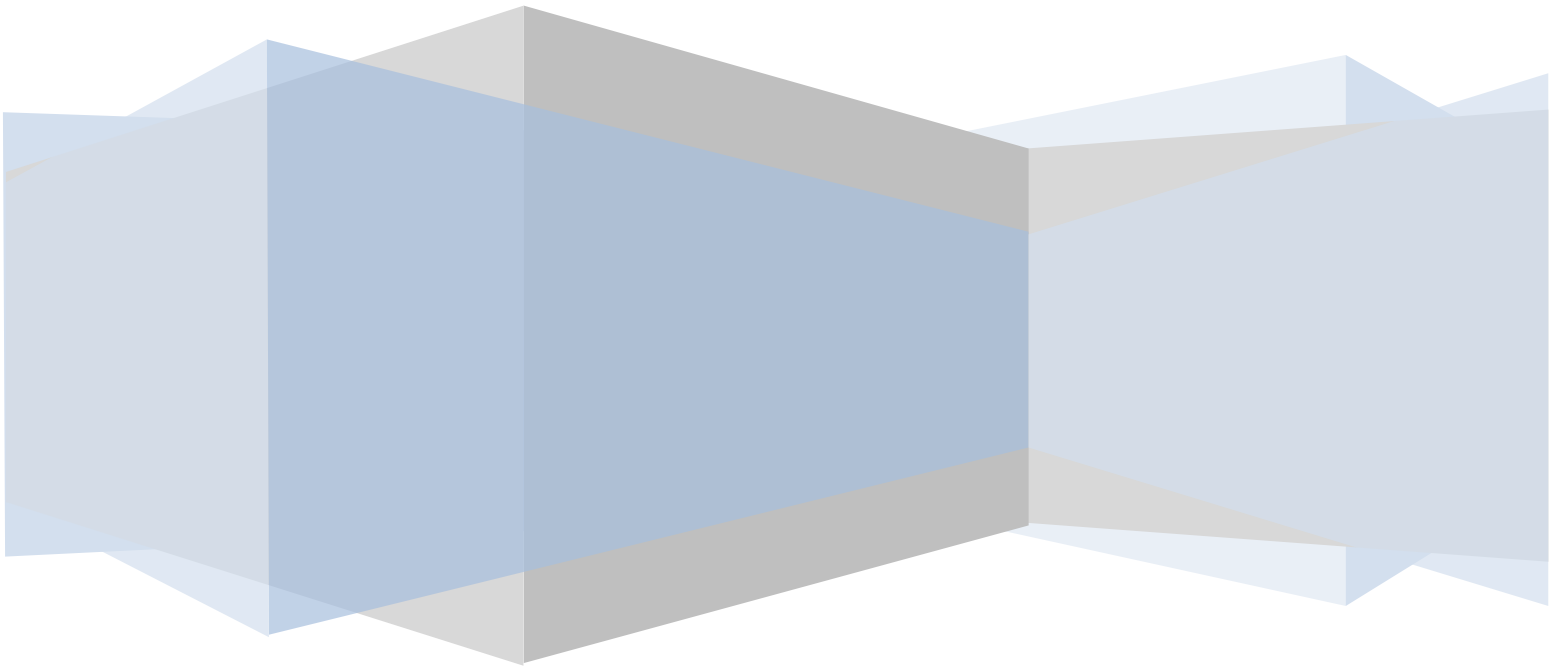
Studies and Recommendations

International Shariah Scholars Roundtable (2)

Sponsored by Bank Rakyat Malaysia

Held at the Sama Sama Hotel

10 & 11 Safar 1439H corresponding to 30 & 31 October 2017 CE



First Edition

1438H – 2017 CE

Keynote Address

Bank Rakyat's International Shariah Scholar Roundtable (iSHAR)

Sama-Sama Hotel, KLIA

30th and 31st October 2017

In the name of of Allah, the Beneficent, the Merciful

All praise is for Allah, and peace and blessings be upon the Messenger of Allah and upon his family and companions and those who follow him.

By a hospitable invitation from the Chairman of the Board of Directors of Bank Rakyat Malaysia, the First Fiqh Symposium of Bank Rakyat has been convened. The Forum was attended by a number of scholars specialized in the jurisprudence of transactions and Islamic banking. Their invitations came from the Chairman of Bank Rakyat's Board of Directors. The invitation mentioned that the objectives of the Symposium include:

1. Deepening the discussion in order to issue unified resolutions on contemporary issues in Islamic banking.
2. Issuing recommendations that will serve as a reference for practitioners, researchers and stakeholders in the Islamic banking world.
3. Trying to coordinate between theoretical understanding of Shariah and the applications of theory in Islamic banking at an international level.
4. Implementing the social responsibility of the Bank towards the society by developing the knowledge base regarding the applications of Islamic banking.

