

## Family Waqf: Its Origin, Law Prospects

**Magda Ismail Abdel Mohsin**

[magda@inceif.org](mailto:magda@inceif.org)

[www.inceif.org](http://www.inceif.org)

Historically speaking, the non-profit institution of waqf, played a remarkable role in developing the Islamic societies as well as in assisting the Islamic State in providing all the essential services as it; supported the health and the educational sectors, supplied the basic infrastructures, provided jobs, enhanced commercial and business activities, provided food for the hungry, sheltered the poor and the needy, besides supporting the agricultural and industrial sectors, without any cost to the government. However, this role had been deteriorated since the end of the 19<sup>th</sup> century up to the present time as the governments in the different Muslim countries gave the right to themselves to centralize its administration and to confiscate and abolish family *waqf*. By doing so the government hoped that they will solve all the problems which had occurred to the *waqf* properties during that time. However, they fail to realize that they are destroying its remarkable role which it had played throughout the past centuries.

This paper will focus on the origin of family *waqf*, its law and its development. The paper will also highlight the importance of the creation of family *waqf* during the time of the Prophet (pubh) and the reasons of its abolishment in almost all the Muslim countries since the 1950's. Moreover, the paper will present some recommendation for revising the law of family *waqf* and for encouraging people to create new *waqfs*.

## DEFINITION & CLASSIFICATION OF WAQF

The terms, waqf (plural *awqaf*) and *habs*<sup>1</sup>(plural *ahbas*), both mean ‘to stop, to prevent, to restrain’ i.e. *al-habs wa al-man*’. The word *tasbil* is also used in the same sense, i.e. devoting in the way of Allah (*fi sabil Allah*). For the creation of waqf it can be defined as follows:

The confinement of a property (movable or immovable) by a founder(s) and the dedication of its usufruct in perpetuity to the public or to the family.

Waqf is divided into three types, *waqf khayri* (public waqf), *al-waqf al-ahli* (family waqf) and *al-waqf al-mushtarak* (combined public and family waqf).

### ***Waqf Khayri* /Public Waqf**

It is an endowment made by the founder to support the general good and welfare of the poor and the needy in society.<sup>2</sup> In this case the founders create this type of waqf in the form of immovable such as building mosques, schools, hospitals, orphanages houses, and guest houses, or immovable such as books, weapons, crops, money etc.

### ***Al-Waqf al-Ahli*/Family Waqf**

*Al-waqf al-ahli al-waqf al-dhurri*, and *waqf ‘ala’-wlad* are all the same and refer to family waqf. In this case, the founder endows his property to his children, grandchildren, relatives or to other persons he specifies.<sup>3</sup> If the beneficiaries specified by the founder are no longer alive, then only in this case will the waqf property be given for public welfare purposes. This type of waqf was approved by the Prophet (pbuh) as he encouraged his companions to make endowments to their nearest relatives. Moreover,

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<sup>1</sup> Al-Hanafi, *Sharh-Fath al-Qadir*, 37.

<sup>2</sup> ‘Imam, *Al-Wasaya wa al-Awqaf fi al-Fiqh al-Islami*, 187.

<sup>3</sup> Ibid.

the Prophet (pbuh) declared that the most pious offering is to one's family in providing for their wants, which is more pious than giving alms to beggars.

### ***Al-Waqf al-Mushtarak* /Combined Public and Family Waqf**

It is a waqf created by founder to support both the public and his family, i.e. the founder dedicates a part of his property to his family and another part to the public. This type of waqf had been recommended by the Prophet (pbuh) and created by his wives and companions.

## **LAW OF FAMILY WAQF**

The law of family waqf follows the same law of the public waqf. For example for the family waqf to be valid there are certain conditions and restrictions, which have been agreed on by the majority of Muslim jurists. We believe that it is useful to highlight these conditions and restrictions owing to the importance of reviving the law of family waqf at the present time.

