

## *Fiqhi* Issues in the Revival of *Awqaf*

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*For Islamic Horizons*

The recent interest in *Awqaf*<sup>1</sup> is part of the global Islamic revival. Rediscovering this traditional Islamic institution and attempting to enhance its role in social and economic development requires the scholarly study of endowment-related *Fiqhi* (Islamic legal) matters such as: perpetuity vs. temporality, endowments of usufructs<sup>2</sup> and financial rights, public vs. posterity or private endowments, who manages a *Waqf*, its legal status and ownership, and the *Waqif*'s (founder's) special conditions.

The ancient Egyptians, Greeks, and Romans had endowments, but the Islamic form introduced by Prophet Muhammad (*Salla Allahu Alayhi wa Sallam*) is without precedent. Among its distinctions is perpetuity, according to which a dedicated property remains so until Judgment Day. However, there are also provisions for temporary endowments.

Perpetuity requires that the property be suitable for such a status based on its nature, legal status, or accounting treatment. Only land is perpetual by its nature. The legal organization or legal status acquired by common-stock equity in perpetual companies grants perpetuity to a property; also accounting provisions for capital consumption or amortization may give perpetuity.

The founder's explicit or implicit expression is a prerequisite for the endowment's perpetuity. This condition is not elaborated fully in classical *Fiqh*. However, while *Malikites* are the only jurists to explicitly accept will-based temporality, they do not apply it to mosques, for them such an endowment is considered perpetual irrespective of the founder's decree.

This seems to infringe on the founder's desire and property rights without any legal or Shari'ah basis. The late Shaikh Zarqa opined that everything in a *Waqf* is subject to *Ijtihad*, except the unanimous agreement that its purpose must be benevolent (*Birr*).

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<sup>1</sup> *Awqaf* (sing. *Waqf*) is an endowment of money or property made for benevolent reasons.

<sup>2</sup> Usufruct is the legal right to use and enjoy the fruits or benefits coming from something that one does not own.

Apparently all *Fiqh* schools, including the *Maliki* (with respect to a mosque's temporality), did not anticipate the future need for temporary endowments, including mosques. Today, for instance, western Muslim communities may need a temporary mosque due to their mobility while they collect funds and actually build a permanent mosque. The *Malikis* accept a mosque's temporality only if the founder is a lessee and has made her/his usufruct, owned by virtue of the lease contract, into a mosque endowment. Perpetuity must remain the rule and temporality must allow for the founder's expressed will.

The third reason for perpetuity is that the endowment's objective must be perpetual. If a founder did not state an objective, jurists favor either annulling the *Waqf* or transforming it into the general objective of supporting the poor and needy, as such people are always present. The *Shari'ah's* principle of perpetuity is vital to societies seeking to establish revenue and services generating permanent assets to be devoted to social objectives. It provides for capital accumulation in the third (not-for-profit) sector that, over time, builds the necessary infrastructure to provide steady social services. Such perpetuity helps the non-profit sector accumulate the assets necessary for growth, in contrast to the profit-motivated private sectors and the government sector built on authority and law enforcement.

Although perpetuity is protected by a series of rulings, scant attention is given to the importance of temporality. All jurists have a defacto agreement on temporality when it is based on the nature of the endowment's assets, as they include such items as buildings, trees, horses, and books in this category. They did not think of such an endowment as non-perpetual, saying that it lasts as long as the items forming it last. In other words, such items, even though non-perpetual by nature, are given a perpetual meaning! The *Malikis* accept temporal endowment by the founder's will, and also accept making usufructs into endowment. Very often usufructs are temporal. Perpetuity cannot be measured in terms of a horse's life or durability of a tree or rug. Recognizing this, the *Maliki* scholar Ibn Arafa defines an endowment's perpetuity in terms of "as long as the property lasts." Many *Fuqaha'* (Islamic legal scholars) maintain that some mobile assets can be made into endowment as an exemption only from this, because this was done during Prophet's lifetime.

The accounting idea of forming capital consumption provisions, which lead to accounting perpetuity, is new. Most jurists (except *Malikis*), do not permit temporality decreed in the founder's will, while they approve temporality caused by a mobile asset lifespan. They just call it something else.

The contemporary experience of Muslim societies and communities indicate that temporality expressed in the founder's will and by the nature of certain objectives is part of social life.

Present-day Muslim jurists should reconsider this principle in terms of the basic distinction between *Waqf* and ordinary *sadaqah* (charity). The Prophet considered a *Waqf* as distinct from ordinary *sadaqah* by its repetitiveness and ensuing a stream of benefits. Thus any *sadaqah* having continual service as its objective is a *sadaqah jariah* (a stream of *sadaqah*). In other words, it is an endowment.