The forum will include knowledge-sharing sessions to which specialists have been invited to discuss topics related to the development of Islamic banking. Among the researchers and scientists who will participate in this forum are:

1. Shaykh Nizam bin Muhammad al-Yaqoubi - Chairman of the Forum
2. Shaykh Dr. Abdul Sattar Abu Ghuddah
3. Shaykh Dr. Muhammad Abdul Rahīm Sultan al-Ulamāʾ
4. Shaykh Yūsuf bin Abdullah al-Shubailī
5. Shaykh Abdul Aziz al-Qaṣṣār
6. Shaykh Dr.ʿIṣām al-ʿAnzī.
7. Shaykh Dr. Usayd al-Kīlānī.
8. Shaykh Dr. Mūsā Muṣṭafā al-Quḍāh.
9. Shaykh Dr. al-ʿAyyāshī Fadād.
10. Shaykh Dr. Abdul Rahman al-Saʿdī.

11. Shaykh Dr. Aznan Hassan.
12. Shaykh Prof. Muhammad Akram Laldin.
13. Shaykh Prof. Ashraf Muhammad Hāshīm
14. Shaykh Burhanuddin Luqman
15. Shaykh Dr. Azman Muhammad Noor
16. Shaykh Wan Rumaizi Wan Hussein
17. Shaykh Abdullah Jalīl
18. Shaykh Muhammad Yūnus Abdul Azīz.
19. Shaykhah Dr. Rabīʿah al-Adawiyyah Binti Engku Ali
20. Shaykh Dr. Nūr al-Dīn ibn Ghādimūn
21. Shaykh Muhammad Zumairi Abdul Razzaq

The forum is held as follows:

Date: 10-11 Ṣafar 1439H corresponding to 30-31 October 2017.
Time: 8:30 am
Place: Sama Sama Hotel, Kuala Lumpur, Malaysia (Next to Kuala Lumpur International Airport)
The theme of the forum is: Coordinating Shariah opinions on contemporary financial transactions.

The Chairman of the Forum prepared ten areas for discussion. He explained the title of each area, the issues contained therein, and summarized the opinions of scholars and what they based them on. The General Secretariat of the symposium enlisted one of the participating scholars [to deliver a research paper] on each area of discussion. After extensive discussions among the eminent scholars, the symposium adopted resolutions [on certain issues] while some resolutions were deferred.

Topics of the Symposium:

1. Waqf of Cash and Securities: The Experience of the Hashemite Kingdom of Jordan as a Model
2. Substitution of Waqf [Properties] and Its Applications in the Hashemite Kingdom of Jordan.

3. Research Topics on Waqf: Administrative Expenses, Wage Parameters, and the Experience of the Kingdom of Saudi Arabia in the Development of Endowments
4. SharÊÑah Rulings Concerning Cash Waqf and Its Investments
5. Article 51: Parameters of the Provisions on Hedging
6. Waqf Expenses, and Which of Them Should Be Borne by the Endowment
7. A Case Study of Shariah Supervision as Practiced by the General Secretariat of Endowments

8. Waqf Experiences in Malaysia, the Ruling on Substitution of Waqf [Properties], Administrative Expenses of Waqf, the Parameters for Receiving Wages, and Cash Waqf

Bank Rakyat is pleased to present to researchers and students of knowledge the research papers presented by the Chairman of the Forum and the eminent scholars, as well as the resolutions issued at the forum.

On behalf of the eminent scholars, we extend our sincere thanks to Bank Rakyat for sponsoring the Forum. We thank the organizers and, in particular, Shaykh Muhammad Zumairi Bin Abdul Razzaq, the Audit Manager of the Bank, for his efforts to ensure the success of the Forum. The appreciation is also extended to all those who worked with him. We ask Allah to accept from all of us.

Chairman of the Forum

The First Area of Discussion:

The Application of Cash Waqf and Securities in the Hashemite Kingdom of Jordan

and

Waqf Substitution and Its Implementation in Jordan

by

Dr. Musa Mustafā al-Quḍāt

Associate Professor, the World Islamic Sciences and Education University, Jordan

Waqf of Cash and Securities: The Experience of the Hashemite Kingdom of Jordan

by

Dr Musa Mustafa al-Qudah

Associate Professor, International University of Islamic Sciences, Jordan

ABSTRACT

WAQF OF CASH AND SECURITIES: THE EXPERIENCE OF THE HASHEMITE KINGDOM OF JORDAN AS A MODEL

by: Musa Mustafa al-Qudah

The aim of this study is to present the views of jurists on making waqf of cash and securities as well as related issues such as waqf of movable properties, joint-contribution waqf, waqf of jointly owned properties, and temporary waqf. It also explains the direct and indirect aims of these types of waqf. It then presents the most important contemporary forms of this kind of waqf. The study concludes by discussing the experience of the Hashemite Kingdom of Jordan in this field. This is done by explaining the position of the [relevant] legislation and the opinion of the Fatwa Office. After that, three models of actual applications are presented. The study found that a group of classical Islamic scholars considered cash waqf permissible while contemporary scholars unanimously agree on the permissibility of making waqf of cash and securities. There are contemporary forms of this kind of waqf, and Jordan has some modest experience in this area. The study recommends that ways must be found to raise consciousness about this type of waqf and encourage it. Also, a national fund should be established for the waqf of cash and securities for the purpose of revitalizing waqf real estate holdings and responding to societal needs.