### **Conditions for the Validity of Waqf**

There are five conditions for the validity of waqf as explained below;

- The founder of the waqf must be *'aqil* (in full possession of his physical and mental faculties), *baligh* (adult) and *hurr* (a free man/women), and he must be capable of transferring it from his ownership to the ownership of Allah.<sup>4</sup> This means that he owns the property either by buying it himself or through inheritance.
- The dedicated property can either be a movable or an immovable property.<sup>5</sup>
- The founder has to appoint a *mutawalli* (trustee), either appointing himself or to appoint some specified person in order to administer and to manage his own waqf.<sup>6</sup> He also has the right to specify the successor to his trustee in case the trustee dies or becomes incapable of performing his duties.
- The beneficiaries should be specified by the founder in his *waqfiah* (waqf deed). These beneficiaries can either be the relatives of the founder, or

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<sup>4</sup> 'Ala al Din b. Abu Bakr b. Mas'ud al-Kasani al-Hanafi', *Kitab Bda' al-Sana' fi Tartib al Sharai'*, vol. 6, 2<sup>nd</sup> edit. (Bairut: Dar al-Ktob al-'Ilmiah, 1986), 220.

<sup>5</sup> Ibid, 220.

<sup>6</sup> The duty of the *mutawalli* is to manage the waqf property honestly and efficiently and to maintain, improve and develop it in order to derive maximum income out of it and to distribute it according to the founder's deed.

for the public in case they created waqf in terms of mosque, schools, hospitals etc.

- The creation of waqf can be oral i.e. verbal, with the action such as building a mosque and calling people to pray inside it.<sup>7</sup> Or the waqf can also be created in a written form known as a waqf deed. Since the declaration in written form is much recommended by Muslim jurist rather than the verbal type, we believe that it will be better if all records and documents are kept in proper files and saved in computers as backup. This on one hand would ensure proper management, and on the other will preserve documents for the future generation.

### **Key Restrictions for Family Waqf**

Regarding the restrictions of waqf, Muslim jurists agree that once a property is created as waqf, including family waqf, it should be placed under three key restrictions.

- **Irrevocability**, which is the most important feature of waqf as there is a consensus among the Muslim jurists that the founder cannot revoke the dedication if the property has already been declared as waqf.<sup>8</sup> This means that a waqf (public or family) is irrevocable once a founder declares his property as waqf, and his heirs cannot change its status. These restrictions are intended to ensure that as far as the waqf is created for philanthropic purposes, the founder or his descendents have no right to take it back.<sup>9</sup> So in this case, it will continue to benefit the majority of people and at the same time the founder will continue to get rewards from Allah (s.w.t.).
- **Perpetuity** of the waqf once it is created. The majority of the Muslims jurists agreed that the waqf must be perpetual once it is created. This, on the one hand will ensure that no confiscation of waqf property will take place either by the government or by individuals. And on the other, it will ensure regular and continual support from this waqf towards financing charitable areas such as mosques, hospitals, orphanages, schools, etc.<sup>10</sup>
- **Inalienability** of waqf once it is created. This feature originates as the property of waqf is transferred to Allah (s.w.t), although the usufruct derived from it can benefit man. All jurists agree that no one can ever become the owner to alienate it and that waqf property is thus in nature, like a 'frozen asset'. It cannot be the subject of any sale, disposition, mortgage, gift, inheritance, or any alienation whatsoever,<sup>11</sup> as highlighted in the hadith below.

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<sup>7</sup> Ibn Qudamah, *Al-Mughni*, 6:191.

<sup>8</sup> Rashidi and Husain, *Waqf Laws and Administration in India*, 112.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid, 113. See also 'Imam, *Al-Wasaya wa al-Awqaf fi al-fiqh al-Islami*, 189.

<sup>11</sup> Qursehi, *Waqf in India*, 28 -37.

All these conditions and restrictions will secure a continual benefit for the present and future generations.

