

GLOBAL WAQF CONFERENCE SERIES

# WAQF PAST, PRESENT AND FUTURE

EDITORS

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## UNDERSTANDING THE LEGALITY OF *WAQF MUAQQAT*: A SHARIAH PERSPECTIVE

Isa, Abdul Razaq Sarumi<sup>1</sup>  
Nor Asiah Mohamad<sup>2</sup>

### INTRODUCTION

*Waqf* or *habs* generally means 'to hold', 'confine', 'detain' or 'restrain'. Legally it means to protect a form of property be it, movable or immovable, by preventing it from being disposed of by the owner and becoming a property of another person i.e. in the context of *Waqf*, it becomes the property of Allah SWT. Among the traditional definitions as developed by the jurists, many prefer the opinion of Mohamad Abu Yusuf from the Hanafi school where the property is transferred from the ownership of the settler to the 'ownership' of Allah and becomes irrevocable.<sup>3</sup> Nonetheless, the meaning of irrevocable does not indicate that the property must be forever but the so long there is a 'Waqf', whether the creation is *muaqqat* or subject to specific term or permanently, it cannot be revoked so long the period accrues as per the *sighah* or the declaration of the *Waqf*.

### CONCEPT AND SCOPE OF *WAQF MUAQQAT*

Etymologically, the word *muaqqat* is a derivative of 'ta'qīt or tawqīt which literally means to set a time limit for something or to determine a specific period of time or to state a particular time frame.<sup>4</sup> The literal meaning of *muaqqat* could be fathomed in the following verse:

إِنَّ الصَّلَاةَ كَانَتْ عَلَى الْمُؤْمِنِينَ كِتَابًا مَوْقُوتًا

Allah says to the effect: "for such prayers are enjoined on believers at stated times."<sup>5</sup>

Discussion on 'ta'qīt' or 'tawqīt' shows that the word is used in the context of time or period hence refers to stating or limiting the beginning and the end of a particular action. It has also been defined as a boundary between two things, one known earlier and the other known later.

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<sup>3</sup> Muhammad Abu Zahrah, *Muhadarat fi al-Waqf*, np: Dar al-Fikr-al Arabi, Second Edition, pp. 39-40

<sup>4</sup> Muhammad Ibn Mansur, *Lisan al-Aarab* (Beirut: Dar Sadir, 2008), vol.18, 220

<sup>5</sup> Surah An Nisa':103.

### *Waqf Muaqqat* based on Views of Islamic Scholars

The pillars of *Waqf* as agreed by the Muslim jurists revolve around the *wakif*, *mawquf*, *mawquf alaih* and *sighah*. Jurists highly regard the assertion of *sighah*, which does not bear the opposite intention of *wāqif*. This is why *Waqf* is not legally binding with mere intention. Imam Abu Yusuf was of the opinion that a clear *sighah* of *Waqf* will make it valid even without the transfer of possession of property<sup>6</sup>. One of the conditions stipulated by the majority of jurists for the validity of *Waqf* is to make it legally binding and irrevocable. Thus, optional conditions are to be avoided. Besides, the majority of jurists, exclusive of Malikis, are also of the view that the establishment of *Waqf* should not be attached to a condition; like attaching the establishment of *Waqf* to a probable matter in the future. The condition emphasises that *Waqf* must be made perpetual without restricting it to a specific time in the future.<sup>7</sup> However, some jurists are of the opinion that *Waqf* can be made provisional. Arguments of each school of law would be addressed with their proofs one after the other.<sup>8</sup>

### Opponents Arguments

Majority of Muslim jurists from Hanafis, Shafies and Hanbalis disallow temporary *Waqf*. Hanafis are stricter in having perpetuity as the condition in order for a *Waqf* to be valid by obliging the founder to explicitly express it in the *Waqf* declaration.<sup>9</sup> Imam Ahmad Ibn Hanbal further stated that a *Waqf* would be invalid if the founder expresses a condition whereby the founder can at any time revoke the *Waqf*, sell or give it as a gift. Shafiites however permit a *Waqf* declaration without the founder stating the duration of the *Waqf* as for them *Waqf* is initially perpetual in nature.<sup>10</sup>

Majority of jurists who are at variance with the legality of temporary *Waqf* have provided the following hadith as one of their proofs. Narrated by Ibn 'Umar:

When 'Umar got a piece of land in Khaibar, he came to the Prophet (SAW) saying, "I have got a piece of land, better than which I have never got. So what do you advise me regarding it?" The Prophet (SAW) said, "If you wish you can keep it as an endowment to be used for charitable purposes." So, 'Umar gave the land in charity (i.e. as an endowments on the condition that