Key words: Waqf, Cash, Securities

INTRODUCTION

Waqf is one of the constant channels for charitable activities that draw a person close to Allah, the Mighty and Exalted. Based on the principle that Islamic law is universal in its applicability for all times and places till the Day of Judgment, it is necessary to constantly find ways by which the Sharīʿah continues to address contemporary developments. More than that, solutions should be provided that meet people's needs without infringing the eternal principles and general rules of the Sharīʿah. Nearly half a century has passed since the emergence of Islamic jurisprudence applications of exchange contracts and partnerships in the institutional form of banks, investment funds and *takāful* insurance companies. The need now seems more pressing for comparable applications in the form of banks and charitable investment funds that are rooted in the jurisprudence of donations. Since waqf is one of the most important and comprehensive donation contracts, it is necessary to examine everything that appears to be contrary to the nature, essence and make-up of waqf funds. The most prominent of these seem to be waqf of movable properties, joint-contribution waqf, waqf of jointly owned property, and temporary waqf. If we conclude that these are permissible from the fiqh perspective, we have opened the door wide for the establishment of the desired institutions and realization of the Sharīʿah's ability to address contemporary issues and people's needs. This research is intended to contribute to that establishment, and it is accompanied by the experience of the Hashemite Kingdom of Jordan in this field.

First: Research Problem

The research problem can be summarized methodogically through the following questions:

a. What are the definitions of waqf, cash and securities?
b. What are the root issues for jurisprudential research on making waqf of cash and securities?
c. What are the opinions of jurists regarding the Sharīʿah ruling on the waqf of cash and securities?
d. What are the forms and purposes of the waqf of cash and securities?
e. What is the experience of the Hashemite Kingdom of Jordan with respect to cash waqf and securities?

Third (*sic*): Research Objectives

To answer the above questions, the researcher will attempt to achieve the following objectives:

1. Define waqf, cash and securities (shares and *ṣukūk*).
2. Discuss the root issues for the jurisprudential ruling on waqf of cash and securities. These are waqf of movable properties, joint-contribution waqf, waqf of jointly owned property, and temporary waqf.
3. Present the Islamic jurists' opinions concerning the legality of making waqf of cash and securities. This will be achieved by presenting the views of the classical Islamic jurists concerning the legality of making waqf of gold and silver coins and the opinion of the Islamic Fiqh Academy regarding the legality of waqf of cash and securities.
4. Explain the purposes and forms of waqf of cash and securities.
5. Present the experience of the Hashemite Kingdom of Jordan with waqf of cash and securities. This will be done by explaining the position of Jordanian legislation regarding waqf of cash and securities and explaining the opinion of the General Fatwa Office of Jordan about it. This will be followed by a presentation of some applications of waqf of cash and securities in Jordan.

Research Methodology

In order to achieve the aforementioned objectives, the following recognized research methods have been adopted:

First: The Inductive Descriptive Approach

This is exemplified by scrutinizing the most important statements of Islamic jurists that concern issues related to this research.

Second: The Analytical Approach

This is done by analysing the texts related to the research topics and trying to correlate them in order to achieve the desired objective.

Literature Review

There are many studies that have dealt with some of the elements related to this study, but to the best of my knowledge, there is no previous study that has addressed all of these elements,

especially the experience of the Hashemite Kingdom of Jordan concerning waqf of cash and securities. The following are some of the relevant studies:

1. "Waqf of *Ṣukūk* and securitization of waqf" by Abdul Jabbār al-Sabhānī, *Journal of King Abdul-Aziz University, Islamic Economics*, vol. 28, no. 4, pp. 81-122, 2015: The researcher discussed the ruling on making waqf of Islamic investment securities to support a charitable waqf, concluding that it is permissible. He then discussed the financing of waqf projects through the securitization of waqf assets.
2. "Cash waqf and its investment" by Aḥmad ʿAbdul ʿAzīz al-Ḥaddād; research presented to the Second Conference on Waqf, held at the University of Umm al-Qurā in 2006. The study dealt with the definition of waqf, its stipulated conditions, and the jurisprudential controversy over cash waqf. Then he addressed the investment avenues for cash waqf, followed by investigation of the most important problems of cash waqf.
3. "Waqf of shares, *ṣukūk*, usufruct and intangible rights"; a number of research papers bearing this title were presented at the Nineteenth Session of the Islamic Fiqh Academy, held in Sharjah in 2009, by a group of distinguished professors. Each of them presented individually. They included Khalīfah Bābakr Al-Ḥasan, ʿĀdil ʿAbdul Qādir Qūtah, Monzer Kahf and Ḥamzah al-Sharīf. These studies addressed jurisprudential opinions concerning waqf of shares, *Ṣukūk*, benefits and intangible rights. These studies and my study have in common the discussion regarding the ruling on waqf of cash and securities, but my study has presented another aspect dealing with the experience of the Hashemite Kingdom of Jordan with respect to the waqf of cash and securities.

Organization of the Study

The First Issue: Definition of the Most Important Terms of the Study

1. Definition of waqf.
2. Definition of cash.
3. Definition of securities (shares and *Ṣukūk*).
    - Shares.

- *Ṣukūk*.

