup> The head of the HUF has traditionally been the "Karta"—the senior-most male member of the family.<sup>432</sup> In 2015, however, the High Court of Delhi handed down a landmark decision ruling in favor of a female being the head of the HUF.<sup>433</sup> In the HUF, the male members have

---

<sup>422</sup> *Id.* art. 169.

<sup>423</sup> *Id.* art. 170.

<sup>424</sup> *Id.* art. 171(1).

<sup>425</sup> *Id.* art. 171(2).

<sup>426</sup> Chirashree Das Gupta & Mohit Gupta, *The Hindu Undivided Family in Independent India's Corporate Governance and Tax Regime*, 15 S. ASIA MULTIDISCIPLINARY ACAD. J. 1, 13 (2017).

<sup>427</sup> HUF, *a Way to Save Tax Under Hindu Undivided Family Act*, CLEAR TAX (May 1, 2022), <https://cleartax.in/s/huf-hindu-undivided-family> [<https://perma.cc/86EA-XMRQ>].

<sup>428</sup> *Id.*

<sup>429</sup> Commissioner of Income Tax v. Gomedalli Lakshminarayanan, 159 Ind. Cas. 424 (1935) (per Rangnekar, J., concurring) (India); *see also* Commissioner of Income Tax v. M.M. Khanna, 1963 49 ITR (Trib) 232 (Bom) (India) (a joint Hindu family springs from a Hindu male and every Hindu male can be the stock of a fresh descent constituting a joint Hindu family or a Hindu coparcenary).

<sup>430</sup> HUF, *a Way to Save Tax Under Hindu Undivided Family Act*, *supra* note 427.

<sup>431</sup> *Id.*

<sup>432</sup> *Id.*

<sup>433</sup> Mrs. Sujata Sharma v. Shri Manu Gupta, (2016) 226 DLT 647. For a discussion of the ruling, *see* Savita Singh & Amit Wadhvani, *India: Women Can Now be Karta in an HUF Governed by Mitakshara Law*, MONDAQ (Mar. 2, 2016),

traditionally been called coparceners, while the females have been referred to as members.<sup>434</sup> Only coparceners have the right to demand partition of the HUF.<sup>435</sup>

#### 4.2.7. Perspectives

The idea of asset locks is gaining traction in both common law and civil law milieus. In the United States, for example, there is now a great variety of approaches with regard to the common law rule against perpetuities, which has traditionally provided that no future property interest is good, unless it must vest, if at all, no later than twenty-one years after some life in being at the creation of the interest.<sup>436</sup> A survey of the fifty states made available by the American College of Trust and Estate Counsel finds that only a few states have retained the traditional common law rule or moved to a “wait-and-see” modification, while a majority of states have eliminated the rule or replaced it with a temporal cap ranging from ninety to one thousand years.<sup>437</sup> In Germany, a recent proposal for a limited liability company with bound capital<sup>438</sup> contemplates a bar to the distribution of profits.<sup>439</sup> This prohibition would be permanent in that it cannot be repealed or limited, not even through a unanimous shareholder resolution.<sup>440</sup> At this time, the proposal is

---

<https://www.mondaq.com/india/wills-intestacy-estate-planning/470790/women-can-now-be-karta-in-an-huf-governed-by-mitakshara-law> [<https://perma.cc/49PK-RZ77>].

<sup>434</sup> HUF, *a Way to Save Tax Under Hindu Undivided Family Act*, *supra* note 427.

<sup>435</sup> *Id.*

<sup>436</sup> JOHN C. GRAY, *THE RULE AGAINST PERPETUITIES* § 201, 205 (4th ed. 1942).

<sup>437</sup> HOWARD ZARITSKY, *THE RULE AGAINST PERPETUITIES: A SURVEY OF STATE (AND D.C) LAW 1*,

[http://www.actec.org/public/documents/studies/zaritsky\\_rap\\_survey\\_03\\_2012.pdf](http://www.actec.org/public/documents/studies/zaritsky_rap_survey_03_2012.pdf) [<https://perma.cc/Y7L6-55V7>] (last visited Mar. 11, 2023).

<sup>438</sup> For the draft legislation reforming Germany’s Law Concerning Limited Liability Companies, along with introductory narratives and explicatory commentaries, see generally ANNE SANDERS ET AL., *ENTWURF EINES GESETZES FÜR DIE GESELLSCHAFT MIT BESCHRÄNKTER HAFTUNG MIT GEBUNDENEM VERMÖGEN [DRAFT LAW ON THE LIMITED LIABILITY COMPANY WITH BOUND CAPITAL]* (2021), <https://www.gesellschaft-mit-gebundenem-vermoegen.de/der-gesetzesentwurf/> [<https://perma.cc/BW4B-TENA>] (presenting the draft law alongside considerations and explanations) (Ger.).

<sup>439</sup> *Id.* at 12, 26, 63, 66, 68, 68 n.80.