## **ORIGIN OF FAMILY WAQF**

Even though, Allah (s.w.t) does not specify the term waqf in the Holy Qur'an, there are some verses on matters regarding charity which carry the essence of waqf as stated in the following Qur'anic verse:

لَنْ تَنَالُوا الْبِرَّ حَتَّى تُنْفِقُوا مِمَّا تُحِبُّونَ وَمَا تُنْفِقُوا مِنْ شَيْءٍ فَإِنَّ اللَّهَ بِهِ عَلِيمٌ

By no means shall ye attain righteousness unless ye give (freely) of that which ye love; and whatever ye give, of a truth God knoweth it well.  
(*Surat Al-Imran*, 3:92)

This Qur'anic verse had been interpreted by Abu Talha. 'Obid Allah, one of the companions of the Prophet (pbuh), who endowed his most lovely garden called Bi'ruha', full of date-palm trees which was in front of the mosque of the Prophet (pbuh). The Prophet (pbuh) used to go there and drink from its nice water. So when this verse was revealed, Abu Talha said to the Prophet (pbuh):

Allah's Messenger! Allah, the Blessed, the Superior says: By no means shall you attain Al-Birr (righteousness, piety etc, it means here Allah's Reward i.e. Paradise), unless you spend (in Allah's Cause) of that which you love. And no doubt, Bi'ruha' garden is the most beloved of all my property to me. So I want to give it in charity in Allah's Cause. I expect its reward from Allah. O Allah's Messenger (pbuh) Spend it where Allah makes you think it feasible.' On that the Prophet (pbuh) said, 'Bikh (good) it is useful property. I have heard what you have said, O Abu Talha, and I think it would be proper if you give it to your kith and kin'. Abu Talha said, 'I will do so, O Allah's Messenger'. Then Abu Talha distributed that garden amongst his relatives and his cousins.<sup>12</sup>

The creation of family waqf has been encouraged by the Prophet (pbuh) in many Ahadith. For example the following hadith does not only highlight the creation of family waqf it also show its law and its management:

Narrated ibn 'Umar (pbuh): In the lifetime of Allah's Messenger (pbuh), 'Umar gave in charity some of his property, a garden of date palms called

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<sup>12</sup> Narrated by Anas b. Malik, *Sahih al-Bukhari*, Kitab al-Zakah (The Book of Zakah), No. 24, trans. Muhammad Muhsin Khan, (Jeddah: Maktaba Dar us-Salam 1994) 367. See also *Sahih Muslim*, Kitab al-Zakah, Hadith No. 1664, 1665.

Thamgh. ‘Umar, said, “O Allah’s Messenger! I have some property which I prize highly and I want to give it in charity.” The Prophet (pbuh) said, “Give it in charity (i.e. as an endowment) with its land and trees on the condition that the land and trees will neither be sold nor given as a present, not bequeathed, but the fruits are to be spent in charity.” So ‘Umar gave it in charity, and it was for Allah’s Cause, the emancipation of slaves, for the poor, for guests, for travelers, and for kinsmen. The person acting as its administrator could eat from it reasonably and fairly, and could let a friend of his eat from it provided he had no intention of becoming wealthy by its means.<sup>13</sup>

The above *hadith* illustrate many sets of law. In the first instance, once the property becomes a waqf it must not be sold or inherited or given away as a gift. Second, it is up to the founder to specify any person or any institution he feels need it more, i.e. either to the public or to his family. In this case, Caliph ‘Umar devoted it to both public and family. Third, the administration of the waqf is also clarified since the founder, he himself administers his own waqf and at the same time he can benefit from it in a reasonable manner as long as he lives.

