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**THE CLASSICAL ISLAMIC LAW OF *WAQF*: A  
COMPARATIVE APPROACH**

BY

**LUQMAN HAJI ABDULLAH**



**THESIS SUBMITTED TO  
THE UNIVERSITY OF EDINBURGH  
FOR THE DEGREE OF DOCTOR OF PHILOSOPHY  
JULY 2005**

**IN THE NAME OF ALLĀH  
THE COMPASSIONATE, THE MERCIFUL**

DECLARATION

I, THE UNDERSIGNED, HEREBY DECLARE THAT  
THIS THESIS IS WRITTEN BY MYSELF AND ANY  
REFERENCES MADE TO THE SOURCES ARE DULY  
ACKNOWLEDGED

LUQMAN HAJI ABDULLAH

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Luqman Haji Abdullah  
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## ABSTRACT

This thesis is a study of the classical Islamic Law of *Waqf*. This thesis is divided into two parts. Part One is focused on the nature of *waqf*, while Part Two is about the administration of *waqf*.

Part One is divided into two chapters. Chapter One provides a discussion of the nature and the legal principles of the classical law of *waqf* according to the four Sunni schools of law. It serves as the basis for later discussion and argumentation. The origin of the law of *waqf* is also discussed in this chapter. Chapter Two focuses on the constituent elements of *waqf*. It then analyzes the conditions for the validity of the founder of a *waqf*, the subject of a *waqf*, the object of a *waqf* and the declaration of *waqf* as provided by the classical jurists.

Part Two comprises two chapters, i.e. Chapter Three and Chapter Four. Chapter Three discusses the office of the administrator of a *waqf* (*nazir*). It explores the discussion of the jurists regarding the role of the administrator of a *waqf* as well as his limit and power in the classical law. Chapter Four discusses the methods of maintenance and mobilization of *waqf* property.

In tackling both parts a comparative approach has been taken, i.e., a comparison between the four sunni schools in matters concerning the principles of the schools in the classical Islamic law of *waqf*.

## TABLE OF CONTENTS

ACKNOWLEDGEMENT	iii
ABSTRACT	iv
TABLE OF CONTENTS	vi
TRANSLITERATION	ix
INTRODUCTION	xi

### PART ONE: THE NATURE OF *WAQF*

#### CHAPTER ONE: THE NATURE AND LEGAL PRINCIPLES OF *WAQF*

1.0	Introduction	1
1.1	Definitions of <i>waqf</i>	1
1.1.1.	Definition of <i>waqf</i> in the Hanafi School of law	3
1.1.2.	Definition of <i>waqf</i> in the Maliki School of law	8
1.1.3.	Definition of <i>waqf</i> in the Shafi <sup>c</sup> i School of law	10
1.1.4	Definition of <i>waqf</i> in the Hanbali School of law	11
1.2	The legal principle of <i>waqf</i> : Its absolute nature ( <i>luzum al waqf</i> )	13
1.3	The origin of <i>waqf</i> and its development in Islamic law	17
1.4	Classification of <i>waqf</i>	29
1.5	<i>Waqf</i> in comparison with the other methods of disposition of property	33
1.5.1	<i>Waqf</i> in comparison with <i>hiba</i> (gift) and <i>‘ariya</i> (loan)	34
1.5.2.	<i>Waqf</i> in comparison with the English Law of trust	39

#### CHAPTER TWO: THE CONSTITUENT ELEMENTS OF *WAQF*

2.0	Introduction	44
2.1	The <i>waqif</i> (founder of <i>waqf</i> )	45
2.1.1	Qualifications	45
2.1.2	The <i>Waqf</i> of a non-Muslim	48
2.1.3	The <i>Waqf</i> of someone on his death bed	51
2.1.4	The <i>Waqf</i> of an <i>amir</i> ( <i>irsad</i> )	54
2.1.5	The <i>waqif</i> 's stipulation regarding <i>waqf</i>	55
2.2	The subject of <i>waqf</i> ( <i>mawquf</i> )	62

2.2.1	The <i>waqf</i> immovables ( <i>‘aqar</i> )	62
2.2.2	The <i>waqf</i> of movables ( <i>manqul</i> )	63
2.2.3	The cash <i>waqf</i>	66
2.2.4	The <i>waqf</i> of jointly owned property ( <i>musha‘</i> )	70
2.3	Beneficiaries ( <i>Mawquf‘alayh</i> )	73
2.3.1	Conditions	73
2.3.2	<i>Waqf</i> in favour of the <i>waqif</i> himself	80
2.3.3	<i>Waqf</i> for the benefit of descendants	82
2.3.4	<i>Waqf</i> to establish a mosque	87
2.4	Declaration of <i>waqf</i>	94
2.4.1	An Offer	95
2.4.2	An acceptance	101
2.4.3	Conditions of a declaration	103
2.5	Conclusion	109

## **PART TWO: THE ADMINISTRATION OF *WAQF***

### **CHAPTER THREE: TRUSTEESHIP (*AL WILAYA / AL NAZAR*)**

3.0	Introduction	110
3.1	The position of <i>nazir</i> and <i>qadi</i>	112
3.2	The appointment of a <i>nazir</i>	113
3.2.1	Qualifications	114
3.2.2	Appointment of the <i>nazir</i> by the <i>waqif</i>	118
3.2.3	Appointment by other than <i>waqif</i>	122
3.2.4	Appointment of a successor to the <i>nazir</i>	124
3.3	Removal of the <i>nazir</i>	128
3.4	Remuneration of the <i>nazir</i>	131
3.5	Duties of the <i>nazir</i>	135
3.6	Conclusion	139

## CHAPTER FOUR: MAINTANENCE AND MOBILIZATION OF *WAQF* PROPERTY

4.0	Introduction	140
4.1	The general principles of mobilizing <i>waqf</i> property	140
4.2	The lease of <i>waqf</i> property	141
	4.2.1 The legal basis of the lease of <i>waqf</i> property	143
	4.2.2 Period of lease	145
	4.2.3 Rate of lease	150
	4.2.4 Termination of the lease	152
	4.2.5 The rights and responsibilities of the lessee	154
4.3	Innovations in leasing <i>waqf</i> property	155
	4.3.1 The contract of <i>hukr</i>	156
	4.3.2 The contract of <i>ijaratayn</i>	159
	4.3.3 The contract of <i>kadik</i>	160
4.4	<i>Muzara'ca</i> and <i>musaqat</i>	161
	4.4.1 The position of <i>muzara'ca</i> and <i>musaqat</i> is Islamic law	162
	4.4.2 <i>Muzara'ca</i> and <i>musaqat</i> as the means of mobilizing <i>waqf</i> property	167
4.5	<i>Istibdal al waqf</i> (exchange of <i>waqf</i> )	169
4.6	Conclusion	180
	<b>CONCLUSION</b>	182
	<b>BIBLIOGRAPHY</b>	192

## NOTE ON TRANSLITERATION AND SPELLING

This study involves the use of Arabic words in which the general system of transliteration and spelling has been adopted with some modifications:

### a. Consonants

ب	B	ن	n
ت	T	ه	h
ث	Th	و	w
ج	J	ي	y
ح	H		
خ	Kh		
د	D		
ذ	Z		
ر	R		
ز	Z		
س	S		
ش	Sh		
ص	S		
ض	Dh		
ط	T		
ظ	Z		
ع	‘		
غ	Gh		
ف	F		
ق	Q		
ك	K		
ل	L		
م	M		

**b. Short vowels**

**Fatḥa = a**

**Kasra = i**

**Damma = u**

**c. Long vowels**

**Fatḥa + alif = a**

**Kasra + ya = i**

**Damma + waw = u**

**d. Diphthongs**

**Fatḥa + ya = ay**

**Fatḥa + waw = aw**

**e. Other combination of sounds**

**Wa al = wal**

**Fi al = fil**

**Zu al = zul**

## INTRODUCTION

### BACKGROUND OF THE STUDY

In a nutshell, *waqf* is a kind of an endowment in which a person detains the property from the ownership of any person and its income or benefit is given to specific beneficiaries or for the public charity. Property becomes *waqf* upon the declaration of the owner. The *waqif* (founder) may specify in his declaration to whom or what its income goes. A *waqf* is administered by a person called a *mutawalli* or *nazir* who is appointed by the *waqif*. The *waqif* has full authority to stipulate in his declaration how to develop and mobilize his *waqf* or to stipulate no stipulations. In this institution the *qadhi* has authority in many cases and he is the one who supervises the job of the *mutawalli* or *nazir*.

This is how a *waqf* operates. Behind this simple statement of the operation of *waqf* the law, in fact, comprise many juristic matters that have become the subject of discussion among the jurists. In Islamic Law, *waqf* is one of the areas that have become a subject of concern for many. Those who study Islamic law find that the law of *waqf* represents one of the most complicated ones compared to other branches of the law. Its complexity makes this law worthy of study in depth.

Since it is very difficult to understand this law in its form as *fiqh* many take an easy path to understanding this law by referring to booklets published on this subject while some advanced students like to refer to the codified laws of



*waqf* which are found in many Muslim countries, especially in the Arab world, such as the Law of *Waqf* in Egypt, Jordan, Syria, Tunisia and other countries. For them the modern codified law suffices to cater for their needs of comprehending this law. They can never do justice to this law in these ways. For the lawyers, they see this law as part of other laws codified in the modern codes of Islamic legislation. They are only concerned with the sections, clauses and terms which appear in the code, and implementing them in their judiciary work. They do not try to find the original sources of the law with which they are dealing. Economists see this law as an institution of an endowment which gives benefit to people. Some become proponents of the law and some become its opponents. The proponents produce many ideas on how to develop *waqf* property in order to make the property have commercial value. Those who oppose this law see this property as non-productive, since a *waqf* property cannot be developed as they would wish to.<sup>1</sup>

This is the position of the Islamic Law of *Waqf* in modern times. In the light of this position, we try to explore this law in its classical form, not influenced either by the modern codes of legislation or the economists' point of view. This study is classical, or we can name it *fiqhi*, in nature. It tries to trace back the law to its original development. This method of study will give a better understanding of the law of *waqf* in its original form as has been developed by the classical Muslim jurists.

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<sup>1</sup> For the basic understanding of the economist point of view, see Mohammad Anas Al Zarqā, "Some Modern Means for The Financing And Investment Of Awqaf Projects", in Hasmet Basar (ed.), *Management And Development Of Awqaf Properties*, Jeddah: Islamic Development Bank, 1987, pp. 38-48.

## THE PURPOSE OF THE STUDY

This study starts out from the premise that the law of *waqf* owes its development to work of the jurists. Textual evidence, whether from the Qur'an or the Traditions, is too slight to give the complete set of law that we find today in the classical books of *fiqh*. Henry Cattan observes this phenomenon:<sup>2</sup> "The institution of *waqf* has developed with Islam, and there is no doubt that credit must go to the jurists for having developed the legal theory of *waqf*." Mustafa Ahmad al Zarqa' also observes quite the same thing:<sup>3</sup> "Most of the juristic matters in *waqf* are based on the extensive work of the jurists (*ijtihadiyya*)." This study is exactly to investigate this.

This study is therefore to analyze the law of *waqf* from the perspective of the four *Sunni* schools of law. This is critical since the four schools have developed the law based on their own established principles and consequently we find in many cases they differ and could not reach a point of agreement. This study of the classical law of *waqf* is appreciated from this perspective. We cannot see this law in its original development if we study the law from the perspective of modern legislation. In modern codified laws of *waqf* such as provided in the Egyptian Law of Waqf 1949, the Jordanian Law of *Waqf* 1976, the Syrian Law of *Waqf* 1949, the Lebanon Law of *Waqf* 1952, etc. there is no trace of the specific school of law from which these codes are derived. There is a lot of *talfiq* (amalgamation) that has been used in developing this codified law.

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<sup>2</sup> Henry Cattan, "The Law of Waqf", in Majid Khadduri & Herbert J.Liebesny (eds.), *Law In The Middle East*, Washington D.C.:The Middle East Institute, 1995, p. 205.

<sup>3</sup> Mustafa Ahmad al Zarqa', *Ahkam al Waqf*, cAmman: Dar cAmmar, 1997, p. 17.

There is no clear origin anymore to this kind of law. This study therefore will assist the lawyer to trace back this law to the classical law where this modern codified legislation comes from.

This study also aims at revealing the legal principles of the four schools in developing the law. For every issue discussed in this study we will try to find the reason behind the juristic view. So this study is not only to find the answer for ‘what’, but also the question ‘why’. In this way we will find the principles used in the schools in their extensive works on developing this law.

## **THE SCOPE OF THE STUDY**

This study encompasses two aspects of the law of *waqf*: the constitutional and administrative aspects of the law. The study of the constitutional aspect of the law is devoted to the body of the law as developed by the jurists. This aspect is about what constitutes a *waqf*. In this regard the works of the jurists from the four schools of law will be analyzed on a comparative basis. This aspect is of paramount importance given that the modern trend of works on *waqf* is always to focus on the second administrative aspect of this study. On the administrative aspect, this study is devoted to the issues of trusteeship in *waqf* and the methods of mobilizing *waqf* property. Again the study will analyze the works of the jurists from the four schools of law on a comparative basis.

In handling this study we have relied heavily on the mainstream texts of classical law (*fiqh*) according to the four schools of law. In the Hanafi school, to

mention some, we have relied extensively on Muhammad Amin Ibn ‘Abidin’s (d.1836) *Radd al Mukhtar*, Kamal al Din Muhammad ‘Abd al Wahid Ibn al-Humam’s (d.1197) *Fath al Qadir*, Fakhr al Din ‘Uthman ibn ‘Ali al Zayla‘i’s (d.1342) *Tabyin al Haqiq*, and Nizam’s (d.1850) *al Fatawa al Hindiyya*. In the Maliki school we have referred to Abu ‘Abdillah Muhammad ibn Muhammad al Hattab’s (d.1547) *Mawahib al Jalil*, Salih ‘Abd al Sami‘ al Abbi’s *Jawahir al Iklil*, Ahmad bin Muhammad al Dardir’s (d.1786) *al Sharh al Saghir* and al Imam Malik’s (d.795) *al Mudawwana*. In the Shafi‘i school we have studied Abu al ‘Abbas Ahmad bin Hamza al Ramli’s (d.1595) *Nihayat al Muhtaj*, Shihab al Din Ahmad Ibn Hajar’s (d.1566) *Tuhfat al Muhtaj* and Muhammad al Khatib al Sharbini’s (d.1569) *Mughni al Muhtaj*. In the Hanbali school we have relied on ‘Abdullah ibn Ahmad ibn Qudama’s (d.1223) *al Mughni*, ‘Abd al Rahman ibn Abi ‘Umar al Maqdisi’s (d.1344) *al Sharh al Kabir*, Mansur ibn Yunus al Bahuti’s (d.1641) *Kashshaf al Qina‘* and Ibrahim ibn Muhammad Ibn Duban’s (d.1924) *Manar al Sabil*. Reference also has been made to modern writings of *fiqh* such as Wahba al Zuhayli’s *al Fiqh al Islami*.

As emphasized before, since this study is classical in its nature reforms made in the law of *waqf* as embedded in the modern legislation are not studied herein. We do not wish to follow the new trend of the modern writers who like to refer to modern legislation in discussing the law of *waqf* because it does not help us in understanding the original of law *waqf* as expounded by the four school of law.

In tackling this study we have focused on the major issues in the classical law of *waqf* that have become the point of agreement or disagreement between the four schools. Small issues that are only considered by certain schools will be left out or, if applicable, will be mentioned cursorily. The principles used by every school on the issues discussed will be investigated and analyzed to give a better understanding of this law in its classical form.

### **A BRIEF SURVEY OF THE LITERATURE**

There have been a considerable number of works on the law of *waqf* from the classical period to the modern times. An attempt to systemize the regulation concerning *waqf* was made as early as fourteenth century when Abu Bakr Ahmad ibn °Amr al Khassaf (d.1470) and Hilal ibn Yahya al Ray (d.1455) each produced *Kitab Ahkam al Awqaf*. Of later books, special mention may be made of Ibrahim ibn Musa al Tarabulsi's (d.1607) book *al Is'af fi Ahkam al Awqaf*. In these books they attempted to clarify every legal issue concerning *waqf* in a more systematic way. The first two books are organized in the format of question and answer and the third one tries to outline the principles of the law of *waqf* as underlined in the first two. All of these three books follow the Hanafi school point of view and they form a significant contribution to understanding the law of *waqf* in that school.

In modern times we find several books published on *waqf*. In 1959, Muhammad Abu Zahra (d.1974) published his *Muhadharat Fi al Waqf*. The book covers the law of *waqf* combining classical *fiqh* and modern legislation in Egypt.

However this book does not cover this law comprehensively. Many aspects of the mobilization of *waqf* property have been left out. Another book that has become a reference in the law of *waqf* is Muhammad al Kubaysi's *al Waqf fi al Shari'ah al Islamiyya*. This book compiles the law of *waqf* in the four *Sunni* schools as well as *Shi'i* school. The modern legislation in some Muslim countries is also included in the book. Apart from these Mustafa Ahmad al-Zarqa' (d.1999) has also published a book on *waqf* entitled *Ahkam al Awqaf*. The book covers many aspects of *waqf* from both the classical and modern point of view, but still falls short of mentioning many major issues about *waqf*.

At the PhD level we find that many scholars have done work on *waqf* with regard to its application in certain countries or states. In 1970 at St. Andrews University, Mohd Zain Hj Othman produced a thesis named the *Theory, Practice and Administration of Waqf With Special Reference To The Malayan State of Kedah*. Part of his thesis has been published with the title *Islamic Law with Special Reference to the Institution of Waqf*. In this book and in the theory part of his thesis, considerable attention has been given to the Hanafī Law. Little has been said on a comparative basis about the other schools. This is understandable in that when we study the classical works of the jurists, we find that the Hanafī school is the most advanced in discussing the law of *waqf*. So, many modern writers tend to focus on this school more than the others. Another PhD thesis was produced by Siti Mashitoh Mahamood in 2000 at The University of Birmingham with the title *The Administration of Waqf, Pious Endowment in Islam: A Critical Study of The Role of The State Islamic Religious Council as The Sole Trustee of Awqaf Assets And The Implemetation of Istibdal in Malaysia With Special Reference to The Federal Territory of Kuala Lumpur*. The thesis is a field

study focusing on the implementation of *istibdal* in Kuala Lumpur by the Islamic Religious Council.

In our study we make a comparative approach between the four schools of law, and the study is confined to the classical law of *waqf* as expounded in these four schools.

**PART ONE**

**THE NATURE OF *WAQF***



## CHAPTER ONE

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### THE NATURE AND LEGAL PRINCIPLES OF *WAQF*

#### 1.0. Introduction

The Islamic law of *waqf* is considered the most important branch of the Islamic law of property. Its vastness and complexity mark this and far more than that a *waqf* has a sacrosanct status which becomes the premise of its juristic development as expounded in the various schools of law. This chapter aims to give the conceptual understanding of this institution as a point of departure for the work in hand. Tackling this matter requires the researcher to touch upon some important aspects of the law such as its definition and principles, its legitimacy in Islam, its historical background and its classification. This early discussion is also important in familiarizing the reader with the legal terms and principles concerning the subject that will appear in this work.

#### 1.1. Definition

The word *waqf* (plural *awqaf*) is an Arabic verbal noun (*masdar*), from *waqafa*, and its literal meaning in Arabic as given by the jurists is *habs*<sup>1</sup> (plural *hubus* or *ahbas*),

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<sup>1</sup> Ibn ʿAbdīn, *Rad al Mukhtar*, Beirut: Dar al Kutub al ʿIlmiyya, 1994, vol. 6, p. 519; al Sarakhsi, *al Mabsut*, Beirut: Dar al Maʿrifa, 1987, vol. 11, p. 27; al Ramli, *Nihaya al Muhtaj*,

from *habasa*. The word *habs* has been translated into English as ‘prevention,<sup>2</sup> confinement,<sup>3</sup> detention or tying up.<sup>4</sup> The word *tahbis* (from the same root as *habs*) and *tasbil* (to devote in the way of Allah) also have the same meaning as *waqf*.<sup>5</sup> It is also called *sadaqa muharrama* (sacred donation).<sup>6</sup> As a technical term generally it means to prevent the property from becoming the possessory right of anybody and to devote its usufruct (*manfaʿa*) to a charitable purpose.<sup>7</sup> This definition can be considered as the essence of *waqf* as accepted by the majority of the jurists and in fact its literal meaning *habs* (prevention) reveals that. Any property by its nature is the subject of circulation among people by the act of transferring

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Cairo: Dar al Fikr, n.d., vol. 5, p. 358; Zakariyya al Ansari, *Fath al Wahhab*, n.p.,n.d, part 1, p. 256; al- Bahuti., *Kashaf al Qinaʿ*, Beirut: Dar al Fikr, 1982, vol. 4, p. 240; al Şawi, *Bulghat al Salik*, Beirut: Dar al Maʿrifa, 1988, vol. 2, p. 296. The term *habs* is commonly used among the Malikis instead of *waqf* and therefore it predominates in particular in North Africa like Morocco, Algiers and Tunis. See Hautsma, *Encyclopedia of Islam*, Leiden: E.J. Brill Ltd, 1934, vol. 4, p. 1096; see also Anderson, J.N.D., *Islamic Law in Africa*, p. 379.

<sup>2</sup> Hautsma, *ibid*.

<sup>3</sup> Lane E.W., *Arabic-English Lexicon*, London: William & Nargate, 1872, vol 1, 167; Milton, *Hans Wehr Dictionary of Modern Written Arabic*, London: MacDonalds and Evan, 1961, p. 153; John L. Esposito, *The Oxford Encyclopedia of the Modern Islamic World*, Oxford: Oxford University Press, 1995, vol.4, p. 312; see also Fyzee, Asaf A.A., *Outline of Muhammadan Law*, London: Oxford University Prees, 1955, pp. 231.

<sup>4</sup> Anwar Ahmad Qadri, *Islamic Jurisprudence in the world*, Lahore, p. 455.

<sup>5</sup> Al Ramli, *Nihaya al Muhtaj*, vol. 5, p. 358; al Nawawi, *al Majmūʿ*, Dar Ihyaʾ al Turath al-ʿArabi, n.d. vol. 16, p. 243; Ibn Hajar, *Tuhfat al Muhtaj*, in the margin of Hawasha, n.p., n.d., vol. 6, p. 235; al Sharbini, *Mughni al Muhtaj*, Beirut: Dar al Turath al ʿArabi, 1958, vol. 2, p. 376.

<sup>6</sup> Al Sharbini, *ibid.*; al Shafiʿi in his *Al Umm* frequently uses the term *sadaqa muharrama* and *ahbas*. See al Shafiʿi, *al Umm*, Qatar: Dar Qutaybah., vol.7, 1987, p.134-137.

<sup>7</sup> Mustafa Ahmad al Zarqaʾ, *Ahkam al Awqaf*, ʿAmman: Dar ʿAmman, 1997, p. 10.

the ownership from someone to another. However, when that property is removed from circulation and confined in nobody's possession in a way that only its usufruct can be utilized, this property is called *waqf*.

The discussion regarding the definition of *waqf* is not complete if we do not observe the various definitions of *waqf* that have been given by the jurists. The following discussion will detail these definitions and, as we will see, the differences of definitions mirror the disagreements among the jurists in many juristic matters of *waqf*.

### **1.1.1 The definition of *waqf* in the Hanafi School of law**

In the Hanafi school we find there are two definitions that have been given. One of these is that of al Nu<sup>c</sup>man bin Muhammad Abu Hanifa (d.767) himself and the other one is the definition given by his two disciples, Abu Yusuf Ya<sup>c</sup>qub (d.798) and Muhammad al Shaybani (d.805) (after this referred to as al Shaybani).

According to Abu Hanifa *waqf* signifies the detention of a specific thing in the ownership of the *waqif* (founder of a *waqf*) and devoting or appropriating its

usufruct (*manfaʿa*) in charity.<sup>8</sup> The remarkable element in the definition is that the ownership of the thing continues in the hand of the *waqif* after the act of appropriating. This element has some notable impacts on Abu Hanifa's doctrine regarding *waqf* that makes him differ with the other jurists. Since, according to Abu Hanifa the ownership of the things devoted still belongs to the *waqif*, the *waqf* is irrevocable in nature (*ghayr lazim*)<sup>9</sup> and this brings him consequently to make it analogous to loans (*ariya*).<sup>10</sup> Being of this nature the *waqif* is at liberty to revoke and dispose the property according to his own will as with a sale or a gift, and after his death it will devolve upon his heirs.<sup>11</sup> However, according to Abu Hanifa, a *waqf* becomes irrevocable (*lazim*) in two circumstances:<sup>12</sup> upon a decree from a *qadi* making the *waqf* irrevocable (*lazim*) because his decree will nullify any juristic conflicts (*hukm al hakim yarfaʿ al khilaf*) and a testamentary *waqf* upon the death of a testator. In these two circumstances the *waqf* becomes absolute and therefore the ownership of the *waqif* is extinguished.

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<sup>8</sup> Al Zaylaʿi, *Tabyin al Haqaiq*, Cairo: al Faruq al Haditha, n.d., vol. 3, p. 325; al Tarabulsi, *al-Isʿaf*, Beirut: Dar al Raid al ʿArabi, 1981, p. 7; Ibn ʿAbidin, *Rad al Mukhtar*, vol. 6, p. 519; Wahba al Zuḥayli, *al Fiqh al Islami*, Dimashq: Dar al Fikr, 1989, vol. 8, p. 153.

<sup>9</sup> Ibn ʿAbidin, *ibid.*, vol. 6, p. 520; Ibn al Humam, *Syarh Fath al Qadir*, Beirut: Dar al Kutub al-ʿIlmiyya, 1995, vol. 6, p. 191; Charles Hamilton, *The Hedaya*, Pakistan: Premier Book House, n.d., p. 231.

<sup>10</sup> Ibn ʿAbidin, *ibid.*; Wahba al Zuḥayli, *al Fiqh al Islami*, vol. 8, p. 153; Zuḥdi Yakan, *Ahkam al- Waqf*, p. 16; al Sarakhsi, *al Mabsut*, vol. 11, p. 27.

<sup>11</sup> Al Kasani, *Badaʿ al Sanaf*, n.p., n.d., vol. 8, p. 3908; Wahba al Zuḥayli, *ibid.*

<sup>12</sup> Ibn ʿAbidin, *Rad al Mukhtar*, vol. 6, p. 520; Ibn al Humam, *Sharh Fath al Qadir*, Beirut: Dar al Kutub, 1995, vol. 6, p. 188; al Tarabulsi, *al Isʿaf*, p. 7-8.

Abu Hanifa bases this opinion on a tradition of the Prophet narrated by Ibn ʿAbbas<sup>13</sup> that the Prophet said: “There is to be no withholding from the quotas ordained by Allah (*la habs ʿan faraidh Allah*)”. This tradition originally pointed to a case of inheritance where Allah forbids withholding the right of the heirs of the dead people. Applying this tradition to the case of *waqf* Abu Hanifa argues that if the *waqf* is absolute, that means the ownership of the *waqf* property is detained and therefore the rights of the heirs of the *waqif* on the property will be denied. According to him this will oppose the injunction of Allah who orders the believers to give their heirs their rights.<sup>14</sup>

The other tradition used by Abu Hanifa in his argumentation is the report from Shurayh who says that: “The Prophet was tasked to sell all endowments (*jaa Rasul Allah bi bayʿ al hubus*)”.<sup>15</sup> This report refers to the practice of the Arabs before Islam who used to detain their property. When the Prophet came he declared that selling such property is lawful. Abu Hanifa argues that if *waqf* is absolute the Prophet would not declare that such property can be sold.<sup>16</sup>

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<sup>13</sup> Al Bayhaqi, *Sunan al Kubra*, n.p.: Dar al Fikr, n.d., vol. 6, p. 162;

<sup>14</sup> Cited in al Sarayti, *al Wasaya wa al Awaqaf*, Beirut: Dar al Fikr, 1987, p. 162; Muhammad Saʿid Ramadhan al Buti, *Muhadarat fi al Fiqh al Muqaran*, Dar al Fikr: Dimashq, 1999, p. 71;

<sup>15</sup> Al Daruqutni, *Sunan al Daruqutni*, in *Kitab al Ahbas*, Cairo: Dar al Mahasin, 1966, vol. 4, p. 193.

<sup>16</sup> Al Sarayti, *al Wasaya wa al Awaqaf*, p. 162.

These two pieces of evidence clearly reveal that the detention of property has never been a recognized practice in Islam and therefore Abu Hanifa concludes that *waqf* is not absolute.

The definition given by Abu Hanifa above, however, was rejected by his two prominent disciples, Abu Yusuf (d.798) and al Shaybani (d.805), who later modified the definition. They define *waqf* as the detention of the property under the ownership of Allah and devoting its usufruct in charity.<sup>17</sup> This definition given by these two disciples that has been accepted by the Hanafi jurists has taken root in the Hanafi school of law,<sup>18</sup> and creates a strong principle in the later development of the law of *waqf* in that school. This definition gives a totally different perspective to *waqf* as opposed to what was expounded by their master Abu Hanifa. Since the ownership belongs to Allah, as based on this definition, the consequent effect of a *waqf* is that it is an absolute contract (*‘aqd lazim*) in which cannot be revoked, and the object of *waqf* cannot be sold, given away or inherited. This legal consequence of *waqf* is accepted as a matter of principle in the law of *waqf* for these two disciples. The evidence that supports this is the tradition of ‘Abd Allah ibn ‘Umar (d.692)<sup>19</sup> that ‘Umar Ibn al Khattab, at the partition of Khaybar, acquired lands which were very

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<sup>17</sup> Al Zayla‘i, *Tabyin al Haqaiq*, vol. 3, p. 324; Ibn al Humam, *Sharh Fath al Qadir*, vol. 6, p.191; Nizam, *al Fatawaal Hindiya*, Beirut: Dar al Ma‘rifa, n.d., vol. 2, p. 350.

<sup>18</sup> Al Zayla‘i, *ibid.*; Nizam, *ibid.*

<sup>19</sup> Al Bayhaqi, *Sunan al Kubra*, in *Kitab al Waqf*, vol. 6, p.158-159; al Nassai, *Sunan al Nasai*, in *Kitab al Ahbas*, al Azhar: Al Matba‘a al Misriyya, n.d., vol. 5, p. 230; Ahmad, *al Musnad*, vol. 6, p. 4609; al Tarmizi, *Sahih al Tarmizi*, in *Kitab al Waqf*, vol. 6, p. 143.

valuable to him and sought the Prophet's advice in regard to them. The Prophet said: "If you like, you detain the things themselves and devote their fruits to pious purpose (*habbis aslaha wasabbil thamarataha*). 'Umar did this declaring that "the land should neither be sold nor given away nor bequeathed (*la yuba' wa la yuhab wa la yurath*)"; he gave it as charity to the poor, needy relatives, slaves, wanderers and guests. It is reported that when this tradition reached Abu Yusuf he retreated from Abu Hanifa's view and changed his view to being that a *waqf*, once made, becomes the property of God Almighty.<sup>20</sup> It is reported that Abu Yusuf said:<sup>21</sup>

If Abu Hanifa had access to this tradition of Ibn 'Umar he would have followed this tradition and changed his opinion of the permissibility of selling *waqf* property.

### 1.1.2. The definition of *waqf* in the Maliki school of law

The Maliki school defines *waqf* as the gift of the usufruct of a thing, which is binding on the *waqif* so long as the thing exists, and the ownership of the thing remains with the *waqif*, though as bare ownership (*taqdiran*) only.<sup>22</sup> According to

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<sup>20</sup> Al Ramli, *Nihaya al Muhtaj*, vol. 5, p. 359; Mustafa Ahmad al Zarqa', *Ahkam al Awqaf*, p.31.

<sup>21</sup> Cited in Ali Bassam, *Taysir al 'Allam*, Riyad: Dar al Salam, 1997, vol.2, p.251; John Roberts Barnes has failed to see from this perspective when he can accept the vociferous opposition from Abu Hanifa toward the institution of *waqf* and seemingly he is in line with Abu Hanifa. See John Roberts Barnes, *An Introduction To Religious Foundation In The Ottoman Empire*, The Netherlands: Leiden-E.J. Brill, 1986, p. 11.



this definition the usufruct (*manfaʿa*) is transferred but the right of ownership remains with the *waqif* with the provision that the property cannot be the subject of use (*tasarruf*) by anybody<sup>23</sup> and therefore it is absolute in nature, meaning irrevocable.<sup>24</sup> So, there is a clear cut difference between Abu Hanifa's and the Maliki school's definition, though both hold the idea that the ownership remains in the hand of the *waqif*.

However, we should understand another aspect of the Maliki doctrine of *waqf*. Though it is accepted in that school that *waqf* is absolute in nature the school maintains that it is not necessarily held in perpetuity. It is lawful in the school to make *waqf* of the usages (*manfaʿa*) only and not the property itself. This is very clear when we consider another definition of *waqf* given in that school. According to this second definition *waqf* is to grant the usage of the thing owned, even by lease, to the beneficiaries by using any declaration of *waqf* for the period which is agreed by the founder (*jaʿlu manfaʿa mamluk wa law bi ujra aw ghullatihi li mustahiqq bi sigha muddat ma yarahu al muhabbis*).<sup>25</sup> From this definition it is clear that *waqf* can be

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<sup>22</sup> What is meant by *taqdiran* in the definition is that the *waqf* is valid even if the property is not yet owned by the *waqif* but it will be his in the future. This is like he says: "If I own that house, it will become a *waqf*." This definition actually given by Muhammad ibn ʿArafat (d.1401) and since then has been popularly accepted by the Mālikis. See al Hattab, *Mawahib al Jalil*, n.p.: Dar al Fikr, vol. 4, p. 18; al Aabi, *Jawahir al Iklil*, Beirut: Dar al Fikr, n.d., vol. 2, p. 205; al Khurasyiy, *al Khurasyiy*, Beirut: Dar Sadir, 1899, vol. 7, p. 78; Layish Aharon, "The Maliki Family Waqf According to Wills And Waqfiyyat," *Bulletin of the School of Oriental and African Studies*, 46 (1983), p. 3.

<sup>23</sup> Abu Zahra, *Muhadharat fi al waqf*, n.p.: ʿAli Mukhaymar, 1959, p. 100-101; Zuhdi Yakan, *Ahkam al Waqf*, p. 8.

<sup>24</sup> Muhammad Saʿid Ramadhan al Buti, *Muhadarat fi al Fiqh al Muqaran*, p. 70;



lawfully made for a specific period of time. It is not necessary that he owns the property but it is also valid if the property has been rented. This is like someone who hires a house or land and he then makes this house or land as a *waqf* for the period of the lease.<sup>26</sup> So what is meant by absolute in the Maliki school is that it cannot be sold or given away or inherited while its status is a *waqf*. When the specific period ends the property reverts back to its original status.

The evidence that they have is also based on the tradition of Ibn ʿUmar that has been mentioned above. They interpret the reply of the Prophet “Detain the things themselves and devote their fruits to pious purpose” as detaining the ownership in the *waqif* and devoting the usufruct to charity. They maintain that a *waqf* is an absolute contract as contained in the tradition but with the idea that it can be made for a specific period of time.<sup>27</sup>

### 1.1.3. The definition of *waqf* in the Shafiʿi school of law

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<sup>25</sup> Al Sawi, *Bulghat al Salik*, Beirut: Dar al Maʿrifa, 1988, vol. 2, p. 296-297.

<sup>26</sup> Al Abi, *Jawahir al Iklil*, Vol. 2, p. 205; al Khurashiy, *al Khurashiy*, p. 79. For the clear picture of this doctrine of *waqf* in the Maliki School, see an analysis by Joseph Schacht of temporary *waqf* as it appears in the *Mudawwana* of Sahnun ʿAbd al Salam bin Saʿid (d.854), which is considered the ancient Madinan doctrine of temporary *waqf*, in Joseph Schacht, “Early Doctrines On *Waqf*” *Melanges Fuad Koprulu*, Istanbul, 1953; For a better understanding of the doctrine of Madinan practice as adopted strongly by the Malikis, see Yasin Dutton, *The Origin of Islamic Law: The Qurʿan, The Muwaḥḥaʿ and Madinan ʿAmal*, Richmond: Curzon, 1999.

<sup>27</sup> Wahba al Zuhayli, *al Fiqh al Islami*, vol. 8, p. 156.

The Shafi'i school defines *waqf* as the detention of property from which advantages are derived and which are devoted to permissible charities (*masraf mubah*) by way of suspending the right of the *waqif* (founder) and the others to own it.<sup>28</sup> According to this definition, the ownership of the property comes under nobody's right and the usufruct is given to the charity, and at the same time the right of exercising the property by way of selling, giving and inheriting ceases. Some jurists in the school also use the term 'transferred to God Almighty' to imply this meaning.<sup>29</sup> So what is meant by 'detention' in the definition is detaining the property in the ownership of Allah, exactly like the view propagated by Abu Yusuf and al Shaybani and established in the Hanafi school. The evidence that they have is also the same tradition of Ibn 'Umar narrating the proposal of the Prophet to 'Umar with regards to the partition of the land of Khaybar as mentioned above.<sup>30</sup> Apart from that they also argue using the tradition narrated by Abu Hurayra (d.677) that the Prophet, peace be upon him, said: "*When a man dies, his acts come to an end, but three, recurring charity (sadaqa jariya), or knowledge (by which people) benefit, or a pious son, who prays for him (for the deceased)*".<sup>31</sup> According to the Shafi'is what is meant by

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<sup>28</sup> Al Sharbini, *Mughni al Muhtaj*, vol. 2, p. 376; al Nawawi, *al Majmu'*, vol. 16, p. 234; al Ramli, *Nihaya al Muhtaj*, vol. 5, p. 358; Ibn Hajar, *Tuhfat al Muhtaj*, vol. 6, p.235.

<sup>29</sup> Al Qalyubi, *Hashiyatan*, Beirut: Dar al Fikr, n.d, vol. 3, p.105.

<sup>30</sup> Al Sharbini, *Mughni al Muhtaj*, vol. 2, p. 376

<sup>31</sup> Muslim, *Sahih Muslim*, in *Kitab al Wasiyya*, translated into English by Abdul Hamid Siddiqi, Beirut : Dar al 'Arabiyya, vol. 3, p. 867; al Tarmizi, *Sahih al Tarmizi*, vol. 6, p. 144.

'recurring charity' in the tradition is *waqf* because it can never be a continuous (*jariya*) if it is not absolute and can be exercised by others.<sup>32</sup>

#### 1.1.4. The definition of *waqf* in the Hanbali school of law

In the Hanbali school we find there are two popular definitions of *waqf* which have been given but there are no differences in terms of their juristic implication. For the purpose of clarification we will mention both definitions and we will try to see to what extent this school differs with the other three schools of law. The first definition is that a *waqf* is the detention of advantageous property (*al muntafa<sup>c</sup> bih*) by someone who has a full capacity by suspending the right of exercising the property, and to devote its usufruct to charity for the purpose of drawing close to God (*taqarrub ila Allah*).<sup>33</sup> It seems that this definition does not differ much from the definition in the Shafi'i school. The second definition which is the most popular one in the school is that a *waqf* is to detain the property and to give its produce or usufruct to charity (*tahbis al asl wa tasbil al thamara*).<sup>34</sup>

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<sup>32</sup> Muhammad Sa'id Ramadhan al Buti, *al Fiqh al Muqaran*, p.73.

<sup>33</sup> Al Bahuti, *Kashaf al Qina<sup>c</sup>*, Beirut: Dar al Fikr, 1982, vol. 4, p.240 - 241.

<sup>34</sup> The word *al thamara* in the definition is used interchangeably with the word *al manfa<sup>c</sup>a* in many books in this school. Since both words imply the same meaning we assume it as the same definition. See Ibn Qudama, *al Mughni*, vol.6, p.185; al Maqdisi, *al Sharh al Kabir*, printed with Ibn Qudama, *al Mughni*, Amman: Dar al Fikr, n.d., vol. 6, p. 185; al Bahuti, *al Raudh al Murbi<sup>c</sup>*, Riyad: Maktaba al Riyad al Haditha, n.d., vol. 2, p. 452.

Though the two definitions given differ between each other they actually contain the same idea about *waqf*. All of them stress on the ‘detention (*habs*)’ of the property and devoting the usufruct to charity. However the term ‘detention’ needs some clarification here. In the Hanbali school the idea of ‘detention’ in the definition is derived from two principles. First, the ownership of the property is transferred to God in the case of a *waqf* made in favour of the mosques or public facilities like schools, bridges, etc. Second, the ownership is transferred to the beneficiaries if the *waqf* is made for a certain person or a limited group of people, such as his children.<sup>35</sup> Both principles are to convey that the property cannot be the subject of sale, gift or inheritance and for this they also have the authority of the tradition of Ibn ‘Umar as mentioned before.<sup>36</sup> So the ‘detention’ in the definition carries two ideas, that is, the ownership is detained as the ownership of God and also for the beneficiaries. Thus the essence of this definition differs from the definitions given earlier.

This tradition mentions that the things that are made *waqf* (*mawquf*) cannot be the subject of any transaction because the word ‘*habs*’ in the tradition means to prevent, that is, to prevent it being owned by anybody, even the

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<sup>35</sup> Al Bahuti, *Kashaf al Qina*<sup>c</sup>, vol. 4, p.254-255.