<sup>440</sup> Barbara Mayer & Christian Osbahr, *Neue Rechtsreform? Das Project einer GmbH mit gebundenem Vermögen (GmbH-gebV)* [*New Legal Reform? The Project of a Limited*

still being vetted by the various stakeholders as well as the Federal Government.<sup>441</sup>

## 5. CONCLUSION

In the mixed jurisdiction literature, three characteristics for membership in the third legal family have been crystallized.<sup>442</sup> These include a duality of “building blocks of the legal edifice,”<sup>443</sup> a quantitative threshold and a psychological state of mind with respect to a distinctive bijurality,<sup>444</sup> and a structural separation of the traditions into their respective bins in private law and public law.<sup>445</sup> While these three characteristics have been said to single out the “Western” mixtures arising from the confluence of Romano-Germanic and Anglo-American legal materials,<sup>446</sup> the discussion of the Iranian waqf yields a broader understanding that envelops “Eastern” horizons.

With regard to the building blocks under the first characteristic, the Iranian waqf reflects a blending of form and substance from different legal traditions. In form, the Iranian waqf is integrated into a civil law edifice erected in the enlightened mold of the French Civil Code. But in substance, the Iranian waqf is decidedly not “civilian.” Rather, it has resulted from the consolidation of centuries of Ja’farî Shi’ite jurisprudence. Transcending the common law and civil law bipolarity, the Iranian waqf showcases Islamic law, one of the

---

*Liability Company with Bound Capital (GmbH-gebV)*], HAUFE (Nov. 16, 2022), [https://www.haufe.de/recht/weitere-rechtsgebiete/wirtschaftsrecht/gmbh-mit-gebundenem-vermoegen-gmbh-gebv\\_210\\_579786.html#:~:text=Der%20Grundsatz%20der%20Verm%C3%B6gensbindung%20verboten,nicht%20einmal%20durch%20einstimmigen%20Gesellschafterbeschluss](https://www.haufe.de/recht/weitere-rechtsgebiete/wirtschaftsrecht/gmbh-mit-gebundenem-vermoegen-gmbh-gebv_210_579786.html#:~:text=Der%20Grundsatz%20der%20Verm%C3%B6gensbindung%20verboten,nicht%20einmal%20durch%20einstimmigen%20Gesellschafterbeschluss) [<https://perma.cc/DHX8-SGZH>] (Ger.).

<sup>441</sup> See WISSENSCHAFTLICHER BEIRAT [ADVISORY BOARD], BUNDESFINANZMINISTERIUM DER FINANZEN [GERMAN FEDERAL MINISTRY OF FINANCE], ZUM VORSCHLAG FÜR EINE GMBH MIT GEBUNDENEM VERMÖGEN [ON THE PROPOSAL FOR A LIMITED LIABILITY COMPANY WITH BOUND CAPITAL] 4–12 (2022), [https://www.bundesfinanzministerium.de/Content/DE/Downloads/Ministerium/Wissenschaftlicher-Beirat/Gutachten/gmbh-mit-gebundenem-vermoegen.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundesfinanzministerium.de/Content/DE/Downloads/Ministerium/Wissenschaftlicher-Beirat/Gutachten/gmbh-mit-gebundenem-vermoegen.pdf?__blob=publicationFile&v=2) [<https://perma.cc/KH56-XKYE>] (offering a critical posture by all but one member of the advisory board) (Ger.).

<sup>442</sup> PALMER, *supra* note 1, at 7–11.

<sup>443</sup> *Id.* at 8.

<sup>444</sup> *Id.* at 8–9.

<sup>445</sup> *Id.* at 9–11.

<sup>446</sup> *Id.* at 8.

world's major legal and cultural systems, as a sophisticated foundation of mixtures in law and language. In terms of the quantitative and psychological criteria under the second characteristic, the presence of the Iranian Civil Code, which has stood the test of time, visibly signals innovation. The third characteristic of a structural separation in Iran goes beyond the distinction between public law and private law. Rather, by constitutional command, Islamic law permeates all aspects of legal life. This means that, even if civilian structures and grafts are seemingly cordoned off in codified private law, they continue to be interpreted in accordance with Islamic criteria and procedures.

Beyond the three characteristics identified in the literature, this Article has illustrated the Iranian waqf's unique ability to advance the exogenous comparative dialogue with its interlocutors and counterparts in common law, civil law and mixed jurisdictions. Such ability may actually serve as a valuable fourth characteristic of mixed jurisdictions, with their hallmark of being comfortably conversant across fences demarcating legal families, schools and traditions. We therefore close with the conclusion that Iran rightfully belongs to the third family as a new neighbor in law,<sup>447</sup> with the neighborhood being larger than traditionally acknowledged. After all, Iran's waqf offers a powerful response to Thomas Jefferson's famous locution, which he expressed in a letter written to James Madison: "the earth belongs in usufruct to the living;"<sup>448</sup> and his words are equally resounding in Persian: "زمین همواره به نسل زنده تعلق دارد" "Sis felix!"

---

<sup>447</sup> Palmer, *supra* note 2, at 109 (referring to a locution coined by Thomas B. (TB) Smith).

<sup>448</sup> Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in THE LETTERS OF THOMAS JEFFERSON 1743-1826, <http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson/jefl81.php> [<https://perma.cc/74T9-3T5S>].