Similar examples has been realized from the creation of the companions of the Prophet (pbuh) as has been documented by Al-Humaidi, *shaykh* of al-Bukhari, who gave the names of the companions, their endowments and their beneficiaries. He stated that Caliph Abu Bakr endowed his house to his children, ‘Omar b. al-Khatib endowed his land at Thamgh to his children, Sa’d ibn Abu Waqqas his house in Madinah and Egypt for his children, and al-Zubair ibn al-‘Awwam his houses in Makkah and Egypt and his money in Madinah for his children, ‘Omar b. al-‘As his house in Makkah for his children, and Hakim b. Hizam his houses in Makkah and Madinah to his children.<sup>14</sup> Moreover,

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<sup>13</sup> Narrated by Abdellah b. ‘Umar, Sahih Bukhari, *Kitab al-Shurut* (The Book of Conditions), Hadith No. 2532, see also *Kitab al Wasaya* (Wills and Testaments) No. 52, trans. Muhammad Muhsin Khan, (Jeddah: Maktaba Dar us-Salam 1994) 576. Also see *Sunan al-Ni’sa’* (*Kitab al-Ahbas*), Hadith No. 3541.

<sup>14</sup> Ibid. For more details on the waqf of the companions of the Prophet (pbuh) see Al-Khassaf, *Ahkam al-Awqaf*, 8-17.

most of the wives of the Prophet (pbuh) had created family waqf, for example, ‘Aisha, Umm Salamah, Umm Habibah, Safiah and Hafsa created their own waqf for the benefit of their kin.<sup>15</sup>

All these are good examples that indicate the creation of family waqf since the time of Prophet (pbuh). This is good evidence for those countries, which have abolished this type of waqf at the present time as will be discussed below.

## **DEVELOPMENT OF FAMILY WAQF**

The mismanagement of the administration of family waqf started in the Mamalik’s time. But due to the strength of the Muslim jurists during that time, who used to resist and to prevent any sultan or ruler from harming waqf property, the institution of waqf survived. Before the Mamalik’s period there was no agricultural waqf land, since during that time all lands belonged to the state, i.e. the state retained the ownership, and what it handed over to the ordinary citizens and farmers were merely the rights of possession and usufruct.<sup>16</sup> Nevertheless, during the Mamalik’s time, it was allowed to create waqf on the agricultural land. From that time people started to create many waqfs including agricultural lands. The increase in the number of waqfs forced the state to create three departments in order to supervise such waqfs; Diwan al-Ahbas wa al-Masajid, Diwan al-Harmin al-Sharifin, and Diwan al-Awqaf al-Ahliyah.<sup>17</sup> With the passage of time and the increased number of the waqf properties, mismanagement of trustees occurred. This matter had aggravated the situation, for example, some trustees tried to confiscate some waqf properties through *istibdal*. A good example of this case was mentioned in *Khutat al-Maqrizi*, who stated that the trustee Jamal al-Din Yusuf brought two witnesses testifying to the chief judge Kamal al-Din that the nearby waqf harmed them. Hence, that waqf property was exchanged with money and which was then taken by the trustee. But due to the resistance from Muslim jurists, during that time, towards such an act they

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<sup>15</sup> Abu al Su ‘ud, *Risalah fi Jawaz Waq al-Nuqud*, 13.

<sup>16</sup> Abu Zuhrah, *Muhadarat fi al-Waqf*, 13. For more details on this issue, the nature of state ownership of lands in Islamic law please refer to Cizakca, *A History of Philanthropic Foundations*, 74-75.

<sup>17</sup> Abu Zuhrah, *Muhadarat fi al-Waqf*, 13.

used to issue rules and regulations to protect the waqf property from any harm. For example, in that case they issued a *fatwa* limiting the exchange of waqf property only on the basis of exchanging any waqf property with another property. Moreover, during the time of Al-Zahir Baybirs, who tried to confiscate all lands, including the waqf land, Imam Muhi al-Din al-Nawawi stopped him from doing so. However, Baybirs imposed tax on all owned lands including the land of waqf.<sup>18</sup> This was the first time tax had been imposed on the waqf land. The same was repeated by Mohammed Ali Pasha. In addition, during the 8<sup>th</sup> century Barqoq Atabik tried to abolish family waqf. His reason was that most of these waqfs were established on state owned land i.e. on *miri* land, so most of the waqfs which had been created by governors, as family waqf, were unsound waqf. So a *fatwa* from the Muslim jurists was issued regarding this matter. The fatwa stated that any family waqf on *miri* land should be abolished, with the exception of waqf meant for the public. Nevertheless, in 827 A.H. this act created another problem when the governors started to create waqf *mushtrak* i.e. waqf for both public and family waqf on *miri* lands.<sup>19</sup> By doing so they avoided abolishing their waqf since it was for the public, but it supported their intention of devoting the biggest share of revenue to their families.

