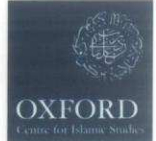


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'Shariah Regulations and Contemporary Reforms of Waqf'

PRESENTER 1



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The paper I have prepared is entitled: 'Shariah Regulations in Contemporary Reforms of *Waqf*,' and I have focused mainly on expounding the rules of *Shariah*, which are fairly well-developed on the subject of *waqf*, but most of them are based on *ijtihad*. There is in fact little in the Quran; in fact there is no reference to *waqf* specifically in the Quran. As such, these are *ijtihadi* rules that would suggest that the subject is open to further development in line with the experiences in the needs of the Muslim community at any given time.

In the *hadith* there is a specific reference to *waqf*. Although there is no specific reference on *waqf* in the Quran, there are many references encouraging charity, helping the poor, orphans and the needy. These verses are very well-known, "*Lan tanalul-birra hatta tunfiqumimma tuhubbun*," (You shall not achieve excellence unless you give of the assets that you love for yourself to others).

That was what prompted *Sayiddina 'Umar ibn Al-Khattab* to come one day to the Prophet (PBUH) saying that he has a piece of land in Khaibar, what are the choices he has, and that he wants to give it in charity. The Prophet suggested that he can keep the corpus but give away the revenue. And that was the subject of *waqf*, which is endowment in perpetuity.

There are different types of *waqf*. One is *waqf khairi*, that is *waqf* for philanthropic and social welfare purposes and the other is *waqf ahli* or family *waqf*. In historical terms, the first one is more important in every other respect. Most of the *waqf ahli*, over the course of time, ended up to join the first category as *waqf khairi*. The two existed side by side, although the one ended into the other, there was no clear procedure to mark the end of one and the beginning of the other. Hence, there was some confusion even in the rules of *fiqh* concerning regulations

in certain aspects of *waqf*. It is endowment in perpetuity according to the *jumhur* (majority) of the *mujtahid* (ulama who delivers *ijtihad*). Only the Maliki jurisprudence recognises that *waqf* can be temporary. For example, rental revenue of a property may be given in *waqf* over the period of the lease or contract period.

The *fiqh* also has known aspects of *waqf* like *waqf al musha*, being *waqf* of undivided property and *waqf* of mortgaged property and *waqf* of *haq al-intifāq*, or ancillary rights attached to real property. Basically, when we speak of *waqf*, we visualise real property. In fact, all properties or assets that yield some revenue are capable of being assigned into *waqf*. It should not be such that the corpus itself is consumable, so *waqf* of vegetable and fruit will not be possible. Issues have arisen in *fiqh* over the ownership of *waqf*. The *jumhur* (majority) of the *mujtahid* take the position that the ownership is transferred to God. Even the owner during his lifetime has no ownership rights. He relinquishes his rights.

But there are differences. The Hanafi and Maliki jurists maintain that the owner still remains in control of the property. He cannot sell it but he can determine and has a say. In Shafi'i jurisprudence, a *waqf* is a contract and it is concluded when the beneficiary of *waqf* gives consent and it becomes binding when the assets of the *waqf* are taken possession of by the beneficiary. It is not possible for situations of *qabd*, or repossession, like *waqf* for a mosque or *waqf* to the poor.

Another question has arisen over the ownership of *waqf*. For those who maintain that *waqif* still remains as the owner, another question

arises: is he the owner or the beneficiary? On issues that arise on *waqf*, the judge or *qadi* has jurisdiction to determine in particular cases the stand, situation or status of *waqf*. For the *waqif*, his wishes are upheld by the rules of *Shariah*. There is a legal maxim, *nusus al-waqif ka-nusus ash-shari*: 'What is determined by the *waqif* is what is determined by the Law Giver'. So, the *mutawalli* of *waqf* or the manager of *waqf*, his first duty is to honour the wish of the *waqif* and this, to some extent, has become the source of the problem with reference to *waqf*, as I will elaborate.

On the position of the *mutawalli* or *waqif*, different expressions are used. Sometimes you hear *nazir*, *qayyim*, *mushrif*, *mubashir*, all of them are alternative terms conveying the same. In history, we also have situations where you have a *mutawalli* and a *nazir* or a *mutawalli* and a *qayyim*. Sometimes you have two *mutawallis* over the same *waqf*, one from one *madhhab* and another from the other *madhhab*, but rules of *Shariah* are maintained that a *mutawalli* or the manager of *waqf* must be a Muslim, must be trustworthy and an upright person. There is no gender distinction made. A man or a woman can be a *mutawalli*, even a blind person, so long as he or she is a competent person, a *mukallaf* (responsible or accountable person), can be the *mutawalli* of *waqf*.

