THE LEGAL REGIME OF WAQF IN LEBANON:
AN OVERVIEW
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A HISTORICAL AND COMPARATIVE INTRODUCTION TO THE LAW OF WAQF

One of the five pillars of Islamic faith is the principle of charity. Because a Muslim is obligated to perform charitable acts, an independent body of law has developed governing the use of property for charitable purposes based on a Hadith between the Prophet and Omar ibn Al-Khattab. When property is used for such purposes, it is known as a Waqf or also habous in some North African countries.

As it transpires from its Arabic name (Waqf from the verb “waqaf” - to stop or habous from “habasi” - to detain), the law of Waqf forbids the sale or disposition of real property when property rights are created for the benefit of a charitable enterprise (in effect the direct opposite of the rule against perpetuities). Furthermore, the many similarities of the law of Waqf with the English/American law based trust and the Roman-Germanic law based fiducia con amico or with the modern French and German laws concepts of fondation or stifftung, have been highlighted by legal scholars in their perpetual search for new asset management techniques based on trust and confidence that go beyond the traditional approach related to the management real property and estates to reach modern financial assets and the development of financial markets.

This paper will focus on the legal regime of Waqfs in Lebanon.

After the establishment of the French Mandate, the High Commissioner reorganised the law of Waqfs in Lebanon. Yet, because Waqfs at that time were based essentially upon Qur’anic law rather than secular law, a special legislation was required to maintain both the spirit of the Sharia and the independence of the Islamic community in its use and administration of Waqfs.

In addition to the Islamic charitable Waqf, the Christian communities have also adopted a similar concept of Waqf regulated by each community’s specific law.

However, not all Waqfs are of a charitable nature. When property is initially alienated for the benefit of certain relatives of the founder (or other specified persons) and will subsequently benefit a charitable enterprise, the alienation is known as a Waqf zurry (or ahil), a family Waqf that is regulated in Lebanon by a secular law enacted in 1947. There is also a Waqf known as a mixed Waqf.

Although the legal regime of family Waqf may be more interesting to explore in the present context, this paper will focus on both the Islamic charitable Waqf (which is the main type of charitable Waqf which has inspired other types of Waqfs) and the family Waqf. It will address the legal characteristics and nature common to all categories of Waqfs (I), before turning to some specificities of the legal regimes relating to charitable (II) and family Waqfs (III).

I. COMMON CHARACTERISTICS OF WAQF AND ITS LEGAL NATURE

1. General characteristics of Waqf

A Waqf immobilizes property and prevents its disposal by sale, donation, mortgage, surety, partition or seizure. In addition, one cannot acquire ownership of such property by prescription. The alienated property can, however, be acquired for public use, by pre-emption. The creation of a Waqf also creates a legal person which has a special patrimony owner of the alienated property. Case law recognises the legal personality of an alienated Waqf property.

A charitable Waqf, once established, becomes obligatory. However, the new Waqf zurry is no longer obligatory, as the founder is allowed to reverse his decision.

A Waqf is a property right and as such must conform to the legal requirements pertinent to all property rights.

2. Formal conditions required to establish a valid Waqf

For a Waqf to be considered valid and to have legal effect, a written document must be executed and registered in the Real Property Register.

The creation of a Waqf is completed and has legal effect as soon as it is issued from the waqef (the founder). However, the beneficiary can refuse it, in which case, the Waqf goes to another beneficiary and then to the charitable institution as indicated by the Waqf deed.

II. THE CHARITABLE WAQF (WAQF KHEIRI)

A charitable Waqf (Waqf kheir) is that whose profits are to be used for charity (e.g., payment to mosques, churches, hospitals, asylums etc.).

1. Control of the Waqf

Islamic Waqfs are administered by the High Council of Islamic Waqfs, which makes general policy decisions and, in particular, decides how the income derived from Waqf property will be used.

Local committees send their grievances to the Council for consideration. The Council is assisted by a General Committee for the Islamic Waqfs, which acts as a consultant and makes unbinding recommendations. Decisions of either the High Council or the General Committee are made by majority vote. The General Comptroller carries out the decisions of the High Council; controls the way funds are spent, reports illegalities, issues instructions to local Waqf directors; and proposes a budget to the High Council.