This continuity feature can include pledging an asset's income or usufruct for a limited number of periods, after which the asset, and its income or usufruct, returns to the founder. Or, it may be become temporal through repeated distributions, in installments, of the income and part of its asset, which would cause depletion at the end of the desired period. Or, it may be a perpetual asset producing a repetitive flow of income or services, or a right granted to the beneficiary to receive a periodic (at repeated intervals) flow of mobile objects or usufructs. These can be considered *Waqf*. In a similar case, Ibn Taymiah considers renting an asset that produces repeated mobile objects rather than usufruct as a valid *Ijarah*, as in the case of renting a well for its water or hiring a nursing woman for the milk she provides to a newborn baby.

### Endowments of Usufructs and Financial Rights

Contemporary lifestyle has many endowable usufructs: toll roads, tunnels or bridges, or offering a parking facility for *Eid* prayers. Only *Malikis* accept such endowments of (*manafi'*). Contemporary *Fiqh*, as well as Muslim countries and communities need to recognize such potential endowments. For instance, although authorship rights are nontransferable, exploiting an author's product has become a big business. Patents and intellectual rights are also new. Laws governing endowments need to extend such rights to objects with a repetitive character, such as newspapers and magazines, media products, software, and other modern intangible properties. Under

existing *Fiqh* and *Awqaf* laws, one cannot endow a library with a ten-year journal subscription, although civil law considers such a donation. Similarly, *Awqaf* laws must give privileges to this kind of endowment similar to those granted to other types of *Awqaf*.

Modern day publishers of classical *Fiqh* and other works usually ignore the author's financial right; authors who were motivated by the Islamic tradition that prohibits withholding knowledge. In effect, this intellectual property is an endowment for students and non-commercial users. However, publishers profiteer by not paying royalties on classical transcripts. *Awqaf* laws must prevent such exploitation and also preserve the authors' desire by making publishers donate a percentage of their printed copies to libraries and similar institutions.

#### Public and Private Endowments

An endowment may be public or private. A public one has a societal objective (i.e., mosques, schools, scientific research, charity, etc.), while a private one mainly benefits specific individuals or the founder's relatives or descendants (a "family" or "posterity" *Waqf*). This is a purely Muslim invention based on the companions innovating practice during the time of 'Umar Bin al Khattab when they created endowments in which the founder's descendants would be the first or major beneficiaries.

Private and public endowments have never been completely separate, since all private ones always assign either a fraction of their revenues to a public cause or convert private endowments into public ones when there are no more assigned beneficiaries.

In the late 1800s, some disciples of western Orientalists criticized private endowments. In Egypt and Syria, private endowments were liquidated and new ones were prohibited. Lebanon limited them to two generations, after which they were liquidated to the benefit of the beneficiaries. Such criticism, although justified by the prevailing corruption, did not warrant discrimination between private and public endowments, for the management of both was corrupt and most of their properties already had been stolen or abused. What really was called for was better management.

Private endowments serve important social objectives and contribute to economic growth. Properties left to posterity help provide additional income to the founder's descendants, and provide a generational mechanism of capital accumulation. This important tool for growth and development was recognized in the West, especially in the United States, and gradually various family trusts became common and were granted tax privileges.

### Endowment Management

An endowment is not an invitation for governments to control benevolent activity. In fact, endowments were traditionally off-limits to profit-motivated individuals and to governmental authority both. In Caliph 'Umar's personal endowment document, written during his administration and still serving as the issue's main *fiqhi* source, he appointed himself manager, and after him a family member. The other endowment set up during the Prophet's lifetime was 'Uthman's Ruma well, which supplies drinking water to al Madinah. This was managed virtually by the community. Abu Zahrah mentions that many rulers and rich persons resorted to this practice to escape potential persecution and confiscation by new rulers. No book of *Fatawa* mentions that the government was ever appointed by a founder to manage an endowment.

In fact, severe criticism from the *Fuqaha* and scholars forced the Mamluk ruler al Zahir Bebars to stop trying to control Cairo's endowments. Ironically, almost all Muslim governments now manage such properties—with great inefficiency and corruption. This change began around the mid-1800s, when the Ottoman *Awqaf* law was enacted to curb rampant corruption in this sector. This was only a first step, although this law neither transferred all endowment management to the government nor eliminated private endowments.

The *Awqaf* laws issued during the first half of the twentieth century assigned a branch of government, a ministry or a directorate, to manage all *Awqaf* properties. Invariably, bureaucracies have proven to be the worst managers. Several Muslim countries have attempted reforms, but these have not addressed the real problem of management.