The Second Issue: **The Root Issues Underlying Research into the Fiqh Ruling on Waqf of Cash and Securities**

1. Waqf of movable properties
2. Joint-contribution waqf
3. Waqf of jointly owned property
4. Making a temporary waqf

The Third Issue: The Views of Islamic Jurists Concerning the Legality of Waqf of Gold and Silver Coins

1. Presentation of classical Islamic scholars' opinions on waqf of gold and silver coins
2. Opinion of the International Islamic Fiqh Academy concerning waqf of cash and securities

The Fourth Issue: Purposes of Making Waqf of Cash and Securities, and Its Forms

Section 1: Purposes of Making Waqf of Cash and Securities

1. Direct purposes of waqf of cash and securities
2. Indirect purposes of waqf of cash and securities
3. The purposes of waqf mentioned in the actual stipulations of waqf creators in the Hashemite Kingdom of Jordan

Section 2: Forms of Waqf of Cash and Securities to Achieve the Purposes of Waqf

1. Waqf of cash in an investment portfolio
2. A portfolio completely endowed to create a project whose proceeds are to be spent in charitable ways
3. A waqf portfolio deposited with an investment institution whose revenue is spent [on charity]
4. A portfolio that is entirely a waqf, with the assets spent to build a charitable project
5. Waqf of the income from tangible assets without making waqf of those tangible assets
6. Waqf of the reserve funds of joint stock companies

7. Waqf of the cumulative reserve of insurance surplus
8. Waqf of bank accounts
9. Establishment of Islamic insurance companies on the basis of waqf

Fifth Issue: The Hashemite Kingdom of Jordan's Experience with Waqf of Cash and Securities

Section 1: The Position of the Laws of the Hashemite Kingdom of Jordan on Waqf of Cash and Securities

1. Jordanian Civil Law
2. The Law of Endowments and Islamic Affairs in effect in the Hashemite Kingdom of Jordan, issued in 2001.

Section 2: Fatwas of the General Fatwa Office on the Waqf of Cash and Securities

Section 3: Models Implementing Waqf of Cash and Securities in the Hashemite Kingdom of Jordan

The first application: An institutionalized endowment model, "Jordan Benefits Fund"

The second application: A model cash waqf deed

The third application: A model share waqf deed

THE FIRST ISSUE: DEFINITION OF THE MOST IMPORTANT TERMS OF THE STUDY

1. Definition of Waqf

a) Linguistically, waqf is a verbal noun (*maṣdar*) associated with the verb "*waqafa"* meaning "to hold back, to set aside". This meaning is the basis of the juristic statement:

وقَفَ الأرضَ على المساكين

"He made a waqf of land for the poor" when he set it aside for them (Ibn Manẓūr, 1993). It is in this sense that the verb is mentioned in the Glorious Quran in the verse:

{وَقِفُوهُمْ إِنَّهُمْ مَسْئُولُونَ}

"Detain them; verily they are to be questioned," (37:24)

and the verse:

{وَلَوْ تَرَى إِذْ وُقِفُوا عَلَى النَّارِ}

"If you could only see when they are made to stand before the Fire!" (6:27).

b) In the technical sense: Islamic jurists differed with respect to the definition of waqf, according to their perception of it, the conditions they set for its [legality], and the question of who is the owner of the waqf asset: whether it remains the property of the waqf creator or is transferred to others. Abū Ḥanīfah defined it as "retaining the asset as the property of the waqf creator and giving its usufruct in charity; its status [is thus] like the loan of a non-fungible asset (Ibn Al-Humām, 2003, vol. 6, p. 191). This definition implies that waqf is just the donation of the usufruct while the asset remains the property of the waqf creator without being tranferrred. This situation allows him to dispose of it by any means of transfer of ownership; he can sell it, donate it or will it; and if he dies, it remains part of his estate like the rest of his property. There are only three exceptions to this rule, according to Imam Abū Ḥanīfah's express statements, whereby the waqf creator cannot renege on his pledge due to considerations particular to each case.[1]

As for his two disciples [Abū Yūsuf and Muḥammad ibn Al-Ḥasan], they defined it as "setting aside the asset under the status of divine ownership and giving its usufruct in charity at present and in the future" (Ibn Al-Humām, 2003, vol. 6, p. 191). The implication of this definition is that waqf is binding and that the waqf creator is not allowed to take it back or dispose of it by transferring its ownership. Also, it is not transferable to his heirs when he dies because his ownership of it has already ceased and it has been transferred to divine ownership. This is one of the opinions of both Imam Al-Shāfiʿī (Al-Nawawī, 1984) and Imam Aḥmad, and it is the most correct opinion [in their respective schools] (Ibn Qudāmah, 1984). They have a second opinion: that the ownership of the waqf asset transfers to the beneficiaries. However, this ownership does not allow them to dispose of it in any way that would lead to transfer of ownership, nor is it inherited when they die. That is because their ownership of the property is incomplete or nominal ownership (Shalabī, 1982).