<sup>36</sup> Al Bahuti, *ibid.*, p.240

*waqif* himself, and to prevent it from any transaction that can transfer the ownership.<sup>37</sup>

They also argue that it was the practice of the companions of the Prophet, their followers and those who came after them until nowadays to make *waqf* that can benefit mankind and to prevent it from being used neither by the *waqif* nor the others. Hence this nature of *waqf* was unanimously agreed by the *ummah (ijma'c)*.<sup>38</sup>

## **1.2. The Legal principle of *waqf*: An absolute nature (*luzum al waqf*)**

The discussion on the definitions of *waqf* according to the four schools of law above gives us the basic conceptual understanding of *waqf*. The differences of definitions given by the schools are in technical terms but as a general concept they share the same idea, that is, *waqf* is a kind of charitable deed in which only the usufruct of the thing goes to the beneficiaries. In relating to the above discussion we can see there are three elements involved, namely, the ownership of the property, the right of the owner in exercising the property and the usufruct or benefits derived from the property. All of these three elements are considered as the foundation of *waqf* on which the edifice of the classical Islamic law of *waqf* rests. It is now our intention to

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<sup>37</sup> Wahba al Zuhayli, *al Fiqh al Islami*, vol. 8, p. 155.

<sup>38</sup> Al Zayla'ci, *Tabyin al Haqaiq*, p. 320; al Nawawi, *al Majmu'c*, p. 245-246.

analyze the definitions above and schematize it into the proper legal principles which later will become the basis of our analysis and argument.

From the above definitions we can see that the issue of ownership of the *waqf* property belongs to God is a matter of principle in all of the schools, with an exception in Abu Hanifa's view. The idea that the property belongs to Allah means that after a *waqf* has been dedicated such property ceases forever to be a subject to private proprietorship and therefore it belongs neither to the *waqif* nor to the beneficiary.<sup>39</sup> It is indeed a troublesome complexity and an imperfect form of ownership because ownership and utility cannot be combined in one person. The consequent effect of this principle is that the *waqf* is absolute (*lazim*) in nature, which means irrevocable, and any exercising of transferring of the ownership like sale, gift and inheritance is considered unlawful.

We find that Abu Hanifa takes it for granted that is the ownership of the property remains in the *waqifs*' hand, which implies that *waqf* is not absolute. His two disciples, however, established a different idea and held that the ownership is transferred to God, and this became the accepted doctrine in the Hanafi school. The Maliki school, however, follows Abu Hanifa in wording their definition of *waqf* by saying that 'ownership remains in the *waqifs*' hand', has put it in different perspectives, that is, with no legal effect, meaning the right of the *waqif* to exercise

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<sup>39</sup> Wahba al Zuhayli, *al Fiqh al Islami*, vol.8, p.155; Muhammad Sa'id Ramadhan al Buti, *al Fiqh al Muqaran*, p.68; Ahmad Ibrahim, *Islamic Law in Malaya*, Singapore: Malaysian Sociological Research Institute, 1965, p. 280.

the property is subtracted from him, at least for the specific period declared by the founder. The Shafi'i school also outlines this principle overtly in the definition, that is, the property is detained and the right of the *waqif* and others is suspended, exactly as the idea 'belongs to God' means. In the Hanbali school, which differentiates between the idea of transferring the ownership of a *waqf* made for a mosque and one made for individuals or a specific group of people: the former one is regarded as belonging to God and the latter is regarded as belonging to the beneficiaries, also imply the same meaning as the others do. So, it is an agreement among all the schools that 'the property belongs to God', which means it is absolute in nature, and this is a matter of principle in the law of *waqf*. It is this principle that guides the jurists of all four schools of law in formulating the law of *waqf* as will be found throughout our study.

It is therefore justifiable to reject the stand of Abu Hanifa in this matter. The tradition of Ibn 'Umar which unequivocally states that the property cannot be sold, given away or inherited provides a strong argument for this. Furthermore the evidence given by Abu Hanifa has been argued by the jurists as having been misplaced. His first piece of evidence actually referred to the culture of the Arabs in pre-Islamic times (*jahiliyya*) who used to prevent female heirs from succession, while the second piece of evidence actually referred to what was done by the Prophet who nullified the practice of endowments given to the idols prevalent at that time.<sup>40</sup> Neither piece of evidence is connected with the subject of *waqf*.

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Since the evidence given by Abu Hanifa is not applicable here, it therefore seems reasonable to accept the principle of the absolute nature of *waqf*. The history of *waqf* from its very beginning also supports this argument in which all of the *waqfs* whether made by the Prophet himself or his companions still exists up to this time. Ibrahim ibn Musa al Tarabulsi (d.1607) the author of *al Is'af*, one of the earliest accounts on the classical law of *waqf*, observes this:<sup>41</sup>

As for Abu Yusuf and Muhammad, may Allah bless them, *waqf* is absolute. This is the right view and the stand of all of the jurists in general because the Prophet made *waqf* of the seven gardens in Madina and the Prophet Ibrahim also made several *waqfs* and all of these *waqfs* continue unchanged to this day. The four guided caliphs and the other companions also made *waqf* (and the *waqfs* remain up to this day).

Among these views the view of the majority has been accepted widely in the Muslim world. Even in the Hanafi school of law the view of Abu Hanifa has been ignored but the view of his two disciples has been accepted as the judgment for *fatwa*.<sup>42</sup>

Regardless of the opinions above, in fact, all achieved unanimity on one major aspect of *waqf*, which is that is to provide something that gives benefit to

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<sup>40</sup> Wahba al Zuhayli, *al Fiqh al Islami*, vol. 8, p. 154.

<sup>41</sup> Al Tarabulsi, *al Is'af*, Beirut: Dar al Raid al 'Arabi, 1981, p. 8.

<sup>42</sup> Al Shalabi, *Hashiya al Syalabi*, vol. 3, p. 325; Ibn 'Abidin, *Rad al Mukhtar*, vol. 6, p. 521.



mankind for the sake of Allah (*fi sabili Allah*). The *waqif*, by this deed, is expecting and looking forward the reward from Allah in the hereafter. Allah says in the Quran:

*Those who( in charity) spend of their goods by night and by day, in secret and in public, have their reward with their Lord; on them shall be no fear, nor they shall grieve.*<sup>43</sup>

#### **1.4. The origin of *waqf* and its development in Islamic law**

The jurists agree that *waqf* is a good deed in Islam. Though it is not compulsory for Muslims to make *waqf* they are most recommended to practise it since there are many verses in the Quran and traditions of the Prophet which encourage Muslims to spend their property for the sake of God. Allah says in the Qur'an:

*"Ye will not attain righteousness unless Ye give (freely) of that which ye love and whatever ye give, of truth Allah knows it well".*<sup>44</sup>

Allah also says:

*"They ask thee what they should spend (in charity). Say:Whatever Ye spend that is good , is for parents and kindred and orphans and those in want and for wayfarers. And whatever ye do that is good - Allah knoweth it well".*<sup>45</sup>

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<sup>43</sup> Al Hajj 22: 77.

<sup>44</sup> Ali <sup>c</sup>Imran 3 : 92

<sup>45</sup> Al Baqara 2 : 215.

In another verses Allah says :

*“Those who spend(freely), whether in prosperity,or in adversity; who restrain anger, and pardon (all) men - for Allah loves those who do good”.*<sup>46</sup>

All of the verses above indicate that good deeds of charity deserve most attention from Allah and the Prophet, (Peace be upon Him), and there are many other verses in Quran indicating the same thing.

However, it should be noted that although there are Quranic verses recommending gifts of property to charity, there is no single verse in the Qur’an which expressly mentions the institution of *waqf*.<sup>47</sup> In fact, the jurists trace the institution of *waqf* from the traditions of the Prophet, whether it was the practice of the Prophet himself or the practice of his companions in the time of his life or after

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<sup>46</sup> Ali °Imran 3 : 134.

<sup>47</sup> This fact should be stressed here because some writers take it for granted and tend to view that *waqf* originated from Quran, that is, in Chapter Ali °Imran, verse 92 as mentioned before. These writers confusedly view that this verse refers to *waqf*. In fact, this verse is nothing to do with the legitimacy of *waqf*, rather it exhorts Muslims to spend their wealth in general. This confusion arises when the writers find that, when this verse was revealed, one of the companions, Abu Talha, made *waqf* of his most beloved property “*Bayruha*”. Because of this they say that this verse was revealed in the context of *waqf*. As a matter of fact, what was done by Abu Talha was his practical response to the verse and he found that *waqf* was the best thing he could do in realizing that exhortation. This means that *waqf* was known to him prior to this verse and, as far as Islamic law is concerned, we can never say that this verse is an authoritative source of the *waqf* law or this institution originated from the Quran. See this confusion, for example, in Amir °Abd °Aziz, *Fiqh al Kitab wa al Sunna*, Nablus, Palestine: Dar al Salam, 1999, vol.3, p.1625; see also Daud Bakar, “Amalan institusi wakaf di beberapa Negara Islam:Satu perbandingan”, in *Konsep dan Pelasanaan wakaf di Malaysia*, Nik Mustapha Nik Hassan (ed.), Kuala Lumpur:IKIM,1999, p. 155-156.

his life. The Quranic sources which support this matter are only, as mentioned earlier, general exhortations to charity<sup>48</sup> and, such being the case, since *waqf* is one method of charity, it is also included in that general expression of the Quran. In Islamic jurisprudence we have the principle that “one must take into account the general sense of the terms and not the particular nature of the case” (*al ‘ibra bi ‘umum al lafz la bi khusus al sabab*).<sup>49</sup> Thus those verses can be applied to *waqf* in terms of spending out of the property for the sake of God in general terms.

With regard to the traditions which the institution of *waqf* is traced from, there are a few that become the basis for the jurists in formulating and developing the law of *waqf*. One famous tradition, which is always referred to<sup>50</sup> is the tradition narrated by Abu Hurairah who reported the Prophet as saying: *When a man dies, his acts come to an end, but three, recurring charity (sadaqa jariya), or knowledge (by which people) benefit, or a pious son, who prays for him (for the deceased).*<sup>51</sup>

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<sup>48</sup> *Waqf* in the meaning of a charitable deed actually was in existence before the coming of Islam as asserted by Abu Zuhra in his book but not in the constitutions and conditions that is implemented in Islam later. For instance, he says, *al Haram Mosque* and *al Aqsa Mosque* existed before the Prophet Muhammad and were not owned by anybody but for the all people who came to worship there. It is same with the other things like sale (*al bai’*), rent (*ijara*), marriage (*al nikah*) etc. which existed before Islam and were embedded in the customary law of the Arabs and they were modified when Islam came. See Abu Zahra, *Muhadarat*, p. 7.

<sup>49</sup> Wahba al Zuhayli, *Usul al Fiqh al Islami*, Dimashq: Dar al Fikr, 1995, vol. I, p. 272; ‘Abd al Karim Zaydan, *al Wajiz*, p. 325.

<sup>50</sup> Zuhdi Yakan, *Ahkam al Waqf*, p. 29; al Zuhayli, *al Wasaya wa al Waqf*, p. 156; al Ramli, *Nihaya al Muhtaj*, Vol. 5, p. 359; al Zayla‘i, *Tabyin al Haqaiq*, Vol. 3, p. 325; Ibn Qudama, *al-Mughni*, Vol. 6, p. 185. Abu Zahra, *Muhadarat*, p. 9.

*Sadaqa jariyah* in the tradition has been interpreted by the jurists as *waqf* because the other kind of *sadaqa* was not so common in practice at that time.<sup>52</sup>

The most important tradition in the discussion of *waqf* is the tradition narrated by Ibn ʿUmar (d.692) concerning the land made *waqf* by ʿUmar in the incident of the Battle of Khaybar as mentioned repeatedly before. The land that involved was called “Thamgh”.<sup>53</sup> Given the importance of this tradition in providing the basis for the development of the law of *waqf* we mention here the full text of the tradition as narrated by Muslim in his *Sahih*:<sup>54</sup>

Ibn ʿUmar reported: ʿUmar acquired a land at Khaybar. He came to Allah’s Apostle (peace be upon him) and sought his advice in regard to it. He said: Allah’s Messenger, I have acquired land in Khaybar, I

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<sup>51</sup> Muslim, *Sahih Muslim*, in *Kitab al Wasiyya*, translated into English by Abdul Hamid Siddiqi, Vol. 3, p. 867; al Tarmizi, *Sahih al Tarmizi*, Vol. 6, p. 144.

<sup>52</sup> al Ramli, *Nihaya al Muhtaj*, Vol. 5, p. 359; al Sharbini, *Mughni al Muhtaj*, vol. 2, p. 376; al Sharbini, *al Iqnaʿ*, Egypt: n.d., p.81; Abu Zahra, *Muhadharat*, p. 9.

<sup>53</sup> Al Nawawi, *Commentaries of al al Nawawi on Sahih Muslim (Sahih Muslim bi sharh al-Nawawi*, printed with *Sahih Muslim*, Beirut: Dar al Kutub, 1995, vol.11,p. 82; Ali Bassam, *Taysir al Aʿllam*, vol.2, p.247; al Ramli, *Nihaya al Muhtaj*, Vol. 5, p. 359; al Sharbini, *Mughni al- Muhtaj*, vol. 2, p. 376

<sup>54</sup> Muslim, *Sahih Muslim*, in *Kitab al Wasiyya*, translated into English by Abdul Hamid Siddiqi, Vol. 3, p. 867; see also this Tradition in al Bukhari , *Sahih al Bukhari*, in *Kitab al Syurut*, Riyad: Markaz al Dirasat wa al Iʿlam, n.d, vol. 3, p. 185. ʿUmar did not write his *waqf* until he became the caliph. Jabir bin ʿAbdullah narrates that when ʿUmar wrote his *waqf* at time of his caliphate he invited some people from the Muhajirin at the time of his and Ansar and made testimony on his *waqf*. After this his *waqf* become popularly known and consequently influenced others to make *waqf* of their wealth. See al Khassaf, *Kitab Ahkam al Awqaf*, Cairo: Maktaba al Thaqafa al-Diniyya, n.d., p.16.

have never acquired property more valuable for me than this, so what do you command me to do with it? Thereupon he (Allah's Apostle) said: If you like, you may keep the *corpus* intact and give its produce as *sadaqa*. So 'Umar gave it as *sadaqa* declaring that property must not be sold or inherited or given away as gift. And 'Umar devoted it to the poor, to the nearest kin, and to the emancipation of slaves, and in the way of Allah. There is no sin for one who administers it if he eats something from it in a reasonable manner, or if he feeds his friends and does not hoard up goods (for himself). He (the narrator) said: I narrated this *hadith* to Muhammad, but as I reached the words "without hoarding (for himself) out of it," he (Muhammad) said: "without storing the property with a view to becoming rich." Ibn 'Aun said: He who read this book (pertaining to *waqf*) informed me that in it (the words are) "without storing the property with a view to becoming rich."

The main principles of the law of *waqf* stem from this tradition. Some legal principles applied in the law of *waqf* that are derived from this Tradition are: First, based on the reply of the Prophet to 'Umar who asked him to retain the property and to let the usufruct go to charity, and the provisions made by 'Umar that the property can neither sold, given away nor inherited, the jurists have derived the principle that the transfer of ownership of the property ceases. Second, based on what was done by 'Umar, that the produce of the *waqf* was for the poor, nearest kin and so on, the jurists have concluded that the object of *waqf* must always be a religious one (*wujuh al khayr*). Third, based on the reply of the Prophet to retain the property, the subject of the *waqf* should have the quality of permanency and not be diminished by use. Fourth, based on 'Umar's giving permission to those who were to administer his *waqf* get some benefit from it, the jurists view that it is lawful for the founder of a *waqf* to make stipulations regarding his *waqf* so long it does not

contravene any of the legal principles of the law of *waqf*.<sup>55</sup> As will be found in this study, these principles have had an impact on the development of the law of *waqf* in the various schools of law.

Another tradition is the tradition narrated by <sup>c</sup>Aisha that the Prophet made seven of his gardens (*Hawait*) in Madina into a *waqf* to Bani <sup>c</sup>Abd al Muttalib and the Bani Hashim.<sup>56</sup> The said gardens, namely “*al A<sup>c</sup>raf*”, “*al Safiyiyya*”, “*al Dalal*”, “*al- Mithyab*”, “*Burqa*”, “*Hasna*” and “*Masyrabay Umm Ibrahim*”, were property that was originally given to the Prophet by a Jew named Mukhayriq. It was on this occasion that the Prophet said that: “Mukhayriq is the pious Jew.”<sup>57</sup>

Between these two traditions there are differences of the opinion among the jurists regarding which of these two was the first *waqf* in Islamic history. According to the some jurists the *waqf* of <sup>c</sup>Umar was the first *waqf* in the history of Islam, and this is the most widespread view.<sup>58</sup> According to some other jurists, the *waqf* of the Prophet was the first *waqf* in Islam, not the *waqf* of <sup>c</sup>Umar above.<sup>59</sup> This difference of opinion actually dates to the time of the companion of the Prophet. Sa<sup>c</sup>d ibn

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<sup>55</sup> Ali Bassam, *Taysir al A<sup>c</sup> llam*, p. 249.

<sup>56</sup> Al Bayhaqi, *al Sunan al Kubra*, in *Kitab al Waqf*, vol. 6, p. 160.

<sup>57</sup> Cited in al Khassaf, *Kitab Ahkam al Awqaf*, p. 4.

<sup>58</sup> Al Ramli, *Nihaya al Muhtaj*, vol. 6, p. 359; al Sharbini, *Mughni al Muhtaj*, vol. 2, p. 376; see also Muhammad Syakir, Ahmad, in the margin of Imam Ahmad, *al Musnad*, Vol. 6, p. 277.

<sup>59</sup> Mustafa Ahmad al Zarqa, *Ahkam al Awqaf*, p. 11.



Mu<sup>c</sup>az<sup>60</sup> narrated that he once asked the people about the first *habs* in Islam. *Al Muhajirun* said that it was the *waqf* of <sup>c</sup>Umar, whereas *al Ansar* said that it was the *waqf* of the Prophet. After meticulous observation we find that, chronologically, the latter opinion is a reasonable one. This is based on the narration of Ibn Ka<sup>c</sup>b, as reported by al Khassaf, which states that the first *waqf* in Islam was the *waqf* of the Prophet (peace be upon Him). When he was questioned about people's belief that the *waqf* of <sup>c</sup>Umar was the first, he narrated the full story of the case to counter the misunderstanding of the people. He narrates:<sup>61</sup>

Mukhayriq was killed at the battle of Uhud. That happened thirty two months after the emigration of the Prophet (to Madina). (Before the battle) he had left a *wasiyya* that if he was killed in the battle his property was to be given to the Prophet. The Prophet took his property (when he died) and give it as *sadaqa* (*waqf*). This happened before the *waqf* of <sup>c</sup>Umar took place. As to this latter, it happened at Thamgh when the Prophet came back from Khaybar in the year seven after the *Hijra*.

Evidently, from this narration that the *waqf* of the Prophet is the first *waqf* because it took place after the battle of Uhud at the year three after Hijra, whereas the *waqf* of <sup>c</sup>Umar was made at the year seven after Hijra.

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<sup>60</sup> Al Shawkani, *Nayl al Awtar*, in *Kitab al Waqf*, Beirut: Dar al Khayr, 1998, vol. 6, p. 422.

<sup>61</sup> Al Khassaf, *Kitab Ahkam al Awqaf*, p. 4

Regarding the *waqf* made by the Prophet, we find that the above *waqf* was not the only *waqf* made by Him. There are reports that the Prophet only left three items of wealth at the time of his death and all of these three were made *waqf*. For this we have the authority of ʿAmr ibn al Harith who reports:<sup>62</sup>

The Prophet left neither a single *dinar*, *dirham* nor a male or female slave (at the time of his death), except his white female mule, his weapon and a piece of land that he gave in the way of Allah. Qutayba (the transmitter of this tradition) says once again as *sadaqa*.

This tradition shows that making *waqf* was a practice of the Prophet himself. He not only exhorted his companions to do this, as showed in the *waqf* of ʿUmar, but he himself was the one who came first in doing this good deed. No wonder then that we find many of his companions following his steps in making *waqf*.

With regard to the first *waqf*, one should not forget the Mosque of Quba' which the Prophet built on his arrival at Madina.<sup>63</sup> Chronologically this mosque was built earlier than the incident of Khaybar, so it is questionable why the jurists did not consider this mosque as the first *waqf* in Islam. Examining the classical works of the jurists on *waqf* there is no reference at all to the Mosque of Quba'. Actually they did recognize this as the first *waqf* but this kind of *waqf* was not something alien to Islam since Islam has recognized the *Ka'aba* as a place of worship

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<sup>62</sup> Al Nassai, *Sunan al Nassai*, in *Kitab al Ahbas*, p. 229.

<sup>63</sup> Muhammad Sa'īd Ramadhan al Buti, *Fiqh al Sira*, Dimashq: Dar al Fikr, 1990, p. 181.



before the Prophet built the Mosque of Quba'. Mustafa Ahmad al Zarqa, the modern writer, has given the best commentary on this when he differentiates between the *waqf* of a mosque and the *waqf* of land. In his book he considers that the Mosque of Quba' is the first *waqf* in Islam in term of religious *waqf* (*waqf dini*) and the other *waqf* is considered as a profitable *waqf*.<sup>64</sup> So, when the jurists trace the earliest *waqf* in Islam they recognized the Mosque of Quba as the first *waqf* but they did not consider it as the first *waqf* in the meaning of it being a profitable one. The discussion of the jurists on *waqf* was more concentrated on the idea of *waqf* being a profitable or beneficial institution. And, as a matter of fact, the way the jurists deal with the *waqf* of mosques and the other kinds of *waqf* is in many legal aspects different, as will be found out in this study.

Let us proceed with another tradition on *waqf*. In a report by Anas bin Malik<sup>65</sup> it is narrated that Abu Talha had the greatest amount of property in palm trees, called "*Bayruha'*", among the *Ansar* in Medina and the Prophet used to go there to enjoy its shade and drink its water. In keeping with the Quranic pronouncement of "*You will not obtain rightness of action until you expend of what you love*"<sup>66</sup>, Abu Talha came to the Prophet and said: "The property which I love most is Bayruha'. It is *sadaqa* for Allah". Then the Prophet asked him to give it to

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<sup>64</sup> Mustafa Ahmad al Zarqa, *Ahkam al Awqaf*, p. 11.

<sup>65</sup> Malik bin Anas, *al Muwatta*, translated into English by Aisha Abdurrahman, Chapter of *Sadaqa*, Granada: Madinah Press, 1992, p. 250; al Bayhaqi, *Sunan al Kubra*, vol. 6, p. 165.

<sup>66</sup> Ali 'Imran 3 : 176.

the poor of his relatives. In another report from Anas bin Malik,<sup>67</sup> he states that Abu Talha gave the property as *sadaqa* to Ubay ibn Ka'b and Hassan ibn Thabit. This was named later by the jurists as a family *waqf*.<sup>68</sup>

Apart from the above traditions there are other traditions of *waqf* made by the companions which took place after the time of the Prophet. Al Khassaf (d.1470) reports the *waqf* of eighteen of the companions in detail and these include the *waqf* of four of the wives of the Prophet.<sup>69</sup> Abu Bakr 'Abd Allah ibn al Zubayr al Humaydi (d.834), the teacher of al Bukhari, reports other *waqfs*, namely, the *waqfs* that Abu Bakr and 'Umar made to their sons, the *waqf* of the spring of *Bi'r ruma* by 'Uthman, the *waqf* of Zubayr to his son of his houses at Mecca and Egypt and his property at Medina, the *waqf* of 'Amr ibn al 'As of his *Waht*<sup>70</sup> to the needy people and the *waqf* of Hizam ibn Hakim of his houses in Mecca and Medina. Al Humaydi says all of these *waqf* were still valid up until his time.<sup>71</sup> Jabir ibn 'Abd Allah (d.697), one of the renowned companions, confirmed these practices when he said: "I don't know any *Muhajirin* or *Ansar* who were rich who didn't make their property

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<sup>67</sup> Al Daruqutni, *Sunan al Daruqutni*, in *Kitab al Ahbas*, vol. 4, p. 191.

<sup>68</sup> Hautsma, *et al*, *Encyclopedia of Islam*, vol.4, p. 1098; Mohamad Zain Othman, *Islamic Law*, Kuala Lumpur: Prime Minister's Department, Religious Affair Division, 1982, p. 12.

<sup>69</sup>They are 'Aisha, Umm Habiba, Umm Salama and Safiyya. See al Khassaf, *Kitab Ahkam al-Awqaf*, Cairo: Maktaba al Thaqafa al Diniyya, n.d., pp.5-17.

<sup>70</sup> *Waht* was the name of the Garden at Taif owned by 'Amr ibn al 'As. See al Nawawi, *al-Majmu'*, p. 346.

<sup>71</sup> Al Bayhaqi, *Sunan al Kubra*, in *Kitab al Waqf*, vol. 6, p. 161.

*sadaqa mu'abbada* (i.e. *waqf*).<sup>72</sup> It is evident from this that making *waqf* was a common practice among the companions of the Prophet. We also wish to stress here that almost all of the reports of *waqf* made by the companions mentioned above were declared as being of the type that “cannot be sold, given away as a gift or inherited,”<sup>73</sup> meaning that *waqf* is an absolute (*lazim*) contract.

The jurists trace the institution of *waqf* back to the Prophet through these traditions and since it was practiced by many of his companions the jurists from all of the schools of law conclude that it became an *ijma'*.<sup>74</sup> Hence, assuming the validity of these traditions, *waqf* was clearly a common practice among the companions of the prophet, and the argument for it being accepted by *ijma'* can be seen to be valid.

Even though *waqf* originated from the tradition, the relevant traditions are still few in numbers and do not help much in formulating the law systematically as can be seen in the work of the jurists in all of the schools of law. The jurists, in fact, developed the law of *waqf* on the grounds of *ijtihad* by means of principles laid

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<sup>72</sup> Al Syawkani, *Nayl al Awtar*, vol. 6, p. 220.

<sup>73</sup> See this in the reports of *waqf* made by the companions in al Khassaf, *Kitab Ahkam al Awqaf*, pp.5-17.

<sup>74</sup> Al Nawawi, *al Majmu'*, vol. 16, p. 246; Ibn Qudama, *al Mughni*, vol. 6, p. 186; al Sarayti, *al-Wasaya wa al Awqaf*, p. 163.

down in *usul al Fiqh*.<sup>75</sup> As happened in other areas of the law, with the passing of time a lot of new complexities in *waqf* arose which demanded juristic solutions and in response to these the jurists have done their best to give a religious decision based on the principles that have been established in Islamic law. As a consequence we see that the discussion concerning *waqf* in the *fiqh* books is very deep and a variety of opinions between the jurists is inevitable in many cases. Given the very limited number of traditions that offer guidance in the law of *waqf* we can safely say that the the classical law of *waqf* owed its development to the *ijtihad* of the jurists. It is this perspective that we will investigate throughout our study.

From the discussion above it may be concluded that the origin of *waqf* in Islam does not come, clearly, from the Quran but is based upon the Traditions and later developed by the jurists through the means of *ijtihad*. Being the result of an *ijtihad* does not mean it is purely a man made law. The divine elements still exist in the law produced by *ijtihad*, for *ijtihad* is nothing more than the following of general principles derived from the texts of the Quran and the tradition of the Prophet.<sup>76</sup> It is based on the principles approved by the divine law and therefore the jurists always insist that all the means of *ijtihad* are legal sources of Islamic law (*masadir al ahkam*).

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<sup>75</sup> Wahba al Zuhayli, *al Wasaya wa al Awqaf*, p. 158; see also Mustafa Ahmad al Zarqa, *Ahkam al Awqaf*, p.19.

<sup>76</sup> Nyazee, *Theories of Islamic Law: The Methodology of Ijtihad*, Kuala Lumpur: The Other Press, 2002, p, 278.

### 1.5. Classification of *waqf*

In its general classification Islamic law recognizes two kinds of *waqf*, namely, public *waqf* or *waqf khayri* and family *waqf* or *waqf ahli* or *waqf dhurri*.<sup>77</sup> A public *waqf* is a *waqf* devoted for a religious purpose or for the public, such as mosques, schools, hospitals, bridges, water works etc. A family *waqf* is a *waqf* designed for specified individuals such as children or grandchildren, or other relatives or for other persons with an ultimate benefit for a charitable purpose.<sup>78</sup>

As can be seen from the traditions mentioned before, at the beginning only public *waqf* was recognized. The concept of this *waqf* is that the property can be enjoyed by all of the people including the *waqif* himself and his family. This is what we have observed from the tradition regarding *waqf* like the practice of ‘Umar and the *waqf* of seven gardens by the Prophet.<sup>79</sup>

However in its later development there was a trend among the companions of the Prophet to make *waqf* for their relatives only as can be seen from the *waqf* of Abu

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<sup>77</sup> Wahba al Zuhayli, *al Fiqh al Islami*, vol. 6, p. 160.

<sup>78</sup> Hautsma, *Encyclopedia of Islam*, vol. 6, p. 1096.

<sup>79</sup> Mustafa Ahmad al Zarqa’, *Ahkam al Awqaf*, p. 14-15.

Bakr, ʿUmar, ʿUthman and some others. There are observers who suggest that this new trend in making *waqf* was used to frustrate the inheritance rights of females.<sup>80</sup> We do not agree with this suggestion since the historical account suggests otherwise. We find this trend was actually as a result of their anxiety about circumventing the rights of heirs in inheritance by devoting their property entirely or mostly for the public *waqf*. As mentioned earlier, making a *waqf* was a common practice among the companions and they were keen to devote their property as *waqf* since they knew the *waqf* of ʿUmar. This created a sort of caution among some companions, that the property in question would not reach their heirs when the founder dies. We can trace this in the report of Umm Bakr bint al Musawwar as narrated by al Khassaf that Umm Bakr narrated from his father who narrates:<sup>81</sup>

I was with ʿUmar ibn al Khattab when he made testimony about his *waqf* among the *Muhajirun*. I said nothing at that time but should I have an opportunity I will say this: O! Amir al Mu'minin, you are doing a good thing sincerely, but I am afraid there will be people after you who will make *waqf* not as sincere as you did, and they will circumvent inheritance. But I feel shy (to say this) for fear of creating chaos among the *Muhajirun*. I am confident that should I say this they would make no *waqf* at all.

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<sup>80</sup> David S. Powers, "The Maliki Family Endowment: Legal Norm and Social Practices," *International Journal of Middle East Studies*, Cambridge University, vol.25, 1993, p. 385.

<sup>81</sup> Al Khassaf, *Kitab Ahkam al Awqaf*, p. 7.

Surely the caution of the narrator of this tradition is justifiable. It is not a good measure to make *waqf* of a large amount and leave a small portion for inheritance, because this will bring trouble to the heirs. Based on this report, some jurists assume that the trend of making family *waqf* was to spare the property from being disposed of for public *waqf*, at the expense of the rights of the heirs. By making the family *waqf* the interest of the heirs in the property is secured because they can benefit from the property, not as inheritance but as a *waqf*, and this property later goes down to their children and children of their children until they die out, when the property is then used for charitable purposes. Thus they gain a double benefit, the reward of making *waqf* while at the same time securing the benefit of their family.<sup>82</sup> The confinement of this property within family members makes the rights of the family even more protected than by inheritance. The spirit of this can be found as well in the law of *wasiyya* (bequests), which is permissible in Islamic law within one third of the property. No *wasiyya* is valid beyond that limit. The reason for this limitation is, as stated by the Prophet, “*Leaving your heirs rich is better than leaving them poor to beg from people*”.<sup>83</sup> So, the theory that the development of family *waqf* among the companions was to circumvent the rights of the heirs is not true because we cannot trace any trend of keeping the heirs from their rights. However, if this was the case we would not accept it and Islamic law also does not

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<sup>82</sup> Mustafa Ahmad al Zarqa', *Ahkam al Awqaf*, p. 16.

<sup>83</sup> See this Tradition in Ibn al 'Aini, *Umda al Qari Sharh Sahih al Bukhari*, in Kitab al Wasaya, Egypt: Matba'a Mustafa al Babi, 1972, vol. 11, p. 263; see also al Imam Malik, *al Muwafta'*, translated into English by Aisha Abdurrahman Bewley, Granada: Madinah Press, 1992, p. 315.

recognize it because it is tantamount to giving harm to the heirs and this was surely not the intention of the companions in making *waqf*.<sup>84</sup>

On the validity of family *waqf* in Islamic law, the tradition of Abu Talha, who gave his property Bayruha' to his relatives with permission from the Prophet prove that the family *waqf* was approved by the Prophet himself. It is also supported by many other pieces of evidence which in general exhorts the believers to give *sadaqa* to their relatives. One of them is the tradition of the Prophet when he said:<sup>85</sup> “*Sadaqa given to the needy people is merely a sadaqa but if it is given to the relatives it becomes sadaqa and family relationship (silat)*”.

As far as the Islamic law of *waqf* is concerned there is no clear cut line which can be drawn between public and family *waqf* in terms of their nature and in the legal rules applied to them.<sup>86</sup> However in their development in many countries it is family *waqf* that always being the subject of condemnation by many writers and politicians to the extent that it has been abolished in some laws.<sup>87</sup> Among the

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<sup>84</sup> According to Abu Zahra the intention of a *waqif* to circumvent the rights of the heirs can be traced in declaration of *waqf* such as if he declares that his *waqf* is for the males of his children excluding females. It is clear from this declaration that the *waqif* has an intention to limit the property to the males only. This kind of *waqf* is void because it is not in line with the principles of Islamic law which ordains people to give the heirs what they rightly deserve. See Abu Zahra, *Muhadharat fi al Waqf*, Cairo: Dar al Fikr, 1971, p. 52-53.

<sup>85</sup> Muslim, *Sahih Muslim*, in *Kitab al Wasiyya*, vol. 11, p. 85.

<sup>86</sup> Catten H., *Law in The Middle East*, p. 204; Mohd Zain Othman., *Islamic Law*, p. 114.



attacks that are made against it are that this kind of *waqf* brings harm to the economy because this property is taken out from the economic circle.<sup>87</sup> In 1949 Syria provided a law (Legislative Decree No. 76) that after the date of May 16 family *waqf* was prohibited and any registration of such *waqf* was deemed to be legally void. Moreover, all family *waqfs* which were established prior to that date were to be dissolved and liquidated in accordance with the provisions of the decree. In Egypt in 1952 a new law provided that no *waqf* could be created except for a charitable purpose (public *waqf*) and any existing *waqf* that was not presently or exclusively devoted to a charitable object was to be dissolved.<sup>89</sup> We are not intending here to view this modern legal practice from the perspective of Islamic law. Our aim here is to clarify and investigate the classical heritage of the Islamic law of *waqf* and it is proven that there are two kinds of *waqf* recognized in Islamic law, public and family *waqf*. What is done by the ruler or the government in modern times in abolishing the family *waqf* is outside our focus and beyond the space available in this research.

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<sup>87</sup> Al Kubaysi, *Ahkam al Waqf*, Baghdad: Matba'a al Irshad, 1977, p. 42; Mohd Zain Othman, *ibid.*, p. 113.

<sup>88</sup> Mohd Zain Othman, *ibid.*

<sup>89</sup> Catten H., "The Law of Waqf" in *Law in The Middle East*, vol. p. 218-220; See also Jumhuriyya Misr, *Qawanin al Waqf wa al Hukr*, Cairo: al Idarat al 'Amma li al Shu'un al-Qanuniyya, 1997, p. 22-25. For more details on modern legislation regarding family *waqf* see Tahir Mahmood, "Islamic Family *Waqf* In Twentieth Century Legislation: A Comparative Perspective" in *Islamic and Comparative Law Quarterly*, 1988, vol. 8, pp.1-20.

## **1.5 *Waqf* in comparison with the other methods of disposition of property**

On the basis of our study up to this point, we should have a basic understanding of the special features of the law of *waqf*. To appreciate more and to give a clear picture of the distinctive concept of this system we will here make a legal comparison between *waqf* and some other methods of disposition of property. The attempt has been made to be brief and factual and to avoid unnecessary analysis.

### **1.5.1. *Waqf* in comparison with *hiba* (gift) and *‘ariya* (loan)**

The Islamic law of property mostly deals with the disposition of property, whether this disposition takes effect between two parties in their life time, or by testamentary disposition, or by succession, both of which take effect after death. All of these dispositions are lawful in Islam with certain rules applied to them which make them different from other laws. The first kind of disposition is unfettered as to amount, testamentary disposition is limited to one-third of the estate and disposition by death is according to the rules of inheritance in which the heirs who deserve the property have been specified with certain portions.<sup>90</sup>

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<sup>90</sup> Fayzee, Asaf A.A., *Outlines of Muhammadan Law*, p. 186.

The first kind of disposition includes *hiba*, *sadaqa*, *zakah*, *hadiyya*, *'ariya*, *ijara*, *rahn* and some other ways of disposition of one's property to another during one's lifetime. Since all of these are kinds of disposition of property, which is also the case with *waqf* and have a different legal consequence, we discuss them and *waqf* here from a comparative perspective. However, we have been selective on this. We will discuss the methods of disposition which are nearest to the nature of *waqf*. Our focus is on the nature and legal effect of these contracts.

We take *hiba* (gift) first. It has been defined as the transfer of the right of the property in substance (*tamlík*) by one person to another without any return (*bila 'iwad*) during that person's lifetime.<sup>91</sup> Based on this definition *hiba* includes *sadaqa* and *hadiyya* since they are approximately the same.<sup>92</sup> If the gift is made to needy people and in view of a reward in the next world it is called *sadaqa*, and if the gift is made with the object of manifesting one's love or respect to the donee it is called *hadiyya*.<sup>93</sup> If it is neither *sadaqa* nor *hadiyya* it is called *hiba*.<sup>94</sup> Whatever all of them

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<sup>91</sup> Al Syarbini, *Mughni al Muhtaj*, p. 328; Ibn Qudama, *al Mughni*, vol.6, p. 246.

<sup>92</sup> Wahba al Zuhayli, *al Fiqh al Islami*, vol. 5, p. 5; Ibn Qudamah, *ibid.*; al Syarbini, *ibid.*, p. 85; al Mahalli, *Syarh al Mahalli*, in the margin of Qalyubi and <sup>c</sup>Umayra, *Hashiyatan*, Dar al Fikr, n.d., vol. 3, p. 110.

<sup>93</sup> Ibn Qudama, *ibid.*; al Zarkashi, *Sharh al Zarkashi*, Riyad: Maktaba al <sup>c</sup>Ubaykan, 1993, vol.4, p. 300. It is reported that the Prophet didn't accept *hadiyya* but he accepted *sadaqa*. Cited in Ibn Qudama, *ibid.*

are, they are good deeds and Muslims are exhorted to do them because the Prophet said: ‘Send presents to each other for the increase of your love’.<sup>95</sup> According to the majority of the jurists, except Abu Hanifa, once a *hiba*, *sadaqa* or *hadiyya* has been made it cannot be revoked, except those made to the sons or daughters<sup>96</sup> based on the Tradition which says: ‘It is not lawful for a man to give a gift and then take it back, except a father regarding what he gives his child’.<sup>97</sup>

The methods of disposition of property discussed above resemble *waqf* in that they are all acts of goodwill and generosity. A person can voluntarily dispose by these methods of things in his possession whose transfer is lawful. The main difference is that in *waqf* the use of the thing is transferred from one person to another and the ownership is transferred to Allah and the beneficiaries do not have any authority to use it for any purpose other than receiving its fruits and profits. In *hiba*, *sadaqa* or *hadiyya* however, it is the thing itself that is transferred (*tamlík*) and

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<sup>94</sup> Wahba al Zuhayli, *al Fiqh al Islami*, vol. 5, p. 5

<sup>95</sup> Al Bayhaqi, *al Sunan al Kubra*, in *Kitab al Hibat*, vol. 6, p. 169.

<sup>96</sup> Al Nafrawi, *al Fawakih al Dawani*, Beirut: Dar al Ma’rifa, n.d., vol. 2, p. 217; Ibn Rushd, *Bidaya al Mujtahid*, p. 249; al Mahalli, *Hashiyatan*, vol.3, p. 113; Qalyubi, *Hashiyatan*, vol.3 p. 113; Ibn Qudama, *al Mughni*, pp. 295-298; al Sharbini, *Mughni al Muhtaj*, vol.5, p. 87. However there are some exceptions to this rule, if the son or daughter has married after the *hiba* has been made, or the property has been damaged, or either the donor or donee sick then the *hiba* cannot be revoked. See al Nafrawi, *ibid.*, p. 218; see also Ibn Rushd, *ibid.*; Wahbat al Zuhayli, *al Fiqh al Islami*, vol.5, p. 27. Abu Hanifa maintains that *hiba* can be revoked so long as the *wahib* (giver) does not obtain any return for it, while *sadaqa* cannot be revoked. See Charles Hamilton, *The Hedaya*, Lahore: Premier Book Store, n.d., p. 485-486 & 489; see also Wahba al Zuhayli, *al-Fiqh al Islami*, vol.5, p. 27.