In the Islamic legal system, endowments represent an early version of the corporation concept that was invented over the last three centuries and finally matured in the third quarter of the nineteenth century. While for-profit corporations are no more than funds utilized to generate profit for their owners, endowments are funds utilized for the benefit of beneficiaries. Research indicates that founders usually tended to nominate a manager from their own vicinity or from the property's beneficiaries.

### Endowment Ownership

Who owns an endowment's property? The *Malikis* and some others say it belongs to the founder and can be inherited by her/his legal heirs, they say however that owners of *Awqaf* have no disposal rights. Abu Hanifah says it belongs to the beneficiaries. However, his main two disciples Abu Yusuf and al Hassan, along with al Shafi'i, and others assign ownership to Allah. This was a puzzling issue at that time, for the concept of legal entity or legal personality, outside of natural persons, was unknown. Contemporary *Awqaf* laws give each endowment a legal personality and consider its property as owned by that legal entity.

The concept of legal entity (corporation) developed in Western Europe and the United States over the last three centuries. Contemporary Muslim jurists usually accept this concept and include it in their studies and rulings. It has been argued that the concept of an Islamic endowment comes very close to that of a legal entity, as it has its own separate and independent financial personality (*Thimmah*) and does not mix with that of its manager. The manager (*Nazir*) is only the endowment's representative. The relationship between them is elaborated in *fiqhi* literature.

Is the concept of a corporation and its legal entity suitable for an Islamic endowment? Corporate managers, with authorization from their constituency (the general assembly), can sell, gift, or transfer ownership of a corporation's assets. They can liquidate it and dispose of its properties. *Awqaf* managers are highly restricted in such matters, for an endowment's property is not considered owned by any human entity, individually or jointly, and can only give its income to the assigned philanthropic objective.

Therefore, such property requires a special kind of judiciary person or an amended legal entity that does not allow its owners complete control. Somehow, the endowment's legal

entity should be allowed only to perform certain contracts and legal actions relating to asset investment and to income and usufruct distribution. It should not be allowed to perform other contracts and legal actions that infringe on the principles of perpetuity, continuous growth and accumulation of said properties, and on the distribution prescribed by the founder. Likewise, its manager's scope of authority differs from that of corporate managers.

Unfortunately nowadays, *Awqaf* located in non-profit organizations can be liquidated, sold, and disposed of according to the regulations of incorporated legal entities.

The resulting legal confusion has paved the way for great financial mismanagement. Endowment properties assigned for the Muslim community's use in North America, Europe, and South Africa are subject to all kinds of ownership-transfer contracts by the management, as well as to litigation resulting from the actions, or lack thereof, of the corporation's managers. Managers can mortgage endowments or use them as liens for borrowing, thereby exposing them to repossession by lenders. These properties can be sold, subjected to other disposal transactions, or liquidated by legal action arising from managerial neglect. The corporations, in whose form the organizations that own *Awqaf* properties appear, are always vulnerable to litigation that threatens the endowment's properties and public character.

#### The Founder's Special Conditions

Classical *Fiqh* followed the maxim: "The founder's conditions are similar to the legislator's texts." This indicates the *fiqhi* value attached to the founder's conditions. However, *Fuqaha*' often deviate from the founder's expressed or inferred wishes.

Contemporary life is loaded with uncertainty, unpredictable future events, and lax familial or tribal financial cooperation and solidarity. An endowment's founder cannot have perfect predictions. It will help to create many new *Awqaf*, if founders could be assured of benefiting from the funds when they face retirement, old age, sickness, or otherwise, they could be the prime beneficiaries, or use their *Waqf*'s assets and income. Additionally, allowing endowments to end after fulfilling their objective encourages their establishment, for it is a lesser sacrifice for the founder. For instance, a 1,000 Dinar 10-

year annuity with the depletion of its principal requires half the amount of principal needed at a 7 percent expected rate of return, should the principal remain perpetual.

Contemporary *Fiqh* and *Awqaf* laws must re-address the founder's special conditions to recognize the implications of modern uncertainty and unpredictability about future income and future financial needs. They must focus on the founder's right to benefit from the endowment and its income, to change her/his mind sometime down the road, and to terminate it after its objectives have been realized. Jordan and Saudi Arabia now accept the condition of self-beneficiary, and Kuwait's proposed *Awqaf* act allows the founder to change his/her mind.

A balance between an endowment's perpetuity and public benevolent objectives, and the founder's special desires, conditions and right to select its objectives, must be established to preserve the Islamic endowment's unique character of perpetuity as a way to provide the economy's non-profit benevolent sector and society with permanent and ever-increasing income-generating assets. We must revise our classical *Fiqh* in areas that promote the establishment of new endowments and improve the benefits derived from existing ones. Many Muslim societies and communities are rich in inherited endowment properties, but need to improve their capital benefit ratios.

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