2. Lease, exchange and partition of charitable Waqfs

A usufruct can be obtained from an alienated Waqf property in accordance with either the conditions set by the founder or the nature of the property, in which case, the usufruct is limited to what has been stipulated (e.g., mosques, schools, cemeteries).

If the founder imposes conditions upon the use of the property, his stipulations must be respected if they are not illegal. However, the founder may not indicate how the property shall be used as a general principle. Also, there is a particular way of exploiting agricultural property.

In 1926, a law was enacted to limit the leasing of Waqfs. Another provision which subjects all leases to state authority represents a major intervention of the state in the administration of Waqfs.

Waqf property can be exchanged for another property or sold with the proceeds being used to purchase other lands.

Each parcel that is exchanged should be equal in value to that which is received. Also, there is a right of pre-emption for the lessor in the event of an exchange. A Waqf may be divided into independent lots to enable each beneficiary, which becomes its trustee, to receive the proceeds from a separate portion of the property.
3. Authority to expropriate property for charitable purposes

Under Islamic law, Waqfs are intended to serve the public; Ottoman law provided for the expropriation of real property for charitable purposes. This law has been maintained in Lebanon.

4. Use of profits from the Waqf

Waqfs apply to non-profit organisations in Islamic countries. To carry out their functions, they have an internal organisation that was originally delineated by the Ottoman law and is still essentially in force in Lebanon today.

III. THE FAMILY WAQF

1. Nature and establishment

The profit in a family Waqf is initially distributed among the family members of the founder. It is possible, however, to find mixed Waqfs which are part charitable and part family. Rules for the establishment, division and termination of Waqfs were set forth in the law enacted in 1947. Any Waqf established after the effective date of this law should be administered in accordance with its provisions, otherwise the Waqf is null and void.

According to the 1947 law, a Waqf cannot be made for more than two generations in the future, the property goes back to the beneficiary of the initial inheritance. If there is no beneficiary, the family Waqf becomes a charitable Waqf.

Any condition in the establishment of the Waqf contrary to its purpose is null. The Waqf may be in the form of real property or any other property. The division of a family Waqf is subject to the general rules applicable to any other legal division of property. The shares are divided according to the will of the donor or the value of the Waqf's property.

2. Beneficiaries and administration

The beneficiaries of a family Waqf can include the founder himself, his children, his relatives, or even third parties; whether individuals or corporations. No affiliation to a particular religion or sect is required.

Any single person with no children can establish a Waqf using his entire property. If he has prospective heirs, however, the amount of the donation may be limited to what is permitted by the inheritance laws of his religious community.

Since a Waqf is deemed to be a legal person, it becomes necessary to appoint a natural person, which acts as a trustee, to represent it, to manage its interests, to make proper use of the property, to distribute the proceeds to the beneficiaries, and to carry out the wishes of the founder. If the founder does not appoint such person, he will act himself as the trustee either directly or through a representative. But the founder must appoint a person to act as a trustee after the founder's death, otherwise, a local judge becomes the legal trustee and subsequently manages the Waqf directly or through someone he appoints. A family Waqf is managed by one of the beneficiaries appointed by the religious court. The administrator is liable for any action he takes which may diminish the value of the Waqf. He is required to present relevant data to the religious authorities on a regular basis and to enforce all decisions of the religious court. The laws relating to family Waqfs apply only to Christian and Jewish Waqfs. Islamic family Waqfs are still administered in accordance with Islamic tradition.

3. Termination of family Waqf

In principle, a charitable Waqf is considered to be perpetual. The Waqf zurry and the mixed Waqf, however, became temporary since 1947.

If the founder specifies a period of alienation, the Waqf terminates on the specified date, unless each of the beneficiaries predeceases him, in which case it terminates upon the death of the last beneficiary to die.

If the Waqf is to continue for the life of the beneficiaries, it will terminate upon the death of the last surviving beneficiary.