<sup>6</sup> Al-Sarakhsi, *al-Mabsut*, Cairo, 1956, vol. 12, p. 27, <http://feqh.al-islam.com/Books.asp>; translation by Mohd. Zain b. Haji Othman, *Islamic Law with special Reference to the Institution of Waqf*, Kuala Lumpur: Prime Minister's Department, Religious Affairs Division, 1982, p. 41

<sup>7</sup> Al-Shirbīnī Muhammad al-Khatīb, *Mughni al-Muhtāj ilā M'arifat al-Fāz al-Minhāj*, (Beirut: Dar al-Fikr, 1987), vol. 4, 462.

<sup>8</sup> Ibn 'Abidin, *Radd al-Muhtār*, (Damascus: Dar al-Fikr li al-Tibā'at wa al-Nahsr, 2000), vol. 4, 339. See also Ibn Qudamah Abdullah ibn Ahmad, *al-Mughni*, (Beirut: Dar al-Kitab al-Arabi, 1985), vol. 3, 385.

<sup>9</sup> Ibn Nujaim Zain al-Deen, *al-Bahr al-Rahīq Sharh Kanzu al-Daqāiq*, (Beirut, Dar al-Ma'rifah: 1985), vol. 5, 204.

<sup>10</sup> Al-Saiwasi Kamal al-Deen 'Abdul al-Wahid, *Sharh Fathul al-Qadīr*, (Beirut, Dar, al-Fikr, 1989), vol. 6, 207.

the land would neither be sold nor given as a present, nor bequeathed, (and its yield) would be used for the poor, the kinsmen, the emancipation of slaves, *jihad*, and for guests and travelers; and its administrator could eat in a reasonable just manner, and he also could feed his friends without intending to be wealthy by its means."<sup>11</sup>

In the hadith, it is understood by the opponents on the permissibility of temporary Waqf that the saying of the Prophet Muhammad (SAW) "you may keep the corpus intact" shows that the nature of Waqf is perpetual. Keeping 'intact' means to preserve it. It is also understood from the action of Umar RA who disallowed the property to be sold, gifted away and to be inherited which means that the Waqf cannot be temporary. The prohibition is for the purpose to protect Waqf properties from any dealings so as to make the Waqf lose its characteristics. Their argument moots that if Waqf can be temporary, Umar RA would not give the conditions in the first place. Although the conditions were given by Umar RA, Rasulullah (SAW) did not go against it suggesting that what Umar understood is not against the intention of the Prophet SAW.

They also suggested that the word *Waqf* or *Habs* means perpetuity, repetition and continuity thus; it does not represent any form of temporary meaning. This is supported by all the actions of the companions where the Waqf declaration they made never included any words or phrases leading to temporary declaration.<sup>12</sup> Since Waqf is removal of ownership, analogical to freeing a servant, it is unimaginable that the transaction occurs only for a specific period. This is because in the case of freeing a servant, it is removal of ownership from the owner to Allah SWT. The same concept applies to Waqf. Hence, whoever takes charge of the property, he takes the duty as a trustee. The power to deal with Waqf property is always subject to the rule of Allah SWT. Thus, Shariah compliance of all the dealings is necessary and determine the legality of the Waqf transaction. In the contemporary context, having a proper check and balance of Waqf assets is essential and vital, being the khalifah of Allah SWT.

### Proponents Views

However, the Malikis have a different view on the perpetuity of Waqf. They disagree on having perpetuity as one of the conditions of valid Waqf. According to the Malikis, it is valid to establish a Waqf within a specific period in which after the end of the stated period, the founder is able to transact with the subject matter.<sup>13</sup> This is also the view held by Abu Yusuf as reported by Ibn Hammam, "If it is known that Abu Hanifah allowed the Waqf

<sup>11</sup> Al-Bukhari Muhammad Isma'il, *Al-Jamiu al-Musnad al-Sahih al-Mukhtasar*, (Beirut: Dar Tauqu al-Najat, 2001) Book 55, Hadith 35.

<sup>12</sup> Al-Kasani Abu al-'Ala', *Badā'iu al-Sanā'iu fi Tartīb al-Sharā'iu*, (Beirut: Dar al-Kutub al-'Ilmiyyah, 1982), 230.