<sup>97</sup> Al Tabrazi, *Mishka t al Masobih*, Vol. 2, p. 141; al Bayhaqi, *al Sunan al Kubra*, p. 179.

in this case the donee has the right to use it for any purpose and he becomes the legal owner of the property. Regarding the legal principle of irrevocability it seems there is a coincidence in the principle between them and *waqf* in which they maintain the irrevocability of the property once it has been disposed.<sup>98</sup>

*‘Ariya* (loan) has been defined as transferring the right to enjoy the uses or profits of something without any return’.<sup>99</sup> This means that the borrower only obtains the use or beneficial enjoyment and the property does not pass to him. There are two kinds of *‘ariya*, first, what is called an absolute loan (*‘ariyah mutlaqa*). In this kind of *‘ariya* there is no restriction or limitation regarding the use of things lent as to duration, place, way of using of the thing or who can use the thing. Hence the borrower (*musta‘ir*) can benefit from the thing as he is the owner of the thing provided that he does not misuse it. The second is called a limited loan (*‘ariya muqayyada*), in which the uses of the thing are restricted and in this situation the borrower is bound to the limitations imposed in the contract of *‘ariya*.<sup>100</sup> As to the

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<sup>98</sup>This conclusion is based on the opinion of the majority of the jurists. Here we find that Abu Hanifa always maintains the revocability in both the *waqf* and *hiba*.

<sup>99</sup> Fyzee, *Outlines of Muhammadan Law*, p. 225; al Sarakhsi, *al Mabsut*, Vol. 11, p. 133. This definition is given by the Hanafis and Hanbalis. Based on this definition the borrower has the right also to lend the property to someone else because it was the transfer of the right (*tamlík*) of enjoying the use of the property. The other definition of *‘ariya* is ‘to authorize (*ibahah*) someone to enjoy the use of the property without any return’. This definition given by the Malikis and Shafi‘is and based on this definition the borrower has no right to lend it to somebody else because it was just the authorization to enjoy the use of property. See Wahba al Zuhayli, *al Fiqh al Islami*, vol.5, p. 55

revocation of an *‘ariya*, the jurists unanimously agree that it is lawful for the lender to revoke the thing from the borrower at any time in the case of an unlimited loan (*‘ariya mutlaqa*), but in the case of a limited loan (*‘ariya muqayyada*) it only can be revoked when the limitations given in the contract have been fulfilled.<sup>101</sup>

Compared with *waqf*, an *‘ariya* is superficially the same since the focal point is that the uses or profits of the property are transferred and not the thing itself and up to this point there is no difference between *‘ariya* and *waqf*. What makes them different is that, in *waqf* the ownership of the property transferred is suspended, that is, it passes neither to the *waqif* nor to the beneficiaries but is transferred to Allah and only the uses or usufruct are transferred to the beneficiaries. While in *‘ariya*, however, the ownership still belongs to the lender, though its uses and usufruct are transferred to the borrower. *Waqf* is an irrevocable transaction (*‘aqd lazim*) but *‘ariyah* is a revocable one if it is unlimited (*‘ariya mutlaqa*). Hence though they seem very similar in definition they differ in nature. From this we can understand the position of Abu Hanifa who defines *waqf* as analogous to *‘ariya* since both have similarities in the aspect of the right of enjoying the benefit of the thing.<sup>102</sup>

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<sup>100</sup> Al Sarakhsi, *Ibid.*, p. 144; al Mahalli, *Hashiyatan*, vol.3, p. 20-21; Wahba al Zuhayli, *ibid.*, pp. 59-60; al Syarbini, *Mughni al Muhtaj*, vol.5, p. 53.

<sup>101</sup> Wahba al Zuhayli, *ibid.*, pp. 62-64;

<sup>102</sup> See the position of Abu Hanifa pp. 4-5.



In the light of the discussion above, it can be seen that *waqf* has very special characteristics within the methods of disposition of property for its ownership is transferred to Allah, meaning that it is a respected deed for the sake of Allah. No one can own that property even the beneficiaries who are entitled to the usufruct and once it has been made it cannot be revoked. Understanding the special feature of *waqf* is of paramount important in order to qualify someone to deal with the juristic matters pertaining to *waqf*.

### **1.5.2. *Waqf* in comparison with the English law of trust**

In English law there is a kind of charity<sup>103</sup> that is very close to the concept of *waqf*. This is called the Trust, which has been developed under that law in England and has been applied in many countries which impose that law. The similarity between both systems is striking in nature since, under both concepts, property is reserved, and its

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<sup>103</sup> Charity in English law is referred to the preamble of the statute of Elizabeth I 1601 (commonly called the Charitable Uses Act 1601) in which the preamble classifies what is considered as charitable in English law, namely, "the relief of aged, impotent and poor people; the maintenance of sick and soldiers and mariners school of learning, free schools and schools in universities; the repair of bridges, ports, havens, causeways, churches, sea banks and highways, the education and preferment of orphans; the relief, stock or maintenance for houses of correction; the marriage of poor maids; the supportation, aid and help of young tradesmen, handicraft men and persons decayed; the relief or redemption of prisoners or captures; and the aid of case of any poor inhabitants concerning payment of fifteens; setting out of soldiers and other taxes". The application of this preamble of the statute to the charity is confirmed by Section 38(4) of the Charities Act 1960 which provided that "a reference in any enactment or document to a charity within the preamble should be construed as a reference to charity in the meaning it bears as a legal term according to the law of England and Wales". Cited in Underhill and Hayton, *Law of Trust and Trustee*, London: Butterworths, 1987, p. 5.

usufruct appropriated for the benefit of beneficiaries, with the appointment of one body to administer the property, which known as *nazir* or *mutawalli* for a *waqf* and a trustee for a trust.

Trust is of two kinds, private and public. A private trust is for the benefit of a specified group of beneficiaries and a public trust is for a general charitable purpose, such as the advancement of education, which is for the benefit of a large or fluctuating group of people.<sup>104</sup>

The aspects of similarity between *waqf* and trust are clear if we look at the definition of a trust which has been defined as “an equitable obligation binding a person (who is called a trustee) to deal with property over which he has control (which is called trust property) for the benefit of persons (who are called beneficiaries) of whom he may himself be one and any one of whom may enforce the obligation”.<sup>105</sup> It is also defined as “a relationship which arises wherever a person (called a trustee) is compelled in equity to hold property, whether real or personal, legal or equitable title, for the benefits of some persons (of whom he may be one and who are termed beneficiaries) or for some object permitted by law, in such a way that

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<sup>104</sup> P.W.D. Redmond, *General Principles of English Law*, London: Pitman, 1991, pp. 336.

<sup>105</sup> Underhill and Hayton, *Law of Trust and Trustee*, London: Butterworth, 1987, p. 3.



the real benefit of the property accrues not to the trustees but to the beneficiaries or other object of the trust".<sup>106</sup>

From the definitions given, it is confirmed that there is a close similarity between *waqf* and trust, in which we find that the elements of trustee, property and beneficiaries can be construed as being the same as the *nazir/mutawalli*, *mawquf 'alaih* (beneficiaries) and the *mauquf* (property) in *waqf*. This similarity is, however, only in the concept. Technically, we find that they differ and one of the most important differences is that under the law of trust the property is vested in the trustee and he is consequently the legal owner of the trust.<sup>107</sup> As a legal owner of the property he has more power conferred to him compared to the *nazir* of a *waqf* who is not considered to be the owner of the *waqf*. However both of them have the same duties and functions, that is, to administer the property for the benefit, not for themselves, but of the object of the trust or *waqf*.

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<sup>106</sup> Sheridan L.A. and George W. Keeton, *The Law of Trust*, London: Butterworth, 1993, p. 3.

<sup>107</sup> The beneficiaries are called equitable owner. See Redmond P. W.D., *General Principles of English Law*, p. 332; The Trustee Act 1925 gives trustee various powers which they can exercise at their discretion: trust money can be used for maintenance, education or benefit of a beneficiaries who is a minor, sec. 31; trust money can also be used for the purposes such as the purchase of a house for a beneficiaries, sec. 32; Sale or mortgage of trust property, sec. 13,16; Insurance of trust property up to three-quarters of its value, sec. 19; settlement of claims by or against the trust, sec. 15; investment authorized by the Trustee Act 1925 and the Trustee Investments Act 1961. Cited in Underhill and Hayton, *Law of Trust and Trustee*, p. 7.

Another difference between *waqf* and trust is in terms of the duration. As a condition of validity for a *waqf*, according to the majority of jurists, its must be made in perpetuity, while a private trust cannot be perpetual. This kind of trust must comply with the 'rule against perpetuity', that is, it is valid for a short period of time only.<sup>108</sup> In *waqf* there is no 'rule against perpetuity'; it must be perpetual except the jurists differ as to whether it is necessary to mention the word perpetuity when making a *waqf*.<sup>109</sup> In this case we can see that the difference is in the context of private trust not in public trust. So there is still a similarity between public trust and *waqf*.

The other aspect we should look into when we discuss the similarities and differences between *waqf* and trust is the *cy-pres* doctrine. In trust, in case of the object of public trust fails the doctrine of *cy-pres* doctrine is applicable where the court has the power to apply the charitable trusts which has failed as near as possible to the object for which it was intended or to another charity which is similar in

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<sup>108</sup> Philip H Pettit, *Equity and The Law of Trust*, London: Butterworths, 1989, pp. 223. Rules against perpetuity are: 1) The gift must be vested to the charity within the period of a life or lives in being and 21 years thereafter. 2) The property must be not limited in such a way that it is alienable in the hand of recipient. 3) The maximum period for which the vesting may postponed is either, i. the period of a life or lives in being, and further period of 21 years; ii. where there is no life in being, a period of 21 years; or iii. in case of child in womb, the gestation period plus life or lives in being, and period of 21 years. Cited in Parker David and Mellow Anthony, *The Modern Law of Trust*, London: Sweet & Maxell, 1990, pp. 98-101.

<sup>109</sup> S.A. Husain and S.K. Rashid, *Wakfs Law and Administration in India*, Delhi: Eastern Book Co., 1973, p. 112.

nature.<sup>110</sup> In *waqf* there is also a case like that where the *waqf* cannot be applied to the desired objects because of change of time, circumstances or for any other reason. In such a case the same rule will be applied and many say that the *cy-pres* doctrine is analogous to that in *waqf*.<sup>111</sup>

These are some of the aspects of similarity between *waqf* and trust in their concept. However, since the legal principles used in English law and Islamic law are different in many aspects, it is certain that there will be technical differences between them. These technical differences create some problems in some countries where Islamic law and English law are both applied together. The problem arises when a case of *waqf* is tried at an English civil court on the grounds that the case is similar to a trust and the parties involved in the dispute are Muslims. In many cases the decision is not in line with the law of *waqf* and this create problems and dissatisfaction to the Muslims who see *waqf* as a sacred institution.<sup>112</sup>

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<sup>110</sup> Parker David and Mellow Anthony, *The Modern Law of Trust*, p. 223.

<sup>111</sup> Abdur Rahim M.A., *Muhammadan Jurisprudence*, London: Luzac, 1907, p. 306.

<sup>112</sup> In Malaysia, for example, where both English Civil court and Shariah court are operating together there are many cases where the civil court interferes in a shariah court regarding cases of *waqf*. Some times the cases will be transferred to a civil court on the basis that the cases are a trust case not a *waqf* case and they must be tried at civil court. Sometimes the judge at the civil court is not a Muslim and this is against Islamic law which requires the *qadhi* must be a Muslim. This happens because the English court assumes that *waqf* is similar with trust and in Malaysia the English court is higher than the shariah court in the judiciary structure. The same thing occurs in India. See Ahmad Ibrahim, *Islamic Law in Malaya*, Singapore: Malaysia Sociological Research Institution, 1965, p. 201.

## Chapter Two

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### The Constituent Elements of *Waqf*

#### 2.0 Introduction

The institution of *waqf* comprises elements each of which has its rules and conditions that must be fulfilled. Failure to fulfill these rules and conditions will result in the *waqf* being void. As far as the Islamic law of *waqf* is concerned there are four elements that constitute a *waqf*, namely, the *waqif* (the founder of the *waqf*), the *mawquf* (the subject of the *waqf*), the *mawquf<sup>c</sup>alayh* (the beneficiaries) and the *sigha* (the declaration of *waqf*).<sup>1</sup> The area of discussion that is covered by each element, as it appears in the jurists' works, is vast and complicated. Each school offers a different way of discussion and indulges in the detail of every issue as they do in other branches of Islamic law. In this chapter we will try to bring to the reader the discussion of the jurists regarding these elements and our attention will only be engaged on the main issues and principles of the matter.

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<sup>1</sup> These four are considered as the elements (*arkan*) of a *waqf* by the majority of the jurists. See Wahba al Zuhayli, *al Fiqh al Islami*, vol.8, p. 158; al Ansari, *Hashiyat al Jamal*, Egypt: Matba<sup>c</sup>a Mustafa Muhammad, n.d., vol. 3, p. 576; al Bujayrimi, *Bujayrimi<sup>c</sup>ala al Khatib*, Egypt: Mustafa al Babi al Halabi, n.d., vol. 3, p. 203; Ahmad bin Muhammad al Dardir, *al Sharh al Saghir*, in the margin of al Sawi, *Bulghat al Salik*, Beirut: Dar al Ma<sup>c</sup>Rifa, 1988, vol. 2, p. 297.

## 2.1 The *waqif* (founder)

The *waqif* is the one who disposes his property for the purpose of *waqf*. Basically, there is no limitation for a *waqif* to create as many *waqfs* as he likes.<sup>2</sup> Everyone who qualifies can create a *waqf* in his lifetime by deed or by will. In his capacity as *waqif*, he has very few privileges over the property since the *waqf* has become irrevocable. Once he makes a *waqf* he no longer has any right to the property but he can, in certain cases, enjoy the property in his capacity as a beneficiary. The only area in which he has access, in his capacity as *waqif*, is in administrative matters, that is, regarding the office of *nazir* (this will be touched on in the subsequent chapter), designating the beneficiaries and drawing stipulations regarding the way the property should be treated.<sup>3</sup>

### 2.1.1. Qualifications of a *waqif*

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<sup>2</sup> Mustafa Ahmad al Zarqa', *Ahkam al Awqaf*, p. 141.

<sup>3</sup> Al Bujayrimi, *ibid.* p. 204; Ahmad bin Muhammad al Dardir, *al Sharh al Saghir*, p. 297; al-Bahuti, *Kashaf al Qina'*, vol. 4, p. 240.

In any transaction of alienating property the one who is going to dispose of or alienate his property must have full right of disposal over his property (*ahliyya al tabarru*<sup>c</sup>).<sup>4</sup>

Since *waqf* is a kind of disposal of property, the *waqif* must possess this quality, that is, he must be of full age, of sound mind, free (*‘aqil, baligh, hurr*) and one who has not been declared legally incompetent or insolvent (*ghayr mahjur ‘alayh bi safah aw falas*).<sup>5</sup>

With respect to this last condition, authority is given to the *qadi* to declare people as incompetent and insolvent, and to detain their right of spending their property by placing them under the guardianship of someone appointed by the *qadi*<sup>6</sup>. The purpose of this ruling is to prevent a legally incompetent person from destroying his property by overspending, and to guarantee the right of creditors to the insolvent's property.<sup>7</sup> This is based on the tradition of the Prophet who said: *Neither harm nor making harm are permitted*.<sup>8</sup>

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<sup>4</sup> Abu Zahra, *Muhadarat*, n.p.: Ahmad ‘Ali Mukhyar, 1959, p. 127; Mustafa Ahmad al Zarqa’, *Ahkam al Awqaf*, p. 55.

<sup>5</sup> Al Nafrawi, *al Fawakih al Dawani*, Beirut: Dar al Ma‘rifa, n.d., vol. 2, p. 225; al Bahuti, *Kashaf al Qina*<sup>c</sup>, vol. 4, p. 240; Nizam, *al Fatawa al Hindiyya*, vol. 2, p. 352 & 355; for the meaning of *ahliyya al tabarra*<sup>c</sup>, see Wahba al Zuhayli, *al Fiqh al Islami*, vol. 5, p. 331; see also Mustafa Ahmad al Zarqa’, *ibid*. Some *jurists* categorize *‘aqil, baligh* and *hurr* as *sihhat al-‘ibarah* (literally means legally acceptable) and *ghayr mahjur ‘alayh* as *ahliyyah al tabarra*<sup>c</sup>. These what are used in Shāfi‘i school. See al Syarbini, *Mughni al Muhtaj*, vol. 2, p. 376; al-Ramli, *Nihaya al Muhtaj*, Vol. 5, p. 359; Ibn Hajar, *Tuhfa al Muhtaj*, Vol. 6, p. 236; see also al-Khan, al Bugha and al Sharabji, *al Fiqh al Manhaji*, ‘Amman: Dar al Fikr, 1996, vol. 5, p. 13.

<sup>6</sup> Al Mawardi, *al Ahkam al Sultaniyya*, Beirut: Dar al Ma‘rifa, n.d. p. 67.



The disposition of property by way of *waqf* is not excluded from this ruling. Hence, according to the majority of the jurists, except Abu Hanifa,<sup>9</sup> a *waqf* made by those who have been declared incompetent or insolvent is void<sup>10</sup> and, according to the Shafi'i school, even their guardian cannot create a *waqf* on their behalf.<sup>11</sup> Abu Yusuf, however, makes an exception in the case legally incompetent person if a *waqf* is created in his favour and after him in favour of another purpose which does not dies out. He says that the *waqf* is valid, but the latter will take effect upon its being sanctioned by the *qadi*.<sup>12</sup>

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<sup>7</sup> Al Junaydal, *al Tamalluk Fi al Islam*, °Amman: Dar al Fikr, 1985, p. 72.

<sup>8</sup> Cited in Wahba al Zuhayli, *al Fiqh al Islami*, vol. 5, p. 440. The legitimacy of this authority of the *qadhi* to detain the right of someone from spending his property is derived from the Quran in which Allah said: "To those weak of understanding make not over your property which Allah hath made a means of support for you, but feed them and clothe them therewith and speak to them words of kindness and justice". Al Nisa' 4: 5.

<sup>9</sup> Abu Hanifa's position on this matter directly counters to the accepted ruling of declaration of those who are incompetent and insolvent. According to him those persons cannot be stopped from exercising their property for that ruling is considered to disrespect his dignity, therefore a *waqf* created by them is valid. See Wahba al Zuhayli, *ibid.*, p. 439. However his two disciples, Abu Yusuf and al Shaybani, disagree with him and maintain that the *waqf* is void, which is in line with the view of the majority of the jurists in other schools. See Ibn °Abidin, *Radd al Mukhtar*, vol. 6, p. 523.

<sup>10</sup> Al Nafrawi, *al Fawakih al Dawani*, Beirut: Dar al Ma°rifa, n.d., vol. 2, p. 225; al Bahuti, *Kashaf al Qina°*, vol. 4, p. 240; Nizam, *al Fatawa al Hindiyya*, vol. 2, p. 352 & 355; al Syarbini, *Mughni al Muhtaj*, vol. 2, p. 376; al Ramli, *Nihaya al Muhtaj*, vol. 5, p. 359.

<sup>11</sup> Al Sharbini, *ibid.*, p.377.

<sup>12</sup> Ibn °Abidin, *Radd al Mukhtar*, vol. 6, pp. 523 - 524; Ameer Ali, *Mahommedan Law*, New Delhi: The English Book Store, 1985, p. 197.

However the rule for someone who is insolvent depends on the creditors. The majority of the jurists agree that if the creditors give their permission for an insolvent man to make a *waqf* it will be valid<sup>13</sup> because the permission is considered an abolishment of their rights to the insolvent person's property.<sup>14</sup>

### 2.1.2 The *waqf* of a non-Muslim

The right to create a *waqf* is not confined to Muslims. Non-Muslims also are allowed to create a *waqf*<sup>15</sup> with the same stipulations as Muslims and if it is valid the *waqf* must be treated as that of the *waqf* of Muslims. However there are some details of the discussion among the jurists that must be pointed out regarding the validity of a *waqf* created by a non-Muslim.

In this matter the jurists have taken into account whether the subject of the *waqf* is considered as religious (*qurba*) both from the point of view of the religion of the *waqif* and Islam. Concerning this matter there are various opinions among the jurists as can be seen in the following discussion.

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<sup>13</sup> Zuhdi Yakan, *Ahkam al Waqf*, p. 84.

<sup>14</sup> Abu Zahra, *Muhadarat*, p.134.

<sup>15</sup> Al Sharbini, *Mughni al Muhtaj*, vol. 5, p. 376.



The jurists unanimously agree that if the *waqf* of a non-Muslim is made for a non-religious purpose, both from the point of view of the religion of the *waqif* and Islam, it is void, as for example, if the *waqf* is made for a dancing club or night club.<sup>16</sup> The jurists however disagree whether the subject of a *waqf* must be considered religious either from the point of view of the religion of the *waqif* or Islam, or both of them, in order for the *waqf* to be valid.

According to the Hanafi school and the dominant view in the Maliki school, for the *waqf* of a non-Muslim to be valid, the subject of the *waqf* must be religious from the point of view of the *waqif*'s religion as well as Islam.<sup>17</sup> For the purpose of clarification some instances may be cited here. If a non-Muslim creates a *waqf* for the poor, the *waqf* is valid because it is considered as religious by both religions. If the *waqf* is made for a mosque it is invalid because it is not considered as religious from the point of view of the *waqif* even though it is religious in Islam. The same verdict also applies if the *waqf* is made for a temple because it is only considered as religious in the religion of the *waqif* but not in the religion of Islam.<sup>18</sup>

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<sup>16</sup> Wahba al Zuhaili, *al Fiqh al Islami*, vol. 8, 197.

<sup>17</sup> Al Tarabulsi, *al Is'af*, p. 145; al Abi, *Jawahir al Iklil*, Beirut: Dar al Fikr, n.d., Vol. 2, p. 206; al-Mawwaq, *al Taj wa al Iklil*, in the margin of al Hattab, *Mawahib al Jali l*, n.p.: Dar al Fikr, n.d., vol. 4, p. 24. There is another view in the Maliki school which is that the subject of the *waqf* only needs to be considered religious in the religion of the *waqif*, regardless of the point of view of Islam. Therefore according to this view, the *waqf* of a non-Muslims of a temple is valid because it is considered religious in the religion of the *waqif*. See Ahmad bin Muhammad al Dardir, *al Sharh al Saghir*, vol. 2, p. 304.

<sup>18</sup> Al Tarabulsi, *ibid.*, p. 145 -146.

The Shafi'is and the Hanbalis disagree with the above opinion, and hold that the subject of a *waqf* must be religious according to the Islamic point of view only, regardless of the religion of the *waqif*,<sup>19</sup> and, as long as it is permissible in Islam, it will be valid. Hence a *waqf* created by a non-Muslim for a religious purpose in Islam, even for a mosque, is valid because it is religious in Islam, whereas a *waqf* made for a temple is void because it is non-religious from the Islamic point of view.

The focal point in this disagreement among the jurists is whether the subject of *waqf* is considered religious from the point of view of the *waqif* and Islamic law. This is because the purpose of making *waqf* as established in the law is that it must be for a religious purpose (*qurba*). So, any *waqf* made, whether by a Muslim or a non-Muslim, should meet this purpose.

In the Hanafi and Shafi'i schools the rules of the *waqf* of a non-Muslim as discussed above exclude the *waqf* of an apostate. For the validity of the latter they have differences of opinion. According to Abu Hanifa the *waqf* of an apostate is suspended. If he repents and returns to Islam the *waqf* will be valid, but if he does not, or he dies in apostasy, it is void. If the apostasy happens after the *waqf* has been made this *waqf* is void, even if the person repents, because his deeds are extinguished with the apostasy.<sup>20</sup> The Shafi'is, however, hold that the *waqf* of an apostate is

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<sup>19</sup> Sulayman Ibn 'Umar Jamal, *Hashiya al Jamal*, Egypt: Matba'a Mustafa Muhammad, n.d., vol. 3, p. 576; al Bahuti, *Kashaf al Qina'*, vol. 4, p. 245.

immediately void and they disagree with the opinion of Abu Hanifa who considers it in suspense, because for them the *waqf* is void from the beginning.<sup>21</sup> The different treatment imposed by these two schools toward apostates might be based on the fact that apostasy is considered a major crime in Islamic law and apostates are treated as criminals. So a *waqf* made by them cannot be treated as that made by a non-Muslim.

### **2.1.3 The *waqf* of someone on his death bed (*marad al mawt*)**

It has been mentioned earlier that anyone who has the right to dispose of his property can create a *waqf* and there is no limitation imposed regarding the amount of the property that can be made *waqf*. However if the *waqif* is on his death bed,<sup>22</sup> according to the majority of the jurists, his *waqf* is subjected to the same restriction as a bequest in favour of individuals, namely it operates only to the extent of one-third of his property. Any *waqf* that exceeds one-third of the property will depend on the consent of the heirs. If the heirs consent to it, it will be valid in its entirety, but if they do not consent, the *waqf* will not be valid beyond the one-third allowed for

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<sup>20</sup> Wahba al Zuhayli, *al Fiqh al Islami*, vol. 8, p. 178.

<sup>21</sup> Al Ramli, *Nihaya al Muhtaj*, vol. 5, p. 366; Ibn Hajar, *Tuhfa al Muhtaj*, vol. 6, p. 244.

<sup>22</sup> Being on one's death bed means someone who is sick and whose illness will most probably last until his death. There are opinions of the jurists regarding such illness. Some say that it is being unable to go out from house, some say being unable to stand while doing the prayer and some others say being unable to get off his bed. See Wahba al Zuhayli, *al Fiqh al Islami*, vol. 5, p. 450.

bequests. If some of the heirs consent and others do not, the *waqf* in excess of the one-third will be valid in proportion to the shares of the assenting heirs.<sup>23</sup>

When a *waqf* is made in favour of one of the heirs alone or some of them to the exclusion of others it will depend on the latter whether it is within the one-third of the property or over. If they consent, the *waqf* will be valid and must be treated as stipulated by the *wāqif*. But if they repudiate it, the heirs who benefit under the *waqf* have to share it with the other heirs according to their hereditary portions.<sup>24</sup>

With regards to this, only the Malikis hold that a *waqf* in favour of heirs is void even if it is made within the one-third of the property because they say that *waqf* is analogous to bequest and according to them there is no bequest permitted in favour of heirs.<sup>25</sup> However there is an exception to this when the *waqf* is made for the *waqif's* descendants and for their descendants' descendants. Such a *waqf* is characterized as *waqf mu'acqab* (*waqf* made for the immediate and the second descendants) in the Maliki school.<sup>26</sup> In this case, the *waqf* will be valid provided that

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<sup>23</sup> Ibn Qudama, *al Mughni*, Vol. v, p. 571-574; al Sharbini, *Mughni al Muhtaj*, vol. 2 p. 377; al-Syibramilsi, *Hashiya 'ala Nihaya al Muhtaj*, in the margin of al Ramli, *Nihaya al Muhtaj*, vol. 5. p. 369; Charles Hamilton, *The Hedaya*, Lahore: Premier Book House, n.d., p. 233; al Zayla'i, *Tabyin al Haqaiq*, vol. 3, p. 326; al Syalabi, *Hashiya 'ala Tabyin al Haqaiq*, in the margin of al-Zayla'i, *Tabyin al Haqaiq*, vol.3, p.326; al Tarabulsi, *al Is'af*, p. 58.

<sup>24</sup> Al Tarabulsi, *ibid*; Zuhdi Yakan, *Ahkam al Waqf*, p. 251-252; al Ramli, *ibid*.

<sup>25</sup> Al Hattab, *Mawahib al Jali l*, vol. 6, p. 26-27.

<sup>26</sup> Al Hattab, *ibid.*; al Sawi, *Bulghat al Salik*, vol. 2, p. 301-302; al Abi, *Jawahir al Iklil*, vol. 2, p. 207; Ibn Rushd, *al Bayan wa al Tahsil*, Beirut: Dar al Gharbi al Islami, n.d., vol. 12, p. 191;

it is within the one-third of the property,<sup>27</sup> and the distribution of the usufruct among the beneficiaries must be in accordance with the rules of the law of inheritance.<sup>28</sup> One of the examples for this kind of *waqf* is cited by Khalil bin Ishak al Jundi (d.1365), namely, that someone on his death bed makes a *waqf* for three of his descendants and four of his descendants' descendants and at the time of his death his mother and wife are alive as well.<sup>29</sup> The property must be divided into seven portions, namely, one each for the three descendants and four descendants' descendants. The portions of the mother and the wife are one sixth and one eighth respectively of the three descendants' portion and the rest of that will be distributed to the three descendants, to a man the portion of two females. The remaining four portions will be distributed among the four descendants' descendant equally between males and females as a *waqf*.<sup>30</sup> This is the kind of *waqf mu' aqqab* known in

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see also David S. Powers, "The Maliki Family Endowment : Legal Norms And Social Practices", *International Journal of Middle Eastern Studies*, 25 (1993), p. 383; Aharon Layish, "The Maliki Family Waqf According To Wills And Waqfiyyat", *Bulletine of the School of Oriental and African Studies*, 46 (1983), P. 3. °Abd al Salam Sahnun (d.854) said that this kind of *waqf* is among the most difficult issues that have been discussed in *fiqh* books and not many know it very well. In the Maliki school it also recognized as the case of *walad al a' ya n* (specified descendants and descendants of the descendants) See al Abi, *ibid*.

<sup>27</sup> Al Mawwaq, *Mukhtaṣar khalil*, printed with al Hattab, *Mawahib al Jalil*, vol. 6, p. 26; al-Hattab, *Mawahib al Jalil*, vol. 6, p. 26; al Abi, *Jawahir al Iklil*, vol. 2, p. 207;

<sup>28</sup> The statement of Khalil reads: *aw 'ala warith bi marad mawtihi illa mu' aqqaban kharaja min thuluthihi faka mirath li warith*. See Sidi Khalil, *Mukhtaṣar Khalil* , printed with al Hattab, *Mawahib al Jalil*, vol. 6, p. 26.

<sup>29</sup> The statement of Khalil reads: *ka thalathi awlad wa arba'a awladi awlad wa ' aqqabahu wa taraka umman wa zaujatan*. See Sidi Khalil, *ibid*.

<sup>30</sup> Al Hattab, *ibid*; al Aabi, *Jawahir al Iklil*, vol. 2, p. 207; al Sawi, *Bulgha al Salik*, vol. 2, p. 301-302. See also al Imam Malik, *al Mudawwana al Kubra*, vol. 6, p. 104.

the Maliki school. It combines inheritance law and *waqf* law. For the wife, mother and the descendants the distribution is according to the law of inheritance, whereas the descendants' descendants will get their portion as a *waqf*. If we follow the original law of inheritance, the descendant's descendants deserve nothing from the property because the descendants prevent them from the succession, but in this case they get their portion as a *waqf* not as inheritance. Hence the portion that they deserve is equal between male and female, not to a man the portion of two females as required by the law of inheritance.

If a person makes a *waqf* while on his death bed and at the same time is in debt, the *waqf* will be set aside and the property must be sold to pay his debt. After the payment of the debt, one-third of the remaining property will be a *waqf* as in the case of bequests. However, if the creditors consent the *waqf* may be valid even in its entirety.<sup>31</sup> Similarly if a person were to purchase a house and make it a *waqf*, and then a claim of *shufa* is made in respect of it, the *waqf* would be set aside and the claim must be allowed to be put into effect. This is the position of the four schools of law.<sup>32</sup> The principle here is that making a *waqf* is not an obligatory act, so Islamic law does not permit anyone to do it at a time when he has an obligation to dispose his property to the others.

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<sup>31</sup> Wahba al Zuhayli, *al Fiqh al Islami*, vol. 8, p. 229; Zuhdi Yakan, *Ahkam al Waqf*, p. 250.

<sup>32</sup> Wahba al Zuhayli, *ibid.*; al Tarabulsi, *al Is'af*, p. 37.

#### 2.1.4 The *waqf* of an *amir* (*irsad*)

An *amir*, in his capacity as having general authority (*wilaya<sup>c</sup>amma*),<sup>33</sup> can create a *waqf* from the property of the *bayt al mal* (public treasury) in favour of public benefits (*maslaha<sup>c</sup>amma*) like schools, mosques or any other charities. This kind of *waqf* is called *irsad*.<sup>34</sup>

This differs from the *waqf* of *iqta<sup>c</sup>at* which has been declared void by the jurists. *Iqta<sup>c</sup>at* is land which belongs to the government and is given to the people in order to use it, and on which they have to pay tax. The owner of the land is still the government. If the one who receives this land makes it a *waqf*, it is in fact void because he does not own that land. However, if someone gets the land by way of *ihya' al mawat* the *waqf* of that land is valid because he owns the land. As far as Islamic law is concerned there no disagreement on this matter since the *waqif* has the full right to exercise his land whatever he wishes.<sup>35</sup>

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<sup>33</sup> Wahba al Zuhayli, *ibid.*, p. 167.

<sup>34</sup> Ibn <sup>c</sup>Abidin, *Radd al Mukhtar*, vol. 6, p. 597; al Sharbini , *Mughni al Muhtaj*, vol. 2, p.377.



### 2.1.5 The *waqif's* stipulation regarding *waqf*

It is understood that the ownership of *waqf* property is transferred to Allah. Hence it is out of the jurisdiction of anybody, be it the *waqif* or the beneficiaries. It comes under special rules whereby only its usufruct can be utilized and enjoyed by people, within certain limitations. This is the basic principle of the law of *waqf*.

For the *waqif*, he is given an unfettered freedom to make stipulations regarding the administration of the *waqf*, the appointment of a *nazir*, the designation of beneficiaries and the distribution of the *waqf*. His stipulation is binding and must be put into effect.<sup>36</sup> The basis for this is the following maxim that has been used widely in the law, namely that, "The stipulations of the *waqif* are as binding as those enacted by the Lawgiver (*shurut al waqif ka nass al shari'*)".<sup>37</sup> This maxim rules that

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<sup>35</sup> Wahba al Zuhayli, *al Fiqh al Islami*, vol. 8, p. 166. This is based on the Tradition of the Prophet who says: "Whoever reclaims barren land becomes its owner." See Abu Dawud, *Sunan Abi Dawud*, translated into English by Ahmad Hassan, Lahore: Ashraf Press, n.d., vol.2, p. 873.

<sup>36</sup> Al Hattab, *Mawahib al Jalil*, vol. 6, p. 33; al Azhari, *al Fawakih al Dawani*, vol. 2, p. 225; Ibn 'Abidin, *Rad al mukhtar*, vol. 6, p.735;

<sup>37</sup> Ibn 'Abidin, *ibid.* p. 735; al Sawi, *Bulghat al Salik*, vol. 2, p. 305; Ibn Dhuban, *Manar al Sabil*, Mecca: al Maktaba al Tijariyya, 1996, vol.2, p.714.; Ibn Taymiyya (d.1328) explains that this maxim means that the *waqif's* stipulation should be interpreted in the same way as the revealed texts. Hence the terms *'umum* and *khusus*, *itlaq* and *taqyid*, and *tashrik* and *tartib* that appear in the stipulation must be taken into consideration in keeping with what is done when dealing with



the *waqif's* wishes are respected by the law and are binding; for they must be followed like the law of God. A *waqf* will therefore be established in accordance with the *waqif's* stipulations. However one must not forget that the *waqif's* stipulations are not as absolutely binding as the statement of God, for to regard them as absolutely binding is to blaspheme God.<sup>38</sup> Only the word of God qualifies as being absolutely binding and which Muslims have no choice but to follow. As for the *waqif's* stipulation, it must be followed but there is a limit to that.

For the stipulations to be binding, the general principle is that they must not in any way contravene the teachings of Islam and must meet the requirements of the law before they are followed.<sup>39</sup> In this regard we have the tradition of the Prophet who said:<sup>40</sup> “*What do people think when they make stipulations that are not in the Book of God. If anyone makes a stipulation that is not in the Book of God it is void even if he makes one hundred stipulations.*” Any stipulation that is against this principle is invalid and must be ignored.

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revealed texts. See Ibn Taymiyya, *al Fatawa al Kubra*, Beirut: Dar al Kutub al ‘Ilmiyya, n.d., vol.4, p. 258.

<sup>38</sup> Ibn Taymiyya, *ibid.*, p. 259.

<sup>39</sup> Al Sharbini, *Mughni al Muhtaj*, vol. 2, p. 386; al Nawawi, *al Majmu‘*, vol.16, p. 256.; Ibn ‘Abidin, *Rad al Mukhtar*, vol. 6, p. 527; al Hattab, *Mawahib al Jalil*, vol. 6, p. 33; al Sawi, *ibid.*; Ibn Duban, *Manar al Sabil*, vol. 2, p. 712.

<sup>40</sup> Al Bukhari, *Sahih al Bukhari*, in *Kitab al Syurut*, vol.3, p. 183.

For the sake of discussion it is worth mentioning here what has been observed by Ibn Taymiyya (d.1328) regarding stipulations. He said that the stipulations made in *waqf* can be categorized into three types:<sup>41</sup>

1. Stipulations that approach Allah, that is, those that involve obligatory or recommended deeds. This kind of stipulation must be followed and the rights of beneficiaries are subjected to these stipulations being fulfilled.
2. Stipulations of what is prohibited the Lawgiver. This kind of stipulation is invalid by the consensus of the jurists.
3. Stipulations of permitted acts (*mubah*). Some jurists accept the permissibility of this kind of stipulation but the position of the majority is that it is invalid.

The first and second categories are held in common by the jurists because they are regarded as principles in the law. To follow the obligatory and recommended stipulations are the accepted principle, emphasized by the maxim “*The stipulations of the waqif are as binding as those enacted by the Lawgiver,*” while not to follow prohibited stipulations are mandatory because they are against the teachings of Islam.<sup>42</sup>

The third category is not accepted by most jurists and Ibn Taymiyya’s statement saying that it is the view of the majority that this stipulation is invalid

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<sup>41</sup>Ibn Taymiyya, *al Fatawa al Kubra*, vol. 4, p. 265-266.

<sup>42</sup>Al Nawawi, *al Majmu’*, vol. 16, p. 257.

contradicts the fact. It is stated in *al Majmu'* of Mahy al Din al Nawawi (d. 1277) that the position of the four schools is that stipulations of indifferent acts are valid and must be followed.<sup>43</sup> Regarding this, Abu Zahra says, "I see that the opinion of the majority of the jurists regarding this matter, as demonstrated by the *fiqh* books of the schools of law, differs from the statement of Ibn Taymiyya. It is agreed by previous and present scholars that the stipulation of indifferent acts is lawful and there is no clear prohibition regarding that".<sup>44</sup> If we accept the view of the majority in this matter then we can conclude that any stipulation must be followed except that which contradicts the teachings of Islam. Among the stipulations that are considered against the teachings of Islam as given by the jurists, is, for example, the stipulation of celibacy for the beneficiaries in order for them to be entitled to the usufruct. This stipulation is invalid because celibacy is in contradiction to the exhortation to marriage in Islam.<sup>45</sup> But if a *waqif* stipulates that his ex-wife is entitled to the usufruct so long as she does not remarry, according to the Shafi'i and the Hanbali schools the *waqf* is valid but her rights will be abolished once she gets married.<sup>46</sup>

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<sup>43</sup> Al Nawawi, *Ibid.*

<sup>44</sup> Abu Zahra, *Muhadarat*, p. 149. The argument of Ibn Taymiyya that not to follow the stipulation of indifferent acts is that the purpose of making a *waqf* must be religious one (*qurba*). If a *waqif* stipulates something that does not bring any benefit to his life and after his life that means the stipulation is not considered as religious. Hence that stipulation must not be followed. See Ibn Taymiyya, *al Fatawa al Kubra*, vol. 4, p. 266.

<sup>45</sup> Ibn Taymiyya, *ibid.*, p. 267-268;

<sup>46</sup> Al Nawawi, *al Majmu'*, vol. 16, p. 255; Ibn Hajar, *Tuhfa al Muhtaj*, vol. 6, p. 256.

In another categorization we find that the Hanafis state that any stipulation that disadvantages the institution or beneficiaries must be ignored. This is like the stipulation giving the usufruct to beneficiaries while the property itself needs maintenance, or the stipulation prohibiting the appointment of a *nazir*. These kinds of stipulation are invalid because they do not benefit the *waqf*.<sup>47</sup>

Apart from the above, we also find another categorization in the Shafi'i and Hanbali schools, which states that any stipulation which contradicts the absolute nature of *waqf* is void. For example, if the *waqif* stipulates that he can make a choice (*khiyar*), at any time, of whether to perpetuate or to revoke the *waqf*, to sell it or change the beneficiaries, the *waqf* will be void because the nature of *waqf* is contrary that stipulation. This is the view of the Shafi'is and the Hanbalis.<sup>48</sup> Abu Yusuf, however, states that if a *waqif* stipulates making a choice (*khiyar*) within three days it will be valid, as in the case of a sale, which is in disagreement with al Shaybani who says it is void.<sup>49</sup>

The discussion above concerns the principles governing the application of the *waqif*'s stipulations. His stipulations form a constitution for the *waqf*. Once a valid stipulation has been drawn up a *waqif* cannot revoke it, unless he has reserved the

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<sup>47</sup>Cited in al Nawawi, *ibid*.

<sup>48</sup> Al Sharbini, *Mughni al Muhtaj*, vol. 2, p. 385; al Bahuti, *Kashaf al qina'*, vol. 4, p. 251; Ibn Qudama, *al Mughni*, °Amman: Dar al Fikr, n.d., vol. 6, p. 195.

<sup>49</sup> Cited in al Sarakhsi, *al Mabsut*, vol. 12, p. 42; cited in Nizam, *al Fatawa al Hindiyya*, vol. 2, p. 356.

right to change his stipulation in the declaration, in which case he can change it whenever he likes.<sup>50</sup> Therefore even if the *waqif*'s stipulation is irrevocable and binding, as a precaution to him he can put in the declaration that he has the right to change it.