[1] The three cases are:
1) When a judge, in case of dispute, makes a pronouncement that the waqf is binding.
2) When the waqf creator changes its form from waqf to a will by saying, for example, "When I die, this land of mine will become charity." It then takes the rule of a bequest and becomes binding on the heirs.
3) When he makes a waqf of land to make it a mosque, builds it, and allows people to pray in it (al-Kāsānī, 1982).

The Mālikīs defined it as "granting owned usufruct—even [if the donor owns it] by a [rental] fee—or the yield [of an asset] to a beneficiary by a particular wording for a period specified by the donor" (Al-Dardīr, 2000, vol. 4, p. 97). It is understood from this definition that waqf, in their opinion, is a binding contract and that its subject matter can be real estate that produces a yield or pure usufruct such as *ijārah*. It also implies that waqf can be temporary and that the ownership of the asset remains with the creator of the waqf. However, he is not allowed to dispose of it in any manner that will lead to transfer of ownership of the waqf asset. It is not permissible for the creator of the waqf to renege on his waqf contract because he is obliged to grant the benefit of the waqf asset throughout the duration of the waqf period.

The bottom line in the definition of waqf is that it is "to make an asset inalienable and assign its usufruct to charity".[2]

2. Definition of Cash (*Naqd*)

a) Linguistically, *naqada* means to expose something and make it manifest. The three-letter root signifies to expose [something] or to emerge. The statement *"Naqada al-dirham"* means he scrutinized the coin to determine its quality. The statement, *"Naqadahu al-darāhim,"* means "he [paid him cash and the other party] took possession of it." *Naqd* is also used to refer to both gold and silver coins and to other media of exchange (Al-Rāzī, 1994; Al-Fayrouz Ābādī, 2005; Ibn Fāris, 2001). That is the meaning intended here.

b) Technically, money is what people use as a measure of value, a medium of exchange and an instrument for saving (Ahmad, 1999). It was once limited to gold and silver, whether they were minted or not (Al-Zarkhashī, 1984). The decision of the Islamic Fiqh Academy [of the Muslim World League] No. (6), issued in 1401H, affirmed that paper currency is considered as artificial money in that it fully possesses the attribute of acceptance as the price in a sale. All the Sharīʿah rulings for gold and silver apply to it such as *ribā*, *zakāh*, the *salam* contract, and all the other rulings that apply to them.

[2] This definition is attributed to Imam al-Muwaffaq (Ibn Qudāmah, 1984, vol. 6, p. 184). It is also the definition chosen by Muḥammad Al-Kubaysī in his book *Ahkām al-Waqf fī al-Sharīʿah al-Islāmiyyah*, after his review and discussion of the various definitions of the different schools of jurisprudence (Al-Kubaysī, 1977, vol. 1, p. 85).

3. The Definition of Securities (Shares and *Ṣukūk*)

Shares

a) Linguistically, *as·hum* is the plural of *sahm*, which has several meanings, including 'arrow' as well as 'allotment' and 'share' (Ibn Manẓūr, 1993). The latter is the intended meaning here.

b) Technically, the word *sahm* is used to refer to one of two meanings (Younis, 1973; Kamal, 1996):

- First: the certificate that represents part of the capital of a company, which increases and decreases according to market demand.
- Second: a capital contributor's share in a joint stock company.
- The two meanings may be combined by saying that the capital contributor's share and the consequent rights are represented by a negotiable instrument; and the shares, which are of equal value, collectively represent the total capital of the company (Al-Qara Dāghī, 2005).

- ***Ṣukūk***

a) Linguistically, the word *ṣakk* means a document. It is borrowed from the Persian word *jak,* which refers to a record of contractual obligation. The plural may be *āṣuk, Ṣukūk* or *ṣikāk.* The yearly food stipends distributed by the early Islamic state were called *ṣikāk* because they were issued as certificates (Ibn Manẓūr, 1993).

b) Technically, they are "certificates of equal value that represent common shares in the ownership of tangible assets, benefits, services, or [other] assets of a particular enterprise or private investment activity. That is after the price of the *Ṣukūk* has been collected, the subscription has been closed, and [the funds] are put to use for the purpose for which [the *Ṣukūk*] were issued" (AAOIFI, 2014, p. 288).

SECOND ISSUE: THE ROOT ISSUES UNDERLYING RESEARCH INTO THE FIQH RULING ON WAQF OF CASH AND SECURITIES

Investigating the ruling on waqf of cash and securities requires a study of their characteristics and prerequisites. They are classified as movable property. When they are collected in a portfolio or an investment fund and people are invited to contribute to it by making waqf of cash, shares or *ṣukūk*, [the portfolio or fund] becomes jointly owned. The securities that are donated as waqf may be shares representing diffuse ownership (*ḥiṣaṣ shāʾiʿ*) of a company or investment fund. Then the waqf creator may make it permanent or temporary. Therefore, the views of the jurists must be presented on each of these issues.

First: Waqf of Movable Properties

Movability is used to describe any property that can be transferred from one place to another. It is thus the counterpart of land and is inclusive of buildings, cultivation, animals and equipment for irrigation or tillage (Ahmad, 2003) as well as cash, stocks and *ṣukūk*.