<sup>13</sup> Al-Dusūqī Muhammad 'Arafat, *Hashiyat al-Dusūqī 'alā al-Sharh al-Kabir*, (Cairo: Matba'at al-Sabih, 1934), vol.2, 471.

property to be given to the heirs, he should also allow Waqf for twenty years because there is no difference (between both situations) at the very beginning".<sup>14</sup>

Ahmad Dardir stated that perpetuity is not a precondition of a valid Waqf, thus it is valid for a period of time and after that the ownership returns to the founder.<sup>15</sup> Ad-Dasuqi further explained that since perpetuity is not the condition of a valid Waqf it is permissible to perform Istibdal.<sup>16</sup>

Al-Khatib Al-Shirbini on the other hand allows temporary Waqf, however, the founder must state the latter beneficiary after the former e.g; I dedicate this Waqf to Zaid for a year and after that to the poor. According to Al-Mawardi, Imam Malik allows the founder to revoke and sell the property if the founder is in need of doing so based on the maxim "the condition of the founder is equal to shariah ruling". Al-Mawardi also added that if a person can donate part or all his property then it is also permissible for him to donate it the entire time.<sup>17</sup>

The proponents have different views on the previous hadith. It is true that the conditions expressed by Umar signals the perpetual nature of Waqf. However, Rasulullah SAW said "If you like" which signifies how the declaration of Waqf is made depending on the founder. Thus, it does not imply impermissibility of temporary Waqf. The acknowledgment of Rasulullah SAW on the conditions given by Umar RA does not necessarily mean that it is the only permissible way and others are impermissible.

It is clear that there is no specific text in the Quran or in Prophetic traditions, which disallow temporary Waqf. It is based on the *ijtihad* of the jurists from every Mazhab. This can be seen whereby there is some jurists in every Mazhab who explicitly or implicitly propose to the idea of temporary Waqf although their views are not the certified view in their Mazhab like Abu Yusuf from the Hanafis, An-Nawawi from the Shafies and Al-Mawardi from the Hanbalis.

Since Waqf is a type of Sadaqah or specifically *Sadaqah jaariyah* (continuous charitable act), then it can be in the temporary or perpetual form. From the hadith of Ibn Umar, it can be understood that a Waqf property cannot be sold, or revoked during the period of Waqf. However, it does not prohibit temporary Waqf.

Some of the jurists allow moveable assets generally like Shafie and some only allow moveable assets that were mentioned by Prophet Muhammad (SAW) such as horses and

<sup>14</sup> Ibn Humam Muhammad, *Fath al-Qadīr*, (Jeddah: Daar al-Fikr, 2010), 89.

<sup>15</sup> Supra note 131.

<sup>16</sup> Istibdal generally refers to conversion of a subject matter of Waqf (Mawquf) with another subject matter, which is equivalent in value or higher.

<sup>17</sup> *Al-mawsu'at al-Fiqhiyyah al-Kuwaitiyyah*, (Kuwait Ministry of Awqaf and Islamic Affairs in the State of Kuwait, 1983-2006), 70.

war instruments as the subject matter of Waqf. Moveable assets are temporary in nature. If the *illah* of Waqf is perpetuity, then moveable assets cannot be recognized as the subject matter at the first place. Thus, perpetuity is not the condition of a valid Waqf and it is up to the founder on how to manage and declare the Waqf.

The opinion allowing temporary Waqf is more suitable in our time. It will allow more people to perform Waqf as it does not bind them throughout their entire life. The dynamism of Waqf should be addressed well in order to maximize the potential of Waqf.

### Fatwas on Temporary Waqf

The different opinions of classical jurists on permissibility of temporary Waqf is reflected in the various fatwas on international level issued on the religious authorities. Islamic Religious Council of Singapore (MUIS) in their discussion on temporary Waqf in Singapore issued a fatwa against its permissibility in the year 1997 and 2000. They opined that Waqf should be made perpetual and its temporary dedication caused the Waqf to be invalid.

AAOIFI in their Shariah Standard No.33 on Waqf 2017, Section 3/1/4 allowed temporary Waqf by stating "In principle, Waqf should be eternal. Nevertheless, temporary Waqf is also permissible when the donor desires to get back his property after a specific period." AAOIFI also acknowledged *usufruct* as a valid subject matter of Waqf. This is consistent with their view of allowing temporary Waqf. Section 3/4/6 of the same standard stated "Waqf can be a usufruct of an asset which the Waqif acquires through rent.

