

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 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.

طلبہ مدارس اسلامیہ و اہل قلم کے لئے

اعلان کیا جاتا ہے کہ آئندہ شمارے سے انشاء اللہ "فقیر ماورواں"

کے عنوان کے تحت ہر ماہ ایک مضمون فقہاء کرام میں سے کسی ایسے فقیہ کی خدمات جلیلہ پر شامل اشاعت کیا جائے گا جن کی ولادت یا وصال یا کسی اہم تصنیف یا واقعہ کے حوالے سے اس ماہ سے ان کی نسبت ہو۔ آپ اس عنوان پر لکھنا چاہیں تو مضمون لکھ کر مجلس ادارت کو ارسال کر سکتے ہیں۔ موصول ہونے والے مضامین میں سے سب سے اچھا لکھا ہوا مضمون شامل اشاعت کیا جائے گا۔ (مجلس ادارت)

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.

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

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 loan 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.

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)

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 phylanthropic 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 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

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 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 (Thimma) 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

respect of the distinctive nature of the third sector, the non-profit sector of Awqaf, and in recognition of the tremendous failure of governments in managing economic and benevolent enterprises, and in realization of the need for distinguishing the style of management of Awqaf from that of profit-motivated private-interest-seeking enterprises, the Awqaf management should be run by local people who relate to the beneficiaries of Awqaf as well as to the community in which Awqaf properties represent an infrastructure capital for social work and social interests.

The management that is needed for Awqaf is one which is similar to that of economic corporations but with finding a way of electing a management board of directors that relates to the beneficiaries and locality of the Awqaf property. A new proposal recently submitted in the context of a study on the reform of Awqaf in Saudi Arabia was based on the concept of creating Awqaf management units that are selected from concerned individuals and civil society organizations in the area where Awqaf properties exist.

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

whose revenues are utilized in supporting the objective designated for them, are merely properties that belong to economic/benevolent activities in the society in which government represents a failing manager.

Several reform attempts started taking place in some Muslim countries to reform the management of Awqaf. In Sudan, starting from 1987, a new organization was found under the name of the Public Corporation of Awqaf. 1993 witnessed the reorganization of the ministry of Awqaf in Kuwait whereby a General Secretariat of Awqaf was created as an autonomous, though governmental, body to manage the Awqaf in Kuwait. Qatar also remodeled its ministry of Awqaf along similar lines.

Unfortunately, all these reforms could not touch the real problem; hence, solutions suggested were only cosmetics and represent mere change of hands, a kind of intergeneration struggle, rather than a change in the concept of management.

Awqaf represents, in the Islamic legal system, an early version of the concept of corporation that was invented throughout the last three centuries and matured in the third quarter of the nineteenth century. In a way, economic corporations are no more than funds utilized to generate profit to their owners whereby Awqaf properties are funds utilized for the benefit of its beneficiaries. There are numerous indications, at least from existing or surviving Awqaf documents, that founders tended to always nominate a manager for their Awqaf from their own vicinity or that of the property itself. Once we decide to respect the conditions of founders and avoid the government as a nazir, it can be established, on the basis of the surviving documents, that the intention of founders has always been in the direction of appointing local managers rather than the central government or its local branch.

Hence, in fulfillment of the will of founders, and in

power, and there was no mention in any book of fatawa and nawazil of any single event of a Waqf in which the founder nominates the government as a manager of his/her Waqf.

It seems that the first attempt by the government to manipulate Awqaf took place during the period of Mamalik, at the time of Al-Zahir Bebars in Cairo. This attempt was received with extreme negativity and rejection by Fuqaha and other Muslim scholars. It was withdrawn. The miraculous change came in our era where we find Awqaf properties in almost every Muslim country run and managed by a branch of the government. Hence, instead of having a strong third sector, independent of both the profit-making motivation and the power of the government, we ended up with an Awqaf that works under the shadow of a corrupt and inefficient public sector.

This change began with the Ottoman Awqaf law which was enacted around the middle part of the nineteenth century and which came as a drastic response to the dominant corruption in the management of Awqaf as a result of abuse, neglect, and mistrust that enveloped a great majority of Awqaf managers (nuzzar).