What are the Views of Scholars on the Permissibility of Waqf of Movable Properties?

It can be stated that there is no dispute among Islamic jurists concerning the permissibility of making waqf of movable properties mentioned in Sharīʿah texts; for example, horses and armor. The Prophet (peace be upon him) was reported to have said, "You have been unjust to Khalid, for he has pledged his armor and equipment in the way of Allah" (Al-Bukhārī, 1993, vol. 2, p. 122). He also said, "Whoever donates a horse as waqf in the way of Allah due to belief in Allah and confirmation [of his revelation], its fodder, dung and urine will be written in his account as good deeds on the day of Resurrection" (Al-Bukhārī, 1993, vol. 4, p. 28). The majority of Islamic jurists considered these *ḥadīths* to have a general indication, thus including all movable properties, but with some detailed distinctions to be presented in the course of this study. In contrast, some Ḥanafīs restricted the meaning to only those properties that have been mentioned in the texts. This view of the Ḥanafīs was based on the application of *istiḥsān*. The views are presented as follows:

The Ḥanafīs

- The basic rule, according to the Ḥanafīs, is that it is not permissible to pledge movable property as waqf except as an adjunct to real estate. Based on that, it is not permissible to pledge a building or trees as waqf unless the land is also granted as waqf. In that case, what is on it would follow its ruling. It is stated in *al-Durr al-Mukhtār*: "If someone built on a piece of land and then pledged the building as waqf but without [the land; as long as] the land is owned [by him] the waqf contract is not valid" (Ibn ʿĀbidīn, 1966, vol. 3, p. 315). Ibn Al-Humām said:

> The Sharīʿah ruling on waqf is that it must be forever, and nothing can be forever except real estate. However, this condition was passed over in jihad (weapons and horses), the reason being that jihad is such an important aspect of the religion that the devotional meaning in [donating] them is stronger. Thus, the legality of pledging weapons and horses as waqf does not necessarily imply the same for other movable property. The indication [of the texts regarding these two] cannot be extended to other [movable property] because they are not the same in meaning (Ibn Al-Humām, 2003, vol. 5, p. 51).

- It is [however] permissible to pledge as waqf whatever is customary to donate, such as copies of the Qurʾān, books, carpets for mosques, and clothes for the poor as long as it is practiced by the people. [This rule applies] without [further] qualification. Ibn ʿĀbidīn says:

> It is obvious that the fatwa found in the Ḥanafī books is the permissibility of making waqf of movable properties that people customarily donate for waqf. Since the pledging of buildings as waqf has become customary, [the opinion] that it is permissible is in conformity with the transmitted [opinions] and does not contradict the stipulated views of the *fiqh* schools that [say] it is not permissible. That is because they were based on it not being practiced by the people. (Ibn ʿĀbidīn, 1966, vol. 3, p. 320)

The Mālikīs

It is unconditionally permissible to pledge movable property as waqf, whether it is adjunct to real estate or not and whether it is supported by [specific] textual evidence or not. The criterion, according to them, is whether it has financial value and is beneficial. Everything that is financially valuable and beneficial is allowed to be pledged as waqf. Therefore, it is permissible to pledge books, animals, furnishings and cash as waqf as they are beneficial. They also do not stipulate that

the property pledged as waqf must be capable of remaining forever. Therefore, it is permissible to pledge as waqf both movable and immovable properties. It is also valid to pledge as waqf silver coins, gold coins and food. It is stated in *Ḥāshiyat al-Dasūqī*:

> It is permissible to pledge as waqf things such as food [whose existence] cannot be known if they were to be concealed, [which also] includes money. This view represents the opinion of the [Mālikī] School, but [some scholars have] reservations regarding fungible goods other than gold. As for gold, there are no reservations about it. It is absolutely permissible to pledge gold as waqf, as was clearly stated in *al-Mudawwanah*. What is intended by this is pledging it to be loaned out; its repayment is treated as if [the gold] itself is physically permanent. If, however, waqf is made of it [with the condition] that it physically remain, it is invalid by consensus as no benefit recognised by the Sharīʿah would result from that (Dasūqī, n.d., vol. 4, p. 77).

The Shāfiʿīs: It is permissible to make waqf of movables. It is stated in *al-Minhāj* and its commentary *Nihāyat al-Minhāj*, "It is valid to make waqf of real estate, by consensus, and of movables, based on the authentic narration about that" (Al-Ramlī, 1984, vol. 5, p. 263).

The Ḥanbalīs: The Ḥanbalīs distinguish between movables that cannot be used except by consuming the asset itself—for example, food and drink—and between movables that can be used while leaving the asset intact—for example, books. They allowed waqf of the second type but not the first (Ibn Qudāmah, 1984, vol. 5, p. 524).

In summary, the Ḥanafīs permit waqf of all that it is customary to donate for waqf and of the movables that are customarily donated for waqf in our time. The Mālikīs permit making waqf of anything that has the attribute of property. Movables, the topic of our research, have that attribute. The Shāfiʿīs explicitly affirm the validity of making waqf of movable property. The Ḥanbalīs permit the waqf of movables that can be used while leaving the asset intact but not of other types.