The same opinion is held by the International Fiqh Academy in their conference on 30 April 2009 which concluded that stating specific periods of Waqf is permissible for all types of Waqf. It is also highlighted by the Fiqh Academy that Waqf is one of the widest topics in Fiqh and it is heavily based on the *ijtihad* of the jurists. It is related to the Maqasid Shariah in which the purpose of it is to accommodate the needs of the public (International Fiqh Academy (2009).

### DISCUSSION AND FINDINGS

*Hukm Syarak* should always be the basis of laws for the Muslims. *Hukm Syarak* refers to the provisions from the primary sources of law i.e. Al Quran and the Hadith. Some jurisdiction defines clearly what is meant by *Hukm Syarak*. For example, in Malaysia, the laws on Waqf defines *Hukm Syarak* as the principles based on the opinion of Mazhab Shafie or other school of thoughts from the Mazhab Maliki, Hanafi and Hanbali. In the context of Waqf, if there is no specific and clear law, thus, reference to the clear *hukm* from the primary sources of al Quran and the hadith must be the guidance. If there is no clear legal Shariah principles or *Hukm* from the main authorities, a reference to the opinion of the jurists is necessary. The jurists will deliberate and discuss among the qualified

scholars till an opinion is arrived using the methodology of *Ijtihad* or extracting *hukm*. This opinion will be endorsed as *fatwa*. It is binding on the person seeking the *hukm* but not on court. In Malaysia, a fatwa must be gazetted to have legal effect. In arriving to the *hukm*, the jurists will always give preference to the *maqasid al Shariah* (objectives of Shariah).

Perpetuity of Waqf or the *mawquf* remains as the accepted principles of Shariah and law. It has never been doubted. The call for the flexibility of the interpretation and the application of the *hukm* are made on the deliberation of the needs of the people with the consideration of the *Maqasid al Shariah*. In the context of *Waqf muaqqat*, if the law is silent, reference must be made to the opinion of the jurists. There is clear principle or guideline from the views of the majority opinion of the jurists on the position of perpetuity of *Mawquf*. Nonetheless, the development in the practice of Waqf in general, demand for a consideration of other opinions such as the views of Maliki school as the needs for the application of *Waqf muaqqat* is contemporary and meeting the need in the society.

The argument on the perpetuity element of Waqf gives rise to the question, can Waqf be revoked if there is a special need for such purpose. If yes, what are the requirements? The opinion of Hanafis allows for the revocation of Waqf and treats Waqf as a non-binding contract. According to Imam Abu Hanifah Waqf does not become absolute but rather the making of property for the benefit of others falls under the category of '*ariyah* (lending).<sup>18</sup> According to him, a *wakif*, even after establishing the Waqf does not forgo his right or power to revoke the Waqf during his lifetime, or can make a gift of that property to others or to alienate it by sale, until the Waqf is adjudged as perpetual or become absolute. The Waqf shall become absolute only in three cases; (1) if the Waqf is for the purpose of building a Mosque (2) if the *wāqif* has created Waqf as Waqf by *wasiyah* (will) or (3) if there is dispute on the Waqf deed the judge will determine the Waqf as perpetual. Imam Malik is of the view that Waqf is not perpetual.<sup>19</sup>

Another issue in discussing the permanent nature of Waqf is related to the status of Waqf if the Waqf is created for a temporary period or if there is a term or condition indicating that the Waqf is not perpetual. Imam Zāhiriyyah is of the view that Waqf must be perpetual and when a *wakif* makes a condition in Waqf, the condition is void but the Waqf is valid.<sup>20</sup> In this regard, the Maliki school is of the view that if a permanent Waqf is valid so is the Waqf for a fixed period. The flexibility also relates to the right to sell the Waqf property. If it is stipulated in the Waqf deed that *wakif* may sell the *Mawquf* in time of his need, the

<sup>18</sup> Zaīn al-Dīn Aḥmad bin Ibrāhīm Ibn Nujaym, *Al Baḥār al Rā'iq Sharḥ Kanz Al Daqā'iq*, vol. 5, ed. 2nd (Dār Al Kitāb al Islāmī), 202; Muḥammad Amīn al-Shaḥīr Ibn 'Ābdīn, *Rad al Muḥtār 'alā al Dur al Mukhtār*, vol. 4, (Dār al Fikr, 1992), 337.