Yet, the Ottoman Awqaf law was only a first step because it did not transfer all Awqaf management to the hands of government nor did it eliminate the private Awqaf. During the first half of the twentieth century Awqaf laws were issued in almost all Muslim countries and several communities. These laws established a branch of government, called "Ministry of Awqaf" or General Directorate of Awqaf to manage Awqaf properties the same way other branches of the public sector are managed.

Everybody knows that government is a bad manager of economic enterprises, it is also the worst manager of benevolent projects. Awqaf properties, whether used directly for its objective or were of the investment type

under different variants became very common and these trusts were granted several tax privileges. Moreover, it is known in Islamic Fiqh that any Waqf whose beneficiaries cease to exist turns into a Waqf for the poor and needy as this is considered a primary objective of the institution of Awqaf itself. Hence, both Fiqh and laws in Muslim countries should have dealt with the problems of corruption, fragmentation of beneficiaries and cost of locating beneficiaries in relation to the revenues in a more dynamic way that allows for the promotion of private Waqf and for turning it into a Waqf for the poor and needy over time instead of looking at it in a negative way.

IV. The Management of Awqaf

A careful study of the Islamic Awqaf and its Fiqh as developed throughout centuries and a deep look into Shariah rulings on Awqaf and the different fatawa in its regard in different Muslim cities and countries, all that point to the idea that Islamic Awqaf is certainly not an invitation to the authority of the government to dominate the area of benevolent activities in the society. In the opposite, from its beginning, the establishment of Awqaf was a clear representation of creating a third sector related to philanthropies that is kept away from both the profit-motivated behavior of individuals and the authority-dominated action of the government. 'Umar Bin Al-Khattab, during his reign as a khalifa, wrote the document of his famous Waqf, which is considered the main source of Fiqh on the issue. He appointed himself a manager, and after him a person from his family not his successor in khilafa. The other Waqf which was done at the time of the prophet (pbuh) by 'Uthman, the Waqf of the well of "Ruma" which supplies drinking water to al-Madina was not also put under the command of the government. It was managed virtually by the community with no government interference. The late Abu Zahrah mentions that many rulers and rich persons used to make Awqaf in order to have their wealth escape potential persecution and confiscation by new comers to

The private Waqf has always a spillover to public Waqf since all private Waqf always have a clause assigning either a fraction of the revenues to a public cause or converting the private Waqf, all of it, to a public cause in case the assigned beneficiaries cease to exist. Al-Shafi'i in his "Al-Umm" gave two empirical examples of private Waqf, one of them was for his own son Abu al-Hassan, who was born to him in Egypt. In both, the Waqf becomes to the poor and needy after its private objective ceases to exist.

In several Muslim countries, private Waqf came under heavy attack from some disciples of western orientalist who criticized this type of Waqf in the late 1800s. Several Muslim countries enacted laws that liquidate existing private Waqf and prevented establishing new ones as it happened in both Egypt and Syria. Lebanon limited the private Waqf to two generations only, after which a private Waqf is subjected to liquidation to the benefit of the beneficiaries. These attacks were rightly justified by huge amount of corruption that dominated handling Awqaf all over the Muslim world but there was no reason for any discrimination between private and public Awqaf on the basis of corruption. The fact was that the management of both types of Awqaf was corrupt and most Awqaf properties were either already stolen or very much abused. The solution could not be found in eliminating such a benevolent institution but in redesigning its approaches of management, as we will discuss later.

The private Waqf in fact serves an important social objective as well as economic growth. Properties left to posterity help provide additional income to descendants of the founder. They also help keep them off social welfare and Zakah recipient lists while, at the same time, such properties provide for a mechanism of capital accumulation through generations which is an important way for growth and development: a fact that was only recognized in the west, especially in the United States, over the past few decades where the use of family trusts

others, so they were always keen to make all their intellectual products available to users. This is equivalent to making their intellectual properties a Waqf to students, scholars, and other non-commercial users. What is being done by the publishers of these works is that they profiteer themselves from the share that is otherwise given to authors. This is an area where, I think the laws of Awqaf in the Muslim countries and communities must interfere to protect the right of our heritage writers from being exploited financially by contemporary publishers. This can be done, for instance, by imposing a percentage of the copies published to be given for free to libraries, mosques, schools, and other learning institutes which, to a large extent, fulfill the main desire of those authors by making their works accessible to those who seek knowledge.