A Waqf zurry can be revoked by the founder. A Waqf terminates when the property becomes materially useless or the proceeds therefore become negligible. A request for the termination of a Waqf can be made by any of the parties before the civil court. At the end of the Waqf, full ownership reverts to the founder if still alive, or if he has deceased, to his heirs, otherwise, it reverts to a charitable institution when stipulated and, if not, reverts to the state.

CONCLUSION AND SUGGESTIONS

The Waqf system has played a significant socioeconomic role throughout history of Islamic civilization. It has been submitted by economists that the Waqf system can significantly contribute towards the ultimate goals of a modern economy, by providing essential services to society at zero cost to the state. In Lebanon, Waqf could restore distribution of income and wealth and play a vital role in socioeconomic development, which could be achieved in modern times by comprehensively improving some prerequisites as follows:

a) Issuing a new legal framework that imparts a clear definition of Waqf, organises this institution effectively, and regulates its social and economic roles, providing necessary legal protection for the Waqf properties and governing the repossessions of all those that were diverted to other public and/ or private persons.

b) Revising the management of Waqf, especially its investment kind and providing technical, managerial and financing support to the Waqf management to help it increase the productivity of Waqf properties; in order to: (i) increase the efficiency and productivity of the Waqf properties; and (ii) minimize the potential of dishonest practices and corruption by the Waqf managers.

c) Revising the classical concept of Waqf to accommodate many new forms of potential Waqf, particularly in the area of Waqf of usufruct and Waqf of non-physical properties, although this is currently possible for family Waqfs under Lebanese law. Similarly, the concept of temporary Waqf also needs to be expanded.

d) Redefining the roles of the Waqf authorities by making them agents of support and catalysts of help in the development of Waqf rather than administrative managers of Waqf properties.
FOOTNOTES

1. Imam Muslim, Sahih Muslim, volume: The Book of Bequests (Kitab Al-Wasiyya), at 4006
5. See Id.
6. See e.g., Code of Canons of the Eastern Churches (Cath.), Canon 1007 et seq; also, Law on Personal Status of the Catholic Communities, article 255 et seq.
7. Law on Waqf, 10 March 1947, article 1.
8. Id. article 2. For example, if a property is alienated for the construction of a mosque or a church, and upon completion of the building, the proceeds of the alienated property go to specified persons.
10. Law on Waqf, 10 March 1947, article 2.
11. Id.
12. The Council is vested with both legislative and administrative authority and meets twice a year. Its members include high-ranking judges from the largest cities of the country, the President of the Islamic Supreme Court (or his delegate) and the General Comptroller of Islamic waqfs.
13. Composed of the President of the High Council of waqfs, another Counsel, the directors of the local waqfs, a delegate from each district and the General Comptroller of waqfs in Lebanon.
14. Appointed according to the law by the High Commissary of the French Republic, although, since the expiration of the French Mandate, the Prime Minister now possesses all authority previously vested in the High Commissary regarding Islamic law.
15. This is done by leasing the land to a peasant, who cultivates it and gives part of the crops obtained to the trustee.
16. Decree No. 80 of 29 January 1926.
17. In fact, as mentioned above, as the High Council of waqfs is authorised to make decisions regarding the leasing of waqf property, some radical actions taken between 1919 and 1926 (some of these leases had been made for periods as long as ninety-nine years)
18. Decree No. 79 of 29 January 1926.
20. 1331 A.H. (Hejri calendar).
21. Id. article 4.
22. These laws may contain substantial differences with respect to the amount which may be donated, since the various religious communities are ruled by different inheritance laws.
23. Law on Waqf, 10 March 1947.
24. Unless there is some stipulation naming a successor beneficiary in case of death.
25. Law on Waqf, 10 March 1947 article 10.
26. Id. article 7.
27. The proceeds will be deemed to be negligible when the crop is too poor, or the number of beneficiaries has become too great.
28. Including charitable party i.e. the religious community to which belongs the founder of the waqf that receives 15% of the value of the terminated waqf, according to Law on Waqf of 10 March 1947 article 34.

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