

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.¹ When property is used for such purposes, it is known as a *Waqf* or also *habous* in some North African countries.²

As it transpires from its Arabic name (*Waqf* from the verb "*waqaf*" -to stop- or *habous* from "*habass*" - 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 *stiftung*, have been highlighted by legal scholars in their perpetual search for new asset management techniques based on trust and confidence³ 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.⁴

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*.⁵

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.⁶

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 *ahli*); a family *Waqf* that is regulated in Lebanon by a secular law enacted in 1947.⁷ There is also a *Waqf* known as a mixed *Waqf*.⁸

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 *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.⁹

A charitable *Waqf*, once established, becomes obligatory. However, the new *Waqf zurry* is no longer obligatory,¹⁰ as the founder is allowed to reverse his decision.¹¹

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 kheiri*) 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*,¹² 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*,¹³ 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 Comptroller¹⁴ 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 property¹⁵.

In 1926, a law was enacted¹⁶ to limit the leasing of *Waqfs*.¹⁷ Another provision which subjects all leases to state authority represents a major intervention of the state in the administration of *Waqfs*.¹⁸

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 lots¹⁹ 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 law²⁰ 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.²¹ According to the 1947 law, a *Waqf* cannot be made for more than two generations thereafter, the property goes back to the beneficiary of the initial inheritance. If there is no beneficiary, the family *Waqf* become 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 *Waqfs* 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.²²

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 1947.²³

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.²⁴

If the *Waqf* is to continue for the life of the beneficiaries, it will terminate upon the death of the last surviving beneficiary.²⁵ A *Waqf zurry* can be revoked by the founder.²⁶ A *Waqf* terminates when the property becomes materially useless or the proceeds therefrom become negligible.²⁷ A request for the termination of a *Waqf* can be made by any of the parties²⁸ 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.²⁹ 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:³⁰

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 repossession 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 *Waqf* 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
2. Joseph Luccioni, *Le habouss ou wakf (rites malékite et hanéfite)*, Thèse de droit, Alger, 1942 ; Abdelfattah Eddahbi, *Les biens publics en droit marocain*, Editions Afrique-Orient, Casablanca, 1992.
3. See e.g., David Powers, *The Islamic Family Endowment (Waqf)*, (1999) 32 *Vanderbilt Journal of Transnational Law* 1167; Jeffrey A. Schoenblum, *The Role of Legal Doctrine in the Decline of the Islamic Waqf: A Comparison with the Trust*, (1999) 32 *Vanderbilt Journal of Transnational Law* 1191; Thomas P. Gallanis, *The Contribution of Fiduciary Law*, University of Iowa Legal Studies Research Paper, Number 12-05, January, 2012, in L. Smith (ed.), *The Worlds of the Trust*, Cambridge University Press, (2013) available at <http://ssrn.com/abstract=1970440> (visited on 31 December 2017); Bichara Tabbah, *Propriété privée et registre foncier*, LGDJ, Paris 1947, vol. 1, p. 399; Tahar Khaloune, *Le Habous, le domaine public et le Trust*, *Revue internationale de droit comparé (RIDC)*, 2/2005, pp. 442 et seq; Marwan Sakr, *Droit de propriété, wakfs, fiducie et trust anglo-saxon. Convergence et divergence*, a paper presented to the conference: *Droit et propriété au Liban : explorations empiriques*, Institut français du Proche-Orient, Beirut, 14 June 2012 <http://www.ifporient.org/node/1127>
4. See e.g., The World Bank Group and Islamic Development Bank Group, *Global Report on Islamic Finance: Islamic Finance - A Catalyst for Shared Prosperity?* Washington, DC, 2017: World Bank. © Islamic Development Bank Group. Available at <https://openknowledge.worldbank.org/handle/10986/25738> License: CC BY 3.0 IGO
5. High Commissioner's Decision (*arrêté*) No. 753 of 1922
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.
9. See, *Menassa v Waqf of Mar Rouhana*, Cass. Civ. 4th ch., Judgement No. 10 dated 30 March 1988, *Baz* 1988, p. 259
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.

19. Law on Waqf, 10 March 1947

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.

29. Mochammad Arif Budiman, *The Significance of Waqf for Economic Development*, (2014) *Journal Equilibrium*, Vol. 2, No.1, June 2014, pp 19-34. Available at SSRN: <https://ssrn.com/abstract=2995473>

30. M. Kahf, *Financing the development of awqaf property*, a paper prepared for the Seminar on Development of Awqaf organized by IRTI, Kuala Lumpur, Malaysia, March 2-4, 1998.

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