<sup>19</sup> Abū al-Barakāt Aḥmad bin Muḥammad al-Dardīr, *Al-Sharḥ al-Saghīr*, vol. 4 (Egypt: Dār al-M'ārif, 1396), 97; Al-Zuḥaylī, *Al-Fiqh al-Islāmī wa Adillatuhu*, 7602

<sup>20</sup> 'Alā' al-Dīn al-Ḥaṣkafī, *Al-Dur al-Mukhtār*, vol. 3 (Cairo: Maṭba' al-Amīriyyah, 1328A.H), 370

Waqf is valid.<sup>21</sup>[20] Likewise, if it is stipulated that after the death of the person in whose favour the Waqf is made, the Waqf property shall revert back to the wakif (if he is alive), or if he is dead it shall revert to his heirs, that stipulation too shall be valid.<sup>22</sup> Hence, the Malikis are firm in holding to the principles that perpetual Waqf and Waqf for a fixed period are valid. Although generally the Shafie and the Hanbali schools believe that Waqf must be perpetual, nonetheless, they are in agreement that a family Waqf may not be perpetual. The property in which Waqf becomes void due to the existence of the temporary nature in the declaration of Waqf shall revert to the owner.<sup>23</sup>

## CONCLUSION

The position of perpetuity of *Mawquf* in the jurisprudence of Waqf is clear. There is a minority view of the jurists to ease the element of perpetuity to allow for a more flexible principle. Perpetuity can be observed in the form of value and not necessarily the 'ayn or the subject matter itself. Perpetuity will last according to the life span of the Mawquf. While the jurists have generally accepted the movable properties as a Mawquf, hence, the concept of perpetuity also may differ. The contemporary approach of *hukm* pertaining to Waqf should consider the *maslahah* and the needs of the people. The needs have to be prioritised according to the objectives of the Shariah. The interpretation and the application of the objective should be enhanced meeting the needs of the people. It is always advisable to be reminded of the fact that Waqf is an *ijtihadi* matter. There are many opportunities to make Waqf dynamic and flexible within the scope of *Hukm Syarak*.

<sup>21</sup> Muḥammad Amīn Ibn 'Ābdīn, *Radd al-Muḥtār* vol. 3, 497. 316 'Alā' al-Dīn al-Ḥaṣkafī, *Al-Dur al-Mukhtār*, vol. 3 (Cairo: Maṭba' al-Amīriyah, 1328A.H), 370. 90

<sup>22</sup> *Ibid*

<sup>23</sup> Muḥammad 'Ubaid al-Kabaysī, *Aḥkām al-Waqf fī al-Sharī'ah al-Islāmiyah* (Baghdād, n.d), 19

## Chapter Six

### ZAKAT AND WAQF SYNERGY FOR THE SUSTAINABILITY OF SOCIO-ECONOMIC DEVELOPMENT

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## INTRODUCTION

Financial inclusion is prominently featured as a facilitator of other developmental goals in the 2030 Sustainable Development Goals (SDG). There is academic evidence that financial inclusion models can contribute to overall economic growth and the achievement of broader development goals. Financial inclusion contributes to sustainable development by improving people's living standards, reducing socio-economic disaster risks such as economic poverty, multidimensional poverty, and income inequality, and creating economic opportunities.<sup>5</sup>

Waqf and Zakat are examples of Islamic Social Finance which are well-established and effective tools for financial inclusion and poverty alleviation, come into play. Zakat is a type of almsgiving to the Muslim Ummah that is considered a religious obligation in Islam, ranking second only to prayer in the Quran. As poverty is generally higher in Muslim majority countries, the majority of which are in Asia and Africa, zakat becomes a vital institution in an Islamic economic framework for poverty alleviation and economic well-being.<sup>6</sup>

Islamic Waqf is regarded as a form of worship that improves one's relationship with Allah while also contributing to social progress and development. It is one of the preferred forms of worship in Islam. Waqf is an Islamic endowment of property held in trust and used for charitable or religious purposes. Waqf is also critical for health care, mosques, education, orphanage centres, needy residences, and poverty alleviation. Waqf is one of the most ancient Islamic institutions and has been practised since the Prophet

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<sup>5</sup> Ullah, Kifayat, Abdul Qayyum Mohsin, Abdul Saboor, and Saranjam Baig. "Financial Inclusion, Socioeconomic Disaster Risks and Sustainable Mountain Development: Empirical Evidence from the Karakoram Valleys of Pakistan." *Sustainability* 12, no. 22 (2020): 9737.

<sup>6</sup> Shaikh, Salman Ahmed, and Abdul Ghafar Ismail. "Role of zakat in sustainable development goals." *International Journal of Zakat* 2, no. 2 (2017): 1-9.



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