Towards the end of the Ottoman Empire in the 19th century, during the regime of Sultan Mahmud II', a reform was made in which the separation between the state and religion took place. This reform affected the institution of waqf, as a Minister of Awqaf was created apart from the Muslim jurists. The goal of this reform was to incorporate the existing local centers of waqf supervision into a centralized bureau in Istanbul.<sup>20</sup> New waqf administrators were appointed to administer the affair of the waqfs. At the same time Muslim jurists lost their control over the waqf properties as they were placed under direct government supervision, i.e. centralization of administration, and this severely weakened their position in society. This led to the widening of the mismanagement and the abuses of the waqf system itself as many of the appointed administrators were not familiar with the legalities of this institution.

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<sup>18</sup> Ibid., 15-17.

<sup>19</sup> Ibid., 20.

<sup>20</sup> Schoem, *History of Waqf and Case Studies form Damascus*, 86-117.

The creation of the centralization of waqf opened the door to many problems. For example, it created unemployment, as the trustees who were appointed by the founder (in most cases the founder's sons) became dependent on monthly salaries, rather than administering their own waqf. Moreover, mismanagement took place within the institution itself, as most of the waqf properties were managed by appointed trustees who had no intention of protecting these properties other than getting their monthly salaries or having the opportunity to keep more money from the waqf revenues for themselves. This, in turn, left most of the waqf properties idle, as there was not enough money to maintain them. In addition, the main beneficiaries started to borrow under interest, putting their agricultural products from their waqf land as a pawn. This act led to the lenders getting their hands on the agricultural products from the waqf lands of the borrowers. Furthermore, people started to create family waqf in order to preclude their daughters from their inheritance. This situation continued till the regime of Muhammad Ali Pash, in the 19<sup>th</sup> century, who found about 600 thousand feddan out of 2 million feddan of agricultural land had been made into waqf land, i.e. one third of the agricultural land was under waqf, and that no tax was taken from it.<sup>21</sup> This saw the second time of imposing taxation on waqf properties. But this time he imposed half of the taxation on waqf land, while he imposed the whole tax on private agricultural lands. But because most of the people disagreed with this policy claiming that the revenue of all these waqfs was for the support of all the mosques, Muhammad Ali took great care to maintain the mosques and imposed the whole tax on the agricultural waqf land like the other private owned lands.<sup>22</sup> Moreover, due to the problems which arose from the centralization of the administration of waqf, mentioned above, and instead of finding ways and means to solve those problems, Muhammad Ali Pash sought a *fatwa* in order to allow him to confiscate all waqf properties, both family and public. Based on the objections of the three Muslim jurists Abdullah b. Mas'ud, and Abdullah b. 'Abbas<sup>23</sup> and qadi Shuraih<sup>24</sup> to the creation of waqf,, in 1862 he abolished all waqf properties. This act was followed in almost all the countries of the Middle East, which were under Ottoman Empire. Although he

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<sup>21</sup> Abu Zuhrah, *Muhadarat fi al-Waqf*, 15

<sup>22</sup> *Ibid.*, 22-30.

<sup>23</sup> Al-Sarakhsi, *Kitab al-Mabsut*, 11: 29.

<sup>24</sup> Al-Zubidi, *Taj al-'Arus*, 4:125.

succeeded in decreasing the creation of new waqf properties, however, he could not stop the people and his own relatives from creating new ones.<sup>25</sup>

Moreover, the colonization, which took place in almost all Muslim countries, acted as another catalyst to these problems. The destruction of this institution continued even after independence from colonial rule as the centralization of the administration of waqf continued carrying all the above-mentioned problems, together with the abolishment of family waqf.

