

D'Arcy, Conscience and its Right, pp. 16 f, 26.

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B.Nelson, On the Roads to Modernity p.72.

- ۷۴

Ibid pp.45, 224.

- ۷۵

Baylor, Action and Person.

۷۶ - لمعرفة اسهام لوثر انظر



عالم کی فضیلت

فضل العالم علی العابد کفضل القمر علی سائر الکواکب

(سنن ابو داود و ترمذی)

ایک عالم کو ایک عابد پر ایسی فضیلت حاصل ہے

جیسی کہ چاند کو دوسرے تمام ستاروں پر (حدیث شریف)

مفتی محمد رفیق الحسنی صاحب کی کتاب

رفیق الفقهاء المسترشدين

فی الفقه والسنه والقرآن المبين

نفیس کتاب ہے آج ہی خریدیں اور مطالعہ فرمائیں

ملنے کا پتہ: مکتبہ غوثیہ پرانی سبزی منڈی کراچی

ضیاء القرآن پبلی کیشنز کراچی لاہور

other, must be drawn so that we preserve the unique character of perpetuity in the Islamic Waqf as a mechanism for providing the third non-profit benevolent sector in the economy and in the society at large with permanent and ever-increasing income-generating assets.

رویہ

مولوی اونٹ پہ جائے ہمیں منظور مگر
مولوی کار چلائے، ہمیں منظور نہیں
وہ نمازیں تو پڑھائے ہمیں منظور مگر
پارلیمنٹ میں آئے، ہمیں منظور نہیں
حلوہ خیرات کا کھائے تو ہمارا جی خوش
حلوہ خود گھر میں پکائے، ہمیں منظور نہیں
علم و اقبال و رہائش ہو کہ خواہش کوئی
وہ بھی ہم سا نظر آئے، ہمیں منظور نہیں
احترام آپ کا واجب ہے مگر مولانا
حضرت والا کی رائے، ہمیں منظور نہیں

از رشحات قلم: جناب سید ضمیر جعفری صاحب

In contemporary life, which is full with uncertainty and unpredictability about the future as well as with laxity of family and tribal mutual financial solidarity, these three types of conditions become of great importance to the Waqf founder. A Waqif would be very encouraged to make a Waqf if she/he is assured that should she need the Waqf funds at the time of retirement, old age, sickness or otherwise, she can be a prime beneficiary of her own Waqf, or she can rehearse the action and come back to own and use the Waqf assets and/or income. Additionally, allowing a Waqf to end after fulfilling its objective encourages making Waqf because it has a lower sacrifice to the Waqif. For instance, a one Thousand Dinar ten-year annuity with the depletion of its principal requires half the amount of principal needed at a seven percent expected rate of return, should the principal remain perpetual.

Contemporary Fiqh and laws of Awqaf in Muslim countries and communities must re-address the issue of the special conditions of the Waqf founder in order to recognize the implications of the new reality of uncertainty and unpredictability about future income and future financial needs, especially in three areas of: the condition of benefiting the Waqif from her/his Waqf and its income, the right to reverse the decision of making Waqf, and the right to make a Waqf that lapses with the lapse of its objective.

Practices in some Muslim countries accept the condition of self-beneficiary as I found in actual new Waqf documents created in both Jordan and Saudi Arabia. The proposed new Act of Awqaf in Kuwait allows for the Waqif to reverse her/his decision on creating a Waqf.

Finally, it should be noted that a balance between perpetuity and public benevolent objectives of a Waqf on the one hand, and the special desires and conditions of the Waqif and the Waqf's right to select a path that is most appreciated from her/his point of view on the

VI. Special Conditions of the Waqf Founder

Our classical Fiqh adopted a slogan, which over time became very famous: "the conditions of the Waqif are similar to the texts of the Legislator." This indicates the value attached to the conditions of the Waqf founder in our Fiqh.

Yet we find Fuqaha' very often deviate from the spirit of this slogan and impose violations and disrespect of some of the conditions of the Waqif. In the past parts of this paper, we've seen a few examples. Yet, there are many other examples, as can be seen by a quick glance at the two Majallahs: Majallat al-Ahkam al-Adliyah of the Hanafis, and Majallat al-Ahkam al-Shar'iyah of the Hanbalies. For instance, the prevailing view in our classical Fiqh, especially the Maliki and the Hanbali, is that the Waqif is not permitted to make himself a beneficiary of the Waqf. This is on the presumption that making one's own self a beneficiary contradicts the benevolent character of Waqf, as if the Prophet (Pbuh) did not consider making Birr to one's own self is a priority in the actions of Birr!

Another area where the conditions of the Waqif are not respected is the Waqif's right to terminate the Waqf and retrieve its property to her/himself if she/he found that such a reversal is needed. This right is not accepted by all jurists except Abu Hanifah, provided that the Waqf did not, in the meanwhile, gain perpetuity through a judicial action.