III. Public and Private Waqf

From the point of view of the nature of the Waqf objectives, Waqf may be divided into public and private. Public Waqf is that which serves an objective of interest to the whole society or part of it. Its examples are Awqaf for mosques, schools, orphanages, and scientific research, the poor and needy, travelers, etc.

Private Waqf is a Waqf in which the beneficiaries are either specific persons or persons characterized by certain relations to the founder or any other specific person. The most common type of this Waqf is Waqf for the descendants of the founder. That is why this kind of Waqf is usually called family or posterity Waqf.

Posterity Waqf is a pure invention of Muslims. It was created when the companions of the Prophet (pbuh), on mass, started making Awqaf following the footsteps of the second khalifa, 'Umar Bin Al-Khattab, and they added clauses in their Waqf documents to the effect that the first or major beneficiary of the Waqf should be the descendants of the founder.

Waqf in Kuwait recognizes both temporality and usufruct in Waqf. It is still lingering between the government and parliamentary committees.

Financial rights are also not usually recognized in Waqf by jurists and laws. Modern life has many kinds of these rights, some of them were known in the past but were not of much financial value. For instance, although authorship rights are non-transferable (because transferring them makes a lie) the right to publish and financially exploit the product of an author has become an important business in our days. The same was not known in the past. Patents and other rights related to the product of talents are also an important new dimension in contemporary life. These rights are not dealt with in our classical Fiqh, so is the Waqf of objects that have a repetitive character such as newspapers, magazines, and other periodicals. Similarly are the products of film companies, educational software programs, and many other intangible properties. All such rights and objects must be covered in the Awqaf principle.

Under the existing Fiqh and laws of Awqaf in most Muslim countries and communities, one cannot, for instance, make a Waqf of ten years subscription to the American Economic Review to the benefit of a university library. It's true that civil laws in all these countries consider such an act as a donation but the laws of Awqaf must give it privileges similar to those granted to other types of Awqaf.

To complete the story of the Waqf of rights and usufruct, it is worth while to mention the publication of classical works in Fiqh and other subjects that is being done nowadays, all over the world, without any recognition of the financial right of the author in the product made by the contemporary publishers. There are many indications that Muslim writers throughout the Islamic history were motivated by the Islamic tradition that prevents and prohibits withholding knowledge from

and ordinary sadaqah. If one looks at the sayings of the Prophet (pbuh) about Waqf, one important characteristic can be derived. This is the characteristic of repetitiveness; that is, a Waqf is distinct from ordinary sadaqah by its repetitiveness, i.e., the repeatability of the benefits that come out of it. Therefore, any form of sadaqah that makes repeated payments to service its objective is a sadaqah jariah (running sadaqah): a Waqf.

This "running" feature of Waqf can be manifested in different forms. It may be shown in terms of pledging the income/usufruct of an asset for a period of time at the end of which the asset and its income/usufruct return to the founder, in terms of distributing both its income and parts of its asset over repeated installments to the beneficiaries, hence temporality comes from depletion of the asset, in terms of a perpetual asset that produces a repetitive flow of income or services, or in terms of a right granted to the beneficiary to receive periodically, at repeated intervals or when needed, a flow of mobile objects/usufructs. All are Waqf and there is no need for excluding any of them from being a Waqf without valid rationale or support from an original text[3].

II. Waqf of Usufruct and Financial Rights

Waqf of usufruct is known in the Maliki School while the other schools of jurists do not consider it. Contemporary life has many forms of usufructs that can be made into Waqf such as driving a car on a toll way or passing through a tunnel or bridge that has fees on it. Similar to that is the use of a parking lot given a Waqf for two hours for the Eid prayers twice a year. These kinds of Waqf need to be recognized by the contemporary Fiqh as well as by the laws of Awqaf in the Muslim countries and communities.

Most laws of Awqaf, including those in Algeria, Jordan, Sudan, and India do not make any reference to the Waqf of manafi' (usufruct). The recently proposed law of

It must also be noted that the perpetuity in Waqf remains the rule and temporality the exception. Hence we go along with the majority of jurists who consider the Waqf essentially perpetual, and we believe that temporality in Waqf requires an explicit expression of the founder's will.