### **ABOLISHMENT OF FAMILY WAQF**

The beginning of the 23<sup>rd</sup> July revolution in 1952 in Egypt witnesses the starting point of abolishing family waqf not only in Egypt but in Syria, Tunisia and later in other Muslim countries.<sup>26</sup> Moreover this law gave the Ministry of Awqaf, which had been created in 1913, many rights over all waqf properties. For example, it gave it the right to administer all public waqf, the right to change the founder's conditions, the right for founders to revoke their waqf. Not only this, but it discouraged people from creating new waqfs. Hence, many founders started to revoke their waqf properties, with the exception of waqf for mosques.<sup>27</sup> This started as a result of the mismanagement of the waqf properties, as mentioned above, especially the family waqf which does not fulfill its objectives during that time. In fact and due to the bad supervision and the mismanagement of the old waqf properties which were meant for the families, numerous disputes and civil cases had occurred that weakened the spirits of brotherhood and fondness, and led to hostility and hatred among the family members. Moreover, the government realized that it restrained a huge part of the national wealth that prevents a proper utilization of it in a way that benefits the society and the deserving parties.

The above mentioned problems on family waqf acted as a catalyst for Egypt to confiscate and abolish family waqf. In 1952 the first law No. 180 has been issued to abolish family

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<sup>25</sup> Ibid., 38.

<sup>26</sup> Carolyn Fluehr Lobban, *Islamic Law and Society in the Sudan*, (London: Frank Cass, 1987), 259.

<sup>27</sup> Abu Zuhrah, *Muhadarat fi al-Waqf*, 27-38.

waqf. This was followed with another law No. 525 which has been issued in 1954 that gave the right to the Ministry of Awqaf to confiscate and revoke any family waqf and to exchange it with money and divided the shares accordingly to the family members. In 1958 another law No. 122 has been issued which gave the authority to the Ministry of Awaqf the right to manage and to administer all waqf properties. Hence, centralization of the administration of waqf took place not only in Egypt but in almost all the Muslim countries.

### **CALL FOR A NEW LAW FOR FAMILY WAQF**

From the above we realized that whenever mismanagement or abuses arose for family waqf, the state or the government immediately sought *fatwas* in order to confiscate or to abolish such waqf rather than finding ways and means of protecting the family waqf which had been encouraged by the Prophet (pbuh) and which had been practiced by his companions and wives. We also realized that the government tolerated the abuses of the trustees rather than punishing whoever harmed this property in the same line as in the earlier days of Islam where the chief judge used to punish publicly any trustee if approved guilty of mismanaging such properties.

Hence, we believe that it is time to revise the law of waqf and to encourage people to create new family waqf that can benefit them, their family and the public too taken the following recommendation into consideration.

- It is much recommended to revise the law which gave the government the right to confiscate and to abolish family waqf in all the Muslim countries which follows the same law.
- It is recommended to give the right to the founders to administer their own waqf, and for the government or for the religious institution to act as a supervisory body that can punish the trustees in case of any misused to the waqf properties.

- It is also recommended to create A Waqf Board where the members are selected from the founders in order to supervise the administration and the management of their waqf. It is also appreciated to invite people from the government or from the religious institution to be members on this board in order to give their advices to the founders and to have direct supervision on the trustees.
- Although we are recommending to give more flexibility in terms of creating family waqf, however the creation of such waqf has to be restricted if the chief judge realized that the intention of the founder is against the spirit of Islam, such as depriving certain members from their inheritance or wills.

To conclude, it is hoped that by highlighting the historical role of the Islamic state towards the institution of waqf, governments in the Muslim countries will revise the law of family waqf and encourage new founders to create this type of waqf by giving them the flexibility in term of managing their own waqf however, the direct supervision from the government or the religious institution on the trustees is much recommended.