With regard to the *nazir* or *qadi*, there is flexibility in implementing the stipulations of the *waqif*. Ibn Taymiyya says that it is lawful to change the *waqif*'s stipulation to a more beneficial one. This might occur, for example, in the case of a *waqf* in favour of the jurists or *sufis*, which might be diverted for the use of soldiers if there is a necessity for *jihad*.<sup>51</sup> In *Radd al Mukhtar* it is stated there are seven examples of stipulations that can be ignored or changed, either by a *nazir* or a *qadi* namely:<sup>52</sup>

1. Stipulations preventing the exchange (*istibdal*) of the *waqf* property (see the discussion on this matter in Chapter Four).
2. Stipulations preventing the removal of the *nazir*. In this case the *qadhi* can remove him if he is found to be incompetent.

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<sup>50</sup> Mustafa Ahmad al Zarqa', *Ahkam al Awqaf*, p. 163-164.

<sup>51</sup> Ibn Taymiyya, *Kitab al Ikhtiyarat*, printed with Ibn Taymiyya, al Fatawa al Kubra, p. 509.

<sup>52</sup> Ibn Abididn, *Rad al Mukhtar*, vol. 6, p. 587-588.

3. Stipulations that the property cannot be rented for more than one year. In this case the *qadhi* can rent it if he finds that people want to rent it for more than that or if such a provision will be of benefit to needy people.
4. Stipulations enjoining the recitation of the Qur'an over someone's grave. In this case the stipulation can be ignored by those who agree with the opinion that reciting the Quran over a grave is disliked (*makruh*).
5. Stipulations that the usufruct of a *waqf* be given as *sadaqa* to the beggars of certain mosques. In this case the *nazir* can give to other beggars.
6. Stipulations that the beneficiaries of a *waqf* be given bread and meat daily. In this case the *nazir* can exchange the above for provision of the like value.
7. The *qadhi* can increase the salary of an *imam* if it is not enough.

In all of the above seven cases the *waqif*'s stipulations can be changed. Observing these seven examples of stipulation we can derive some general principles, that is: if the stipulation brings no benefit to the *waqf* property, or the beneficiaries, or anyone who serves the property, it can be changed so that it benefits them. As far as Islamic law is concerned, there is agreement on this among all the schools of law.

## **2.2 The subject of *waqf* (*mawquf*)**

The second element of *waqf* is the subject of *waqf* known in Arabic as *mawquf*. In order to make a *waqf* valid the subject of *waqf* must have qualities that are accepted in the law. Not all kinds of property can be made *waqf*. The discussion below will detail these kinds of property.

### 2.2.1 The *waqf* of immovables (*‘aqar*)

As we have discussed in Chapter One there are few traditions that help in developing the institution of *waqf*. The law has been developed by the jurists using the tools of *ijtihad*. Indeed, the discussion of the subject of *waqf* offers one of the examples of how this law has been developed. As we know, almost all of the traditions show that the subjects of *waqf* were immovable like land and houses. Based on this, all the schools are in agreement as to the validity of the *waqf* of immovable objects.<sup>53</sup> There is no room for disagreement on this since it was practised by the Prophet and his Companions. But, with regard to other kinds of property there are differences of opinion between the jurists. In the following section we will discuss the opinions of the jurists regarding the *waqf* of other types of property.

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<sup>53</sup> Al Ramli, *Nihaya al Muhtaj*, vol. 6, p. 362; Ibn al Humam, *Syarh Fath al Qadhir*, vol. 6, p.199; al Zayla‘i, *Tabyin al Haqaiq*, p.327; al Hattab, *Mawahib al Jalil*, p. 18.

### 2.2.2. The *waqf* of movable (*manqul*) property

The Malikis, Shafi'is and Hanbalis allow the *waqf* of movable objects like clothes, horses, weapons, books, upholstery, etc.<sup>54</sup> The evidence for this is the tradition of the Prophet who said: “*Anybody who, faithfully, retains his horse for the sake of Allah will be weighed as good deeds.*” The Prophet also said: “*As for Khalid, he has retained his armour and war equipment in for the sake of Allah*”.<sup>55</sup> Based on this tradition they use the method of analogy to make other movables a valid subject of *waqf*. Since armour and war equipment are both movables they decree that other movables can become a valid subject of *waqf*. According to them the tradition does not mean to confine the valid subject to armour and war equipment only. It can be applied to other kinds of movable.<sup>56</sup>

The Hanafi school, in principle, does not recognize the validity of the *waqf* of movables.<sup>57</sup> They hold that the subject of *waqf* must possess the quality of perpetuity (*ta'bid*) and this quality does not exist in movable things. However, according to the most accepted view in the school, there are three exceptions to this rule: firstly, if the

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<sup>54</sup> Al Mawwaq, *al Taj wa al Iklil*, vol. 6, p. 21; al Sharbini, *Mughni al Muhtaj*, vol. 2, p. 377; al-Bahuti, *Kashaf al Qina'*, vol. 4, p. 243.

<sup>55</sup> Cited in al Sharbini, *Mughni al Muhtaj*, vol. 2, p. 377; cited in al Bahuti, *ibid.*

<sup>56</sup> Al Bahuti, *ibid.*

<sup>57</sup> Ibn al Hamam, *ibid.*, pp. 199-200;



movables are adjunct (*tabi<sup>ʿ</sup>an*) to the immovable property, as when someone has dedicated his land for *waqf*, in which case the movables that may be an accessory to the land are valid as a subject of the *waqf*, like cattle, slaves etc. Secondly, there is a specific tradition (*athar*) regarding movables that had been made *waqf*, like the *waqf* of weapons and animals for battle. Such movables are reported to have been made *waqf* by Khalid Ibn al Walid (d.642) and other companions of the Prophet confirmed it. Thirdly, that is, as promoted by al Shaybani,<sup>58</sup> such things have been made *waqf* on account of the existence of custom (*ta<sup>ʿ</sup>amul*) at that time like the *waqf* of the Quran, religious books, hatchets and funeral equipment.<sup>59</sup> Only in these three cases can movables be made *waqf* and these have been accepted as the doctrine of the school by the Hanafis jurists.<sup>60</sup> It appears here that the Hanafis confine the *waqf* of movables items to the above categories and they do not use the method of analogy to allow other movables to be made *waqf* as the majority do. In this aspect the majority are very flexible since the subject of *waqf* can be in all kind of movables. This is as a consequent effect of using analogy (*qiyas*) by these schools. As for the Hanafi school which rejects the application of analogy in this instance, the valid subject of *waqf* is very limited. They, however, depend on custom (*ʿurf*) to see whether a movable property is valid or not. If there is custom in making such property a *waqf*, then the *waqf* is valid. If not then the *waqf* is invalid. It is hard to discern the

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<sup>58</sup> Cited in al ʿArabulsi, *al Is<sup>ʿ</sup>af*, p. 28; cited in al Zayla<sup>ʿ</sup>i, *ibid.*, p. 327.

<sup>59</sup> Al Zayla<sup>ʿ</sup>i, *ibid.*, p. 327.

<sup>60</sup> Al Zayla<sup>ʿ</sup>i, *ibid.*, p. 327.

position of the Hanafis in this case since the Hanafis normally like analogy in their judgment on juristic matters.

Another category of movable items are things that diminish with use like gold, silver, eatables,<sup>61</sup> drinkables,<sup>62</sup> and perfumes<sup>63</sup> and candles. The jurists agree that to be a valid subject of *waqf* it must not be diminished by use.<sup>63</sup> However, according to the Shafi'i and Hanbali schools, gold and silver will be valid if they are in the form of ornaments. It is reported that Hafṣah, one of the wives of the Prophet, purchased ornaments for twenty thousand *dirhams* and then made them *waqf* for the women of al Khattab's family. *Zakah* was not taken from these ornaments. This is considered valid because ornaments can be used without diminishing their substance and therefore can be a valid subject of *waqf*.<sup>64</sup>

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<sup>61</sup> In the Maliki school the *waqf* of foods is permissible but this should be by way of lending (*salaf*) them to peoples and after that the same amount and kind of foods should be returned. See al Abi, *Jawahir al Iklil*, vol. 2, 205; al Hattab, *Mawahib al Jalil*, vol.6, p. 22.

<sup>62</sup> According to the Shafi'i school it is valid to make *waqf* of plant perfumes which differ from ready made perfumes. Plant perfumes are considered to have the quality of permanency though not for a long time. It is stated in *al Majmu'*: "Harvested perfumes (*mashmum*) are not valid to be made *waqf* but it is valid for plant ones because its perfume scent lasts for some time. This is what has been said by al Nawawi and others. In this respect al Nawawi cites that Ibn al Salah (d.?) and al- Khawarizmi (d.?) said it is valid to make *waqf* of perfumes like raihan (aromatic plant), *'anbar* (ambergris) and *misk* (musk), but for liquid perfume it is not valid because it diminishes with use". Cited in al Nawawi, *al Majmu'*, vol. 16, p. 247.

<sup>63</sup> Ibn Juzayy, *al Qawanin al Fiqhiyya*, n.p., n.d., p. 317; al Sharbini, *Mughni al Muhtaj*, vol. 2, p. 377; al Bahuti, *Khshaf al Qina'*, vol. 4, p. 242.

<sup>64</sup> Al Nawawi, *al Majmu'*, vol. 16, p. 247; Ibn Qudama, *al Mughni*, vol. 6, p. 233-234.

### 2.2.3. The Cash *waqf*

Another category that deserves our attention, and in fact is a controversial one, is the *waqf* of money. Money is like foods and perfumes in that it will diminish with use. Therefore we observe that, in principle, the view of the jurists regarding the *waqf* of money is that it is invalid.<sup>65</sup> There is no difficulty in understanding this, because no benefit can be derived from money without using it. Hence it diminishes by use. However in the Hanafī school there is an opinion that is attributed to Imam Zufar ibn al Huthayl (d.774), the student and companion of Abu Hanifa, which allows the *waqf* of money by way of *mudharaba*.<sup>66</sup> Here is what we find in *Radd al Mukhtar*:

It is reported from al Ansari, one of the students of Zufar, regarding those who make a *waqf* of *dirhams*, or what is measured and weighed, and whether it is permissible for these things to be made *waqf*? That he said: Yes, this would be done. He was asked how? He said: The dirham is invested in *mudharaba* and then the profits are given as alms to the cause for which the *waqf* was established. The measured and weighed things are sold and their value is invested in *mudharaba*.<sup>67</sup>

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<sup>65</sup> Al Bahuti, *Kashaf al Qina'*, vol. 4, p. 244; Ibn Qudama, *ibid.*, p. 235.

<sup>66</sup> Al Tarabulsi, *al Is'af*, p. 26; See also Jon E. Mandaville, "Usurious Piety : The Cash *Waqf* Controversy in the Ottomon Empire", *IJMES*, 10 (1979), p. 294; see also Qadri, *Islamic Jurisprudence*, p.459. *Mudharaba* is a form of business investment through partnership. By means of this mechanism a person with a capital invest in a business venture. He is the 'sleeping partner', and is not otherwise active in the venture. From the proceeds of this business he takes his share of profit according to the ratio fixed at the time of the formation of the partnership. See Muhammad 'Uthman Shabir, *al Mu'amalat al Maliyya*, Damascus: Dar Al Fikr, 1997, p. 300.

But this view is considered against the principle of the Hanafi school itself which only allows the *waqf* of movables in the three cases mentioned above. The *waqf* of money does not come under any of these three cases. However, those who support the view of Zufar argue that the *waqf* of money is another subcategory of movables which became a customary practice (*ta'amul*) at that time even though it was not recognized at the time of al Shaybani. Hence it is in conformity with the accepted principle of *ta'amul* established by al Shaybani.<sup>68</sup> So, the arguments they have for validating the *waqf* of money are, firstly, by way of *mudharaba*, and secondly, customary practice.

In the Maliki school also we find some of their jurists decide that the *waqf* of money is permissible that is, when it is by way of granting an interest-free loan (*salaf*) to needy people and after which the same amount will be taken back. This

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<sup>67</sup> Ibn 'Abidin, *Radd al Mukhtar*, vol. 6, p. 555; Ibn 'Abidin says, analogous to this it is valid to make *waqf* of wheat on the condition that they must be lent to the poor who have no seed with them, so they may cultivate for themselves and then the same quantity of the wheat will be taken back from them after the crops are ripen. After that the wheat will be given to the others, and so on in this way perpetually. See Ibn 'Abidin, *ibid.*, p. 556.

<sup>68</sup> Cited in Ibn 'Abidin, *Radd al Mukhtar*, vol. 6, pp. 555-556; See also John E. Mandaville, "Usurious Piety", *International of Middle Eastern Studies*, 10 (1979), p. 299; see also Colin Imber, *Ebu's-su'ud : The Islamic Legal Tradition*, Edinburgh: Edinburgh University Press, 1997, p. 143; see also Muhammad al Arna'ut, *Dawr al Waqf fi al Mujtama'at al Islamiyya*, Damascus: Dar al Fikr, 2000, p. 17.

view is said to be originally accredited to Imam Malik in *al Mudawwana*<sup>69</sup> where he says:

If anyone makes *waqf* of a hundred *dinars* of his to a man to invest in business for a certain period of time, in which he will pay for any loss, such a *waqf* is just like an interest-free loan.<sup>70</sup>

However, we do not find any Maliki jurists allowing the *waqf* of money directly without going via this way.

Here we find that neither the Hanafis nor the Malikis recognize the *waqf* of money because it goes against the principle of the law of *waqf* which requires the subject of the *waqf* to be permanent. However, to make it valid they resort to the use of *hiyal* (stratagems / means to accomplish an end). The Hanafis divert the money into *mudaraba*<sup>71</sup> whereas the Malikis use the idea of an interest-free loan in order to make the *waqf* valid. By these *hiyal* (stratagems) they consider the money to have a quality of permanency or of not diminishing because the profit can be used while preserving the capital. If we were to choose between these two methods, we find that

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<sup>69</sup> Al Mawwaq, *al Taj wa al Iklil*, vol. 6, p. 21; al Abi, *Jawahir al Iklil*, vol. 2, p. 205.

<sup>70</sup> Al Imam Malik, *al Mudawwana al Kubra*, vol. 4, p. 452.

<sup>71</sup> In modern days the *waqf* of money as established by Zufar has become a basis for the Hanafis to validate the *waqf* of government securities, stocks and bonds. They use the doctrine of customary practice under the Hanafi school to allow the *waqf* of such. For this they have the authority of Muhammad Bakhit al Muti'i (d.1935) the Hanafi jurists of the University Mosque of al Azhar, and the Mufti of Alexandria who held that when a practice has arisen as to making *waqf* of these securities and shares their *waqf* is valid. See A. al Ma'mun Suhrawardy, "The *Waqf* of Moveables", *Journal of the Asiatic Society of Bengal*, vol. 7, 1911, p. 373. See also Qadri, *Islamic Jurisprudence*, p.459; Ameer Ali, *Mohammedan Law*, 255.

the way of the Malikis is nearer to the original concept of *waqf* which requires the quality of permanency. This is because in an interest free loan the one who loans the money will be responsible for any loss for which he must pay back the money to the owner. So, in this case the money can be said to have a quality of permanency because in any situation the money will come back to the owner. The way of the Hanafis, however, cannot be said to have the quality of permanency. This is because in the *mudaraba* law any loss sustained in the venture must be borne entirely by the 'sleeping partner' who is the owner of the money. So, in *mudaraba*, there is no guarantee that the money is given back to the original owner, and such being the case we cannot say that it has the quality of the permanency. The money is at risk of loss.

In this matter we do not find any view from the Shafi'is and Hanbalis regarding the using of such *hiyal*. It goes directly counter to their principle that the subject of *waqf* requires the quality of permanency. These two schools can tolerate neither a *waqf* in the form of *mudaraba* nor an interest free loan because in both ways the original money has gone.

### **2.2.2 Jointly owned property (*musha* ʿ)**

Another category of the subject of *waqf* is jointly owned property, which can be either immovable or movable. There are two kinds of jointly owned property that

have been discussed by the jurists, that is, property which is divisible in nature and property which is indivisible in nature. Property which is divisible in nature includes land, buildings, etc., while property which is indivisible in nature includes things like cars, small houses, books, etc. In this matter we find that the jurists disagree regarding the *waqf* of such jointly owned property and this is due to their principle of the necessity of the *nazir*'s taking possession (*qabd*) when a *waqf* is made.

In the Hanafi school we find al Shaybani holding that it is invalid to make a *waqf* of jointly owned property which is divisible in nature. This is because, according to him, since the property is divisible, it must be divided before it is made *waqf* in order to make it possible to take possession of it. But if all the joint owners make the property a *waqf* at the same time and deliver it to the same *nazir*, the *waqf* is valid because all their shares in the property become the subject of *waqf* and taking possession is possible.<sup>72</sup> However, in cases where the *waqf* is of property which is indivisible in nature, this condition can be ignored because if the property is divided no usufruct can be derived from it. In this case the delivery of possession can take place without a specific division. Hence, according to al Shaybani, *waqf* of this kind of jointly owned property is valid.<sup>73</sup>

In contrast to al Shaybani, there is the view of some Malikis that jointly owned property which is divisible can be made *waqf* because the property is not

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<sup>72</sup> Cited in al Sarakhsi, *al Mabsut*, vol. 11, p. 38.

<sup>73</sup> Cited in Ibn al Humam, *Sharh Fath al Qadhir*, vol. 6, p. 196.



damaged by division and consequently taking possession can take place. Indivisible property which is jointly owned, however, cannot be made *waqf* because it cannot be subject to taking possession, which is a condition for completing a *waqf*.<sup>74</sup>

The Shafi'is, Hanbalis and Abu Yusuf, however, do not differentiate between the divisible and the indivisible in jointly owned property and hold that it is valid to make *waqf* of both because, according to them, taking possession is not a condition for completing a *waqf*.<sup>75</sup> They also base their view on the tradition of 'Umar who made a *waqf* of his portion in the acquired land of Khaybar. According to them it was a kind of jointly owned property and the Prophet gave his approval of it being made a *waqf*.<sup>76</sup> We find here that they make no differentiation between divisible and indivisible property, though the tradition clearly shows that the property that had been made *waqf* by 'Umar was divisible property, i.e. land. The cause of disagreement here goes back to their principle of taking possession. For those who hold that taking possession is necessary, the *waqf* of jointly owned property is invalid, while for those who hold that taking possession is not a requirement, the *waqf* is valid. In the Hanafi school the view of Abu Yusuf, which is in line with the Shafi'is and Hanbalis is the most preferred one by the latest Hanafi jurists.<sup>77</sup>

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<sup>74</sup> Al Hattab, *Mawahib al Jalil*, vol. 6, p. 18-19; see also Wahba al Zuhayli, *al Fiqh al Islami*, vol. 8, p. 164.

<sup>75</sup> Al Zayla'i, *Tabyin al Haqaiq*, p. 326; al Ramli, *Nihaya al Muhtaj*, p. 362; al Sharbini, *Mughni al Muhtaj*, p. 377; Ibn Qudama, *al Mughni*, vol. 6, p. 238.

<sup>76</sup> Al Kasani, *Badai' al Sanai'*, vol. 8, p. 3913; Ibn Qudama, *ibid.*; al Sharbini, *ibid.*;

<sup>77</sup> Nizam, *al Fatawa al Hindiyya*, vol. 2, p. 365.



Whatever the opinions regarding the *waqf* of jointly owned property, the majority of jurists agree in principle that jointly owned property cannot be made a *waqf* if it is to be a mosque or a graveyard because in being jointly owned it cannot be made over fully to God. This is due to that the status of the land itself is not clear.<sup>78</sup> Al Zaylaʿi from the Ḥanafī school reports that consensus has been achieved on the invalidity of this.<sup>79</sup> However this report of consensus is questionable since we find that the Shafiʿis and Hanbalis hold that a *waqf* made to establish a mosque is valid in the first place but it must be divided immediately. But before the property that has been made *waqf* is divided, the whole property must be treated as a mosque and all of the rules regarding a mosque should apply to the property. For example, as stated by al Ramli (d.1595), women who are menstruating cannot have access to it, as well as those who are impure (*junub*) until the property is divided. When the property has been divided, the portion which has been identified as the mosque will be permanently treated as a mosque, whereas the other portion will be given back to the owner as private property.<sup>80</sup>

### 2.3 The object of *waqf* or the beneficiaries (*al mawquf ʿalayh*)

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<sup>78</sup> Al Sarakhsi, *al Mabsut*, vol. 11, p. 37; al Zaylaʿi, *Tabyin al Haqaiq*, vol. 3, p. 326 ;

<sup>79</sup> Al Zaylaʿi, *ibid.*

<sup>80</sup> Al Ramli, *Nihaya al Muhtaj*, vol. 5, p. 362; al Sharbini, *Mughni al Muhtaj*, p. 278; Ibn Hajar, *Tuhfa al Muhtaj*, vol. 6, p. 239; al Bahuti, *Kashaf al Qinaʿ*, vol. 4, p. 243-244.

There are two kinds of beneficiaries: the first are specified (*mu'ayyan*) beneficiaries, and the second are unspecified (*ghayr al mu'ayyan aw al jiha*) beneficiaries. Specified beneficiaries are individuals and can be in the form of one beneficiary or more. Unspecified beneficiaries are classes of people like the poor, scholars (*ulama*), and soldiers. It can also be in the form of public use like mosques, schools, etc.

### 2.3.1 Conditions of the beneficiaries

Before we go into detail about the beneficiaries of *waqf* it is important to note in general the conditions of the beneficiaries. From the discussion of the jurists we find that there are three general conditions for a valid object of *waqf*. These are:

1. The majority of the jurists agree that the specified beneficiaries must be legally able to own something (*ahliyyat al tamalluk*).<sup>81</sup> Therefore, a *waqf* in favour of a foetus, dead person or animal is invalid because they do not have that qualification. It is also invalid to make *waqf* in favour of something does not exist such as a son at the time when the *waqif* has none. Another example of an invalid *waqf* is when a *waqf* is made *waqf* in favour of a slave because the slave has no right to own

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<sup>81</sup> Al Ramli, *ibid.*, p. 364; al Bahuti, *ibid.*, p. 250; Ibn Dhuban, *Manar al Sabil*, vol. 2, p. 708.

property.<sup>82</sup> Based on this condition *zimmis* (the protected non-muslims), like Muslims, are valid beneficiaries because *zimmis* qualify to enjoy the right of ownership. This is irrespective of whether the *waqf* is a Muslim or non-Muslim.<sup>83</sup> However, according to the Malikis, this condition must also depend on the subject of the *waqf*. If the subject of the *waqf* is the Qur'an, it cannot be made *waqf* in favour of a non-Muslim because, according to the Malikis, non-Muslims do not have the right to own the Qur'an.<sup>84</sup> So, though the object is valid, it must be also in conformity with the other principles of the law. We see this as a matter of agreement in all the schools.

A *waqf* in favour of a mosque or school is also included in this condition though in practice a mosque or school is unable to own property. However, legally (*hukman*) they are considered as an entity which is capable of owning property.<sup>85</sup>

2. The *waqf* must be considered to have a religious purpose (*qurba*). This is usually manifested in beneficiaries like the poor, mosques, schools, scholars, students etc. Therefore it is invalid to make a *waqf* to establish a house of worship

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<sup>82</sup> Al Ramli, *ibid.*, p. 365; al Bahuti, *ibid.*, p. 250; Ibn Dhuban, *ibid.* The Hanbalis, however, allow a *waqf* in favour of fetus if the *waqf* is also made in favour of a woman who carries that fetus because the fetus is an adjunct (*tab'an*) to the woman. See Ibn Dhuban, *ibid.*

<sup>83</sup> Ibn Hajar, *ibid.*, p. 242; al Abi, *Jawahir al Iklil*, vol. 2, p. 206; al Bahuti, *ibid.*, p. 249.

<sup>84</sup> Al Abi, *ibid.*, p. 205.

<sup>85</sup> Al Dardir, *al Sharh al Kabir*, in the margin of al Dusuqi, *Hashiya al Dusuqi*, vol. 4, p. 77.

for non-Muslims, because this is considered disobedience to Allah.<sup>86</sup> According to the Shafi'i school it is valid if it is used as a shelter for those in need and not for the use of worship.<sup>87</sup> Similarly if a *waqf* is made in favour of the *Tawra* and the *Injil*, it is considered invalid because these books have been abrogated<sup>88</sup> and therefore they have no element of *qurba*. Another example is to make a *waqf* in favour of sons to the exclusion of daughters, which is also invalid because this was a practice in the *Jahiliyya* (pre-Islamic times).<sup>89</sup>

The condition of *qurba*, however, is still subject to difference of opinion between the jurists. The Hanbalis and the Hanafis are strict in this matter for they exclude a *waqf* in favour of rich people, since they consider this not to be a *qurba*, and therefore not to be valid.<sup>90</sup> However, the Shafi'is and the Malikis allow such a *waqf* because they hold that it is not necessary that the aspect of *qurba* be apparent in the eyes of the people. As long as a *waqf* is not for the purpose of disobedience (*ma'siyya*) to Allah it is valid.<sup>91</sup> Hence, the jurists agree that the purpose of *waqf*

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<sup>86</sup> Al Ramli, *Nihaya al Muhtaj*, vol. 5, p. 368; al Bahuti, *ibid.*, p. 246; al Hattab, *Mawahib al-Jalil*, vol. 6, p. 23; Nizam, *al Fatawa al Hindiyya*, vol. 2, p. 353.

<sup>87</sup> Al Ramli, *ibid.*, p. 369.

<sup>88</sup> Ibn Qudama, *al Mughni*, vol. 6, p. 240; Nizam, *al Fatawa al Hindiyya*, vol. 2, p. 353..

<sup>89</sup> Al Abi, *Jawahir al iklil*, vol. 2, p. 206; al Imam Malik, *al Mudawwana*, vol. 6, p. 106.

<sup>90</sup> Ibn 'Abidin, *Radd al Mukhtar*, vol. 6, p. 519; al Bahuti, *Kashaf al Qina'*, vol. 4, p. 247.

<sup>91</sup> Al Sharbini, *Mughni al Muhtaj*, vol. 2, p. 380-381; see also Anderson, "The Religious Element in *Waqf* Endowments", *Journal of the Royal Central Asiatic Society*, 3 (1951), p. 292.

must be *qurba*, but they disagree regarding the types of beneficiaries that can be classified to have the element of *qurba*.

3. The law also requires that a *waqf* should be destined for ultimate beneficiaries who will, humanly speaking, not die out (*ghayr munqati<sup>c</sup>*) such as the poor, scholars, those reciting the Quran, etc. This is the opinion of the majority of the jurists.<sup>92</sup> Ultimate beneficiaries mean the last beneficiaries who will benefit from the *waqf* after the extinction of the prior beneficiaries. This is in a situation when a *waqf* is made for the benefit of those who will die out, as, for instance, if a man declares, “I make this land a *waqf* for the benefit of my descendants and their successors and after that to the poor”. Here it is considered that the *waqif*'s descendants will die out and therefore the *waqif* has named the poor as the ultimate beneficiaries who will not die out. Hence after all the descendants have died out the *waqf* will revert to the poor as the ultimate beneficiaries.

For a *waqf* that is made for the benefit of those who will not die out like the poor, the jurists unanimously agree its validity and this *waqf* does not need to have any ultimate beneficiaries.<sup>93</sup> However, the jurists disagree regarding the validity of a *waqf* that is made for the benefit of those who will die out but is not destined for any ultimate beneficiaries (this is called *waqf munqati<sup>c</sup> al akhir*). According to the

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<sup>92</sup> Al Nawawi, *al Majmu<sup>c</sup>*, vol. 16, p. 263; Ibn Qudama, *al Mughni*, vol. 6, p. 214; Hamilton, *The Hedaya*, p. 234.

<sup>93</sup> Al Zayla<sup>c</sup>i, *Tabyin al Haqaiq*, vol. 3, p. 327; al Ramli, *Nihaya al Muhtaj*, vol. 5, p. 368; al-Bahuti, *al Raud al Murbi<sup>c</sup>*, Riyadh: Maktaba al Riyad al Haditha, vol. 2, p. 460-461.

majority of the jurists such a *waqf* is valid, but after all the beneficiaries have died out they disagree whether the *waqf* immediately reverts to the *waqif*'s nearest relatives, or to the poor or to the *bayt al mal* or to the *waqif*'s successor.<sup>94</sup> Regarding this we find the view of Shafi'i, one reported view of Ahmad ibn Hanbal (d.855), and that of Ibn Qudama (d.1223) is strong when they hold that after all the beneficiaries have died out the *waqf* reverts to the *waqif*'s nearest relatives. If the *waqif* does not have relatives or they have died out, then the *waqf* reverts to the needy, so that the reward last forever, which is the original purpose of the *waqf*. The priority is given to the *waqif*'s nearest relatives in the first place because the relatives are those who deserve the *waqf* most, as understood from the tradition of the Prophet who said: "Sadaqa given to needy people is merely a *sadaqa* but if it given to relatives it becomes *sadaqa* and keeping up family ties".<sup>95</sup> It is apparent that, though a *waqf* that is not destined for ultimate beneficiaries is valid, the jurists still maintain that the *waqf* must continue, and according to strongest view, it is for the benefit of relatives, so as to prolong the reward to the *waqif*. This is to conform with the requirement of the perpetuity (*ta'bid*) of *waqf*.<sup>96</sup>

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<sup>94</sup> Al Shafi'i's view and one reported view from Ahmad ibn Hanbal is that the *waqf* reverts to the *waqif*'s nearest relatives. The second reported view from Ahmad ibn Hanbal is that the *waqf* reverts to the poor. The third reported view from Ahmad is that the *waqf* reverts to the *bayt al mal*, and Abu Yusuf holds that the *waqf* reverts to the *waqif*'s successor. See Ibn Qudama, *al Mughni*, vol. 6, p. 214-216.

<sup>95</sup> Cited in Ibn Qudama, *al Mughni*, vol. 6, p. 217

<sup>96</sup> Ibn Qudama, *al Mughni*, vol. 6, p. 217.

Contrary to this is the view of al Shaybani, which is the accepted view in the Hanafi school, that a *waqf* which is not destined for ultimate beneficiaries is invalid because it is considered against the rules of perpetuity.<sup>97</sup> The point of disagreement between this view and the majority is the application of the rules of perpetuity. Since perpetuity is a requirement for a valid *waqf*, the Hanafi school does not validate a *waqf* that is not destined for ultimate beneficiaries. However, for the majority the *waqf* is valid but after the beneficiaries specified by the *waqif* have died out the *waqf* must revert to those who are considered as ultimate beneficiaries. In the Hanafi school this view is attributed to Abu Yusuf.<sup>98</sup>

Apart from the above, the jurists also discuss the case of a *waqf* in which the *waqif* names in the line of the beneficiaries those who also do not qualify as valid beneficiaries, such as those who do not possess the quality of *qurba*, but the *wāqif* destines the *waqf* to valid ultimate beneficiaries. An example would be if he makes *waqf* for the benefit of his unborn child and after that to beneficiaries who will not die out, such as the poor (*munqatiʿ ibtidaʿ*). Those who consider such a *waqf* valid maintain that the *waqf* must proceed immediately to the ultimate beneficiaries.<sup>99</sup> This is the view of the Hanbalis and the Hanafis.<sup>100</sup>

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<sup>97</sup> Ibn Qudama, *ibid.*, p. 215.

<sup>98</sup> Cited in al Zaylaʿi, *Tabyin al Haqaiq*, vol. 3, p. 326.

<sup>99</sup> Ibn Qudama, *ibid.*; al Zuhayli, *al Fiqh al Islami*, vol. 8, p. 213.

<sup>100</sup> Al Bahuti, *Kashaf al Qinaʿ*, vol. 4, p. 252; Ibn ʿAbidin, *Radd al Mukhtar*, vol. 6, p. 645. The Shafiʿi consider such a *waqf* invalid because the first beneficiary is legally incapable of owning

Similarly if a *waqif* includes in the middle of the line of beneficiaries someone or something that is not a valid beneficiary (*munqati' al wasat*) such as if he makes a *waqf* for the benefit of a descendant, and then after that for the establishment of a temple, and then after that for the poor, this *waqf* is considered valid and after the first line of beneficiaries die out the *waqf* reverts immediately to the ultimate beneficiaries. The middle beneficiaries are ignored because they are not valid beneficiaries.<sup>101</sup>

The last type is when a *waqf* is made for the benefit of the one who is not a valid beneficiary at the beginning and the end of the line of beneficiaries (*munqati' al- awwal wa al akhir*). For instance, someone makes a *waqf* for the benefit of an apostate, and after that for the poor, and after that for the establishment of a temple. This is also the case like the *waqf* of *munqati' al akhir* mentioned before in which it is valid according to the majority of the jurists.<sup>102</sup>

### **2.3.2. *Waqf* in favour of the *waqif* himself**

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the property. The *waqf* does not revert to the ultimate beneficiaries because the ultimate beneficiaries depend on the validity of the prior beneficiaries. See al Ramli, *Nihaya al Muhtaj*, vol. 6, p. 374.

<sup>101</sup> Al Ramli, *ibid.*;

<sup>102</sup> Al Zuhayli, *ibid.*



The jurists disagree regarding the validity of a *waqf* made for the benefit of the *waqif* himself. According to Abu Yusuf and one of the reported views from the Hanbali school such a *waqf* is valid.<sup>103</sup> They base their opinion on the tradition of ʿUmar in which he stipulated in his *waqf* that, “There is no sin for one who administers it if he eats something from it in a reasonable manner, or if he feeds his friends without hoarding (for himself) out of it”.<sup>104</sup> It is understood that ʿUmar himself became the administrator of his *waqf* and this means that he himself enjoyed the usufruct of his *waqf* in accordance with his stipulation.<sup>105</sup> There is also another tradition in which the Prophet said: “The expenditure of someone for himself is considered a *sadaqa*”.<sup>106</sup> In the Hanafi and Hanbali schools, as a practical consideration that the *waqf* should be facilitated and encouraged, this opinion has been accepted as *fatwa*.<sup>107</sup>

In contrast, the Shafiʿis, Malikis, al Shaybani and one of the reported views from the Hanbali school hold that it is invalid to make *waqf* in favour of the *waqif* himself or to stipulate that the usufruct is given to him.<sup>108</sup> They argue that it is

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<sup>103</sup> Al Zaylaʿi, *Tabyin al Haqāiq*, vol. 3, p. 328-329; Nizam, *al Fatawa al Hindiyya*, vol. 2, p. 371; al Bahuti, *ibid.*, p. 247; Ibn Dhuban, *Manar al Sabil*, vol. 2, p. 707.

<sup>104</sup> See Chapter one, page 20.

<sup>105</sup> Ibn Qudama, *al Mughni*, vol. 6, p. 194.

<sup>106</sup> Cited in al Zaylaʿi, *Tabyin al Haqāiq*, vol. 3, p. 329.

<sup>107</sup> Al ʿArabulsi, *al Isʿaf*, p. 98; al Bahuti, *Kashaf al Qinaʿ*, vol. 4, p. 247.

<sup>108</sup> Al Ramli, *ibid.*, p. 327; al Sharbini, *Mughni al Muhtaj*, vol. 2, p. 380; al Mawwaq, *al Taj wa al Iklil*, vol. 6, p. 25; al Abi, *Jawahir al Iklil*, vol. 2, p. 206; al Zaylaʿi, *ibid.*, p. 328-329; Nizam,

nonsense to confer the right of ownership on oneself because one already possesses that right.<sup>109</sup> It is therefore like selling one's belongings to oneself.<sup>110</sup> Furthermore, as al Shaybani said, *waqf* is an act of seeking nearness to Allah and it must be by way of disposing property to another. If the *waqif* stipulates that the usufruct of the *waqf* is for him, it will be not considered as an act of seeking nearness to Allah<sup>111</sup> and therefore the *waqf* is invalid.

However, according to the Shafi'i school, if the *waqf* is made in favour of scholars or needy people and the *waqif* himself has that quality, he can benefit from his *waqf* because he does not specifically mention himself in the *waqf*. Similarly if he makes a *waqf* in favour of his father's descendants and he mentions certain characteristics of those who may benefit from that *waqf*, he can benefit from it too, if he possesses those characteristics.<sup>112</sup>

If a *waqf* is in favour of the public, such as a mosque, graveyard or well, there is no dispute among the jurists that the *waqif* can benefit from the *waqf* because he is among them. The tradition of 'Uthmān, who made *waqf* of the well of *Ruma*, is very clear on this when he said: "My pail at this well is like all the pails of all the

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*al-Fatawa al-Hindiyya*, vol. 2, p. 371; al Bahuti, *ibid.*; Ibn Dhuban, *Manar al Sabil*, vol. 2, p. 707.

<sup>109</sup> Al Ramli, *ibid.*, p. 327; al Sharbini, *ibid.*, p. 380; Sulayman ibn 'Umar, *Hashiya al Jamal*, vol. 3, p. 579.

<sup>110</sup> Al Bahuti, *Kashaf al Qina'*, vol. 4, p. 247; Ibn Dhuban, *Manar al Sabil*, vol.2, 707.

<sup>111</sup> Cited in al Zayla'i, *ibid.*; cited in Nizam, *al Fatawa al Hindiyya*, vol. 2, p. 371.

<sup>112</sup> Al Ramli, *ibid.*, p. 327; al Sharbini, *ibid.*, p. 380.

Muslims”.<sup>113</sup> It shows that ʿUthmān was entitled to benefit from the well that he made *waqf* in favour of the Muslims.

### 2.3.3 *Waqf* for the benefit of descendants

We have discussed in Chapter One the permissibility of a family *waqf* and its development in Islamic law. A family *waqf* is sometimes made for the benefit of the *waqif*'s family and sometimes for the benefit of someone else's family. The juridical decision about both is the same. However it should be a matter of question as to what degree kinship is taken into consideration in applying the benefit or the usufruct of a *waqf*. This has been discussed by the jurists and the discussion is focused on the lexical meaning of the terms used in a *waqf* declaration.

Family *waqf* is mostly made for the benefit of descendants. This is why the jurists focused heavily on discussing the term '*walad*' and '*awlad*' (child and children) that as used in *waqf* declarations. To whom these terms apply became a subject of wide discussion. The jurists agree that if a *waqf* is made for the benefit of a child or children by using the term '*walad*' or '*awlad*' the usufruct will be both for male and female children equally. Children that are born after the declaration are also

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<sup>113</sup> Cited in al Ramli, *ibid.*; al Sharbini, *ibid.*; Ibn Qudama, *al Mughni*, vol. 6, p. 193.

entitled to the benefit of the *waqf*.<sup>114</sup> According to the majority of jurists it also expands to whichever children of the sons and their descendants exist at the time of the declaration of *waqf*.<sup>115</sup> This is based on the verse in the Quran where Allah says: “Allah commands you as regards your children’s (inheritance): to the male, a portion equal to that of two females”.<sup>116</sup> In this verse the term ‘children’ is also applied to the children of sons. The children of daughters are excluded from the term ‘children’ as is also the case in matter of *wasiya* (bequest) because the verse, when using that term, is understood not to include them.<sup>117</sup> Hence the view of inclusion of children of sons and the exclusion of children of daughters in matters of *waqf* is based on the understanding of term ‘children’ in the Quran which is related to inheritance matters.

However the children of sons are only entitled to the usufruct of the *waqf* by sequence (*tartib*), that is, after all members of the first generation have died out.<sup>118</sup> If one of the children dies, his share passes to the remaining children of the same degree and not to his descendants. This pattern of transmission of entitlement from the first series of beneficiaries to the successive generation is different to the law of

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<sup>114</sup> Nizam, *al Fatawa al Hindiyya*, vol. 2, p. 371; Ibn Dhuban, *Manar al Sabil*, vol. 2, p. 712;

<sup>115</sup> Al Mawwaq, *al Taj wa al Iklil*, vol. 6, p. 44; Ibn Juzay, *al Qawanin al Fiqhiyya*, p. 317; al-Bahuti, *Kashaf al Qina<sup>c</sup>*, vol. 4, p. 278. Only the Shafi<sup>c</sup>i school does not consider the children of the sons as included in the *waqf* made for the children. See Ibn Hajar, *Tuhfa al Muhtaj*, vol. 6, p. 265.

<sup>116</sup> Al Nisa’ 4:11.

<sup>117</sup> Al Bahuti, *Kashaf al Qina<sup>c</sup>*, vol. 4, p. 278; al Mawwaq, *al Taj wa al Iklil*, vol. 6, p. 44; al-Tarabulsi, *al Is<sup>c</sup>af*, p. 100.

<sup>118</sup> Al Bahuti, *ibid.*,

inheritance in which, according to the law, the share of the deceased child passes to his children with certain portion.<sup>119</sup> It is apparent that though the application of the term ‘children (*awlad*)’ is derived from the Quranic law of inheritance, the jurists have formulated the system of transmission in a different way. In this aspect we find the Hanafi school differentiating between *waqf* that is made for the benefit of a child (‘*walad*’, singular) and for children (‘*awlad*’, plural). A *waqf* that is made for a child (singular) only applies to the first generation of his children, whereas a *waqf* that is made for the children (plural) will apply to his descendants, generation after generation, with the above mentioned rules of transmission.