A third example where the conditions of the Waqf founder are not respected is where the objective of the Waqf comes to an end at a certain point of time and the Waqif makes her/his Waqf in such a way that its principal ceases to exist at the same time. An easy example of that is supporting an orphan until maturity.

income and usufructs; but it should not be allowed to take up other kinds of contracts and legal actions that infringe on the principle of perpetuity, continuous growth and accumulation of Awqaf properties, and the distribution prescribed by the founder.

The managers of Awqaf are thus not similar to the managers of corporations in the scope of their authority. The dilemma, referred to above, of Awqaf properties under the authority of judiciary entities that take the names of non-profit organizations, is exemplary. Awqaf under non-profit organizations can be liquidated, sold, and disposed of by actions within the scope of the proper authority of the management of these organization.

As a result of this confusion between Awqaf, corporations, and judiciary entities, the Awqaf properties of Muslim communities in many countries live under continuous threat of mishandling the property itself, not only its usufruct or income. Properties of Awqaf, including mosques, schools, and other properties assigned for the Muslim community use in the United States, Canada, most European countries, and South Africa, for example, are subject to all kinds of ownership-transferring contracts by the management, as well as to litigation by others for actions, or lack of actions, of the corporation's managers. The management of such properties can mortgage them or use them as a lean for borrowing which exposes these properties to be repossessed by lenders, and managers can sell these properties and make other disposal transactions with them. These properties can be liquidated by legal action against them that is merely a result of neglect of the managers. The corporations, in whose form the organizations that own these properties appear, are always vulnerable to litigation that threaten the public character of Awqaf itself in all those countries.

has the right to litigate and to be represented as well as to represent others. There are many voices among law scholars that also call for a legal entity to be covered by criminal laws so that it can be put under guardianship, it can be fined, and it can be eliminated. Contemporary Muslim jurists usually accept this new concept of legal entity or corporation and include it in their studies and rulings.

It has always been argued that the concept of Waqf comes very close to a manifestation of a legal entity, as it has separate and independent financial personality (Thimmah) of its own, completely not intermingled with that of its manager. The manager (nazir) is only a representative of the Waqf and the relationships between them are very well elaborated in Fiqh.

On the other hand, it is rarely questioned whether the concept of corporation and its legal entity does really suit the exact size of Awqaf. While the management of a corporation, with proper authorization from its constituency, the general assembly, can dispose of the assets of the corporation through sale, gifting, and other ownership transferring transactions; it can also liquidate the corporation and do away with all of its properties, the managers of Awqaf are very restricted. In Awqaf, properties are not considered owned by any human entity, individually or in groups, be it natural or judiciary. They cannot even give any of the Waqf income to any philanthropic objective outside the assigned one. We've seen that many scholars consider Allah the owner of Awqaf, and no one dares attribute to Him such kinds of transactions.

The important result of all this is that Awqaf properties require a special kind of judiciary person, or an amended legal entity in which, unlike other persons, the properties are not to be disposed of by owners; or somehow the legal entity of Awqaf should be allowed only to do certain contracts and legal actions; those which relate to investment of assets and distribution of

V. The Ownership of Awqaf and its Legal Entity

The differences of opinions among Muslim scholars on who owns Awqaf property are well known. These opinions may be grouped in three. One: that a Waqf remains on the ownership of the founder and is inherited from her/him by legal heirs. This is the view of Malik and many others. Two: that a Waqf becomes owned by the beneficiaries. The leader of this opinion is Abu Hanifah and he has many others with him. Three: that a Waqf is owned by Allah, the Almighty. To this view, Abu Yusuf, Al-Hassan, and Al-Shafi'i subscribe. With them, there are also many others.

These differences reveal an interesting fact, that is: ownership of Awqaf was really puzzling Muslim scholars at a time when the concept of legal entity or legal personality, outside natural persons, was not yet developed. Contemporary Awqaf laws in Muslim countries and communities quickly assign a legal personality to Awqaf and consider Awqaf properties owned by that legal entity.

In fact, there are many Awqaf-type properties that fall outside the Awqaf laws in all Muslim countries, simply because they come under the acts of non-profit organizations, be they educational, charitable, social, or otherwise. The laws of organizations in Muslim countries assign to an organization a legal entity that allows it to own both mobile and immobile properties. Many of these properties are certainly given to the organization on the basis of forming permanent capital to be used for servicing the objective of the organization, say a school building or land, or as a permanent source of income to the organization, as investments that generate revenues. These properties are no more than Awqaf.

The concept of legal entity, corporation, is a western one which was developed in western Europe and the United States over the last three centuries or a little more. A legal entity has its independent financial status. It also