3. The third condition for perpetuity is that the objective of Waqf must be perpetual. Here also, jurists talk about non-existence of the assigned beneficiary at the beginning, in the middle, or at the end of a Waqf and they treat these cases in ways that finally fall under either annulling the Waqf that has a non-existent objective or transforming it into the general objective of supporting the poor and needy on the assumption that there is always need for such an objective.

The importance of the principle of perpetuity in Shariah should be looked at in the light of the need, in all societies, to establish revenues/services generating permanent assets devoted to social objectives. In other words, the perpetuity in Waqf provides for capital accumulation in the third sector that, over time, builds necessary infrastructure for providing social services on a non-for-profit basis. Hence, perpetuity in Waqf accounts for the accumulation of assets in the non-profit sector which is a first and necessary step for the growth of this sector in contrast with the profit-motivated sector and the government sector that is built on authority and law enforcement.

The principle of perpetuity is protected in Shariah by a series of rulings some of which relate to the prohibition of disposition of the Waqf asset through sale and other contracts and some relates to the transfer of Waqf revenues from one objective to another, should the assigned objective cease to exist, so that the property remains in the domain of Waqf.

However, little attention is given to the importance of temporality in Waqf. In this regard, we must notice that

its accounting treatment. Land is the only property that is perpetual by its nature. Perpetuity of a property is acquired by the legal organization or legal status through equities in common stock perpetual companies. Accounting procedures may turn a given property into perpetuity through the application of the principle of provision for capital consumption or provision for amortization.

2. The second condition relates to the will of the Waqf founder. A perpetual Waqf requires an explicit or implicit expression of will on the part of the founder to make it so. This condition was not fully elaborated in the classical Fiqh. In fact, the Maliki School has the only group of jurists who explicitly accept temporality in Waqf by virtue of the will of the founder. Even Malikis themselves do not accept temporality in a Waqf for a mosque and they say that even if a waqif (founder) decreed that his/her Waqf for a mosque is temporal, the Waqf is considered perpetual and the temporality condition is nullified.

This seems to grossly infringe on the desire and property rights of the founder without any legal or Shariah support for such a position. As expressed by the late Shaikh Zarqa, everything in Waqf is subject to Ijtihad and there is no single ruling in it that gained unanimity except that the Waqf purpose must be benevolent (Birr). Apparently all schools of Fiqh, including the Malikis (with respect to temporality in mosque Waqf), did not anticipate cases in which there are real needs for temporal Waqf in general as well as in mosques specifically[2]. It may be interesting to note that the Malikis, who rejected temporality in mosque's Waqf, accepted it if the founder is a lessee of a structure and he/she made his/her usufruct, owned by virtue of the lease contract into Waqf as a mosque. However, it must be noted here that temporality in a Waqf by a lessee is caused by the nature of the property not by the will of the founder.

Towards the Revival of Awqaf: A Few Fiqhi Issues to Reconsider Monzer Kahf.

The recent interest in Awqaf makes a reversal of a trend of neglect and even attacks that continued for almost a century in most Muslim countries. It represents a facet of the Islamic revival in Muslim countries and communities. Rediscovering Awqaf and attempting to enhance their role in social and economic development requires that we should pay attention to a few important issues in the Fiqh of Waqf, of which I will concentrate on six only, namely: the principle of perpetuity versus temporality, the Waqf of usufructs and financial rights, the public Waqf versus posterity or private Waqf, the Waqf management, the ownership of Waqf and its legal entity, and the special conditions of the Waqf founder (al Waqif).

I. The Principle of Perpetuity Versus Temporality in Waqf

When Al-Shafi'i in his "Al-Umm" mentioned that the Prophet (pbuh) invented the Waqf, a concept with no precedent in all other nations, he was not aware that Egyptians, Greeks, and Romans had certain types or versions of Waqf. Al-Shafi'i was certainly correct in his assertion if we look at some of the unique characteristics and scope of the Islamic Waqf. One of the major points in this regard is the principle of perpetuity. Perpetuity in Waqf means that once a property is dedicated as a Waqf it remains so until the Day of Judgment, and no one can change it later on.[1] In contrast with perpetuity some kinds of Waqf are also recognized as temporal. Hence we have two types of Waqf: perpetual and temporal.

Perpetuity requires three conditions:

1. The property made Waqf must be suitable for perpetuity either by its nature, by its legal status, or by