A *waqf* that is made for the benefit of children is usually coupled with the children’s children such as when a *waqif* says “This land of mine is made *waqf* for the benefit of my children and their children”. In a declaration of this *waqf* one should take precautions regarding the phrase that is used for designating the entitlement of the usufruct. If he indicates that the usufruct is for his children *and* the children of his children (using the word ‘*wa*’ in Arabic), such phrasing is understood as signifying that the entitlement applies to his children and the children of his children simultaneously (*tashrik*). If a *waqif* does not want the second generation of his descendants to be entitled to the usufruct of a *waqf* simultaneously he should use some particle, word, or phrase which is conventionally understood as signifying that

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<sup>119</sup> Aharon Layish, “The Maliki Family *Waqf* According to Wills and *Waqfiyyat*” in *Bulletine of School of Oriental and African Studies*, 46 (1983), p. 13. It is different, however, if the beneficiaries are designated by name and not by the general term ‘children’. In this case the share of the deceased will pass to the next degree. See Aharon Layish, *ibid*.

entitlement does not pass from the first to the second generation of beneficiaries until all members of the first generation have died out. For instance, he can use the particle ‘then’ (*thumma*), as in the phrase “for my children *then* the children of my children”, or the phrase “one generation after the other (*al awwal fa al awwal, batnan ba’da batnin*)”.<sup>120</sup>

In many aspects of the family *waqf* system there is a close link with the law of inheritance. Apart from the *waqf mu’<sup>o</sup>qqab* of the Maliki school that has been discussed earlier there is the case, as developed also by the Maliki jurists, regarding the distribution of usufruct among the daughters in the absence of sons. In this case the daughter takes one-half of the usufruct as a Quranic heir, and two or more daughters take two-thirds.<sup>121</sup> However if a *waqf* is made for the benefit of sons only to the exclusion of daughters, the *waqf* is considered disliked (*makruh*) according to *al Mudawwana*, and according to ‘Abd al Raḥman ibn al Qasim (d.806) it is unlawful and must be cancelled if it is done.<sup>122</sup> It seems that this view is only found in the Maliki school, whereas the other schools set no bars on the exclusion of daughters from the entitlement of usufruct.

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<sup>120</sup> Al Mawwaq, *al Taj wa al Iklil*, vol. 6, p. 27; al Bahuti, *Kashaf al Qina’*, vol. 4, p. 279; Ibn Hajar, *Tuhfa al Muhtaj*, vol. 6, p. 262-263; see also David S. Power, “The Maliki Family endowment : legal norms and social practices”, *International Journal of Middle Eastern Studies*, 25 (1993), p. 376.

<sup>121</sup> Allah says in Qur’an : “If (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is a half”. Al Nisa’ 4:11.

<sup>122</sup> Cited in Aḥmad bin Muhammad al Dardir, *al Sharh al Saghir*, vol. 2, p. 304.

Another example is what we find in the Hanbali school that it is recommended (*mustahabb*) for the usufruct be distributed among the children, for the male a portion equal to two females, that is, in accordance with the law of inheritance. However it is disliked to give preference to sons or to discriminate against some of the children in the entitlement of the usufruct without any reasonable motive. But if it is done so for the reason that, for example, some of them are more in need of the usufruct of the *waqf* than others, or are more involved in studying, or are more religious, or are ill, then it is lawful to give preference of entitlement to them.<sup>123</sup>

Thus *waqf* made for the benefit of descendants has been developed by the jurists in a close connection with the law of inheritance. The most clear case is the terminological application of the term ‘child (*walad*)’ and ‘children (*awlad*)’ in the law of inheritance, which is used in the Quran, and has been applied to the law of *waqf* with some technical differences. This is justifiable when we learn that the discussion of the jurists on this matter mostly refers to the Arabic language. Hence, as regards terminology, the application of these terms in *waqf* declarations as discussed above must be seen as having legal effect only in the Arabic language. If the declaration of *waqf* is made in another language it must be in accordance with the customary practice of the application of the terms ‘child’ and ‘children’ in that language.

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<sup>123</sup> Al Bahuti, *Kashaf al Qina*<sup>c</sup>, vol. 4, p. 284-285.

#### 2.3.4 *Waqf* to establish a mosque

From the early times of Islam mosques have played an important role in Muslim society. They stand primarily as a place of worship where the Muslims perform their five daily prayers. Those who are concerned with the law will see that a mosque denotes not only a structural construction of wood or cement which accommodates the people who come to perform prayers, but it is also considered a consecrated one in which its premises and anything used to construct is treated as *waqf* property. In many cases a mosque is treated differently from other kinds of *waqf*.

The jurists agree that a mosque, once established, becomes irrevocable. This view is even shared by Abu Hanifa, who maintains from the beginning that *waqf* is revocable, but makes an exception in the case of the establishment of a mosque.<sup>124</sup> The jurists however differ regarding the modes of establishment of a mosque.

In the Hanafi school, influenced by the disputed principle of the requirement of delivery of possession (*taslim*), we find there are two lines of opinion regarding the mode of establishment of a mosque. Abu Hanifa and al Shaybani hold that

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<sup>124</sup> In clarification of his paradoxical view, Abu Hanifa says that for a *waqf* other than a mosque the term *waqf* in *waqafu* (I made *waqf*) that is used in the declaration does not give the meaning of relinquishing the ownership in the waqif's hand. Therefore it is revocable in nature. However it is different in the case of the establishment of a mosque where the term mosque in the declaration "I made mosque (*ja'altuhu masjidan*)" is a clear indication of the abolishment of ownership in his hand. See Ibn al Humam, *Fath al Qadhir*, vol. 6, p. 217.



declaration alone does not result in the establishment of a mosque. It is still required that delivery of possession to the *nazir* takes place. However, it is sufficient if a *waqif* gives permission for the people to perform prayer in the building and it will be complete when the prayer has been done congregationally. This prayer is regarded as tantamount to delivery of possession.<sup>125</sup> It is also effective when a person performs his prayer coupled with making *azan* (calling for prayer) and *iqama* (calling to perform prayer), because it is considered the same as doing the prayer congregationally.<sup>126</sup> According to Abu Yusuf, however, a declaration alone is sufficient even though prayers may not have been performed in it.<sup>127</sup>

The Malikis and the Hanbalis hold that to establish a mosque it is sufficient for a *waqif* to give general permission to performing the prayer in the building. That act of prayer be done is not necessary. This permission replaces a clear declaration.<sup>128</sup>

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<sup>125</sup> In the Hanafi school there are three remarkable distinctive features of a *waqf* for establishing a mosque which are contrary to the principle of *waqf* in the school. These are: the delivery of possession to the *nazir* which is not necessary according to al Shaybani, the irrevocability of a mosque according to Abu Hanifa, and the invalidity of a mosque established in the jointly ownership property according to Abu Yusuf. These three cases oppose the principles of the three mentioned jurists themselves. This makes a *waqf* for the establishment of a mosque different from other kind of *waqf*. See Ibn <sup>c</sup>Abidin, *Radd al Mukhtar*, vol. 6, p. 544.

<sup>126</sup> It is not necessary that a mosque be established by constructing a building. A person can also establish a mosque on his piece of land by giving permission for people to perform the prayer congregationally in it forever. If, however, he only gives permission for some time it will not become a mosque because it is against the principle of permanency. See Ameer Ali, *Mahommedan Law*, p. 396.

<sup>127</sup> Ibn al Humam, *ibid.*, p. 216.

<sup>128</sup> Al Hattab, *Mawahib al Jalil*, vol. 6, p. 27; Ibn Dhuban, *Manar al Sabil*, vol. 2, p. 704. For the Hanbalis another provision is added, that is, to make the permission enough to establish a

The Shafi'is on the other hand have no concern on this part, but hold that to establish a mosque a *waqif* must make a declaration that he makes his land as *waqf* to establish a mosque. Another way to establish a mosque is by allowing people to do *i'tikaf* in the intended place. This also will establish a mosque because *i'tikaf* is only valid in a mosque.<sup>129</sup> What matters most in the Shafi'i school, in order to constitute a mosque, is the indication which signifies the relinquishment of ownership from the *waqif*. For that one must use a strong indication that he wishes to establish a mosque, like his declaration or giving permission of *i'tikaf*. Merely constructing a structure bearing the shape of mosque or giving permission to perform the prayer will not release the ownership in the *waqif*'s hand and thereby does not establish a mosque.<sup>130</sup> It is different however, according to the Shafi'is, if the mosque is established on uncultivated land (*mawat*) in which case the requirement is only an intention (*niyya*) because, as asserted by Taqiy al Din al Subki (d.1355) such uncultivated land does not belong to the *waqif*, and therefore the *waqif* is not relinquishing his ownership. For this reason, intention alone is sufficient to establish a mosque on uncultivated land.<sup>131</sup>

Someone who intends to establish a mosque on his property must do it solely for the sake of Allah. Once it has been established no claim can be made upon the

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mosque, the building that is established must bear the shape of a mosque. Otherwise it does not constitute a *waqf* of a mosque and a declaration is necessary. See Ibn Dhuban, *ibid*.

<sup>129</sup> Al Ramli, *Nihaya al Muhtaj*, vol. 5, p. 372; al Nawawi, *al Majmu'*, vol. 16, p. 273.

<sup>130</sup> Al Shafi'i, *al Umm*, vol. 8, p. 148; al Ramli, *ibid.*, p. 370.

<sup>131</sup> Al Ramli, *ibid.*, p. 370; al Sharbini, *Mughni*, vol. 2, p. 382.

property since it becomes the property of Allah. In the Hanafi school this principle is applied to the extent that no mosque will be established if there is any private property attached to it on the upper level or the lower level of a mosque. Regarding this <sup>c</sup>Ali bin Abi Bakr al Marghinani (d.1196) says in his *al Hidayah*:

If a person establishes a mosque and makes the understorey a dwelling or vice versa, even with the door of the mosque towards the public road, and separates it from his ownership, he is nevertheless at liberty to sell it, or if he dies the mosque is an inheritance. This is because the mosque does not appertain solely to God for the individual's right is still subsisting.<sup>132</sup>

Being in this condition the mosque will be subject to the rules of the right of utilization (*haqq al sufla wa al 'ulya*) where the owner has rights on the mosque to facilitate his property that is attached to it. Ibn al Humam explains that if a mosque is established on the lower level, the owner of upper level will have the right to that of the lower and no refurbishment can be done except with his permission and vice versa. This opposes the purpose of the establishment of a mosque which must be solely for the sake of God. Allah says in the Qur'an: "And the mosques are for Allah (Alone)".<sup>133</sup> Bearing in mind that all the things belong to Allah this verse stresses that mosques come under the jurisdiction of Allah which means that the right of the human being in a mosque is abolished. If this is the case then a mosque cannot be

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<sup>132</sup> Al Marghinani, *al Hidayah*, printed with Ibn al Hamam, *Sharh Fath al Qadhir*, vol. 6, p. 217; Charles Hamilton (trans.), *The Hedaya*, p. 239.

<sup>133</sup> Al Jinn 72 : 18.

established while at the same time there is a private property attached to it.<sup>134</sup> The problem here is only with private property. If the attached property is made *waqf* for the benefit of the mosque there will be no restriction on the property being established as a mosque, for, the attached property does not belong to anybody.<sup>135</sup>

The above principle however may be ignored if there is a necessity to establish a mosque attached to private property whether on the upper or the lower level. It is learnt that when Abu Yusuf entered Baghdad and saw that the settlement was densely populated, he gave the decision that it was not a problem for a mosque to be attached to private property. It is also reported that al Shaybani gave the same decision when he entered al Rayy, for the same reason.<sup>136</sup> This view gives a wider space in the Hanafi school for the establishment of a mosque which is attached to private property especially in a big city with high density of population where there is little space provided for places of worship.

This kind of problem is not found in the other three schools, and in fact, the Shafi'is and the Malikis are silent on this matter. Only the Hanbalis state clearly that there is no restriction at all on establishing a mosque which is attached to private

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<sup>134</sup> Abu Hanifa allows a mosque that is established on the ground level while the upper level is a private property and not the vice versa. He reasons that the ground level possesses the quality of permanency which is a condition for a mosque while the upper level does not possess that quality. See Ibn al Humam, *ibid*, p. 218.

<sup>135</sup> Ibn al Hamam, *Fath al Qadhir*, vol. 6, p. 218.

<sup>136</sup> Ibn al Humam, *ibid*.

property whether on the upper or the lower level. They only have a general guideline that anything that is valid to be sold is valid to be made *waqf*.<sup>137</sup>

The case mentioned above is like the case where a person establishes a mosque on the centre of his residence. Contrary to the above decision the Hanafi school holds that the establishment is valid provided that the *waqif* gives permission to people to enter into it. It is not necessary that a *waqif* indicates that a pathway is set up to the mosque because it is implied in his permission.<sup>138</sup> This opinion is supported by the Hanbali school that the establishment of a mosque in the centre of one's residence is valid without indication of a pathway since it is the responsibility of the *waqif* to provide a mosque with a pathway.<sup>139</sup>

It is observed that in many aspects the mosque is treated differently from other types of *waqf*, to the extent that the *waqf* property beside a mosque can be converted to a mosque if there is necessity for that, such as if the mosque does not have enough space to accommodate the people. It is claimed that this was done to the Prophet's mosque in Medina at the time of the caliph 'Uthman. Even, more radically, if the property next to the mosque is private property the *qadi* can pay the

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<sup>137</sup> Ibn Qudama, *Mughni*, vol. 6, p. 196; al Bahuti, *Kashaf al Qina'*, vol. 4, p. 241.

<sup>138</sup> Ibn al Humam, *Fath al Qadhir*, vol. 6, p. 218.

<sup>139</sup> Ibn Qudama, *Mughni*, vol. 6, p. 196.

owner forcefully for the purpose of the enlargement of a mosque in that situation.<sup>140</sup>

This again proves the distinguished status of the mosque in Islamic law.

The last point that should be remembered here is regarding the prohibition of the establishment of a mosque on a graveyard. There is a clear prohibition from the Prophet regarding this. Ibn ʿAbbas reported that: “The Prophet cursed the ladies who visit graveyards and those who make graveyards into mosques and those who put lights on graveyards”. The Prophet also is reported to have said: “Don’t you make my graveyard as a mosque”. In another report the Prophet says: “O Allah, don’t make my grave as an idol worshipped after my death. Allah curses those who take the graves of their prophets as mosques”. With regard to this we find some Malikis make an exception in cases where the graveyard is not used anymore. Ibn Rushd (d.1126) says that when a graveyard cannot be used anymore then it is lawful to establish a mosque on it because both mosques and graveyards are the *waqf* for the benefit of the Muslims. Therefore there is no harm in having a mutual exchange between the two in that situation. ʿAbd al Malik Ibn Majishun (d.829) also says that when a mosque is established on that kind of graveyard it is excluded from the prohibition of the Prophet. He gives evidence that the Prophet established a mosque

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<sup>140</sup> Al Qarafi, *al Zakhira*, Beirut: Dar al Gharbi al Islami, n.d., vol. 6, p. 314; Ibn Qudama, *ibid.*, 218; Ibn al Humam, *Fath al Qadhir*, vol. 6, p. 218. In the Maliki school this can only be applied to a mosque where the Friday prayer is done. If the mosque is not for Friday prayer this rule cannot be applied because there is no necessity for that. See al Nafrawi, *al Fawakih al Dawani*, vol. 2, p. 230; al Mawwaq, *al Taj wa al Iklil*, vol. 6, p. 42.

on the graveyard of the *mushrikin*<sup>141</sup> after he had asked his companions to dig out the graveyard.<sup>142</sup>

#### 2.4. The declaration of a *waqf*

The fourth pillar of a *waqf* is the declaration of *waqf*. This section is important because it discusses the rules stipulating the ways in which a *waqf* can be created. If these rules are not followed, then no *waqf* will be created. Like the other methods for transfer of ownership such as *hiba*, sale and purchase, and *wasiyya* etc.,<sup>143</sup> a *waqf* also must be made by a declaration comprising an offer and acceptance of the offer. In this context it can be said to be included in the law of contract (*‘aqd*) which falls under the general injunction contained in the Qur’an: “*Fulfill your obligations*”.<sup>144</sup> In this section, it is not our intention to discuss the obligations of the parties to the contract; rather we shall examine the lexical aspect of the contract.

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<sup>141</sup> Ab Dawud, *Sunan Abi Daud*, vol. 1, p. 223.

<sup>142</sup> Ibn Rushd, *al Bayan wa al Tahsil*, Beirut: Dar al Gharbi al Islami, n.d. vol. 12, 234-235.

<sup>143</sup> In general, transactions between two parties can be divided into two categories: (1) *Inter vivos* transactions (*mu‘awada*) which are concluded by an offer and acceptance of the offer. This category comprises an exchange between the parties either of a sale, loan, etc. of property, or the rights of enjoyment only (*manfa‘a*) such as a lease, sharecropping (*muzara‘a*), etc. (2) *Mortis causa* transactions which are concluded by an offer from one party only. This category is a disposition by one party to another without any exchange. This is like a will, gift, guarantee (*dhaman*), *zakah*, *waqf*, etc. See al Qarafi, *al Furuq*, vol.1, part 2, p. 135; S.E. Rayner, *The Theory of Contract*, London: Graham & Trotman, 1991, p. 88.

<sup>144</sup> Al Maida 5:1 (*Awfu bi al ‘uqud*).

#### 2.4.1. An offer (*ijab*)

The wording used in an offer can be divided into two categories: direct (*sariha*) and indirect (*kinaya*). A direct offer uses words derived from *waqf*, *tasbil*, or *tahbis*. Hence it is valid to declare, “*Waqaftu* (I have made a *waqf*)”, or “*Sabbaltu* (I have made a gift in the way of Allah)”, or “*Habbastu* (I have tied up)”. It is also valid to declare, “My land has been made into a *waqf* (*ardhi mauqufa*)”, or “My land is tied up (*mahbusa*)”.<sup>145</sup> All of these words are recognized in Islamic law to mean a *waqf*, and it has become the custom to use them when creating a *waqf*.<sup>146</sup> Hence there is no doubt that they are correct terms to use in the declaration of a *waqf*. According to the Maliki school, which maintains that a temporary *waqf* is possible, the use of these words signifies perpetuity if there is no period of time mentioned in the declaration.<sup>147</sup>

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<sup>145</sup> Al Ramli, *Nihaya al Muhtaj*, vol. 5, p. 371; Ibn Qudama, *al Mughni*, vol. 6, p. 190; al Bahuti, *Kashaf al Qina*<sup>c</sup>, vol. 4, p. 241-242; al Dardir, *al Sharh al Saghir*, vol. 2, p. 299; al Kashnawi, *Ashal al Madarik*, vol. 3, p. 100.

<sup>146</sup> Ibn Qudama, *ibid.*; Al Bahuti, *ibid.* The words *tahbis* and *tasbil* appear in the Tradition “*Habbis aslaha wa sabbil thamarataha* (retain the thing itself and devote its fruits to a pious purpose)” as mentioned several times before. Al Mutawalli (d.?) says that all the reports of *waqf* that were made by the companions use these two words. Cited in Ibn Hajar, *Tuhfa al Muhtaj*, vol. 6, p. 250.

<sup>147</sup> Al Dusuqi, *Hashiya al Dusuqi*, vol. 4, p. 84; <sup>c</sup>Illish, *Sharh Minah al Jalil*, vol. 4, p. 56.



An indirect offer is made by using the words “*tasaddaqtu*” (I have made a *sadaqa*), “*harramt*” (I have consecrated), and “*abbadt*” (I have disposed of permanently).<sup>148</sup> Though these words signify *waqf*, one should note that they also have other meanings. The word “*sadaqa*” signifies *zakah* as well as recommended *sadaqa* (*sadaqat al tatawwaʿ*); “*tahrim*” is also used in *zihar*, and “*taʿbid*” can be used in any matter other than *waqf* to stipulate permanency. It is these shared meanings that lead the jurists to consider them to indicate an indirect offer in the declaration of a *waqf*.<sup>149</sup>

According to the Hanbali and Shafiʿi schools, when indirect wording is used in a declaration, a further confirmation is necessary to ensure that the *wāqif* really wishes to make a *waqf*. This may be done in three ways :

- (1) The declaration must include the abovementioned direct wording such as when the *waqif* says, “*Tasaddaqtu sadaqa mauqufa* (I have made a *sadaqa* with the effect of a *waqf*)”, or *sadaqa muhabbasa* (*sadaqa* that has been protected from any right of ownership), or *sadaqa musabbala* (*sadaqa* that has been given in the way of Allah). They can also accompany each other, such as when a *waqif* says, “*hazihi al ʿain muharrama muʿabbada* (this property has been dedicated in

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<sup>148</sup> Al Ramli, *Nihaya al Muhtaj*, vol. 5, p. 371-372; Ibn Hajar, *Tuhfa al Muhtaj*, vol. 6, p. 250; Ibn Qudama, *ibid.*; al Bahuti, *Kashaf al Qinaʿ*, vol. 4, p. 241-242.

<sup>149</sup> Ibn Qudama, *ibid.*, p. 191; al Bahuti, *ibid.*

perpetuity)”. In conclusion, it can be said that if indirect wording stands alone, it has no legal effect in the declaration of a *waqf*.

(2) The declaration must include the characteristics of a *waqf*, such as when the *waqif* says, “I have made a *sadaqa* that cannot be the subject of sale, gift or inheritance”, or he accompanies it with the provision of the appointment of a *nazir* in the statement “I have made a *sadaqa* and the office of *nazir* will be held by myself”. In this way the declaration is clear and therefore the use of indirect wording here has a legal effect.

(3) The *waqif* has the intention (*niyya*) of making a *waqf* even though he uses indirect wording.<sup>150</sup> In this third case, Ibn Qudama says that it is subject to an admission from the *waqif* that he means to make a *waqf* when he uses indirect wording in his declaration. If he says that he does not mean to make a *waqf*, his admission must be accepted for only he can confirm his intention.<sup>151</sup>

The Maliki school recognizes only the second condition. Moreover, there are two different views on the legal consequences of a declaration when it includes this condition. According to the first view, if the word ‘*tasaddaqtu*’ is used in conjunction with this condition such as indicating that the *sadaqa* cannot be sold or

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<sup>150</sup> Ibn Qudama, *ibid.*, p. 191; al Bahuti, *ibid.*; see also Ibn Dhuban, *Manar al Sabil*, vol. 2, p. 704; al Shirazi, *al Muhazzab*, vol. 16, p. 270; Ibn Hajar, *Tuhfa al Muhtaj*, vol. 6, p. 250.

<sup>151</sup> Ibn Qudama, *ibid.*

given away, or, if the *waqif* destines the endowment to ultimate beneficiaries who will not die out, then it signifies *waqf*. If it stands alone, it will not have the effect of a *waqf*, rather it will come under the ownership of the beneficiaries and they are at liberty to sell the property.<sup>152</sup> This is in line with the views of the Shafi'is and Hanbalis. The second view of the Maliki school is that if '*tasaddaqtu*' is used in conjunction with this condition it indicates the perpetuity of the *waqf*. Otherwise it gives no effect of perpetuity.<sup>153</sup>

According to the majority of jurists the declaration of a *waqf* is not confined to a clear statement. It can also be indicated by an action signifying a *waqif*'s intention to make that endowment. This is apparent in immovable property, for example, in the establishment of a mosque, graveyard or an irrigation system. In such cases it is sufficient for the *waqif* to give permission to the people to use the premises, or to make the *azan* (calling for prayer), or to post on the public notice board a notice indicating that he has made a *waqf*.<sup>154</sup> According to the Maliki school, it is also acceptable to apply this principle to other movable property that has become widely known to be the subject of a *waqf*. For example, it is valid to write in books that they have been made *waqf*. However, if the books are not widely known to have

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<sup>152</sup> Abu al Barakat Ahmad al Dardir, *al Sharh al Kabir*, in the margin of al Dusuqi, *Hashiya al Dusuqi*, Cairo: Dar Ihya' al Kutub, vol. 4, p. 84; al Dusuqi, *Hashiya al Dusuqi*, vol. 4, p. 84.

<sup>153</sup> Al Khurashiy, *al Khurashiy*, vol. 4, p. 88-89.

<sup>154</sup> Ahmad bin Muhammad al Dardir, *al Sharh al Saghir*, vol. 2, p. 299; Abu al Barakat Ahmad al Dardir, *al Sharh al Kabir*,; al Bahuti, *al Raud al Murbi'*, vol. 2, p. 452; Ibn Qudama, *al-Mughni*, vol. 6, p. 190.

been made a subject of *waqf*, then a verbal declaration is necessary to constitute a *waqf*.<sup>155</sup>

On the other hand, the Shafi'is seem to be very rigid on this matter. They maintain that, in every instance, the declaration of a *waqf* must be made clearly.<sup>156</sup> In the case of a mosque, for example, they do not accept that giving permission to Muslims to use the premises will in itself establish a mosque. They also take the same stance regarding the establishment of a graveyard or an irrigation system.

In our opinion, it is reasonable to accept the decision of the majority of jurists, who are very flexible. The most important thing when making a contract is that it accords with the parties' intentions and that they understand its legal effect. A formal procedure is not necessary to accomplish this. In the case of a *waqf*, as long as the *waqif* fully understands what he intends to do and its legal effect, the declaration is valid irrespective of the methods he uses. Furthermore, the custom of interpreting certain actions to mean a *waqf* should be considered. It can easily be understood that when someone constructs a building and gives permission to Muslims to perform prayers in that building, he means to establish a mosque, though he makes no specific mention of the fact. The same principle can be applied to graveyards, irrigation systems or shelters, etc. The same conclusion is also reached by Ibn Qudama and Ibn al Humam (d.1197), who say that the position of the majority

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<sup>155</sup> Ahmad bin Muhammad al Dardir, *al Sharh al Kabir*, vol. 4, p. 85; al Dusuqi, *Hashiya al-Dusuqi*, vol. 4, p. 85

<sup>156</sup> Ibn Hajar, *Tuhfa al Muhtaj*, vol. 6, p. 248.

is reasonable because it has become customary (*ʿurf*) for these actions to signify a *waqf*<sup>157</sup>

#### 2.4.2. An acceptance (*qabul*)

The above discussion refers to an offer made by the first party. Since a *waqf* is a type of contract, then acceptance by the beneficiaries should also be considered. The jurists agree that no acceptance is required for a *waqf* made for the benefit of the public, such as that made for the needy or the establishment of a mosque. This decision is based on the fact that an act of an acceptance by the public would be impracticable.<sup>158</sup>

However, the jurists disagree over a *waqf* made for the benefit of a specific (*muʿayyan*) individual. Ahmad ibn Idris al Qarafi (d.1285) mentions that this disagreement results from conflicting principles, where a *waqf* is regarded either as an abolition (*isqat*) of the right of enjoyment, or the conferring of the right of

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<sup>157</sup> To this effect Ibn Qudama and Ibn al Humam say that it is just like when someone brings out food to his guest, or dispenses something to the people, or fills up water in the watering place at the road. These actions are sufficient to signify permission, though it is not mentioned verbally. See Ibn Qudama, *ibid.*, p. 192; Ibn al Humam, *Fath al Qadhir*, vol. 6, p. 217.

<sup>158</sup> Al Qarafi , *al Furuq*, Beirut: ʿAlam al Kutub, n.d., vol. 1, part 2, p. 111; al Khurashiy, *al-Khurashiy*, vol. 4, p. 92.

enjoyment (*tamlīk al manāfiʿ*).<sup>159</sup> For those who consider a *waqf* to be the abolition of the right of enjoyment, like some of the Hanafis and Hanbalis, acceptance is not necessary, and it is judged on the same level as the emancipation of a slave (*ʿitq*). Once an offer is made by the owner, the contract is considered to be complete, whether there is acceptance or not. However, those who see a *waqf* as the conferring of the right of enjoyment, as represented by the Shafiʿis, Malikis and some of the Hanafis and Hanbalis, maintain that acceptance is a necessary condition for the validation of a *waqf*. In their view a *waqf* is analogous to the contract of *hiba* or sale where an offer must be followed by acceptance.<sup>160</sup> However, it should be noted here that this condition of acceptance is applied only for the first line of beneficiaries. For the subsequent lines of beneficiaries it is required only that they do not refuse the *waqf*. If they refuse, the *waqf* will be considered to be *munqatiʿ wasat*, and will therefore revert immediately to the ultimate beneficiaries.<sup>161</sup>

### 2.4.3. The conditions of a declaration

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<sup>159</sup> Al Qarafi, *ibid.*

<sup>160</sup> Ibn Qudama, *al Mughni*, vol. 6, p. 189; al Qarafi, *ibid.*

<sup>161</sup> Al Ramli, *Nihaya al Muhtaj*, vol. 5, p. 372. For the explanation of the *waqf* of *munqatiʿ wasat*, see above p. 79.

A declaration of *waqf* is subject to conditions that must be followed. Like the other aspects that have been touched on above, this sub-section will also discuss the lexical aspect of the declaration. There are four conditions that are examined by the jurists:

### 1. Perpetuity (*ta'bid*)

Since perpetuity is a matter of principle for the majority of the jurists, they agree that no *waqf* is valid if a declaration is made stipulating a certain period of time, such as when a *waqif* says, "I have made a *waqf* of this land for the benefit of the needy for a period of one year". This declaration is considered invalid because it contradicts the principle of perpetuity.<sup>162</sup> In this respect al Shaybani goes even further, stating that "perpetuity", or any word that implies perpetuity, must be mentioned clearly in a declaration, such as a reference to beneficiaries who do not die out, like the needy. Therefore, according to al Shaybani it is necessary to declare, "This land of mine has been made into a *waqf* in perpetuity (*ardi hazihi mawqufa mu'abbada*)", or, "This land of mine has been made into a *waqf* for the needy".<sup>163</sup> However, the view of al-Shaybani is not shared by the majority in this case, for they assert that since a *waqf* is perpetual by its nature, "perpetuity" is not required to be mentioned in the declaration.

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<sup>162</sup> Al Nawawi, *al Majmu'*, vol. 16, p. 259; al Khassaf, *Ahkam al Awqaf*, p. 127; Nizam, *al-Fatawa al Hindiyya*, vol. 2, p. 357; Ibn Qudama, *al Mughni*, vol. 6, p. 221; al Maqdisi, *al-Muqni'*, vol. 16, p. 416.

<sup>163</sup> Cited in Ibn 'Abidin, *Rad al Mukhtar*, vol. 6, p. 535.

For the establishment of a mosque, a declaration with the stipulation of a limited period will not affect the validity of the *waqf*, but the stipulation itself will be ignored.<sup>164</sup> An example would be: “I have made a *waqf* of this land of mine for the benefit of a mosque for a period of one year”. This is an exception to the condition of perpetuity. Even al Shaybani, who maintains the requirement of mentioning “perpetuity” in the declaration, does not impose this condition in the case of a mosque. When someone has declared the establishment of a mosque, it will take effect though no perpetuity is mentioned.<sup>165</sup> The reason for this exception is that a mosque is established solely for Allah and thus achieves a very high status in Islamic law, being considered sacred. This status overrules any stipulation that limits the period of its existence.

However, it is worth noting here that the principle of perpetuity is applicable to the *waqf* property only and not to the right of enjoyment of the property. Therefore it is valid for a *waqif* to declare, “I have made a *waqf* of this land for the benefit of Zayd for one year and after that for the benefit of the needy”.<sup>166</sup> In this declaration the *waqif* has stipulated that the right of Zayd to enjoy the property, as a beneficiary, is for one year only. This does not contradict the principle of perpetuity because it does not limit the *waqf* itself, which will go to the needy, being the

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<sup>164</sup> Al Sharbini, *al Mughni*, vol. 2, p. 383-384; Ibn <sup>c</sup>Abidin, *ibid.*

<sup>165</sup> Ibn <sup>c</sup>Abidin, *ibid.*;

<sup>166</sup> Al Ramli, *Nihaya al Muhtaj*, vol. 5, p. 373; Ibn Qudama, *al Mughni*, vol. 6, p. 221; al-Mardawi, *al Insaf*, vol. 16, p. 417.



ultimate beneficiaries. This falls under the *waqif*'s stipulations which must be followed.

This is the position of the majority of the jurists, represented by the Hanafis, Shafi'is and Hanbalis, regarding the condition of perpetuity in the declaration of a *waqf*. The Malikis take no part in this discussion since perpetuity is not a matter of principle in their system of *waqf*. Therefore in their view it is valid to say, "I have made *waqf* of this land for the benefit of the needy for one year". According to them there is no problem with this declaration and it will take effect for the period of one year. After that period the ownership is returned to the *waqif*.<sup>167</sup>

## 2. Immediate effect (*al tanjiz*)

According to the majority of the jurists, a *waqf*, like a sale or a gift, is a contract in which the ownership is transferred immediately after the declaration. In other words, it takes immediate effect. Therefore it is invalid to make a declaration which contains a postponement, for example, "After a year this land of mine will be made into a *waqf* for the needy". This declaration is against the rules because it does not come into immediate effect.<sup>168</sup> Again, here the Malikis take a contrary view saying that this kind of declaration is valid and will take effect at the stipulated time.<sup>169</sup>

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<sup>167</sup> °Illish, *Sharh Minh al Jalil*, vol. 4, p. 62; Abu al Barakat Ahmad al Dardir, *al Sharh al Kabir*, vol. 4, p. 87; Ahmad ibn Muhammad al Dardir, *al Sharh al Saghir*, vol.2, p. 300.

However, the jurists agree that such a declaration is valid if it is made with the condition that it takes effect after the *waqif*'s death, for example: "After my death my house will be made into a *waqf* for the benefit of the needy". The jurists base their decision on the action of ʿUmar who declared in his will: "This is a will made by ʿAbd Allah, ʿUmar Amir al Mu'minin, if something happens to him, *Thamgh* becomes a *sadaqa*". In this context it becomes a *wasiyya* and thereby is covered by the law of *wasiyya*, and as such takes effect after his death. In some respects this kind of *waqf* contradicts the principles of *waqf* propounded by the majority of the jurists themselves. A *waqif* who declares that his property becomes a *waqf* upon his death can revoke his declaration at any time before his death as with a *wasiyya*. This, of course, contradicts radically the principle stipulated by the majority of jurists that a *waqf* is irrevocable. On another point, it should be noted that this kind of *waqf* may not, under any circumstances, exceed one-third of the *waqif*'s estate, in accordance with the law of *wasiyya* which allows no more than that amount, though the law of *waqf* itself provides no limit for the endowment.<sup>170</sup> So, the execution of this kind of *waqf* follows the conditions laid down in the law of *wasiyya* (bequest).

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<sup>168</sup> Al Sharbini, *Mughni*, vol. 2, p. 385; Ibn Hajar, *Tuhfa al Muhtaj*, vol. 6, p. 252; al Bahuti, *Kashaf a- Qina*<sup>c</sup>, vol. 4, p. 250.

<sup>169</sup> Ahmad bin Muhammad al Dardir, *al Sharh al Saghir*, vol.2 p. 299; ʿIllish, *Sharh Minaḥ al- Jalil*, vol. 4, p. 62.

<sup>170</sup> Sulayman Ibn ʿUmar, *Hashiya al Jamal*, p. 581, Ibn Qudama, *al Mughni*, vol. 6, p. 220; Ibn al- Humam, *Sharh Fath al Qadhir*, vol. 6, p. 193; al Zaylaʿi, *Tabyin al Haqaiq*, vol. 3, p. 326.

### 3. Irrevocability (*ilzam*)

It is understood that, according to the majority of the jurists, a *waqf* is irrevocable in nature. This nature must be reflected in the declaration. Therefore no declaration is valid if it includes the provision of making a *khiyar* (option of cancellation) or the provision of reviewing the stipulations that have already been made. This occurs, for instance, when a *waqif* says, "I have made a *waqf* of this land for the benefit of the needy, and I shall have the right of making a *khiyar* within three days". Another example is the stipulation, "I have made *waqf* of this house for the needy and I shall have the right to change the beneficiaries at any time". Provisions of this kind invalidate the declaration because they imply revocability.<sup>171</sup>

The Maliki school makes no reference at all to this effect of a *waqf*. However, it may be assumed that making a *khiyar* or reviewing the stipulation does not contradict any of the principles imposed by the Malikis. The principles stipulating that a *waqf* can be made for a limited period of time and that it needs not take immediate effect, as mentioned above, are sufficient basis for its acceptability according to the Maliki school.

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<sup>171</sup> Al Ramli, *Nihaya al Muhtaj*, vol. 5, p. 376; Ibn Dhuban, *Manar al Sabil*, vol. 2, p. 708; al-Mabsut, *al Sarakhsi*, vol. 11, p. 42; Nizam, *al Fatawa al Hindiyya*, vol. 2, p. 356. In the case of making a *khiyar*, Abu Yusuf, who also asserts the irrevocable nature of a *waqf*, takes a different view. He maintains that making a *khiyar* is permissible in the declaration of a *waqf* and it will be effective for up to three days. It is difficult to understand his view since his principle is that a *waqf* must be irrevocable. Making a *khiyar* means that the *waqf* will be subjected to revocation in the period of the *khiyar* and this is certainly not in line with his principle. See above p. 60, note no.49.

#### 4. Mentioning the beneficiaries (*bayān al masraf*)

The Shafi'is and some of the Hanbalis stipulate that the beneficiaries must be mentioned in a declaration. According to this view, it is invalid simply to say, "I have made a *waqf*", without mentioning to whom it is made. According to them, since a *waqf* is a kind of conferring of the right of enjoyment (*tamlīk al manafī*), there should be mentioned the party who is to accept that right. In the absence of any mention of this party, the *waqf* is invalid. This should be differentiated from the case of *wasiyya* where this requirement is not stipulated. This is because a *wasiyya*, where there no beneficiary is mentioned, is usually intended, according to custom, for the benefit of the needy. A *waqf* is executed on a different basis.<sup>172</sup>

For the Hanafis, Malikis and some of the Hanbalis, this condition is not required. They hold that if a *waqf* is declared without mentioning the beneficiaries, it will automatically go to the needy or to any public charity.<sup>173</sup> This view seems justifiable since a *waqf* is a kind of charity and is usually made for the benefit of the needy or the public. It could be said that it is also akin to a *wasiyya* where it has become the custom for the benefit always to go the needy or any other kind of charity.

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<sup>172</sup> Ibn Hajar, *Tuhfa al Muhtaj*, vol. 6, p. 252; al Bahuti, *Kashaf al Qina'*, vol. 4, p. 250.

<sup>173</sup> Al Khurashiy, *al Khurashiy*, vol. 4, part 7, pp. 91-92; al Abi, *Jawahir al Iklil*, vol. 2, p. 208; Nizam, *al Fatawa al Hindiyya*, vol. 2, p. 35; al Bahuti, *ibid.*

## 2.5. Conclusion

In this chapter we have covered the constitutional elements of *waqf*. Throughout it we have investigated the view of the jurists from the four schools of law regarding the *waqif*, the subject of *waqf*, the beneficiaries and the declaration of *waqf*. Each element has its own condition of validity. Every school offers its view based on their principle on each issue, for which reason we find there a lot disagreement among them regarding many juristic points on every issue. The discussion has shown that the jurists in the four schools of law developed this part of the law very outstandingly with fully caution and in doing that they were guided with the principles of Islamic law that they adopted.

**PART TWO**

**THE ADMINISTRATION OF  
*WAQF***

## Chapter Three

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### Trusteeship (*al wilaya / al nazar*)

#### 3.0 Introduction

Trusteeship is among the most important parts of the Islamic law of *waqf*, for it is the institution which administers the *waqf* property. The effective administration of a *waqf* will produce great benefit for the beneficiaries. The person in charge of the administration is called a *nazir*, *mutawalli*, or *qayyim*, known in English as “trustee”. These terms appear to be interchangeable for all of the schools of law.<sup>1</sup> *Nazir* is commonly used in Shafi‘i and Maliki books, and *mutawalli* in Hanafi and Hanbali books. Of these three, *qayyim* is used very rarely in all of the schools of law.<sup>2</sup> In this work, for the purposes of consistency, the term *nazir* is used instead of the other two terms.

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<sup>1</sup> In addition there are some other terms in the *fiqh* books, especially those of the Hanafi school, which refer to those involved in *waqf* administration, i.e. *mushrif*, *jabi* and *sairafi*. All of these are subordinates to the *nazir* or *mutawalli* and they have their own departments: *mushrif* in maintenance, *jabi* in revenue and *sairafi* in the treasury. In fact, the term *qayyim* also refers to one under the authority of the *nazir* and who performs his function. See George Makdisi, *The Rise of Colleges*, Edinburgh: Edinburgh University Press, 1981, p. 47.

<sup>2</sup> In modern legislation, only the terms *nazir* and *mutawalli* are used. For example, in the Egyptian and Malaysian law of *waqf*, the term *nazir* is used, whereas in India, the term *mutawalli* is used. See the use of these terms in Ahmad Ibrahim, *Islamic Law in Malaya*,

The position of *nazir* is a kind of *amanah* (trust) in which the *nazir* is responsible for preserving the *waqf* property and is expected to exercise this responsibility for the love of God. However, he has no exclusive right to the property, since the ownership is not vested in his hand. He can only manage the property in accordance with the rules laid down by the *waqif* and no more than that. It is a burdensome task, and for this reason Islamic law has allowed a salary to be fixed and paid out of the revenues of the *waqf*.<sup>3</sup> So from another aspect it is a lucrative position. This is why some jurists hold that it should not be given to anyone actually seeking it, for it is on the same level as the position of *qadhi*.<sup>4</sup> Since a *nazir* is looking after property which may produce benefit and he is allowed to accept remuneration for this, it would look very suspicious if he sought the appointment.