The *mutawalli* is responsible to administer the *waqf*, repair, upkeep, renovation; and utilisation and payment of the revenue to the beneficiaries and managing the employees of *waqf* as well as handling any disputes that arise concerning the *waqf*. These are the duties of the *mutawalli* of *waqf*, but he is not entitled, according to the rules of *fiqh* to set the substance or the corpus

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of *waqf*, nor to even take a personal loan from the *waqf*. He is an *amin*, a trustee, and in that capacity he is responsible.

Earlier His Royal Highness mentioned the word *istibdal*, which refers to selling the *waqf* assets and buying another asset to act as a substitute for it. There is some dispute in the rules of *fiqh* as to whether the *mutawalli* does have the authority to do so, but contemporary *fiqh*, *20th Century Rules of Fiqh*, has departed from some of those rigidities, if I may add. It allows the *mutawalli* to look after the economic viability

of the *waqf* and allows him greater flexibility into *istibdal* including selling off the *waqf* if it becomes an economic liability. This has become, historically, a problem. A lot of *waqf* in many countries have become unproductive, and sometimes derelict as no one has taken enough care of the *waqf* to keep the original purposes, the Shariah purposes, in the continuing need of management.

Some of the problems of *waqf* in historical terms relate to *waqf ahli* or family *waqf*, but in modern times, this has been largely abolished. In many countries, legislation has abolished family *waqf*. Sometimes the *waqif* defines his/her purpose either too narrowly or too broadly and it becomes difficult for the court and managers to understand the purpose very well.

In the 20th century land reform legislation in Muslim countries like Egypt, Turkey, Syria, Pakistan and Bangladesh, limits land ownership up to a maximum of certain acreage, say a hundred acres or so. This meant the splitting up of agricultural estates, which also damages the prospects of *waqf* of larger estates as the estate was divided among families. Management of *waqf* in many Muslim countries under the 20th century reforms has been entrusted to government bodies. It is currently under government control. Although the governments have introduced legislation and reforms of *waqf*, there persisted issues over the loss of revenue, because *waqf* were not taxable, and it was not part of the competitive property market either. The government control also meant a great deal of bureaucracy and this by itself meant the dynamism of *waqf*, its economic viability, over time, was damaged.

As to the reforms of *waqf* in various countries, I have discussed in some detail on the administration of Islamic law enactments. In Malaysia, many states regulate the affairs of *waqf*. In three states – Selangor, Melaka and Negeri Sembilan, they have separate *waqf* enactments to regulate aspects of *Shariah* in the development of *waqf*.

In Malaysia, the powers of management in the *mutawalli* of *waqf* are entrusted to the State Islamic Religious Council (Majlis). All the *waqf* in the states of Malaysia must be registered in its name and it has wide-ranging powers. The Majlis may establish companies and corporations if it would benefit better utilisation and management of *waqf* according to *Shariah* and the objectives of *waqf*. The *Majlis* has a Fatwa Committee, also legal consultative committees, where issues concerning *waqf* are considered and the necessary rulings are made. *Waqf* of shares or cash *waqf*, for example are new varieties of investment, which have been permitted by the Fatwa Committee.

There remain some issues over court jurisdiction, and not just with regard to *waqf*, but also Islamic banking and finance – sometimes it is with the civil court and on certain occasions, with the *Shariah* courts. There need to be clear guidelines to specify the jurisdiction of *waqf* in one stream or the other of these courts. Briefly, in the Arab countries now, the control of *waqf* is with the governments. In some of these countries, a separate ministry of *awqaf* has developed.

Since the 1980s, reforms on *waqf* have focused on making the *waqf* economically and

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financially viable. Some attention has also been paid to developing aspects of international co-operation among Muslim countries. The Islamic Development Bank (IDB) has been proactive in this matter and some progress has been made and new strategies are being developed.

Muslim minority countries such as India, Singapore and South Africa have also endeavoured to deal with the management of *waqf*. India for example, introduced a *Waqf Act* in 1995, including an amendment to the Act in 2010. It has a Federal *Waqf Council* and State *Waqf Board* that regulate the budget, audit the affairs and resolve disputes concerning *waqf*. On the whole, these measures are quite comprehensive.

To conclude my presentation, I have suggested that the management of *waqf* should be

entrusted – unlike the historical pattern in the *fiqh* visualisation of it – not to individuals but to institutions as accountability and proper religious studies are important. Special legislation for regulation of *waqf* is still wanting such that it could merge and combine the *fiqh* regulation of *waqf* with policy initiatives that would take proper care of the financial viability of the *waqf*. Smaller *waqf* should be merged with larger *waqf* perhaps at the national level if possible, if not at the state level.

Lastly, the *Shariah* objectives of *waqf* should not be submerged by the commercial interest.

Of course it is a valid objective to develop the financial and investment aspects of *waqf*, but not to leave the philanthropy and social welfare aspects away from our sight.