Second: Joint-contribution Waqf

The relevance of joint-contribution waqf to this study lies in the fact that the waqf *ṣukūk* used to finance a waqf project entail the participation of all the *ṣukūk* holders in that waqf project.

The Definition of *Mushtarak*

The linguistic meaning of *mushtarak*: derived from *sharika*: to join in something, to share, to participate. *Sharkah* and *shirkah* mean the association of two partners as well as the subject-matter of their partnership. The Form VI derivation, *tashāraka*, and the Form VIII derivation, *ishtaraka*, both mean to enter into partnership, to cooperate (Ibn Manẓūr, 1993; Wehr, 1976, p. 468).

Technically, *waqf mushtarak* (joint-contribution waqf) is "a waqf that a group of people or multiple parties jointly participate to create, each of them contributing to it an amount affordable to them" (Qūtah, 2009, p. 10). The term *waqf mushtarak* is also used to refer to one in which the proceeds and benefits are designated for the descendants of the waqf founder as well as for charitable purposes (AAOIFI, 2014, p. 534). This latter meaning is not what is intended in this study.

The Ruling on Joint-contribution Waqf

It is evident that joint-contribution waqf is permissible, as indicated by the following:

1. Anas (may Allah be pleased with him) said: The Prophet (peace and blessings of Allah be upon him) commanded the mosque to be built and said, "O sons of Najjār, allow me to pay you the price of this garden." They responded: "No, by Allah, we are not expecting its price except from Almighty Allah" (Al-Bukhārī, 1993, vol. 4, p. 13). The relevance of this incident is that the sons of Najjār were joint owners of the garden, each of them pledged his share as waqf, and it thus became a joint-contribution waqf. They became partners in turning it into a waqf, and the Prophet (peace be upon him) did not disapprove of their act, which is considered confirmation of the validity of their action (Qūtah, 2009).
2. The Messenger of Allah (peace and blessings of Allah be upon him) said, "If anyone digs a well, he will be rewarded by Allah on the Day of Resurrection for every living creature that drinks from it, whether a *jinn* or a human or a bird. And if anyone builds a mosque as small as a bird's nest, or smaller, Allah will build a house for him in Paradise" (Ibn Khuzaymah, 2003). The angle of reasoning here is that the bird's nest mentioned is that of a sand grouse, which is not big enough for even one person to observe his prayer. The implied meaning is thus that the reward will be earned by anyone who increases the size of a mosque when it is required, even if the increase is as small as the nest of a sand grouse, or by a group that participates in the

construction of a mosque, each of them contributing a share of even that size (Al-Shawkānī, 2006).

Third: Waqf of Jointly Owned Property

The relevance of waqf of jointly owned property to the topic of this study lies in the fact that stocks of companies represent undifferentiated joint-ownership shares in the assets of those companies. If those shares are pledged as waqf, that would be a waqf of something jointly owned.

The Definition of *Mushāʿ*

The linguistic meaning of *mushāʿ*: it is said that a person's share in a house is *mushāʿ* when it is a percentage of the whole house rather than ownership of a certain part of it that is separate from [the rest]. It is on this basis that they say *"sahm shāʾiʿ"*, meaning an undifferentiated, diffused share (Al-Fayyūmī, 1987).

Technically, Shaykh MuṢÏafā Al-Zarqā explained *mushāʿ* to be the proportional ownership of an entire thing, however large or small that proportion may be. For example, a person may own half of a house, or a quarter of a horse, or one percent or more of a parcel of land, and so on. This is what they call *ḥiṣṣah shāʾiʿah* (a diffused share) in something jointly owned. According to the theory of joint ownership, no part, not even an atom, of jointly owned property is owned by one of the shareholders in particular; rather, the ownership of all of them is attached to [every part] (Al-Zarqā, 2004).

Islamic Jurists' Opinions on Waqf of Jointly Owned Property

The majority of Islamic jurists—including the Mālikīs (Al-Wanshirīsī, 1981), the Shāfiʿīs (Al-Nawawī, 1991), the Ḥanbalīs (Ibn Qudāmah, 1984), Abū Yūsuf of the Ḥanafī School[3] (Ibn

[3] Muḥammad ibn al-Ḥasan of the Ḥanafī School held the opinion that waqf of jointly owned property can be valid only after the property pledged is divided. He based his opinion on the fact that complete possession is a condition for the validity of waqf, which is only realized by dividing the property. He dropped the stipulation of complete possession when it is not possible, as in the case of indivisible property. This is due to the fact that if is divided before being turned into a waqf it loses its benefit, such as a small house or a bath. (Al-Zaylaʿī, n.d.).