This is the general position of the *nazir* and the purpose of the study in this chapter is to examine in detail the position of the *nazir* in the Islamic law of *waqf* as established in the four schools of law.

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Singapore; Malaysian Sociological Research Trust, 1965; See also S. K. Rashid, *Wakf Administration in India*, New Delhi: Vikas Publication House, 1978.

<sup>3</sup> H. Catten, "The Law of *Waqf*", *Law in The Middle East*, vol. 1, p. 210.

<sup>4</sup> Al Tarabulsi, *al Is'af*, p. 53; Ibn al Humam, *Sharh Fath al Qadhir*, vol. 6, p. 223; Nizam, *al-Fatawa al Hindiyya*, vol. 2, p. 408.



### 3.1. The position of *nazir* and *qadhi*

Before we start with the position of the *nazir* in the Islamic law of *waqf* it should be stressed here that in administering the *waqf* property the *nazir* must always refer to the *qadhi* in doing his job. This will be found through out this chapter. To clarify this matter it should be understand that though *nazir* is appointed by the *waqif* he is subordinated under the *qadhi* who has general authority (*wilaya ʿamma*) in *waqf* matters. ʿAli Ibn Muhammad al Mawardi (d.1058) has outlined ten jurisdictions of the *qadhi* which cover almost all aspects of Muslim life ranging from marriage, divorce, settling disputes, guardianship, *hudud* and *qisas*, wills, and *waqfs* etc. On the jurisdiction of the *qadhi* on *waqf* affairs he states:<sup>5</sup>

Fourth, he examines *waqf* properties to see that the fundamental capital is maintained, that any business based on it grows, and that its profit is received and duly spent on what it is meant for; if there already exists someone responsible for inspecting the *waqf* the position of this person is respected, but if there is not, then he should take on this responsibility. He does not have to deal with the specific details of the *waqf* if his appointment is of a general nature; it may be however, that he carries out matters of a general nature even if his appointment is of a specific nature.

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<sup>5</sup> Asadullah Yate (trans.), *al Ahkam as Sultaniyyah: The Law of Islamic Governance*, London: Ta-Ha Publisher, 1996, p. 107.

From the outline given above it is clear that the role of the *qadhi* in matters concerning *waqf* is comprehensive. It includes the maintenance of *waqf* property, its profitability, and taking full responsibility when there is no one else to do so. Therefore, the study of the position of the *nazir* in this chapter will always be in connection with the authority of the *qadhi* because Islamic law has given an authoritative role to the *qadhi* in matters concerning *waqf*.

### 3.2 The appointment of a *nazir*

It is a requirement that a *nazir* is appointed when a *waqf* is made, and this is based on the Tradition of <sup>c</sup>Umar in which he appointed his daughter, Hafsa, to the office of *nazir*.<sup>6</sup> Al Nawawi mentions in his *al Majmu<sup>c</sup>* that all the companions who made a *waqf* designated someone to administer it.<sup>7</sup> This is strong evidence that the institution of *nazir* is very important in a *waqf*, even if it is not considered as one of its pillars. The purpose of making a *waqf* is to give benefit to mankind, and this cannot be realized if there is nobody responsible to take care of the *waqf* and administering it in accordance with that purpose. In this section we will study the procedures for the appointment of a *nazir*.

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<sup>6</sup> Muslim, *Sahih Muslim*, in *Kitab al Wasiyya*, translated into English by Abdul Hamid Siddiqi, Vol. 3, p. 867

<sup>7</sup> Al Nawawi, *al Majmu<sup>c</sup>*, vol.16, p. 329.

### 3.2.1. Qualifications

The jurists have laid down conditions for the person who is to be appointed *nazir* in which failure to fulfill them may invalidate the appointment, or, if the failure happens after the appointment, the *nazir* is removed automatically. There are two conditions, and the jurists disagree over both of them, as will be seen in the discussion below.

#### 1) *‘Adala* (honesty)

According to the Shafi‘i school of law, *‘adala* is compulsory for the *nazir*. If the *nazir* becomes *fasiq* (dishonest) after his appointment, he is automatically removed from the post, in which case the trusteeship will pass to the *qadhi*.<sup>8</sup> However, if he repents he is entitled to be reinstated, provided that the original appointment was made by the *waqif*'s stipulation,<sup>9</sup> for it must be adhered to. This condition is required because the *nazir* is dealing with the property of other people and it is therefore important to have an honest person for that position.<sup>10</sup>

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<sup>8</sup> Al Nawawi, *ibid.*, p. 330.

<sup>9</sup> Qalyubi, *Hashiyatan*, vol. 3, p. 109.

<sup>10</sup> Abu Zahra, *Muhadharat*, p. 355.

According to the Hanbali school, this condition is not required if the *nazir* is appointed by the *waqif* or if the position is given to the beneficiaries. Where the appointment is made by the *waqif*, it seems that the Hanbalis give priority to adhering to the *waqif*'s stipulation over the requirement of *‘adala*. When the *waqif* has designated someone, the right of trusteeship must be given to that person even if he is dishonest. Where the position is given to the beneficiaries, *‘adala* is not required either, for the beneficiaries are creating a benefit for themselves and therefore it is most unlikely that they will manage the property in an improper way. However, there are some Hanbali jurists, like Ibn Abu Musa and al Samiri who hold that an honest person should be appointed along with the dishonest *nazir*. Their reason is that the honest person will protect the *waqf* from being neglected, and at the same time, the *waqif*'s stipulation is being adhered to by keeping the first *nazir* in the office.<sup>11</sup> This is considered as *sadd al zarai‘* (blocking the means) in the Islamic Jurisprudence, meaning, to block the means to an expected end which is likely to materialize if the means towards it is not obstructed.

This shows that the Hanbali school is not as strict as the Shafi‘i school regarding the requirement of *‘adala* for the *nazir*. However, this does not mean that *‘adala* is not taken into account at all. *‘Adala* is still required for a *nazir* when the appointment is made by the *qadhi*. In this case the appointment will be invalid if the

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<sup>11</sup> Cited in Abu Zahra, *ibid.*; al Bahuti, *Kashaf al Qina‘*, vol. 4, p. 2 pp. 268 - 270; Ibn Qudama, *al Mughni*, vol. 6, p. 243.

*nazir* turns out to be a *fasiq*.<sup>12</sup> So, we find here that the Hanbali school differs in its requirement of *‘adala* for a *nazir* who is appointed by the *waqif*'s stipulation or where the office is given to the beneficiaries, and for a *nazir* appointed by the *qadhi*.

According to the Hanafi school, *‘adalah* is only a preferable condition and does not affect the validity of the appointment of a *nazir* at all. He can be removed, but not automatically, once he is proved to be dishonest after the appointment.<sup>13</sup> Though the appointment is valid it is compulsory for the *waqif* or the *qadhi* to appoint an honest person, for the holder of this position is dealing with the property of a *waqf* and the rights of the beneficiaries. The appointment of a dishonest person may lead to the unlawful management of the property. Therefore the appointer is considered to be committing a sin if he knowingly appoints a dishonest person for that position.<sup>14</sup> It is incumbent upon him at that time either to remove the *nazir* or, according to Ibn *‘Abidin*, to appoint another, honest, person as a co- *nazir*.<sup>15</sup>

## 2) *Kifaya* (Competence)

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<sup>12</sup> Al Bahuti, *ibid*.

<sup>13</sup> Ibn *‘Abidin*, *Radd al Mukhtar*, vol. 6, p. 579.

<sup>14</sup> Abu Zahra, *Muhadharat*, p. 355.

<sup>15</sup> Ibn *‘Abidin*, *Radd al Mukhtar*, vol. 6, p. 578.

The *nazir* must be a suitable person for carrying out his duties.<sup>16</sup> This means that he must be sane in mind (*‘aqil*) and matured person (*baligh*).<sup>17</sup> If the *nazir* becomes insane after the appointment, he is removed automatically according to the Hanafis. However, according to the Hanbalis the position is transferred to his guardian (*wali*) if the *nazir* is among the beneficiaries.<sup>18</sup> Men and women are considered on an equal basis in this matter,<sup>19</sup> for ‘Umar appointed his daughter, Hafsa, as *nazir* for his *waqf*. However, it is stated in *al Fatawa al Hindiyya* that a woman is not expected to carry out duties for which she is unsuited, even if she is paid for the position.<sup>20</sup> The blind and the sighted are also treated in the same way in this respect.<sup>21</sup>

### 3.2.2 Appointment of the *nazir* by the *waqif*

A *waqif* has the exclusive right to designate anyone he wishes as the *nazir*.<sup>22</sup> The appointment can be made by specifying the name or the character of the person

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<sup>16</sup> Al Sharbini, *Mughni*, vol. 2, p. 393; al Tarabulsi, *al Is‘af*, p. 53.

<sup>17</sup> Wahba al Zuḥayli, *al Fiqh al Islami*, vol. 8, p. 232.

<sup>18</sup> Abu Zahra, *Muhadharat*, p. 354.

<sup>19</sup> Ibn ‘Abidin, *Radd al Mukhtar*, vol. 6, p. 579; Ibn Dhuban, *Manar al Sabil*, vol. 2, p. 714.

<sup>20</sup> Nizam, *al Fatawa al Hindiyya*, vol. 2, p. 425.

<sup>21</sup> Ibn ‘Abidin, *Radd al Mukhtar*, vol. 6, p. 579.

<sup>22</sup> Al Ramli, *Nihaya al Muhtaj*, vol. 5, p. 397; al Nawawi, *al Majmu‘*, vol. 16, p. 329; al Hattab, *Mawahib al Jalil*, vol. 6, p. 37; al Tarabulsi, *al Is‘af*, p. 53.

preferred. For example, the *waqif* could stipulate that the trusteeship must be given to the most knowledgeable of his children. In this case the one who possesses that quality is appointed as the *nazir*. If, say, two of his children qualify, both of them should be appointed and they would share the responsibilities.<sup>23</sup> This is considered as his stipulation that must be adhered to, which comes under the injunction of the Prophet, who said:<sup>24</sup> “The Muslims should abide by the conditions imposed upon them”. The appointment can be made to take effect either in the *waqif*'s lifetime or after his death, that is, by a *wasiyya*. The appointed *nazir* is expected to act within the boundary of giving benefit (*maslaha*) to the *waqf*, as well as being bound to observe the instructions and stipulations of the *waqif*. The *nazir* in this sense is an agent (*wakil*) to the *waqif* in his lifetime and an executor (*wasiy*) if the appointment is made by a *wasiyya*.<sup>25</sup> If the *nazir* takes any leave the *qadhi* will appoint someone to take his place and the *nazir* has no authority to question any decision made or action taken by the *qadhi* while he was absent.<sup>26</sup>

According to the Shafi'i and Hanbali schools and the accepted view in the Hanafi school, a *waqif* can even designate himself as the *nazir*. This is based on the example of 'Umar, who designated himself as the *nazir* in his lifetime, and after

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<sup>23</sup> Al Sharbini, *Mughni*, vol. 2, p. 394; al Bahuti, *Kashaf al Qina'*, vol. 4, p. 265.

<sup>24</sup> Al Bukhari, *Sahih al Bukhari*, in *Kitab al Ijarat*, vol. 3, p. 250.

<sup>25</sup> Al Ramli, *Nihaya Muhtaj*, vol. 5, p. 397; al Tarabulsi, *al Is'af*, p. 53; Ibn Taymiyya, *al Fatawa*, vol. 4, p. 271.

<sup>26</sup> Al Hattab, *Mawahib al Jalil*, vol. 6, p. 38; al Ramli, *ibid.*, p. 398.

him, Hafsa.<sup>27</sup> We find that this view is also supported by the report of al Shafi‘i that the Companions such as ‘Ali, Fatima, Zubayr, ‘Amr ibn al ‘As, Musawwar ibn Makhrama, and many of the Ansar administered their own *waqf* themselves until their death.<sup>28</sup> Assuming the validity of this report, this view seems to have a strong basis in Islamic law. Abu Yusuf uses logical evidence in its support. He says that if we accept that a *nazir* can enjoy the position of trusteeship according to the *waqif*’s stipulation, then it is hard to accept that the *waqif* himself cannot enjoy that position, because he is the one who gives it to the *nazir*. Moreover, a *waqif* stands in a closer relationship to the property than anyone else, and therefore he is entitled to have the authority of trusteeship over it.<sup>29</sup>

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<sup>27</sup> Al Ramli, *ibid.*; Ibn Qudama, *Mughni*, vol. 6, p. 242; al Tarabulsi, *ibid.*; al Ghanimi, *al Lubab*, Beirut: Dar Ihya’ al Turath al ‘Arabi, n.d., vol. 2, p. 186. For the purposes of clarification it is worth noting that, in this matter, the view of Abū Yūsuf is the accepted *fatwā* in the Ḥanafī school. This is also the view of Hilal. There are two contradictory views attributed to al Shaybani regarding this issue: (1) It is permissible for a *waqif* to confer the trusteeship on himself, which is in line with the view of the Shafi‘is, Hanbalis and Abu Yusuf. However, according to him the stipulation must be made before the delivery takes place. Once he hands it over to the *nazir* he no longer has any right over the trusteeship. (2) It is not permissible to confer the trusteeship on the *waqif* himself, in which case both the stipulation and the *waqf* will be invalid. See Abu Zahra, *Muhadharat*, p. 339; Ibn ‘Abidin, *Rad al Mukhtar*, vol. 6, p. 577; al Ghanimi, *ibid.*

<sup>28</sup> Al Shafi‘i says in his *al Umm* : “More than one of the members of ‘Umar and ‘Ali’s family informed me that ‘Umar administered his *sadaqa* himself until his death, and after that he handed over the trusteeship to Hafsa; ‘Ali administered his *sadaqa* himself until his death, and after that Hasan administered it; Fatima, the daughter of the Prophet, administered her *sadaqa* herself until her death; and I was informed by more than one of the Ansar that they administered their *sadaqa* themselves until their death”. See al Shafi‘i, *al Umm*, vol. 4, part 8, p. 160. Al Bayhaqi quotes this statement of al Shafi‘i in his *Sunan*, and he adds that al Shafi‘i, in his earlier *fatwa*, stated that al Zubayr, ‘Amr Ibn al ‘As and Musawwar ibn Makhrama administered their *sadaqa* themselves. See al Bayhaqi, *al Sunan al Kubra*, vol. 6, pp. 161-162.

<sup>29</sup> Charles Hamilton, *The Hedaya*, p. 238; al Zayla‘i, *Tabyin al Haqaiq*, vol. 3, p. 329.



However, this view is very unlikely to be accepted by the Malikis. According to them it is unlawful for a *waqif* to designate himself as the *nazir*, and should he does so the *waqf* will be invalid. Their justification is that when a *waqif* confers the right of trusteeship on himself, it contradicts the requirement of taking possession (*hiyaza*), which is a condition for the validity of a *waqf*. A *waqif* can confer the trusteeship on himself only when the beneficiaries are denied the right (*mahjur ʿalayh*) to enjoy the *waqf* property because they are not qualified to do so. In this case the *waqif* can stipulate that the right of trusteeship is given to him because the beneficiaries are still legally incapable of taking possession and the *waqif* himself will take care of the property on their behalf.<sup>30</sup> The question put here by the Malikis is on the issue of the requirement of taking possession which is among the central issues in Islamic property law.

It seems that the Shafiʿi, Hanbali and Hanafi schools see the institution of *al-nazar* as part of the authority of the *waqif*. This means that a *waqif* is responsible for the management of the property and that he will ensure that all the stipulations mentioned in the *waqf* declaration are carried out. On the other hand, the Maliki school sees the institution of *al nazar* as a different entity which administers the *waqf* property and the *waqif* has no authority to interfere with its management. From the analysis of these two views and the evidence put forward it is justifiable to

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<sup>30</sup> Al Kasynawi, *Ashal al Madarik*, vol. 3, p. 108; Ibn Juzay, *al Qawanin al Fiqhiyya*, p. 319; al Hattab, *Mawahib al Jalil*, vol. 6, p. 25; al Sawi, *Bulghat al Salik*, vol. 2, p. 304; al Dusuqi, *Hashiya al Dusūqi*, vol. 4, p. 81.

incline to the first view, since it has a strong basis in the example of ʿUmar, who appointed himself as a *nazir*, and the report of al Shafiʿi.

To sum up this discussion, the position of *nazir* is solely under the authority of the *waqif*, and he may appoint whoever he wishes to the post. However, there are differences of opinion over the *waqif* who confers the trusteeship on himself. We find that the majority of jurists validate this practice and the Maliki school stands alone in opposing this view.

### **3.2.3 Appointment of a *nazir* by other than the *waqif***

There are occasions when a *waqif* is silent on the appointment of a *nazir*. This does not affect the validity of the *waqf*, but the jurists disagree about who should be appointed. According to the accepted doctrine in the Hanafi school, which is the view of Abu Yusuf, the position remains in the hands of the *waqif*. This means that it is the *waqif*'s responsibility to administer the *waqf* as long as he wishes until he appoints someone to the position. If the *waqif* has died, the responsibility is given to his executor (*wasiy*), if any, and to the *qadhi* if there is no *wasiyya* regarding this.<sup>31</sup> In appointing a *nazir*, the Hanafi school suggests that the *qadhi* should give preference to those who are closely related to the *waqif* if there is a suitably qualified person among them. However, according to Ibn ʿAbidin, this is

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<sup>31</sup> Nizam, *al Fatawa al Hindiyya*, vol. 2, p. 408; al Ghanimi, *al Lubab*, vol. 2, p. 186; al-Tarabulsi, *alIsʿaf*, p. 53; Ibn ʿAbidin, *Rad al Mukhtar*, vol. 6, p. 577.

not a compulsory condition. If a stranger is appointed in the presence of a qualified member of the *waqif*'s family, then the appointment is valid.<sup>32</sup>

According to the Maliki and Hanbali schools, the position should not remain in the hands of the *waqif*, rather it should be given to the beneficiaries if they are a specified (*mu'ayyan*) group of people, such as the *waqif*'s sons or individuals. This means that each of the beneficiaries will exercise his right to his share in the property in two capacities, as a beneficiary and as a *nazir*. If the beneficiaries are minors or insane then the position is held by their guardians until they are mature or regain their sanity. If the beneficiaries are an unspecified (*ghayr mu'ayyan*) group of people, such as the scholars, the needy, etc., or if the *waqf* is for the establishment of a mosque, the position of *nazir* is taken over by the *qadhi* and he will appoint whoever he wishes as the *nazir*.<sup>33</sup>

In the Shafi'i school, when no appointment has been made by the *waqif*, the *qadhi* will take over responsibility for the *waqf* since, in Islamic law, he is authorized to hold public trusteeship (*wilaya 'amma*). This authority qualifies the *qadhi* as the most suitable person to administer the property, even in preference to the *waqif* or the beneficiaries themselves. Unlike the Maliki and Hanbali schools, the Shafi'i school does not differentiate between a *waqf* made for the benefit of a

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<sup>32</sup> Ibn 'Abidin, *ibid.*, p. 637; al Sarakhsi, *al Mabsut*, vol. 11, p. 44.

<sup>33</sup> Al Bahuti, *Kashaf al Qina'*, vol. 4, p. 268; Ibn Qudama, *al Mughni*, vol. 6, 242; Ibn Dhuban, *Manar al Sabil*, vol. 2, p. 710; Ahmad bin Muhammad al Dardir, *al Sharh al Saghir*, vol. 2, p. 305; al Khurashiy, *al Khurashiy*, vol. 4, p. 92.

specified (*mu'ayyan*) group of people or individuals, an unspecified (*ghayr mu'ayyan*) group of people, or the establishment of mosques. In any type of *waqf* the position will be given to the *qadhi*. Regarding the jurisdiction of the *qadhi* it is accepted in the Shafi'i School that the *qadhi* of the province where the *waqf* property is situated will be responsible for conserving the property (*hifz al waqf*), whereas the *qadhi* of the province where the beneficiaries are living will be responsible for other administrative matters.<sup>34</sup>

These are the three different views regarding who should be appointed as *nazir* where no decision has been made by the *waqif*. It is a necessary appointment to ensure that the *waqf* is administered effectively. Therefore it is preferable to apply the judgement of the Shafi'i school which gives the authority of the trusteeship to the *qadhi* who can administer the *waqf* much better than the other parties. Furthermore it complies with the doctrine that public trusteeship (*wilaya 'amma*) is vested in the *qadhi*.

#### **3.2.4 The appointment of a successor to the *nazir***

If the *nazir* dies then the office of *nazir* must be filled by a successor. This is to ensure that the property continues to be managed, so that the *waqf* can give permanent benefit. According to the law of *waqf*, a *waqif* can specify in his original

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<sup>34</sup> Al Ramli, *Tuhfa al Muhtaj*, vol. 5, p. 286; al Sharbini, *Mughni al Muhtaj*, p. 393; Qalyubi, *Hashiyatan*, vol. 3, p109.

declaration who will succeed to the office after it has been left vacant by the first *nazir*. This is based on the practice of ʿUmar, who stipulated in his *waqf* that it was to be administered by his daughter after his death and then by knowledgeable members of his family. According to Shams al Din al Sarakhsi (d. 1090), it is also acceptable for a *waqif* to make a general stipulation that he will have the authority to appoint whoever he wishes to succeed to the office in the event of the death of the first *nazir*.<sup>35</sup>

According to the Hanafi and Maliki schools, the right to appoint a successor to the office after the death of the first *nazir* is given to the *waqif*, and it is not necessary for him to make a stipulation to that effect. If the death of the *waqif* occurs before the death of the *nazir*, the right of trusteeship is given to his executor (*wasiy*), if any, or to the *qadhi* if the *waqif* has left no *wasiyya* regarding his successor.<sup>36</sup> So, according to these two schools, the right of a *waqif* in appointing a *nazir* still exists even after the death of the first *nazir*.

In this context the Shafiʿi and the Hanbali School take a radically different view. According to them, a *waqif* has no right to appoint a successor to a *nazir* unless he has made a stipulation to that effect. This is based on the principle established in these schools that once a *waqif* has made a stipulation regarding the

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<sup>35</sup> Al Sarakhsi, *al Mabsut*, vol. 11, p. 44.

<sup>36</sup> Nizam, *al Fatawa al Hindiyya*, vol. 2, p. 411; al Sawi, *Bulghat al Salik*, vol. 2, p.305; al-Dusuqi, *Hashiya al Dusuqi*, vol. 4, p. 88.

first *nazir*, he no longer enjoys the right of ownership and trusteeship. On this basis, when the *nazir* dies, then according to the Shafī'i school, the right to appoint the successor is given to the *qadhi*, whereas according to the Hanbali school, it is given to the beneficiaries,<sup>37</sup> following the same principle of when the *waqif* has not appointed the first *nazir*.

The appointment of a successor for the *nazir* can also be made by the *nazir* himself if a *waqif* has authorized him to do so in his *waqf* stipulation. The legal term used in this matter is known as the right of *tafwidh* (consignment). This can be either by leaving a *wasiyya* to his successor, or by resigning and appointing the other to take his post. The legal effect of the *tafwidh* is that the person who takes the office will administer the property independently and he has authority over the property as the first *nazir* did. There is no longer a legal connection between the two. In this respect al Ramli says that *tafwidh* is construed to be the conferring of the right of the ownership (*tanlik*).<sup>38</sup> However, if no authorization has been given to this effect the *nazir* has no right at all to appoint his successor. This is what has been agreed upon unanimously by the four schools of law.<sup>39</sup> The principle that we should accept here is that a *nazir* does not enjoy full authority to exercise his post in the way that he would if he owned the property. His post is created by the *waqif* and he is subject to

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<sup>37</sup> Al Sharbini, *Mughni al Muhtaj*, vol.4, p. 395; Qalyubi, *Hashiyatan*, vol. 3, p109; al Bahuti, *Kashaf al Qina'*, vol. 4, p. 268.

<sup>38</sup> Al Ramli, *Nihaya al Muhtaj*, vol. 6, p. 402.

<sup>39</sup> Ibn 'Abidin, *Radd al Mukhtar*, vol. 6, p. 638; al Hattab, *Mawahib al Jalil*, vol. 6, p. 37 - 38; Ibn Hajar, *Tuhfa al Muhtaj*, vol. 6, p. 291; al Bahuti, *Kashaf al Qina'*, vol. 4, p. 272.

the rules that the *waqif* wishes. When the *waqif* gives no authority for the *nazir* to appoint his successor, he cannot do so on his own discretion. Furthermore, it should be understood that if the *nazir* appoints his successor without authorization given to him, it is deemed to be breaching the *waqif*'s stipulation which has named him as the *nazir*.

However, this should not be confused with the right of the *nazir* to delegate (*tawkil*) his post to another. The jurists unanimously agree that this practice is permissible and it is at the *nazir*'s discretion. Delegation (*tawkil*) is different from *tafwidh* as mentioned above. It is to appoint someone as an authorized agent to manage the property. The agent is working according to the order from the *nazir*. The original authority still belongs to the *nazir* and he can cancel the agent's office at any time. The agent's office also will be automatically cancelled upon the death of the *nazir*.<sup>40</sup> So the contract between the *nazir* and the agent is based on the contract of *wakala* with its conditions in Islamic law.<sup>41</sup>

### 3.3 The removal of the *nazir*

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<sup>40</sup> Ibn ʿAbidin, *ibid.*; Ibn Hajar, *ibid.*; Abu Zahra, *Muhadharat*, p. 349.

<sup>41</sup> Ibn Qudama has listed the endowments and transactions in Islamic law in which the contract of *wakala* can be practised as he states : It is permissible to practise *tawkil* in *hiwala* (bill of exchange), *rahn* (mortgage), *dhaman* (warranty), *kafala* (security), *sharika* (partnership), *wadi ʿa* (saving), *mudharaba* (stock exchange), *juʿala* (wage), *musaqat* (watering), *ijara* (rent), *qardh* (debt), *sulh* (compromise), *wasiyya* (will), *hiba* (gift), *waqf*, *sadaqa*, and *fasakh* (nullification of marriage). See Ibn Qudama, *al Mughni*, vol. 5, p. 74.

For the sake of preserving the *waqf* property the *nazir* will be removed from his office if he is proven to be treacherous or is disqualified by failure to fulfil the conditions required. This ruling is even extended by Ibn <sup>c</sup>Abidin to the *nazir* who is not doing his job as he is expected, and who must be removed as well. For this the *qadhi* is given full authority even if it is objected to by the *waqif*. There are also some jurists, as we have seen, suggest that a disqualified *nazir* is not necessarily be removed but a co- *nazir* can be appointed. Their reason is that the purpose of removing the disqualified *nazir* is to protect the *waqf*, and this purpose can be also realized by appointing a co- *nazir*.<sup>42</sup>

In this respect, we find only the Malikis give a lenient view, when they hold that it is lawful to keep a disqualified *nazir* in the office as long as the beneficiaries can tolerate him.<sup>43</sup> This view might be based on the consideration that the purpose of a *waqf* is to give benefit to the beneficiaries, so that when the beneficiaries satisfy the conditions of the *nazir* it should be no problem to keep him in office. This view is apparently based on weak reasoning. It is a well accepted principle that a *waqf* is not only a relationship between a *waqif* and the beneficiaries but it also includes God, in that it becomes God's property. Holding to this principle it should be borne in mind that the property must be organized and utilized with great care, and this can only be done by a qualified *nazir*. Thus, when a *nazir* is found to be disqualified he

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<sup>42</sup> Ibn <sup>c</sup>Abidin, *Radd al Mukhtar*, vol. 6, p. 578.

<sup>43</sup> Al Dusuqi, *Hashiya al Dusuqi*, vol. 4, p. 88; al Hattab, *Mawahib al Jalil*, vol. 6, p. 37.



should be removed even though the beneficiaries can tolerate him. Moreover, the intention of the *waqif*, when he dedicated his property as *waqf*, was not only to give benefit to the beneficiaries but also to gain reward in hereafter. The reward will only continue as long as the *waqf* produce benefit to the beneficiaries. When a *waqf* no longer gives benefit, no reward will be gained by the *waqif*. This, certainly, creates a need for a qualified *nazir* who can manage the property so as to give benefit to the beneficiaries and allow the reward to continue.

It is clear here that the dominant, and in fact logical, view is that the *nazir* who is found disqualified should be removed from his position, so that a new recruitment can be made. The jurists however differ regarding the removal of a *nazir* without any cause. According to the accepted view in the Hanafi school (originally the view of Abu Yusuf), the Maliki and Shafi'i schools, the *waqif* has the authority to remove the *nazir* at any time without any cause. This is based on the grounds that the *nazir* acts as an agent (*wakil*) to the *waqif*,<sup>44</sup> and this gives an exclusive right to the *waqif* to remove the *nazir*. Based on this we can say that, in these schools, the post of the *nazir* is not a secured one, for it fully depends on the *waqif's* discretion. In this respect, we find the Shafi'i makes an exception of a *nazir* who has been appointed through the *waqif's* stipulation in his declaration, that

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<sup>44</sup> Ibn 'Abidin, *Radd al Mukhtar*, vol. 6, p. 580; al Khassaf, *Ahkam al Awqaf*, p. 202; al Dusuqi, *ibid.*; al Wansharisi, *al Mi'yar*, vol. 7, p. 456; al Sharbini, *Mughni al Muhtaj*, p. 394. According to Abu Yusuf, the *nazir* is automatically removed upon the death of the *waqif* because according to him the *nazir* is an agent of the *waqif*. Being an agent he is subject to the contract of *wakala* which terminates upon the death of the mandator (*muwakkil*). However, if it has been specifically mentioned that he will hold the post in the *waqif's* life time and after his life time, then the post will remain in his hand. See Ibn 'Abidin, *ibid.*, p. 578.

he cannot be removed without any cause,<sup>45</sup> subscribing to the principle that the *waqif's* stipulation cannot be altered. We do not find any clear statement from the other schools pertaining to this exception and we assume that this is only accepted in the Shafi'i school.

Contrary to the above view, the Hanbali school gives no authority to a *waqif* to remove the *nazir* without any cause, except if the *waqif* has provided in his stipulation that he will have the authority to remove the *nazir* at any time.<sup>46</sup> This also is an ignored view in the Hanafi school which was proposed by al Shaybani.<sup>47</sup> So, according to this view, the authority of the *waqif* to remove the *nazir* without any cause is based on whether there is a provision in the *waqif's* stipulation to this effect.

### 3.4 Remuneration of the *nazir*

Since the office of *nazir* deals with administering and manipulating the *waqf* property which requires the proper attentions and cares, there is a provision in Islamic law for giving remuneration to the *nazir*.<sup>48</sup> The basis for this is found in the

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<sup>45</sup> Al Sharbini, *ibid*.

<sup>46</sup> Al Bahuti, *Kashaf al Qina'*, vol. 4, p. 272.

<sup>47</sup> Nizam, *al Fatawa al Hindiyya*, vol.2, p. 409.

*waqf* declaration of ʿUmar where he said:<sup>49</sup> “*There is no sin for one who administers it if he eats something from it in a reasonable manner*”. It was also the practice of ʿAli when he made *waqf* of his property and allocated some amount from the profit of the *waqf* property to some slaves to take care of the property. What was given to the slaves can be considered as the remuneration for the *nazir*. There are also other reports that it was the practice of the other Companions to provide remuneration to the *nazir*.<sup>50</sup>

The jurists agree that a *waqif* is allowed to stipulate this remuneration in his *waqf* declaration and it may be in the form of a fixed sum or a residue of the income of the *waqf* property after defraying the expenses necessary for the maintenance of the *waqf*.<sup>51</sup> This remuneration is considered not only as the wages for the work of the *nazir* but also as the fulfillment of the *waqif*'s stipulation which must be adhered to. In this matter if the *nazir* finds that the remuneration fixed is too small it is his right to apply to the *qadhi* to increase the remuneration and the *qadhi* must determine, by his discretion, the proper wage for him but not exceed the customary allowance (*ujrat al mithl*).<sup>52</sup> The *nazir* deserves that remuneration so long he does his

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<sup>48</sup> Al Ramli, *Nihaya al Muhtaj*, vol. 6, p.401; Ibn Hajar, *Tuhfa al Muhtaj*, vol. 6, 290; al Tarabulsi, *al Isʿaf*, p. 57; Nizam, *ibid.*, p. 425; al Hattab, *Mawahib al Jalil*, vol. 6, p. 40.

<sup>49</sup> See Chapter One, note no. 52.

<sup>50</sup> Al Tarabulsi, *ibid.*, p. 57; Abu Zahra, *Muhadharat*, p. 371.

<sup>51</sup> Al Tarabulsi, *ibid.*, p. 58; al Sawi, *Bulghat al Salik*, vol. 2, p. 305; Ibn Hajar, *Tuhfa al Muhtaj*, vol. 6, p. 290; al Ramli, *Nihaya al Muhtaj*, vol.5, p. 401.

<sup>52</sup> Abu Zahra, *Muhadharat*, p. 371.

job properly. Physical sickness is not a valid reason to remove him if it does not affect his mind for he can supervise others to do his job.<sup>53</sup> If the *nazir* confers the right of the office (*tafwidh*) to another, the latter will be entitled only to the customary allowance even though the first *nazir* have more than that, for the first *nazir* received his remuneration by the *waqif*'s stipulation while the customary allowance for the latter is considered as the right wage.<sup>54</sup>

If the *waqif* has fixed nothing for the *nazir* then, according to the majority of the jurists, the *qadhi* may determine a customary allowance for him.<sup>55</sup> In the Hanbali and Shafi'i school there are two opinions regarding this matter. The first is that the *nazir* is entitled only to what is just and reasonable (*al ma'ruf*). This is the opinion of al Nawawi and the minority of the Hanbalis.<sup>56</sup> The second is that the *nazir* is entitled to the customary allowance. The Hanbalis further hold that remuneration is only for a *nazir* who is accustomed to take remuneration for this kind of job. If he is used to being paid nothing for the job then he is considered to do the job voluntarily unless he asks for remuneration. The principle used here is *urf*

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<sup>53</sup> Al Tarabulsi, *al Is'af*, p. 58.

<sup>54</sup> Abu Zahra, *Muhadharat*, p. 371

<sup>55</sup> Al Ramli, *Nihaya al Muhtaj*, vol. 6, p. 401; Ibn Hajar, *Tuhfa al Muhtaj*, vol. 6, p. 290; al Hattab, *Mawahib al Jalil*, vol. 6, p. 40; Nizam, *al Fatawa al Hindiyya*, vol.2, p. 425. According to the Shafi'i school the *qadhi* cannot determine that remuneration except upon the application of the *nazir*. In the absence of the application the job is considered done voluntarily. See al Ramli, *ibid.*; see also Ibn Hajar, *ibid.*

<sup>56</sup> Al Nawawi, *al Majmu'*, vol. 16, p. 333.

(custom) where what is accustomed is like what is stipulated for him (*al ma'rif 'urfan ka al masyrut syartan*).<sup>57</sup>

Another opinion that is very interesting to observe is the opinion of Ibn 'Itab from the Maliki school. He points out that if there is no stipulation regarding the remuneration, the *qadhi* must pay the *nazir* from the the public treasury (*bayt al mal*) and not from the *waqf* property.<sup>58</sup> It is reported that this is also the opinion of al- Mushawir and Ibn Ward.<sup>59</sup> Regarding this point of view Abu Zahra comments that this may be based on the grounds that the government is responsible for *waqf* affairs because they are related to the public services. Hence is considered as a government agency and therefore the *nazir* is paid from the public treasury like other servants of government agencies. This is not the opinion of the majority of the jurists as understood in the discussion above. However, according to Abu Zahra this opinion may be applicable to the *nazir* of a public *waqf* because this kind of *waqf* is considered as a mechanism for giving services to people which is one of the duties of the government. Hence it is obligatory for the government to pay the *nazir* from the public treasury. For private *waqf* this is not applicable, because the profit of the *waqf* property belongs to the specific beneficiaries and does not benefit all people.

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<sup>57</sup> Abu Zahra, *Muhadharat*, p. 375.

<sup>58</sup> Cited in Al Hattab, *Mawahib al Jalil*, vol. 6, p. 40.

<sup>59</sup> Cited in Ibn Farhun, *Tabsira al Hukkam*, p. 109.

It is thus unfair to allocate some amount of money from the public treasury for the remuneration of a *nazir* of this kind of *waqf*.<sup>60</sup>

### 3.5 Duties of the *nazir*

The previous aspects of the discussion have given us a general idea about the duties of the *nazir*, that is, to maintain and administer the *waqf* property. This general idea does not help us much in understanding the subject in detail, and therefore, we must consider some other details regarding the duties of the *nazir*. For this purpose we find that the list of the duties (*wazifa*) of the *nazir* as drawn by some prominent jurists from different schools is worth an exposition. Some commentaries of the jurists on the lists will also be included to assist our understanding. There are not many differences between the list of one jurist and another but, since they represent their school, it deserves a brief analysis here.

Al Bahuti (d.1641) from the Hanbali school lists the duties of *nazir* as follows:<sup>61</sup>

The duties of a *nazir* are: preservation of the *waqf*, repairing, leasing the property, planting, handling litigation, collecting the revenue from its rent, planting or striving to increase its yields, distributing

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<sup>60</sup> Abu Zahra, *Muhadharat*, p. 373.

<sup>61</sup> Al Bahuti, *al Raudh al Murbi*<sup>6</sup>, vol. 2, p. 465.

the proceeds to the objects of the *waqf* such as its keeping it to life, paying the beneficiaries etc.

This list covers the aspects of maintenance of the *waqf* property, its mobilization and the distribution of the benefit to the beneficiaries, and even litigation. These are considered the main job of the *nazir*, in which, if these are realized, a *waqf* will produce benefits for the beneficiaries.

Another jurist, Hassan Ibn Mansur Qadhi Khan (d.1196) from the Hanafi school, also highlights more or less the same duties as he lists the duties as:

Bringing it to life, preservation of the *waqf*, leasing the property, planting, collecting the income of the *waqf* estate from its rent, crops and fruits, striving to increase its yields, distributing the proceeds among the objects of the *waqf*, repairing, paying its beneficiaries, taking all precautions to preserve the properties and their proceeds, hiring and firing, and handling all disputes and litigations.<sup>62</sup>

It is clear that Qadhi Khan also lists the same duties of the *nazir* which cover the same areas of the job. We will mention another list drawn up by al Nawawi (d.1277) in his *Minhaj* which is considered one of the main texts of the Shafi'i school. He states:

And his duties are keeping active, leasing the property, collecting the revenue and distributing it, and if he is tasked with part of these duties he cannot overstep it.

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<sup>62</sup> Cited in George Makdisi, *The Rise of Colleges*, p. 48.

The list seems very short and does not cover many of the mentioned things in the two lists above. The job that might not be mentioned in this list is regarding the maintenance. However this has been elaborated upon by many of the commentators of the *Minhaj* such as Ibn Hajar, al Ramli and al Sharbini, that the list also covers jobs such as preserving the property, like the duties of the guardian of an orphan (*wali al yatim*), to the extent that the *nazir* can make a loan, if necessary, for the purpose of the maintenance, if it is so stipulated by the *waqif* or approved by the *qadhi*.<sup>63</sup>

Ahmad bin Idris al Qarafi (d.1285) from the Maliki school lists the duties in his *al Zakhira* as he states<sup>64</sup>:

The *nazir* handles the jobs of bringing it to life, leasing the property, collecting the revenue and distributing it after making the necessary repairs. The priority is to repair the property for the sake of preserving the original property.

The list is simple and short but there is no difference with the three former list except that al Qarafi stresses the necessity of giving priority to the job of repairing (*islah*) before turning to the other jobs. By 'repairing' is understood the

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<sup>63</sup> Al Sharbini, *Mughni*, vol. 2, p. 394; al Ramli, *Nihaya al Muhtaj*, vol. 5, p. 400; Ibn Hajar, *Tuhfa al Muhtaj*, vol. 6, p. 289.

<sup>64</sup> Al Qarafi, *al Zakhira*, vol. 6, p.329.



maintenance of the property, which of paramount importance according to al Qarafi in order to keep the property beneficial.

The duties listed by the jurists above can also be considered the view of the pertinent schools as mentioned. Thus, principally, we can say that there are no differences between the schools regarding the duties of the *nazir*. However, as far as Islamic law is concerned, they are still in the form of a general presentation which is subject to technical discussion and, certainly, disagreement among the jurists among matters of detail is inevitable. This will be found throughout the following chapter.

In carrying out these duties the *nazir* is not expected to work alone, rather he can appoint others to assist him. This has been asserted by al Bahuti in another occasion that, for the benefit of the *waqf*, the *nazir* is allowed to recruit someone, who is qualified from an Islamic point of view, for the posts such as *imam*, *muazin*, officer, etc.<sup>65</sup> This shows that the term *nazir* may denote not only a person but also an institution comprising many personnel. It is, in fact, a very practical way to improve the position of the *waqf* property, especially, if the intention is to handle the *waqf* professionally, and give as much benefit as possible to the beneficiaries. On this basis, therefore, we find that in almost every Muslim country or community there is a specific organization dealing with *waqf* affairs. They are manifested in bodies like ministries, departments, committees, etc. Even, more radically, these

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<sup>65</sup> Al Bahuti, *Kashaf al Qina'*, vol. 4, p. 269; Ibn Dhuban, *Manar al Sabil*, vol. 2, p. 715; Ibn Hajar, *Tuhfa al Muhtaj*, vol. 6, p. 289.

bodies have been legitimated by the law of the countries and enjoy an authoritative right to administer any *waqf* created in any part in the countries.

### **3.5 Conclusion**

Our study in this chapter has been on aspect of trusteeship in the *waqf* law. It is apparent from our study that the Islamic law of *waqf* pays great attention to the aspect of trusteeship of *waqf*. This is a sort of legal control over the *waqf* property. We have found out that the four schools of law disagree on many technical things in this respect but they all agree that a *nazir* must be appointed when a *waqf* is made. *Nazir* is given an authority to carry out all the stipulation laid down by the *waqif* and he is paid for his job. Nevertheless, we found that there are not much differences of opinion between the four schools regarding the duties of the *nazir*.

## Chapter Four

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### Maintenance and Mobilization of *Waqf* Property

#### 4.0 Introduction

The fundamental goals of *waqf* are to give benefits to mankind and to get reward in the Hereafter. These two goals soundly allude to the fact that a *waqf* property must be kept functioning so as to make it beneficial. To achieve this, the existence of a *waqf*, at first, must be preserved and measures then are deployed to mobilize it. Should this aspect not be tackled, a *waqf* is left meaningless. Our focus in this chapter will be on this and it is, actually, the subject of the interest of many, given that *waqf* property must be treated in a different and special manner, compared to other property. With regard to this, we find that the jurists have discussed methods of dealing with the property as to how and to what extent the property should be preserved and mobilized. Our discussion expounds the differences of view among the jurists in many technical items and attempts to analyze them.

#### 4.1 The general principles of mobilizing the *waqf* property

As has been established, *waqf* property does not belong to the beneficiaries because the aim of a *waqf* is to keep the property free from anyone's ownership. It has been established as well that the subject of the *waqf* can be either immovable or movable. The immovable is like agricultural land and houses for occupation or commercial purposes, etc. The movable is like books, the Qur'an, cars, etc. In mobilizing all of these *waqf* properties the *nazir* must refer to the stipulations made by the *waqif* in his declaration. No self discretion is approved.

However, when there is no stipulation made by the *waqif* regarding his *waqf* the methods of mobilizing the *waqf* property must be in accordance with the nature of the property. The books, for example, must be made for reference, cars for driving, money (for those who approve the *waqf* of cash money) is given as a loan or as *mudharaba*, etc. Agricultural land must be used for agricultural activity. A house must be used for the occupation of the beneficiaries or let out. No exercise which is incompatible with the nature of that property can be done since there no stipulation has been made by the *waqif*.<sup>1</sup>

This is the general principle of mobilizing *waqf* property that we have seen in our study of the law of *waqf* up to this point. From this point on we will study in detail the methods of mobilizing *waqf* property that have been established by the four schools of law.

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<sup>1</sup> Mustafa Shalabi, *Ahkam al Wasaya wa al Waqf*, Beirut: al Dar al Jami'iyya, 1983, p. 154.

## 4.2 The lease of *waqf* property (*ijara al waqf*)

Among the methods of utilizing *waqf* property which are agreed upon by the jurists is to lease the property.<sup>2</sup> This is one of the financial aspects of the institution given that the *waqf* property must be utilized to give benefit to the beneficiaries. Apart from that, the quality of a *waqf* property that it must not be diminished by use makes *waqf* property qualified to be the subject of lease as far as the Islamic law of lease is concerned.<sup>3</sup> It also meets the principle of *waqf* which give the right of enjoyment, as the rules of lease also gives the same right.<sup>4</sup> The only exception is with a mosque which cannot be leased because it is against the nature of a mosque as a place for performing prayer and other forms of personal rituals.<sup>5</sup> To whom or what the revenue is distributed must be in accordance with the specifications made by the *waqif*, such as financing students, mosques, schools or any other purpose which is in compliance with Islamic law.

The one who has the legal power to lease the *waqf* property is the *nazir*, not the beneficiaries, unless the beneficiaries themselves have been appointed as *nazir*. This is because the law regards beneficiaries to have the right of

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<sup>2</sup> Hilal al Ra'y, *Kitab Ahkam al Waqf*, p. 206; al Nawawi, *al Majmu'*, vol. 16, p. 333; al-Maqdisi, *al Sharh al Kabir*, vol. 6, p. 43; al Kashnawi, *Ashal al Madarik*, vol. 3, p. 109.

<sup>3</sup> See Chapter Two, p. 63-65.

<sup>4</sup> Muhammad 'Ufayfi, *al Awqaf wa al Haya al Iqtisadiyya*, Egypt, 1991, P. 145.

<sup>5</sup> Salim Hariz, *al Waqf*, Beirut: Al Jami'at al Lubnaniyya, 1994, p. 160.

enjoyment to the property, not an exclusive right. Though they are the direct object of a *waqf* the law of *waqf* does not regard them as the owner or the trustee to give them any power to administer a *waqf*. Zakariyya al Ansari (d.1520) from the Shafi'i school, in one of his commentaries, gave a strict warning regarding this as many people at his time were confused about this. They took this matter for granted and exercised a right which did not belong to them.<sup>6</sup> This is a serious matter because it is deemed to be violating the law of *waqf* and considered as treachery.

#### 4.2.1. The legal basis of the lease of *waqf* property

Observing the discussion of the jurists in the four schools of law on this subject we find that, there are two occasions in which leasing *waqf* property can be done. They are, first, in the accomplishment of the *waqif*'s stipulation, and second, in states of necessity.<sup>7</sup>

For the former one it is recognized that when a *waqif* stipulates in the declaration of *waqf* that the *waqf* property is to be leased and the revenue thereof is to be distributed to the named beneficiaries, the *nazir* must act accordingly.

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<sup>6</sup> Ibn 'Abidin, *ibid.*, p. 569; Abi al Fadhl, *Lisan al Hukkam* in the margin of al Tarabulsi, *Mu'in al Hukkam*, p. 302; Sulayman ibn 'Umar, *Hashiya al Jamal*, p. 589; Hamilton, *The Hedaya*, p. 237.

<sup>7</sup> Ibn 'Abidin, *Radd al Mukhtar*, vol. 6, p. 608; Ahmad bin Muhammad al Dardir, *al Sharh al Saghir*, vol. 2, p. 307; al Ramli, *Nihaya al Muhtaj*, vol. 5, p. 389; al Bahuti, *Kashaf al Qina'*, vol. 4, p. 259;.

Should he disregard that stipulation, he is considered to be violating the trust vested upon him. In accomplishing this, the *nazir* is obliged to follow all the details of the stipulation, such as the period and rate of the lease.<sup>8</sup> This means that the *nazir* must particularize all of these details in the terms of the lease contract. For example, if a *waqif* has stipulated that the property is to be given a yearly lease, the *nazir* must include a clause in the lease contract to that effect. No longer period is permitted and any contradiction with the *waqif*'s stipulation will annul the contract, for, the *waqif*'s stipulation must be treated as an absolute injunction.

In cases where no express stipulations have been laid down or there has been a clear stipulation not to lease the *waqf* property, the *nazir* is authorized to do it if he finds there is a necessity or *maslaha* in that.<sup>9</sup> In this situation the *nazir* is not considered to be violating the stipulation because *maslaha* has taken over the case. Should *maslaha* not be adopted here, the property would be useless and consequently no reward in the hereafter would be gained by the *waqif*. Among situations that would necessitate leasing is when houses are in dire need of repair. In this case the house can be leased and the revenue thereof is to be used to finance the works of edification. The *nazir* is authorized to issue an evacuation

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<sup>8</sup> Al Tarabulsi, *al Is'af*, p. 67; al Bahuti, *Kashaf al Qina'*, vol. 4, p. 259; al Syarbini, *Mughni al Muhtaj*, vol. 2, p. 385; Qalyubi, *Hashiyatan*, vol. 3, p. 111; Muhammad 'Illish, *Sharh Minah al Jalil*, vol. 4, p. 80. The opinion of the jurists on this is best summarized here by quoting the statement in *al Is'af*: "If a *waqif* stipulates that the administrator is not to lease the *waqf*, or to invest it in sharecropping contract, or to utilize the trees in the land by any means, or (if he stipulates to lease the *waqf* but) not to lease it more than three years and not to renew the contract until the first contract has expired, these stipulations are binding and it is unlawful to disregard them." See al Tarabulsi, *ibid*.

<sup>9</sup> Al Tarabulsi, *al Is'af*, p. 67; Sulayman Ibn 'Umar, *Hashiya al Jamal*, vol. 3, p. 592;

summons to the occupants of the house (the beneficiaries), so that the house can be leased. Upon the expiration of the lease, they are allowed to reoccupy the house if they wish to.<sup>10</sup> In this case the rent must be paid in advance, so that it can be used for the repairs.<sup>11</sup> This is an example of disregarding the *waqif*'s stipulation, a very strong principle in the law of *waqf*, and giving priority to the *maslaha* of the *waqf* property. This can be easily understood, given that the original purpose of a *waqf* is to serve the beneficiaries, and so the *waqf* property must be maintained intact. For this purpose any measure taken which serves that *maslaha* is legally approved.

#### 4.2.2. Period of lease

As far as the view of the majority of jurists is concerned, a *waqif*, when he himself is acting as *nazir*, can lease the *waqf* property for as long a period as he wishes.<sup>12</sup> There is no limitation imposed upon him because he knows best what is good for his *waqf*. However, for the appointed *nazir*, he does not enjoy that authority, in which he is bound to create a lease contract which is in compliance with the *waqif*'s stipulation. In spite of this, the jurists accept that the stipulated period of lease can be extended by the *nazir*, if it is perceived to give advantage to

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<sup>10</sup> Al Ramli, *Nihaya al Muhtaj*, vol. 6, p. 389; al Sharbini, *Mughni al Muhtaj*, vol. 2, p. 390; al Sawi, *Bulghat al Masalik*, vol. 2, p. 307.

<sup>11</sup> 'Illish, *Sharh Minah al Jalil*, p. 67; see also 'Illish, *Fath al 'Ali al Malik*, vol. 2, p. 241.

<sup>12</sup> Abu al Fadhl, *Lisan al Hukkam* in the margin of al Tarabulsi, *Mu' in Hukkam*, p. 301.



the *waqf* or the beneficiaries,<sup>13</sup> or, there is a necessity (*dharura*) in that.<sup>14</sup> However, since this oversteps the *waqif*'s stipulation, an approval from the *qadhi* must be obtained before the *nazir* proceeds with his idea.<sup>15</sup> It should be inferred here that the duty of the *nazir* is to carry out all the *waqif*'s stipulation. Should he find any measure beneficial which is beyond his duty, he must submit the matter to the *qadhi*, who then legally approves the proposal. This notion shows the flexibility of Islamic law in mobilizing the *waqf* property to the maximum extent without it being unnecessarily restricted by the *waqif*'s stipulation. It is a very practical necessity so that the *waqf* will function over a long period of time. Regarding this, al Bahuti observes that it was the practice of all *qadhis* through out time to disregard a fixed period of lease as stipulated by the *waqif*, when necessities demand.<sup>16</sup> Though this can be deemed to violate the *waqif*'s stipulation, it actually complies with Islamic law given that the objective of *waqf* is to serve the community and that necessity knows no laws. In this case, the advantage of the *waqf* property is put on the top priority even at the expense of the principle that the *waqif*'s stipulation is like that of the God's order (*nas al waqif ka nas al shari*<sup>c</sup>).

Be that as it may, we find in the Hanafi and the Maliki schools that this flexibility apparently has a limit. They are reluctant to regulate that the *nazir* or *qadhi* has full discretionary power regarding the period of lease in the cases

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<sup>13</sup> Al Tarabulsi, *al Is<sup>c</sup>af*, p. 68.

<sup>14</sup> Al Bahuti, *Kashaf al Qina<sup>c</sup>*, vol.4, p.260.

<sup>15</sup> Al Tarabulsi, *al Is<sup>c</sup>af*, p. 68.

<sup>16</sup> Al Bahuti, *Kashaf al Qina<sup>c</sup>*, vol.4, p. 260.

mentioned above. They impose certain limits to the period of lease and many views have been offered on this.

In the Hanafi school their later jurists (*al mutaakhirun*) have overruled their earlier (*al mutaqaddimun*) view<sup>17</sup> whereby they have allowed some limitations to the lease of *waqf* property in the absence of the *waqif*'s stipulation. According to them land cannot be leased for more than three years nor houses for more than one year. The reason for this is that the long period of lease is tantamount to terminating the *waqf* or can lead to the claim of ownership, and this is contrary to the principles of *waqf*. Another opinion is that if the land is leased for agricultural purposes the lessor must provide a lease contract for the period that is required by the lessee to cultivate the land. This will depend on the nature of the crop. For example if the nature of the crop requires one year then the contract of lease must be created for that period to enable the lessee to complete his work and no longer than that is permitted. The third one, which is the opinion of Abu al Layth, is that it is lawful to lease *waqf* property, whether lands or houses, for the period of three years.<sup>18</sup>

This ruling of limitation is actually the manifestation of their concern for the exclusive nature of *waqf* as God's property. The fact is that there is no

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<sup>17</sup> The old view (*mutaqaddimin*) imposes no limitation on the *nazir* to lease the *waqf* property for as long a period as he wishes, if no prohibition is underlined in the *waqif*'s stipulation to that effect. According to this view, since the *nazir* is acting on behalf of the *waqif*, who has an exclusive right to lease out the property for any period he wishes, he is allowed as well to exercise that right. See Abu al Fadhl, *Lisan al Hukkam* in the margin of al Tarabulsi, *Mu'in al Hukkam*, p. 301.

<sup>18</sup> Al Tarabulsi, *al Is'af*, pp. 67-68; see also Ibn Nujaym, *al Bahr al Raiq*, vol. 7, p. 327.

evidence at all in the Quran or Traditions of the Prophet regarding this limitation. The only basis that they have is the principle that *waqf* belongs to Allah, so that, to preserve this principle, there should be a limit to the contract of lease. If no limitation is imposed, the *waqf* is unprotected, because as time passes the question of ownership may arise or deliberately be brought about by the tenant.<sup>19</sup> This certainly would jeopardize the *waqf*. We can assume that this limitation was as a response to cases which arose at the time which included cases of claiming ownership to *waqf* property.

In the Maliki school the same trend is also not an unfamiliar development. The school has made a difference between the types of the subject of *waqf*. For land, if it has been made *waqf* in favour of specific individuals, the period of the lease is limited to two years, or three years according to some authorities. If it has been made in favour of a certain group of people, like the needy or scholars, the lease is extended up to four years. For houses it is limited to a year lease.<sup>20</sup> Land can be given a lease for a longer period because of its undamaged nature, whereas houses do not have this quality,<sup>21</sup> hence one year is the longest period possible. This is the position of the school regarding the period of lease of the *waqf* property in the absence of the *waqif*'s stipulation.

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<sup>19</sup> Al Tarabulsi, *ibid.*

<sup>20</sup> Al Hattab, *Mawahib*, vol. 6, p. 47; Ahmad bin Muhammad al Dardir, *al Sharh al-Saghir*, vol.2, p. 311; al Kannani, *al Aqd al Munazzam*, vol. 2, p. 103;

<sup>21</sup> Ahmad bin Muhammad al Dardir, *ibid.*

As has been asserted above there is no basis at all in the Quran or the Traditions regarding this limitation of the period of lease of a *waqf*. It is rather a juristic judgment that was based on certain circumstances and then became a practice of the *qadhi* throughout the times.<sup>22</sup> Many Maliki jurists like Muhammad ibn Yusuf al Mawwaq (d. 1491), Muhammad ibn ʿAbd Allah al Khurashiy and ʿAli ibn Ahmad al ʿAdawi (d.1775) report that the *qadhis* of Cordoba, in referring to the practice of four years, regarded this as good policy (*wastahsanahu qudhat Qurtuba*).<sup>23</sup> This is also comes under the legal maxim “the policy of a ruler is dependent on the necessity (*tasarruf al imam manut bi al maslahah*)”.<sup>24</sup>

This special policy with regard to leasing, however, cannot be traced in the Shafiʿi and Hanbali school. In their law of lease the period of lease can be as long as the property can give benefit according to the assessment of the experts (*ahl al khibra*). Thus land can be given a lease for a hundred year, or cloth for a year or two. The same principle is applied to *waqf* property, with the provision that if a long period it will give benefit to the *waqf*.<sup>25</sup> We find here that the schools do not give any limitation to the lease of *waqf* property as the

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<sup>22</sup> See *al Mausufat al Fiqhiyya*, Kuwait; Wizarat al Awqaf, 1990, vol. 18, pp. 55-56. This prevailed practice is evident in the observations of al Hattab that states: “For the land that made *waqf* in favour of mosques, the needy, and their equivalents, the *nazir* cannot give a lease of more than four years, and if it is the house not more than one year. This is the practice of the people and what has been practised by the *qadhis* heretofore”. See al-Hattab, *Mawahib al Jalil*, vol. 6, p. 47.

<sup>23</sup> Al Mawwaq, *al Taj wa al Iklil*, vol. 6, p. 47; al ʿAdawi, *Hashiya al ʿAdawi*, in the margin of al Khurashiy, *al Khurashiy*, vol. 4, p. 100; see also al Sawi, *Bulghat al Salik*, vol. 2, p. 311.

<sup>24</sup> Al Suyuti, *al Ashbah wa al Nazair*, Beirut: Dar al Kutub, 1990, p. 121.

<sup>25</sup> Ibn Hajar, *Tuhfa al Muhtaj*, vol. 2, p. 458.

other two schools did. Its rules are the same as the law of *ijara* in their school without any special deal with regard to the lease of *waqf* property. However, we find that Ibn Hajar al Haytami (d.1566), from the Shafi'i school of law, in his *al Fatawa al Kubra*, states that the *qadhis* of the Shafi'i school tend to follow the policy of the Hanafis as discussed above because it is more cautious (*ahwat*) in dealing with *waqf* property.<sup>26</sup> What is meant by cautious here is that by giving limitation to the period of lease, a *waqf* will be more safeguarded from any negligence. We see this as a practical position that should be adopted by the jurists.

#### 4.2.3. Rate of the lease

Apart from the period, the rate of the lease has also been an issue of attention on the part of jurists. Since a *waqf* is created for the benefit of the beneficiaries a *nazir* cannot give lease at the rate of his discretion but at what can give much more benefits to the beneficiaries. This can be seen from their discussion on the minimum rate of the lease and the consequent effect if the lease is below that minimum rate.

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<sup>26</sup> Cited in *al Mawsu'at al Fiqhiyya*, Kuwait: Wizarat al Awqaf wa al Shu'un al Islamiyya, 1990, vol. 18, p. 56.

The understood stand of the jurists regarding this is that the *waqf* property must be leased at not less than the customary rate (*ujra al mithl*).<sup>27</sup> When the lease contract has been established on the customary rent, it cannot be terminated even if there is a high demand in the market for the lease which makes the rate go up, or there is someone else who offers a better rent, because the contract has been established legally.<sup>28</sup> The issue of concern here is that the better rate is more beneficial to the *waqf* property and it should be given preference. However the jurists have ignored this concern since the contract has been established on the customary rate.

However they differ on the point of the consequent effect should the lease be established below the customary rate. The Hanafi and Hanbali schools see that the contract is valid, but according to the Hanafis the tenant is liable to pay at the customary rent,<sup>29</sup> and according to the Hanbalis it is the liability of the *nazir* to make up the payment.<sup>30</sup> The point of disagreement here is who is to take responsibility when the contract has been established on the lower rate. There is no clear justification given for either opinion. The Maliki school also holds it is valid but it will be terminated if there is some one else who offers a better rate of

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<sup>27</sup> Ibn 'Abidin, *Radd al Mukhtar*, vol. 6, p. 608; Nizam, *al Fatawa al Hindiyya*, vol. 2, p. 419; al Kashnawi, *Ashal al Madarik*, pp. 109 -110; al Khurashiy, *al Khurashiy*, vol. 4, p. 100; al Bahuti, *Kashaf al Qina<sup>c</sup>*, vol.4, p. 269.

<sup>28</sup> Ibn 'Abidin, *Radd al Mukhtar*, vol. 6, p. 608; Ibn Hajar, *Tuhfa al Muhtaj*, vol. 6, p. 294; al Ramli, *Nihaya al Muhtaj*, vol. 5, p. 403; al Kashnawi, *ibid*.

<sup>29</sup> Al Tarabulsi, *al Isaf*, p. 68.

<sup>30</sup> Al Bahuti, *Kashaf al Qina<sup>c</sup>*, vol.4, p. 269.

lease.<sup>31</sup> The Shafi'i school however goes in opposite way: they feel that the contract is void unless the tenants are the beneficiaries themselves or those who are authorized by them,<sup>32</sup> for the *waqf* is created for their benefit, so it comes under their discretion. In this small issue, there is actually a conflict of principle among the schools. Though all of the schools agree that the rent must be at the customary rate, not all of them decree that the rate below the customary one is void. It seems only the Shafi'i and the Maliki schools stand firmly on what they have agreed which is considered in compliance with the principles of *waqf*, that is, to give benefit to mankind. If the rate is not the customary rate, then it cannot be said to have a beneficial value and this cannot be accepted in the law of *waqf* whose prime principle is to benefit the beneficiaries. Hence it is void.

#### 4.2.4. Termination of the lease

The lease of *waqf* is terminated when the agreed period in the contract comes to an end as ruled in the Islamic law of lease. There is no difference in this point with the general principle of the Islamic law of lease.

However there is one point in which the principle in the law of *waqf* differs with the law of lease. It is agreed among the schools that the contract of

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<sup>31</sup> Al Kashnawi, *Ashal al Madarik*, p. 110.

<sup>32</sup> Ibn Hajar, *Tuhfa al Muhtaj*, vol. 6, p. 294; al Ramli, *Nihaya al Muhtaj*, vol. 5, p. 403.

lease is not terminated with the death of the lessor, who in this case is the *nazir*.<sup>33</sup> This point is contrary to the general rule of the Hanafi school that the contract of lease is terminated upon the death of either the lessor or the lessee.<sup>34</sup> The justification given for this is that the lessor in the case of *waqf* is not the owner of the property and the contract is not for his interest.<sup>35</sup> He is only a trustee who has no benefit in the contract, and hence he does not have an exclusive right to the property that would give the full right of enjoyment that an owner has. In this capacity, his death does not affect the lease of *waqf* property as is the case with his own property. The case, however, is different if the one who dies is the lessee in which case it will terminate the contract of the lease because the contract has been made for his interest and it binds him to pay the rent. When he dies the liability to pay the rent cannot be imposed on another.<sup>36</sup>

In the Maliki, Shafi<sup>c</sup>i and the Hanbali schools there is not much difference from the original law of lease in the schools. The principle in the law of lease is that the contract of lease is not terminated with the death of either the lessor or the lessee.<sup>37</sup> The contract is still valid until the end of the agreed period in the contract. The death of either two does not affect the contract at all. This is because the schools see that the contract of lease is a binding one like the contract

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<sup>33</sup> Al Tarabulsi, *al Is<sup>c</sup>af*, p. 69; al Kashnawi, *Ashal al Madarik*, p. 109; Ibn Hajar, *Tuhfa al-Muhtaj*, vol. 2, p. 465; al Qalyubi, *Hashiyatan*, vol. 3, p. 84.

<sup>34</sup> Ibn <sup>c</sup>Abidin, *Radd al Mukhtar*, vol. 9, p. 114-115;

<sup>35</sup> Salim, *al Waqf*, Beirut : al Jami<sup>c</sup>at al Lubnaniyya, 1994, p. 165.

<sup>36</sup> Al Kubaysi, *Ahkam al Waqf*, vol. 2, p. 113.

<sup>37</sup> Abu <sup>c</sup>Umar, *al Kafi*, p. 369. Ibn Hajar, *Tuhfa al Muhtaj*, vol. 2, p. 465; Ibn Qudama, *al-Mughni*, vol. 6, p. 20.



of a sale. The subject of the lease is inherited by the heirs of the death to proceed in exercising the enjoyment rights. The termination of the lease occurs if the lessee does not fulfill the contract like refusing to pay the rent.<sup>38</sup> For these three schools they make no special treatment regarding the termination of the lease of *waqf* property. Even the Maliki school, in the case of the period of lease they make special rules for the *waqf* property, but in the case of the termination of the lease they follow the original law of lease.

#### **4.2.5. The rights and responsibilities of the lessee**

Observing the work of the jurists in the four schools of law, we find no special treatment is given regarding the rules governing the rights or responsibilities of the lessee of the *waqf* property. It follows exactly the sanctions given by Islamic law of lease regarding the matter.

It is agreed among the four schools that when the contract of lease is made it is lawful for the lessee to exercise his rights of enjoyment on the property. For instance, in the lease of a house, the lessee can enjoy the right of occupying the house and this includes anything that is needed by himself which comes under the term occupying. He however cannot exercise any right that causes harm to the house because the contract of lease is the contract of the right of an enjoyment

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<sup>38</sup> Ibn Hajar, *Tuhfa al Muhtaj*, vol. 2, p. 465; Ibn Qudama, *ibid*.

only. This nature of contract also allows the lessee to pass these rights and responsibilities to a third party whether by lease or permission.<sup>39</sup>

Regarding leasing *waqf* land, we find there is discussion in the Hanafi school stating that the lessee can plant trees or erect a building in the *waqf* land without any permission from the *nazir* provided that such acts do not injuriously affect the land. In the same manner he can remove the trees and the building if the planting and erecting are for his benefit and not for *waqf*. If such acts are perceived to damage the land the permission must be obtained beforehand. However, if the lessee is to dig reservoirs or tanks in the land the permission from the *nazir* is a compulsory in any case. This is because the act of digging naturally causes permanent damage to the land, so it must be with the permission. Before giving permission in all of the above cases, the *nazir* must have a valid justification that the acts are beneficial to the *waqf*, without which no permission can be given.<sup>40</sup> The point of concern here is to protect the *waqf* property and this comes under the discretion of the *nazir* to identify the extent that such acts will cause damage to the property.

### **4.3 Innovations in leasing *waqf* property**

The discussion on the lease of *waqf* above concerns the established rules and regulations in the classical law of *waqf* in the four schools of law. Apart from

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<sup>39</sup> Wahba al Zuhayli, *al Fiqh al Islami*, vol. 4, p. 763.

<sup>40</sup> Ibn 'Abidin, *Radd al Mukhtar*, vol. 6, p. 678-679.

that we find that there are innovations in the lease of *waqf* that have been established, especially in the period of the Ottoman Caliphate. These new innovations were adopted by the Ottoman rulers as a practical response to the conditions of *waqf* property in their times when conventional methods did not provide much benefit to the *waqf*.<sup>41</sup> However, these new innovations actually find their basis in the classical law of *waqf* though not in a direct way.<sup>42</sup> The discussion below will try to clarify these new methods of mobilization of *waqf* property and the extent to which they are in compliance with the legal principles of the classical Islamic law of *waqf*.

#### **4.3.1 The contract of *Hukr***

*Hukr* has been defined as leasing *waqf* land for a long period of time for the purpose of planting trees and erecting a building or either it. Regarding the period of lease, it is also permissible to be indefinite as long as the yearly rent is paid by the lessee.<sup>43</sup> The main features of this kind of lease are that the subject of the lease is confined to land only, the contract is the long duration of lease or indefinite and the lessee (*muhtakir*) cannot utilize the land beyond the two

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<sup>41</sup> Mustafa Ahmad al Zarqa', *al Madkhal al Fiqh al 'Am*, vol. 3. pp. 40 – 45; Majd Ahmad Makki, *Fatawa al Zarqa'*, pp. 467-470; Nazih Ahmad, "Asalib istithmar al Awqaf", in *Abhath Nadwa Nahwa Dawr Tanmawiyy li al Waqf*, Wizarat al Awqaf wa al Shu'un al-Islamiyya: Kuwait, p. 174.

<sup>42</sup> Mustafa Ahmad al Zarqa', *Ibid*, p. 41.

<sup>43</sup> Zuhdi Yakan, *Ahkam al waqf*, p. 162; al Zarqa', *Ibid.*: al Fakhani, *Mawsu'at al Qada' wa al Fiqh*, Cairo, vol. 26, 1977, p. 756.

purposes mentioned. *Hukr* differs from the basic methods of lease in these three aspects.<sup>44</sup> The method of the payment of the rent and the rate of the lease are also different and considered a new precedent in the law of *waqf*. In this contract the rate of the rent is very high, that is, equal to the current value of the land, and to be paid in advance to the *nazir*. Apart from this payment, the lessee also has to pay the yearly rent at the low rate.<sup>45</sup> So, there are two kinds of payment that must be fulfilled by the lessee, one of which is on a one-off basis, for a big amount, to be paid in advance, and the other of which is a regular yearly payment which is for a small amount. Upon the contract being established the lessee has the right to occupy the land and exercise his rights. The special advantage for the lessee in this contract is that his right of occupation and using the land can be sold to the others and inherited by his heirs upon his death.<sup>46</sup>

The contract of *hukr* is made when a *waqf* is in its worse condition and there is no income derived from it. This new method will provide a big income for a *waqf* since the payment is equal to the selling price of the land in addition to the yearly normal rent. This income can be used for financing and funding

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<sup>44</sup> See *al Mawsu'at al Fiqhiyya*, Kuwait: Wizarat al Awqaf wa al Shu'un al Islamiyya, 1990, vol. 18, Kuwait, pp.55-56. In the modern codification of law of *waqf* however modification has been made in this part, that is, the lessee has the right to exercise any form of utilization of the land and is not confined to only planting and constructing. This modification gives a more flexible perspective for the practice of *alhukr* and certainly this can give much more benefits to the *waqf*. See 'Abd al Sattar, *al Waqf wa Dauruhu Fi al Tanmiyya*, 1998, p. 62.

<sup>45</sup> Nazih Ahmad, "Asalib istithmar al Awqaf", in *Abhath Nadwa Nahwa Dawr Tanmawiyy li al Waqf*, Wizarat al Awqaf wa al Shu'un al Islamiyya: Kuwait, p. 175; Wahba al Zuhayli, *al-Fiqh al Islami*, vol.8, p. 228.

<sup>46</sup> Nazih Ahmad, "Asalib istithmar al Awqaf", in *Abhath Nadwa Nahwa Dawr Tanmawiyy li al Waqf*, Kuwait: Wizarat al Awqaf wa al Shu'un al Islamiyya, p. 175

another *waqf* property or be invested in another place that can generate income for the *waqf*. This is the legal basis for the contract of *hukr*.

If we see this method of lease from the position of the established stand of the Hanafi School of law, that is, the *al muta'akhirun* of the school, and the position of the Maliki School, this kind of lease is strictly prohibited because the long period of lease will jeopardize a *waqf* for it exposes the *waqf* for the claim of private property. This is the concern on their part. However, this never be a problem for the *al mutaqaddimun* of the Hanafi school, the Shafi'i and Hanbali schools, for, their positions is that there is no restriction in leasing a *waqf* property for a long period of time.<sup>47</sup> So, it is the position of the majority of the schools of law to validate the contract of *hukr*. This is the classical law point of view on this matter. It goes back to their principle regarding the period of lease of *waqf* property.

If we look at it from the financial aspects of *waqf* this contract gives a better solution for a *waqf* since it earns a considerable amount of profit from the advanced payment and the rent. This profit can be given to the beneficiaries for whom or the *waqf* was made for. However, this practice should be done in a very cautious manner and must be backed up by certain conditions and rules bearing in mind that a long period of lease can sometimes give much trouble to a *waqf*.<sup>48</sup>

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<sup>47</sup> See above pp. 147-148; see also *al Mawsu'at al Fiqhiyya*, Kuwait: Wizarat al Awqaf wa al Shu'un al Islamiyya, p. 58.

<sup>48</sup> The case of Egypt can be mentioned here as an example. It was for this reason we find the Egyptian government passed a new law in 1982, that is, Law No. 43 to the effect that any

The sacredness of *waqf* property should be given top priority and consideration in any method of developing and mobilizing the property. Apart from that, we should also learn from the position of some jurists who give limitation for the period of lease due to mistreatment suffered by *waqf* property at their time. This is to say that we should think of the *maslaha* of the *waqf* at first in any measure taken, and being a *maslaha* its standard varies from one time to another. It is up to the jurist to measure and balance between sticking to the principle and adopting the *maslaha* in their time and place.

#### 4.3.2 The contract of *ijaratayn*

Another newly adopted contract is *ijaratayn*. This contract has similar features as *hukr*, that is, to lease immovable *waqf* property over a long period of time with double payments, that is, in advance payment and yearly rents with different contracts, just like in the case of *hukr*, but the difference is in the terms of the ownership of the building and the crops in the *waqf* land. In the contract of *hukr* the ownership of the building and the crops belongs to the lessee because he is the one who develops the land, whereas in *ijaratayn* the building and the crops are

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right of *hukr* is terminated commencing from the date that law is passed. In the explanatory memorandum of the law, the Minister of Awqaf stated the reason behind the new law, that is, the practice of *hukr* give a legal binding effect to the *waqf* land and this will put the *waqf* in jeopardy in terms of ownership. Apart from that the economical situation had changed in Egypt at that time, in which, another method of mobilization like *istibdal* (an exchange of *waqf* property) was more practical and it brought much more benefit to the *waqf*. See al Idara al 'Amma li al Shu'un al Qanuniyya, *Qawanin al Waqf wa al Hukr*, Cairo, 3<sup>rd</sup> Ed., pp. 172, 178-179; see also Ahmad Amin and Fathi 'Abd al Hadi, *Mawsu'at al Awqaf*, Iskandariyya: Minshat al Ma'arif, 1999, p. 320.

owned by the *waqf*. As in the case of *hukr*, the rights of the lessee with regard to the *waqf* property are also inherited by his heirs upon his death.<sup>49</sup>

To make this clearer, it can be put like this. When a *nazir* finds an immovable *waqf* property in a deteriorated condition and there is no revenue that can support the improvement (*‘imara*) of the property, he can propose the idea of the contract of *al ijaratayn* to the *qadi* who will then approve the proposal after taking into consideration that the contract will give benefit to the *waqf*. When the contract has been established and the payment has been made the *nazir* will start making an improvement to the *waqf* property after which the improved property will be handed over to the lessee who can exercise his rights of lease.

From the Islamic legal principle point of view, this kind of contract can be seen from the same perspective as that of the contract of *hukr*. It is the matter of duration of the lease that becomes the subject of concern of the jurists. The majority of the jurists validate the contract but the later Hanafis do not accept it as a lawful contract. There are also some jurists who hold that this contract is considered as an alternative to the contract of sale since it is prohibited in the law of *waqf*.<sup>50</sup> If the contract of sale is prohibited because of the consequence transferring the ownership of *waqf*, this contract instead retains the *waqf* under

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<sup>49</sup> Nazih Ahmad, “Asalib istithmar al Awqaf”, in *Abhath Nadwa Nahwa Dawr Tanmawiyy li al Waqf*, Kuwait: Wizarat al Awqaf wa al Shu’un al Islamiyya, p. 175; ‘Abd al Sattar, *Ibid.*, pp. 68-69; Mustafa Ahmad al Zarqa’, *al Madkhal al Fiqh al ‘Am*, vol. 3. p. 42; Zuhdi Yakan, *Ahkam al Waqf*, p. 165.

<sup>50</sup> Wahba al Zuhayli, *al Fiqh al Islami*, vol.8, p. 228.

the ownership of Allah and at the same time obtaining the amount of income as much as if it were sold.

### 4.3.3 The contract of *kadik*

The term '*kadik*' is actually of Turkish origin and refers to a practice that can be explained like this: a person who hires a *waqf* shop and house (*hamut*) has made some renovations or constructed a supplementary building annexed to the shop as required by the nature of his business or works in the house. All of the expenses are due to him and he has got an approval from the *nazir* in doing this. The issue here is that when the contract of lease ends, the lessee in many cases will suffer loss if the *nazir* wishes to evacuate the lessee from the house since the supplementary building has been constructed by him. Therefore the jurists have ruled that it is unlawful to evacuate the lessee in this case and decreed that the lessee has the right to continuously occupy the house as long as he pays an adequate rent. This contract is also known as '*kirdar*' if the property involved is agricultural land. As in the case of *hukr* and *ijaratayn* the rights of '*kadik*' and '*kirdar*' can be sold or inherited by his heirs.<sup>51</sup> We can justify the permissibility of this practice, for there is no harm inflicted on the *waqf* property

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<sup>51</sup> Mustafa Ahmad al Zarqa', *al Madkhal al Fiqh al 'Am*, vol. 3. pp. 43-44; Zuhdi Yakan, *Ahkam al Waqf*, pp. 182-186; Ibn 'Abidin, *Radd al Mukhtar*, vol. 6, pp. 593-594.



by keeping it under the lessee's right of enjoyment. Besides, it continuously gives benefits to the *waqf* through the rent.<sup>52</sup>

#### 4.4. *Muzara'ca* and *musaqat*

Among other methods of mobilizing the *waqf* land that have been discussed by the classical jurists are the agricultural contracts named as *muzara'ca* and *musaqat*. Technically, *muzara'ca* means a sharecropping contract between the owner of a land and the worker over the cultivation of the land. It also named as *mukhabara* as well as *muhaqala*. In the Shafi'i school *muzara'ca* refers to the sharecropping contract on which the owner of the land is the one who provides the seeds and *mukhabara* refers to the contract on which the worker is the one who provides the seeds.<sup>53</sup> The second one, *musaqat* means a sharecropping contract between the owner of the plantation and the worker over the works on the plantation. It is also known as *mu'amala*.<sup>54</sup> The difference between the two as appears in the definitions is that *muzara'ca* involves works to cultivate the land, whereas *musaqa*

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<sup>52</sup> Ibn 'Abidin in equating this practice with *hukr* states that, ".....it is also the case with the owners of *kirdar* and their gardens, and the owners of *kadik* with their shops. By retaining their rights to occupy the property will give benefit to the *waqf* and keep it profitable". See Ibn 'Abidin, *Radd al Mukhtar*, vol. 6, p. 594.

<sup>53</sup> Wahba al Zuhayli, *al Fiqh al Islami*, vol. 5, p.613-614; al Jaziri, *Kitab al Fiqh 'ala al-Mazahib al Arba'ca*, vol. 3, p. 2; al Sharbini, *al Iqna'*, vol. 2, p. 77.

<sup>54</sup> Wahba al Zuhayli, *ibid.*, p. 630. The term '*musaqat*' is an Arabic term from the root word '*saqy*' which literally means 'irrigation'. This term does not mean that this contract is only confined to the work of irrigation. It actually comprises whatever is associated with the work to serving and caring the plantation. It is used in the classical Islamic Law based on that the work of irrigation always takes a large part in serving and caring the plantation. See al-Dusuqi, *Hashiyat al Dusuqi*, vol. 3, p. 539; al Bahuti, *Kashaf al Qina'*, vol. 3, p. 532.

involves works to serve and care the plantation that already exists in the land. Both, however, share one aspect, that is, that the yield is shared by the owner and the worker. These contracts are actually two-in-one contracts, combining partnership and hiring or as asserted by the Hanafis, a contract of hire at the beginning which ends up as partnership (*ijara ibtidaan sharika intihaan*).<sup>55</sup>

#### 4.3.1. The position of *muzara'at* and *musaqat* in Islamic law

To facilitate the discussion of the legal justification of *muzara'at* and *musaqat* as means of mobilizing and utilizing *waqf* land we should first discuss the position of the schools of law regarding these two. Let us first deal with *muzara'at* and we will begin with the position taken by the Hanafi school.

The established view in the Hanafi school is that expounded by Abu Yusuf and al Shaybani who decree that *muzara'at* is a lawful practice, a view which is in opposition with the view of Abu Hanifa himself. According to this school this contract combines three legal elements; the owner, the worker and the subject of the contract (*ma'qud 'alayh*) which can be in the forms of exercising the right of the land (*manfa'at al ard*) if the seed is provided by the worker, or,

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<sup>55</sup> Wahba al Zuhayli, *al Fiqh al Islami*, vol. 5, p.614; al Dusuqi, *Hashiya al Dusuqi*, vol. 3, p. 372.

the labour (*ʿamal al ʿamil*) if the seed is provided by the owner of the land.<sup>56</sup> Their justifications are, apart from the Tradition to the effect that the Prophet made this kind of contract with the people of Khaybar,<sup>57</sup> that *muzaraʿa* is a contract of partnership with wealth from a party and labour by the other, which is, by analogy, the same as *mudharaba*. Both are based on necessity. The owner of the land himself may not be in position to cultivate the land, while the other has the capability to work but has no land. Necessity, therefore, requires that they come to such a contract.<sup>58</sup> These arguments give a strong basis for its validity and have taken place in the Hanafi School. These three arguments of the two disciples of Abu Hanifa are quoted by many Hanafi jurists in supporting the validity of *muzaraʿa*.<sup>59</sup>

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<sup>56</sup> Wahba al Zuhayli, *al Fiqh al Islami*, vol. 5, p. 614.

<sup>57</sup> Ibn ʿUmar reports that “the Prophet (peace be upon Him) made contracts with the people of Khaybar for half of the produce, fruits or vegetables”. See Muslim, *Sahih Muslim*, in *Kitab al Buyuʿ*, translated into English by Abdul Hamid Siddiqi, vol. 3, p. 817.

<sup>58</sup> Whereas Abu Hanifa, in maintaining his view, stand firmly on the Tradition of the Prophet as narrated by Zayd that the Prophet prohibited the practice of *mukhabara*. When the Prophet was asked the meaning of *mukhabara* he replied that it is *muzaraʿa* on the basis of sharing the yield by one third or one fourth. Abu Hanifa also argues that the wages for such hiring of services are unknown or non-existent at the time of the contract is made and this makes it an invalid contract. Regarding the tradition which states the deal made by the Prophet and the people of Khaybar, Abu Hanifa implies it as a kind of *kharaj* and not a *muzaraʿa*. In arguing this position of Abu Hanifa there is view from some Hanafis which says that *muzaraʿa* has become a common practice among the people (*taʿamul*) and this makes an analogy does not work here as in the case of *istisnaʿ*. The legal principle involves here is *istihsan*, for, the analogy is abandoned here with the stronger principle. See Qadi Zada, *Takmilat Fath al-Qadir*, vol. 9, p. 473-475; see also Nyazee, *Islamic Law of Business: Partnership*, p. 279.

<sup>59</sup> See for example al Ghanimi, *al Lubab*, vol. 1, p 228; al Kasani, *Badaiʿ al Sanaiʿ*, vol. 8, p. 3807.

The same arguments are duplicated by the Hanbali school, in which, the school goes in line with the above view. The school furthers their justification of its validity by equating it with the original contract of lease, in which, in their school it is lawful to pay the lease with foods like wheat or other than foods like cotton etc. The contract of *muzara'ca* is in one aspect a lease contract in which it is paid with part of the crop produced. Hence it is a lawful contract. The difference between the schools is in one thing, that is, the Hanbali school stipulates that in this partnership the seed must be provided by the owner of the land as it is an analogous to *musaqat* and *mudaraba*. This appears very clear in the definition of *muzara'ca* itself as given by some Hanbali jurists, that is, to give the land and seed (*hab*) to someone for cultivation in return for part of the produce.<sup>60</sup> This is, however, not a matter of concern in the Hanafi school. It is up to an agreement between the owner and the cultivator.<sup>61</sup>

The Maliki jurists do not assign the same meaning to *muzara'ca* as it is understood by the Hanafi school and the Hanbali school. According to them *muzara'ca* is a partnership for cultivation but not a sharecropping contract because for them the Tradition proscribes the renting of land for its yield. It must be paid

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<sup>60</sup> Al Bahuti, *Kashaf al Qina'c*, vol. 3, p. 532; Ibn Dhuban, *Manar al Sabil*, vol. 2, p. 628.

<sup>61</sup> As far as the Hanafi school of law is concerned there are four types of arrangements made between the owner and the worker as follows: (a) Land and seed are provided by the landowner and work and animals are undertaken by the tenant. (b) Land is provided by the landowner and the rest of the things are provided by the tenant. (c) Land, animals and seeds are provided by the landowner and works by the tenant. (d) Land and animals are provided by the landowner and seeds and works by the tenant. Of these four types the last one is ruled as invalid by the school. See al Ghanimi, *al Lubab*, vol. 1, p.321; al Kasani, *Badai'c al Sanai'c*, vol. 8, p. 3816-3817.

with either in the form of money, animals or merchandise.<sup>62</sup> This actually goes back to the law of lease in this school where it is unlawful to rent the land, for the purpose of cultivation, with food whether it is the products of the land itself or not.<sup>63</sup> The contract of *muzara'ah* as approved by the Hanafis and Hanbalis is tantamount to this and therefore it is unlawful. Since this is a matter of principle in the Maliki school, in this partnership the seed must be provided by both the land owner and the cultivator. The partnership is invalid if the seed is provided by the cultivator because it is considered paying the rent with food.<sup>64</sup>

The standpoint of the Shafi'i jurists on this kind of contract is similar to that of the Maliki school. They denounce the contract of *muzara'ah* of the Hanafis and Hanbalis based on the above mentioned tradition, but not *per se*. They make an exemption when *muzara'ah* is established as subservient to the contract of *musaqat* with provisions that the same worker is employed. In this case, the land should be between two groves that are part of the contract of *musaqat*. Only in this situation is the contract of *muzara'ah* permitted, as for them the tradition of the contract between the Prophet and the people of Khaybar is in this kind of situation. Without any further argument given to support this interpretation they

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<sup>62</sup> Ahmad bin Muhammad al Dardir, *al Sharh al Saghir*, vol. 2, p. 178. The famous tradition that has been used by the Maliki School regarding this is that of narrated by Rafi' Ibn Khudayj which reports that the Prophet (Peace be upon Him) prohibited the contract of *muzara'ah*. Cited in Wahba al Zuhayli, *al Fiqh al Islami*, vol. 5, p. 617.

<sup>63</sup> Ahmad bin Muhammad al Dardir, *ibid.*, p. 269.

<sup>64</sup> Ahmad bin Muhammad al Dardir, *ibid.*, p.179.

see that this contract is permitted on the basis that separating between the two works of *muzara'ca* and *musaqa* will create difficulties.<sup>65</sup>

This is the position of the four schools of law regarding *muzara'ca*. As for *musaqat* the four schools of law agree about its validity. In the Hanafi School, the established view is that of Abu Yusuf and al Shaybani who rules out its validity on the same lines as in *muzara'ca* with the same evidence and argument, while Abu Hanifa do not consider it valid.<sup>66</sup> The Hanbali school follows the view of Abu Yusuf and al Shaybani as in the case of *muzara'ca*.<sup>67</sup> In the Shafi'i school, the contract of *musaqa* is permitted which is in contrary with the schools' view on *muzara'ca* based on the tradition narrated by Ibn 'Umar as mentioned above. Their argumentation is based on the same tradition but with different understanding, in which, for them the tradition means for *musaqa* only and not for *muzara'ca* as the Hanafis and the Hanbalis did.<sup>68</sup> The Maliki school also validates this contract which is seemingly in opposition with their principle that the rent cannot be in the form of food. However, according to this school, *musaqat* is permitted on the basis of necessity (*dharura*) as an exemption from the following prohibited contracts:

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<sup>65</sup> Al Mahalli, *Sharh al Mahalli*, vol. 3, p. 61.

<sup>66</sup> Al Ghanimi, *al Lubab*, vol. 1, p 235; al Kasani, *Badai' al Sanai'*, vol. 8, p. 3815.

<sup>67</sup> Al Bahuti, *Kashaf al Qina'*, vol. 3, p. 532; Ibn Dhuban, *Manar al Sabil*, vol. 2, p. 627.

<sup>68</sup> Al Mahalli, *Sharh al Mahalli*, vol. 3, p. 60.

1. Selling fruits prior to the process of ripening (*bay' al thamar qabl buduw salahiha*).
2. Selling food for food in return for interest (*nasi'at*).
3. Uncertainty (*gharar*), because the worker does not know what the quantity will be.
4. Loan with loan in return (*al dayn bi al dayn*), because the labor (*manfa'a*) and the crop are not in possession when the contract is made.
5. Renting land with what it produces.<sup>69</sup>

#### **4.3.2. *Muzara'a* and *musaqa* as the means of mobilizing the *waqf* property**

Having discussed the position of *muzara'a* and *musaqat* in Islamic Law, let us now turn to our topic of mobilizing *waqf* property by these two means. The Hanafi school, since they accept the validity of *muzara'a* and *musaqat* allows the practice of *muzara'a* and *musaqat* on *waqf* land because these do not affect any principle in the law of *waqf*. It is just like other methods of mobilizing *waqf* land. For this we have the authority of al Khassaf in which he states:<sup>70</sup>

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<sup>69</sup> Al Dusuqi, *Hashiyat al Dusuqi*, vol. 3, p. 372; al Sawi, *Bulghat al Salik*, vol. 2, p. 256.

Abu Bakr says, May Allah bless him, when a man made his land a valid *waqf* and there are dates and trees in the land, is it lawful for him to make a contract of *muzara'ca* with someone in which he will provide the seed and the cost for half of the produce that is given by Allah almighty. He says, this contract is lawful according to Abu Yusuf.

This is regarding *muzara'ca*. As for *musaqat* al Khassaf states:<sup>71</sup>

It is also lawful if the man gives his land of dates and trees to someone on the basis of the contract of *mu'cama* (*musaqat*) for the half or one third of the produce.

We find al Tarabulsi also indicating the same opinion in his *al Is'af*. He reminds us of two things regarding this contract: Firstly, that the liability of any *kharaj* or *'ushur* is incurred upon the beneficiaries of the *waqf* because this is considered a lease contract though the status of the land is a *waqf* property. Secondly, that the contract is not terminated if the *nazir* dies before the termination of the period of *muzara'ca* or *musaqat* because this contract is not for his interest but for the *waqf*. However, the contract is terminated with the death of the worker, for, the contract is for his interest.<sup>72</sup> This is the position of the Hanafi school with regard to the practice of *muzara'ca* and *musaqa* on the *waqf* land.

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<sup>70</sup> Al Khassaf, *Kitab Ahkam al Awqaf*, p. 207.

<sup>71</sup> Al Khassaf, *ibid*.

<sup>72</sup> Al Tarabulsi, *al Is'af*, pp. 73-74.



We cannot trace the position of the other three schools of law regarding the validity of these two methods of mobilizing *waqf* property. However, based on our understanding of the position of these three school regarding *muzara'ca* and *musaqa* we can say that it goes back to their position regarding these two. The Hanbali school, who accept the permissibility of *muzara'ca* and *musaqat*, will have no problem in using them for mobilizing the *waqf* property because these two do not go against any principle of *waqf*. This school goes in parallel with the Hanafi school. The Maliki and Shafi'ci schools, however, cannot accept the practice of *muzara'ca* on *waqf* land because the *muzara'ca* itself is not acceptable in their school. As for the Malikis alone they can accept the *muzara'ca* if it is in the form of hiring and not in the form of sharing the fruits. Both the Maliki and the Shafi'ci schools can only accept *musaqat* as a method of mobilizing *waqf* land since it does not in any way bring harm to the *waqf* land.

#### **4.4. *Istibdal al waqf* (exchange of *waqf*)**

*Istibdal* is to buy a property in exchange for a *waqf* property.<sup>73</sup> The term sounds offensive given that one of the fundamental things in the law of *waqf* is that it

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<sup>73</sup> It is also appropriated to mention here another term that always appear in the classical work of the jurist, that is, *ibdal*. This term means to sell the original *waqf* property with the other property or with the money. By this it conveys before *istibdal* is done the process of *ibdal* must be done first. So the object of selling is the original *waqf* property and the object of buying is the new property that will replace the original *waqf*. See Muhammad Mustafa Shalabi, *Ahkam al Wasaya wa al Awqaf*, Beirut: al Dar al Jami'iyah, 1983, p. 152.

must be perpetual and cannot be a subject to any contract of transferring of the ownership. The practice of *istibdal* superficially strictly contradicts with this fundamental, but we find the jurists offer a special discussion regarding this issue. Despite the fact that there is no textual evidence on its permissibility, we find some jurists provide space for its lawfulness, in which it is considered the most important method in keeping a *waqf* beneficial to those specified by the *waqif*. This can be found upon observing the stand of the four schools of law on the matter.

The Hanafi school of law seems to pay profound attention to this and offers a very liberal view compared to the others. They state there are three instances when *istibdal* can be made. For the purpose of clarification these three will be dealt here separately.

The first is that it can happen that a *waqif* has stipulated in his declaration that he would have the right to do *istibdal* or, in a more direct one to buy another property to replace the original one. According to the most accepted view in the school this *waqf* is valid and consequently *istibdal* can lawfully take place when the *waqif* intends to do that<sup>74</sup> even if the original one is still in function. The Hanafi's stand on this occasion can be seen in Ibn al Humam's report that states:<sup>75</sup>

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<sup>74</sup> Ibn <sup>c</sup>Abidin, *Radd al Mukhtar*, vol. 6, p. 583; Ibn al Humam, *Sharh Fath al Qadir*, vol. 6, p. 211.

<sup>75</sup> Ibn al Humam, *ibid.* p. 211. It is clear from the statement that this is the view of Abu Yusuf, Hilal and al Khassaf, and actually this is the most accepted view in the school. There is report that Muhammad sees that this kind of stipulation is not valid but maintains

If a *waqif* stipulates in the declaration to have the right of *istibdal*, this is considered lawful by Abu Yusuf, Hilal and al-Khassaf, that is, on the basis of *istihsan*. It is lawful as well if he stipulates that he will have right to sell the *waqf* land and exchange it for another.

This ruling seemingly contradicts the principle of irrevocability and perpetuity because such a stipulation is construed to revoke the *waqf*. Regarding this Abu Zahra explains that this stipulation cannot be said to have contradicted the principle because perpetuity cannot be seen as physical existence only, but maintaining the usufruct to keep giving benefit to the beneficiaries is also considered to have the quality of perpetuity. So, as long as the newly made *waqf* property can continuously produces benefit, as the original one did, it is considered to be perpetual and accordingly the stipulation is valid. He further says that this ruling actually accords with the principle of giving priority to the *waqif's* stipulation, even if the original one is still functioning, and the *waqif* in this case is just exercising his right of trusteeship (*wilaya khassa*).<sup>76</sup> This view of Abu Zuhra is actually justifiable in the Hanafi school of law since the school has also established the lawfulness of paying *zakah* with the value of the property in replacing the property itself.<sup>77</sup> The case in hand is standing in the same way. The value of a property acts as the property itself and therefore it can be used as substitute for the property. This is actually what *istihsan* exactly means as it is

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that the *waqf* is valid. See Ibn <sup>c</sup>Abidin, *ibid.*, Ibn al Humam, *ibid.* See also al Khassaf, *Ahkam al Awqaf*, p. 154.

<sup>76</sup> Abu Zahra, *Muhadharat*, pp. 179-180.

<sup>77</sup> Ibn al Humam, *Sharh Fath al Qadir*, vol. 2, p. 199.

firmly established in the Hanafi school as one of the sources of Islamic law. So, the stipulation of *istibdal* is not against any ruling in the school.

The second instance, *istibdal*, is a lawful choice is if the *waqf* property does not function well, e.g. falls into deterioration or the value of the property declines with the passing years and therefore little profit can be derived from it provided that it is approved by the *qadhi*.<sup>78</sup> Ibn Abidin reports this in a very clear way:<sup>79</sup>

The accepted view in the case where no stipulation (regarding *istibdal*) is made by a *waqif* is that the *qadhi* has legal authority to do *istibdal* with the provisions that: (firstly) the property is completely deteriorated, (secondly) there is no profit that can be used to maintain the *waqf* and (thirdly) there is no fraud (*ghibn*) in the process of selling the *waqf*.

Clearly the permissibility of *istibdal* here is under strict provisions and cannot be done in the absence of these provisions. These are the established provisions of practicing *istibdal* in the Hanafi school. This shows that the school stands firmly to the original principle of *waqf* in which it is not a subject of transaction and the permissibility is given only on the basis of necessity where the property cannot operate profitably. It may be because of this caution that al Tarabulsi adds one more provision to these, that, the process of *istibdal* should be

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<sup>78</sup> Ibn 'Abidin, *Radd al Mukhtar*, vol. 6, pp. 583 - 584.

<sup>79</sup> Ibn 'Abidin, *ibid.*, p. 586.

initiated by a very pious *qadi* (*qadi al janna*) in order to avoid any misconduct to the *waqf* property as used to happen at that time.<sup>80</sup>

The third instance is when there is no stipulation regarding *istibdal* and the *waqf* property is still in function but there is potential property that can be exchanged to make the *waqf* more beneficial.<sup>81</sup> Ibn Abidin further states:

.....the *waqif* has not stipulated the *istibdal* but there seems good in doing that and to exchange it is much better in term of usufruct and benefit. In this case it is unlawful for *istibdal* according to the most preferred view in the school.

It is apparent from the statement that this kind of *istibdal* is unlawful according to this report of Ibn Abidin because the original *waqf* is still functioning, but it is actually not agreed upon unanimously in the school. We find that Abu Yusuf maintains its lawfulness, as in the first instance, for the same argument can be brought here. As for Ibn Abidin, he holds it to be unlawful because he holds to the principle that a *waqf* cannot be changed and its originality must be maintained except when there is necessity to change that. For him the first stage is

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<sup>80</sup> Al Tarabulsi, *Al Is'af*, p. 36. Apart from the above provisions as has been established by the Hanafi jurists we find Ibn 'Abidin proposes another provision, that is, the type of the property that will be exchanged to replace the original one must be of immovable property and not in the form of money. He states: "It is important, in our time, to add another provision to these, that is, the exchanged property must be in the form of immovable property not in *dirham* or *dinar*. We have seen cases that some *nazir* have abducted the money and not to buy another property in exchange with the original one. We do not see any *qadi* put their eyes on these though the practices of *istibdal* abound at our time". See Ibn 'Abidin, *ibid.*, p. 586.

<sup>81</sup> Ibn 'Abidin, *ibid.*,

to maintain the *waqf* as it is stipulated by the *waqif* and then, when the necessity arises, *istibdal* can be done. In this case there is no necessity; hence the *nazir* cannot turn to the second stage.<sup>82</sup> This is also the view of Ibn al Humam.<sup>83</sup>

This is all about the Hanafi school's point of view regarding *istibdal*. Now let us see what the Maliki school says on this issue. We find that there are two opinions in the Maliki school regarding *istibdal*. First, they make a differentiation between immovable and movable property. According to this opinion, it is unlawful to do *istibdal* for the immovable property at any situation, except for the cause of enlargement of mosques, graveyards or public roads. For this particular purpose the authorities can even use their power to order the beneficiaries to sell the *waqf* and replace it with the other.<sup>84</sup> Other than these it is unlawful. This opinion actually represents the majority of the Malikis<sup>85</sup> that hold firmly to the original principle of *waqf* in which it cannot be subject to any transaction of transferring its status. The permissibility here is in cases involving the interest of the public as mentioned above in which it should be given a primary concern. Should it not be done it will bring difficulties to the public and this is against the Islamic teachings that exhort making things easy for people.<sup>86</sup> Other than this cause, there is no valid justification for *istibdal* according to this opinion because, as asserted by Ahmad bin Yahya al Wansharisi (d.1508) this

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<sup>82</sup>Ibn 'Abidin, *ibid.*, p.389.

<sup>83</sup> Ibn al Humam, *Sharh Fath al Qadir*, vol. 2, p. 212.

<sup>84</sup> Ahmad bin Muhammad al Dardir, *al Sharh al Saghir*, vol. 2, p. 308.

<sup>85</sup> Abu Zahra, *Muhadharat*, p. 172.

<sup>86</sup> Abu Zahra, *ibid.*, p. 171.

practice is tantamount to exercising the others' property without his consent though it is beneficial to the *waqf* itself.<sup>87</sup> This is actually one of the views of al Imam Malik himself as reported in *al Mudawwana*.<sup>88</sup>

This first group of the Malikis who opposes the permissibility of *istibdal*, however, treats movable *waqf* property differently and says that it is acceptable to do *istibdal* in this kind of property. *Waqf* property like clothes, horses, weapons, etc. which has become of no use anymore can be sold and the money obtained to be used to buy another one in exchange for the original one. If the money cannot cover the cost of buying a new one, then it must be used to buy part of it, sharing with the others, if possible, and if it is not, then the requisite money should be given as *sadaqa*.<sup>89</sup> It is so with the case of the debris or rubble of the ruined mosques, in which, they can be sold and the money can be used for other mosques, or if possible, the debris are not to be sold but to be used to build the same mosque or other mosque.<sup>90</sup> The basis for the differentiation between immovable and movable is that for the case of immovable property, though it has been damaged or ruined, it still has a potentiality of mobilizing in future to keep it

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<sup>87</sup> Al Wansharisi, *al Mi'yar*, Morocco: Wizara al Awqaf wa al Shu'un al Islamiyya, 1981, vol. 7, p. 134.

<sup>88</sup> It should be noted here that there is one other report of Imam Malik's view which is contrary to this view. Abi al Farj reports from Malik who says that if the authority in charge sees that there is any benefit in selling a *waqf* in exchange with the other, the selling is considered lawful. Cited in al Sawi, *Bulghat al Salik*, vol. 2, p. 308.

<sup>89</sup> Al Hattab, *Mawahib*, vol.6, p. 42; Ahmad bin Muhammad al Dardir, *al Sharh al Saghir*, vol. 2, p. 308; Abu Umar, *al Kafi*, p. 541; al Dusuqi, *Hashiyat*, vol. 4, p. 90-91.

<sup>90</sup> Al Mawwaq, *al Taj wa al Iklil*, vol. 6, p. 42.

beneficial but it is not so with the movable property.<sup>91</sup> As the time passes the later will get rotted or weaken and consequently produce no benefit at all. To preserve the *waqf*, then *istibdal* is the right option for the movables.

The second opinion, which is from the minority in the school, is that *istibdal* becomes an option, with the permission from the *qadi*, when a *waqf* has fallen into ruin and no benefit can be derived from it<sup>92</sup> which is in line with the view of the Hanafi school. However, as the Malikis are always concerned, this practice was not found among the Medinans,<sup>93</sup> which implies that the Medinans themselves refused to practice it though they did not deem it as unlawful. Therefore, no wonder that this second opinion represents the view of a small group of jurists in the school for the school is the strong proponent of the Medinans' practice.

In the Shafi'i school it is a point of agreement that a mosque cannot be sold in exchange for another even if it has fallen into ruin. This is because the site on which the mosque has been built can be used validly for the prayer purpose or *i'tikaf* and there is a prospect for it being restored again in future. Any property that belongs to the ruined mosque is preserved until the mosque is built again. If, however, there is no hope for rebuilding the mosque the property can be

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<sup>91</sup> Abu Zahra, *Muhadharat*, p. 173.

<sup>92</sup> Al Hattab, *Mawahib*, vol.6, p. 42; Ahmad bin Muhammad al Dardir, *al Sharh al Saghir*, vol. 2, p. 308; Abu Umar, *al Kafi*, p. 541.

<sup>93</sup> Abu Umar states "It is reported from Rabi'ah that it is lawful to sell any immovable *waqf* property that has fallen into ruin and cannot be mobilized for any benefit in exchange with the other property but this was not the practice (of the Medinans)". See Abu Umar, *ibid*.



transferred to the nearest mosque. If the condition of the mosque is too bad to the extent that it endangers the people the *qadhi* can demolish the mosque and its debris can be used to build another mosque which should preferably be as near as possible to the first one.<sup>94</sup>

However with regard to other kind of property there are two opinions; one of which is very strict and another one is quite liberal. The position of the first one is like that of the majority of the Malikis in which there is no compromise at all with the idea of *istibdal* even if the property is in its worse condition as in the case with mosque. This is the position of the majority of the Shafi'is. Their simple argument is that to protect the continuity of the *waqf* (*idamatan li al waqf*) and therefore it must be perpetuated without transferring its status.<sup>95</sup> Protecting the *waqf* means that its original substance is maintained and preserved, even if it has deteriorated, in no way can it be sold. *Waqf* properties like the stump of dried trees or the spoiled mats of a mosque can be utilized by being leased. The strictness of this group of Shafi'is on this matter runs to the extent that if movable property like dried trees that are of no use anymore but will be of use as fuel, they can be given to the beneficiaries as the subject of *waqf* for their use as fuel but not for selling. This position of the Shafi'is implies that any measures can be taken to utilize the run down *waqf* property but not to sell it for it is against the principle of the law of *waqf*. However, they exclude from this rule *waqf* animals that have become weak, in which case selling them is acceptable and the money thereof is to be used to buy others. This is because the

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<sup>94</sup> Al Sharbini, *Mughni al Muhtaj*, vol. 2, p.392.

<sup>95</sup> Sulayman Ibn 'Umar, *Hashiya al Jamal*, vol. 3, pp. 590 - 591.

weak animals cannot be utilized anymore for any purpose, which differ with the above cases, hence selling them is permitted.<sup>96</sup> So, we can conclude from this exposition that a *waqf* property, if it is still in condition that can be manipulated to gain benefit, though in the very minimum level, cannot be sold at all even in exchange with the other. This is the established view in the Shafi'i school and represents the view of the majority of their jurists.<sup>97</sup>

The second group of the Shafi'is has an opposite opinion. For them it is permissible to sell a *waqf* property, except mosque, if the property becomes not useful anymore. Hence selling the dried trees and spoiled carpets of mosque, for example, that deserves burning are permissible to avoid wasting even at the very low price. The money obtained is to be applied to the original *waqf*.<sup>98</sup> This group of the Shafi'is sees the issue here from the practical side and the original purpose of a *waqf* and goes out beyond the principle that the original *waqf* must be perpetuated. A *waqf* is made to give benefit to mankind. When the property cannot produce benefit anymore something must be done to keep it beneficial, hence selling the property in exchange with the other property is not considered violating the principle of *waqf* but in another sense protecting it from being wasted with no returned cost.

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<sup>96</sup> Al Ramli, *Nihaya al Muhtaj*, vol. 5, p. 395; Ibn Hajar, *Tuhfa al Muhtaj*, vol. 6, p. 283; Sulayman Ibn 'Umar, *Hashiya al Jamal*, *ibid*.

<sup>97</sup> Sulayman Ibn 'Umar, *Hashiya al Jamal*, p.590.

<sup>98</sup> Al Ramli, *Nihaya al Muhtaj*, vol. 5, p. 395.; Ibn Hajar, *Tuhfa al Muhtaj*, vol. 6, p. 283; Sulayman Ibn 'Umar, *ibid*, pp. 590 - 591.

In the Hanbali school the issue in hand is not like that of the majority of Shafi'is and Malikis and they offer a very lenient view. The opinion of this school is in agreement with the majority of jurists in the other three schools that if a *waqf* is still in function it cannot be sold. However this school allows selling a *waqf* property in exchange for another if the property is in the state of devastation or malfunction that cannot produce benefit to the beneficiaries as accepted by the minority of the jurists in the Shafi'i and Maliki schools. They opine that the disused land and house or mosque that has been neglected because the area has been left by the people can be sold and the money thereof is to be used at another place. The schools also allow selling the mosque that cannot be enlarged because of the high density population and the money is to be used to build another mosque.<sup>99</sup> This view is considered a new idea in the law of *waqf* given that there is no reservation for the mosque in this case as that of the other schools which always exempt mosque in many cases of *istibdal*.

For the debris and appliances of a ruined mosque, it is preferable, instead of selling them, that they be used and placed in another mosque because this will keep the original *waqf* beneficial without exchanging it for another. It is also permissible to sell dried trees or broken trunks and the money thereof is to be applied in favour of the original purpose of the *waqf* that was made. The school argues that this practice is to keep the *waqf* perpetual and to keep it in accordance with the original *waqif*'s stipulation. It cannot be said to have gone against the principles of *waqf* and the Tradition, "It is not to be sold (*la yuba'*)" because this

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<sup>99</sup> Al Bahuti, *Kashaf al Qina'*, vol. 4, p. 292; Ibn Qudama, *al Mughni*, vol. 6, p. 225; al-Maqdisi, *al Sharh al Kabir*, vol. 6, p. 243; al Zarkashi, *Sharh al Zarkashi*, vol.4, p. 280.

is in a different context. The prohibition of selling as implied in the Tradition is for a *waqf* that is still in function. When a *waqf* has deteriorated and produces no benefit, then it is permissible to sell it in exchange for another so as to keep it perpetual and beneficial. They argue that the original purpose of a *waqf* is to give benefit to the beneficiaries and not to keep the original property itself. So, the practice of *istibdal* is in accord with this purpose.<sup>100</sup>

This school of law takes a middle path between the openness of some of the Hanafis and the rigidity of the majority of the Malikis and the Shafi'is. They tackle the issue between holding to the literal meaning of the *nass* and following the principles implied in the *nass*. This is also the view of the majority of the Hanafis as discussed earlier. We see that this view is the best when dealing with *waqf* property given that some kind of property naturally deteriorates and finally ends up in a state of malfunction. *Istibdal* is the only way to prevent the *waqf* from going to waste and making sure the purpose of *waqf* is realized. This view can best be summarised by quoting al Maqdisi's (d.1344) statement to this effect:<sup>101</sup>

Ibn 'Uqayl says that a *waqf* is perpetual, but if the property cannot be kept in its original form we can maintain its original purpose, that is, to make a *waqf* continuously beneficial by adopting another property in replacing the original one. To keep holding on the original unproductive property is tantamount to disregard the original purpose of the *waqf*.

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<sup>100</sup> Al Bahuti, *Ibid.*, 293; Ibn Qudama, *Ibid.*, p. 226; al Maqdisi, *Ibid.*, 243.

<sup>101</sup> Al Maqdisi, *ibid.*

The discussion above shows that there is a major disagreement among the four schools of law regarding *istibdal*. The Hanafi and Hanbali schools seem very practical in this aspect and not bound by the original principle of *waqf*. The Shafi'i and the Maliki schools seem very cautious in this matter and not as liberal as other two schools. They give preference to the principle over the practical.

#### **4.5 Conclusion**

As a conclusion to this discussion we can say that there are three ways of mobilization of *waqf* property as embedded in the works of the jurists in the four schools of law. These four are by way of leasing, agricultural methods and *istibdal*. The first one is considered the most profitable since it generates income for the *waqf* property. The second one comes after that in terms of profitability and the third one is more likely to preserve or to prevent property from being wasted. There are differences of opinion among the jurists regarding every one of these three. These differences are based on the principles that they established regarding the issues facing them. We can see from here that the view of the jurists regarding the mobilization of *waqf* property are divided generally into two; one is very lenient and takes every effort to make the *waqf* property can be mobilized and other one is very strict and to hold firmly to the principle that they have established. For the modern jurists, understanding this nature of the differences of the view of the four schools of law and the principles that they have is very important in order to guide them in dealing with many modern issues regarding the development of the *waqf* property.

## CONCLUSION

### **The fundamental legal principle of *waqf***

Now we have reached the stage that we can derive some conclusions from our study. The classical Islamic Law of *Waqf* as expounded by the four schools of law is a very complex law. Its major legal principles are based on the Tradition of the Prophet who he told his companion, ‘Umar, to “detain the property itself and to devote its usufruct for good purposes”. ‘Umar then made his land at Khaybar as a *waqf* that it could neither be sold, nor given away as a gift, nor inherited. It is this nature of *waqf* that provides the basis for the jurists of the four schools of law in developing the law of *waqf* in the structure that we can see today as embedded in the four schools of law.

In its development from the beginning, we found that the jurists of the Hanafi school ignored the doctrine of Abu Hanifa himself regarding the nature of *waqf*, which, according to him, is not absolute in nature and is revocable. They adopted another principle contrary to that of Abu Hanifa, that is, that *waqf* is absolute and irrevocable. For them once a *waqf* is made the ownership of the property is transferred to God. This was the understanding they used throughout this law. From here they took a different path from their master in developing the law and finally their work had been appreciated most in the school itself. The view of Abu Hanifa had been left behind in this development, while the view of his two disciples, Abu Yusuf and al Shaybani, had been accepted and established in the school. This was due to the evidence from the tradition narrated by Ibn

‘Umar which became the basis of their departure from their masters’ position. One who goes through the classical Hanafi law of *waqf* will find these two names reported everywhere in the Hanafi *fiqh* books.

The Maliki school also joined this development very outstandingly. This school maintained that a *waqf* is an absolute contract but the special feature of *waqf* in this school is that a *waqf* can be made temporarily. It is in line with the view of Abu Yusuf and al Shaybani in terms of its absolute nature but with adjustment that a *waqf* is not necessarily perpetual. It can be made for a certain period of time after which the property reverts to the ownership of the *waqif*.

The Shafi‘i and Hanbali schools followed the accepted position of the Hanafi School. According to them a *waqf* is absolute in nature and, once made it is irrevocable. The idea that the ownership is transferred to God is also not alien to these schools, except in the Hanbali school they some times used the expression ‘the ownership is transferred to beneficiaries’ in cases where the *waqf* is made for the specific persons. However, they still held to the idea that *waqf* is absolute in nature.

This is the basic principle of *waqf* as expounded by the four schools of law. This principle makes *waqf* a very distinctive institution compared to other kinds of disposition of property in Islamic law. Compared to English law we find *waqf*, superficially, is in parallel position with the English Law of Trust in terms of its structure. However a close study of these two indicates that both are

founded on different principles of law which results in their differences in many technical aspects.

### **The body of the law**

To constitute a *waqf*, Islamic law rules that the *wāqif* must have the legal right to dispose of his property. This includes his being of sound mind, matured age, a free person and legally competent. Being a Muslim is not a condition for constituting a *waqf*. It is valid if a *waqf* is made by a non-Muslim but there are technical disagreements on this matter. According to the Hanafī and Maliki schools, for the *waqf* of a non-Muslim to be valid, the subject of the *waqf* must be considered religious (*qurba*), both from the point of view of the religion of the *waqif* and Islam. However for the Shafī<sup>c</sup>i and Hanbali schools, it must be considered religious from the point of view Islamic law only, regardless of the point of view of the religion of the *waqif*.

As far as the Islamic law of *waqf* is concerned there are no limitations given to a person in making *waqf*. However, for those who are on their death bed (*marad<sup>h</sup> al mawt*) the rule is, like that of the Islamic law of will, that it must not exceed one third of his property without the consent of the heirs. If the *waqf* is made in favour of some of the heirs to the exclusion of others the consent of the latter must be obtained, even within the one-third. In the Mālikī school, however, a *waqf* made to the heirs is void except for a *waqf* that is made as *mu<sup>c</sup>aqqab*, i.e. that the *waqf* is made for the descendants and the descendants' descendants. This



*waqf* is valid, but with a special proportion of property being given to these heirs combining the law of inheritance and the law of *waqf*.

In making a *waqf*, a *waqif* is at liberty to make a stipulation regarding his *waqf* and this stipulation is binding. The maxim in Islamic law is that “*the waqif’s stipulation must be treated like that of the words of God (shart al waqif ka nas al shari<sup>c</sup>)*”. For the *nazir* this stipulation must be followed and he cannot do other than what has been stipulated because this stipulation is a binding one. However, even though the *waqif’s* stipulation is binding it must be within the limit of, and not in opposition, to Islamic law. When the stipulation is not in line with Islamic law it must be ignored and it is not binding anymore. The principle that the *waqif’s* stipulation is binding has a notable impact on many issues regarding the mobilization of *waqf*. The issue that always becomes a concern here is that when the *waqf* property is not productive anymore and the *waqif’s* stipulation provides no specific injunction regarding it. In this case we find some schools of law holding firmly to this principle and making no change, while some schools make an adjustment to this principle and follow the rule of *maslaha* as we found in the case of the lease of *waqf* property and *istibdal*.

With regard to the subject of *waqf* the jurists agreed that immovable property can be a valid subject. This is based on the tradition of the Prophet and the Companions which frequently mention this kind of property. However regarding movable property there is disagreement among the four schools of law. According to the Hanafi School movable property can be the subject of *waqf* if it fulfils three conditions, namely, the property is an adjunct to the immovable,

there is a specific tradition about the kind of the property, and there is a customary practice that the property can be made *waqf*. According to the other three schools any kind of movable can be a valid subject of *waqf* as long as the property has the quality that it does not diminish by use.

However, for a cash *waqf*, though it diminishes by use, the later Hanafis and also the Maliki school ruled its validity with the condition that it is made by way of *mudharaba* according to the Hanafis and by way of interest free loan according to the Maliki school. By these ways the cash *waqf* is considered that it does not diminish by use. Hence it can be a valid subject of *waqf*. Today, the application of *mudaraba* of the Hanafi school for the cash *waqf*, provides a basis for the modern jurists to rule that the *waqf* of shares in the stock market is permissible.

Another category of the subject of *waqf* is jointly owned property. The principle involved here is the requirement of taking possession (*al qabd*). For the Hanafis, since taking possession is a requirement for a *waqf*, the *waqf* of divisible jointly owned property is invalid. However for indivisible property it is valid. For the Shafi'is and the Hanbalis they made no difference in this kind of property and other kinds of property. It can be a valid subject of *waqf* because for them taking possession is not a requirement. This is also the position of Abu Yusuf in the Hanafi school.

A person who makes a *waqf* will name the beneficiaries of his *waqf*. The Islamic law of *waqf* requires that they must be people who are legally able to own

the property (*ahliyya al tamalluk*). Mosques or schools are considered to have this condition since they are institutions which are legally able to own property. The second condition is that the subject must be a religious one (*qurba*). The third condition is that the application of the *waqf* must be for ultimate beneficiaries who will not die out such as the poor or the scholars if the *waqf* is made for a specific person or persons. This is based on the principle that *waqf* is perpetual and therefore the application of the *waqf* for beneficiaries who will die out, such as a man's children, must be for ultimate beneficiaries who will not die out.

In the Hanafi and Hanbali schools a *waqif* can even name himself as the beneficiary. However, in the Shafi'i and Maliki schools, this is void because for them a *waqf* is a religious act (*qurba*). To name the *waqif* himself as beneficiary is contrary to this principle. However if the *waqf* is made for the poor or for the scholar and the *waqif* is among them, he can benefit from his *waqf*.

One of the most important aspects of the law of *waqf* is the trusteeship (*al wilaya*), that is, the trusteeship over the administrative matters of *waqf*. When a *waqf* is made the *waqif* is supposed to appoint a *nazir* to administer his *waqf*. This is based on what was done by °Umar who appointed his daughter Hafsa as the one who administer his *waqf*. The *nazir* must be the one who is honest (*°adil*) and competent for his job. In the Shafi'i, Hanbali and Hanafi schools a *waqif* can even appoint himself as *nazir*. However in the Maliki school this appointment is void because for them taking possession cannot be realized in this appointment.

When a *waqf* is made it must be delivered to a *nazir* and this cannot be done when the *waqif* himself is the *nazir*.

A *nazir* is expected to follow all the stipulations made by the *waqif* in his declaration. His job is within the scope that has been given to him. If, however, he finds that some measures should be taken for the benefit of *waqf* he must consult on the matter with the *qadi* who has general authority (*wilaya<sup>c</sup>amma*) on *waqf* matters.

Among the duties of the *nazir* is the maintenance and mobilization of *waqf* property. As has been observed, there are three methods of mobilizing the *waqf* property that have become the subject of discussion in the classical law of *waqf*. The lease of *waqf* property is among the most famous methods. It is found that this method had undergone some modifications in the Hanafi and Maliki schools. They imposed limitations with regard to the period of the lease. This is as a precautionary measure to protect the *waqf* property from becoming private property. The Shafi<sup>c</sup>i and Hanbali schools did not follow this development and have no special regulations with regard to this matter.

In later developments we found that new innovations had been adopted in the law of *waqf* with regard to the method of lease. Several new terms of leasing the *waqf* property had appeared especially in the Hanafi law of *waqf* such as the contracts of *hukr*, *ijaratayn* and *kadik*. These new methods find their basis in the four schools of law with some modifications. It is believed that these new methods were the practical response of the ruler at the time to maintain and

preserve the *waqf* property. These new methods show that the jurists were always trying to find new ways in mobilizing the *waqf* property within the scope allowed by the principles of the law of *waqf*.

With regard to agriculture, we see that the contracts of *muzara'ca* and *musaqat* have been adopted by the jurists as the mean of mobilization. Both these two means find their basis in the Hanafi and Hanbali schools. However, the Maliki and Shafi'ci schools only accepted *musaqat* for mobilizing *waqf* property since *muzara'ca* goes against the principles of their schools.

The third one is *istibdal* (an exchange of property). This method offers one of the examples of stringent disagreement between the four schools of law. The Hanafi school seems very lenient in this matter and in fact developed a profound body of work. They categorized three instances where *istibdal* can happen, namely, in realizing the *waqif*'s stipulation, to protect the property from being deteriorated and to make a *waqf* more beneficial. The majority in the Maliki school held that for immovable property no *istibdal* can be done in any situation except for enlargement of mosques, graveyards or public roads. As for movable property *istibdal* can be done when the property is going to become deteriorated. The Shafi'ci school is very strict in that they cannot accept at all the idea of *istibdal*. The Hanbali school, however, maintains that in cases of necessity *istibdal* can be done.

### **Some final observations**

1. The classical Islamic law of *waqf* as expounded by the jurists of the four schools of law was based on only a few traditions. The jurists in fact developed the law by means of *ijtihad*.
2. In developing the law, there were a lot of disagreements among the four schools regarding many issues, ranging from the formation of the basic principles of *waqf* to the mobilization of *waqf* property.
3. The fundamental principle of *waqf* is that it is irrevocable and cannot be the subject of transferring the ownership by anyone. The basis for this is the Tradition of ʿUmar who made his land in Khaybar a *waqf*.
4. In the Hanafi school, the opinion of Abu Hanifa who allowed the revocability of *waqf* was abandoned from the beginning by his two disciples and they established their own principles contrary to their master.
5. The other three schools accepted the irrevocability of *waqf* except the Maliki who gave a different meaning to this in which they accepted the temporary *waqf*.
6. The other principles of *waqf* are that it must be perpetual, having the religious element (*qurba*) and the ultimate beneficiaries must be ones who does not die out.
7. In developing the law the jurists always based their view on the principles that they hold on the issue. They never went beyond the limit of their principles.
8. In consequence of this, each of the four schools of law developed the classical law of *waqf* consistently within its school and not to follow the other's position.

9. The Hanafi school developed the law in the most advanced fashion compared to the others since in many cases they resort to *maslaha* and *istihsan*.

10. The other three schools seem not as advanced as the Hanafi school because they tried not to overstep the limits of the principles that they have.

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