Nujaym, 1997), Muḥammad Abū Zahrah (1971) and the International Islamic Fiqh Academy in its Resolution No. 181—held that making waqf of jointly owned property is valid when the property is divisible and also when it is not divisible.[4] They cited the following evidence:

1. In the *ḥadīth* narrated by Anas (may Allah be pleased with him), the Prophet (peace and blessings of Allah be upon him), upon his arrival in Madīnah, ordered that the mosque be built where it is [today]. He then said, "O sons of Najjār, accept from me the price of your land." They said, "No, we will not accept its price except from Allah." (Al-Bukhārī, 1993, vol. 4, p. 13). Ibn Ḥajar said, "The obvious meaning of the *ḥadīth* is that they gave out the parcel of land—which was jointly owned by diffuse ownership—in charity for the sake of Allah. The Prophet (peace and blessings of Allah be upon him) accepted that (Ibn Ḥajar, 1959, vol. 5, p. 399).
2. It was narrated that Ibn ʿUmar (may Allah be pleased with both of them) said: ʿUmar (may Allah be pleased with both of them) acquired a parcel of land in Khaybar, and he went to the Prophet (peace and blessings of Allah be upon him) and informed him: "I acquired a parcel of land, and I have never acquired a property more valuable than it." He then asked: "How do you direct me [to use it]?" He said, "If you like, you may hold back the property and give out its proceeds in charity." ʿUmar gave [the proceeds] in charity for the poor, the kinship, the emancipation of slaves, for the sake of Allah, the guest and the wayfarer on the condition that the asset should not be sold, donated, gifted, or inherited. And [he added that] there is no blame on the one who administers it to consume from it according to what is customary without appropriating it as [his own] property (Al-Bukhārī, 1993, vol. 4, p. 12). The angle of reasoning from this is that ʿUmar (may Allah be pleased with him) asked the Prophet (peace and blessings of Allah be upon him) for permission to pledge as waqf the one hundred shares that he received in [the spoils of] Khaybar, which were jointly owned (*mushāʿ*) with other [shares] that were not divided. The Prophet (peace and blessings of Allah be upon him) gave him permission to

[4] This is only tenable in properties other than a mosque or cemetery. The Ḥanafīs (Ibn al-Humām, 2003) and Shāfiʿīs (Al-Ramlī,1984) are of the opinion that it is not valid to pledge a mosque until after its separation and division. That is because it is not possible to use it for what it has been pledged for unless it is freed from the ownership of others, which is only possible by dividing it. Time-sharing of the space is not viable because it will lead to a situation where a property that is a mosque or cemetery this year becomes a farm next year and because it prevents Allah's pure right to it.

do so, which indicates the validity of making waqf of jointly owned (*mushāʿ*) property (Al-Shawkānī, 2006; Sultan, 2002).

3. The famous *ḥadīth* of Kaʿb ibn Mālik (may Allah be pleased with him) concerning his repentance, in which he said, "O Messenger of Allah, as part of my repentance I divest myself of all my wealth and make it charity for the sake of Allah and His Messenger. The Prophet said, "Keep for yourself a portion of your wealth. That will be better for you." Kaʿb said, "I will retain my portion that is in Khaybar." Imam Al-Bukhārī (may Allah have mercy on him) in his *Ṣaḥīh* mentioned this *ḥadīth* under the heading: "If he gives charity or pledges as waqf a portion of his slave or his livestock, it is permissible". Ḥāfiz Ibn Ḥajar said:

> It is inferred from this [*ḥadīth*] that making waqf of *mushāʿ* (ownership of a percentage) is permissible. The evidence for that in the *ḥadīth* is the statement [of the Prophet (peace be upon him)], "Keep for yourself a portion of your wealth." The obvious implication is that he commanded him to give a portion of his wealth and to retain another portion of his wealth, without clarifying whether it was separately owned or remained *mushāʿ* (jointly owned). Based on this, whoever prohibits waqf of *mushāʿ* property needs to support it with evidence for the prohibition. (Ibn Ḥajar, 1959, vol. 5, p. 386)

Abū Zahrah (1971, p. 109) says:

> It is permissible to make waqf of shares of joint-stock companies and partnerships engaged in permissible and legitimate activities. Although such shares and equities indicate common ownership in an indivisible property, being of common ownership does not lead to dispute. [Moreover,] these shares are tradable, and [modern] commercial custom treats them as wealth in and of themselves, similar to trade merchandise, because they are tradable. There are some businessmen whose main business is trading in shares. These items thus resemble movable properties, and no attention is paid when selling and buying them to their being diffusely owned shares; [the only concerns are] the company's financial and operational status and the strength of its balance sheet.

Al-Sartāwī (2009, p. 17) in his research presented to the [Islamic Fiqh] Academy explained the reason for the permissibility:

> It encourages acts of piety and realizes the objective of the waqf donor, which is spending to draw closer to Allah. Also, analogy (*qiyās*) is not strong enough to oppose the textual evidence cited by the majority [of jurists]. Whatever the case may be, [the opinion that] waqf of proportionally owned property is impermissible shuts one of the doors of good deeds, whereas anyone who reflects on the provisions of the Sharīʿah will

recognize that the Lawgiver urges donations, including waqf, and has appointed recompense and great reward for them.

The Difference between Joint-contribution Waqf and Waqf of Jointly Owned Property

The difference between joint-contribution waqf and waqf of jointly owned property is as follows. In a joint-contribution waqf, more than one person contributes to the creation of a waqf project such as construction of a mosque or a school. In waqf of jointly owned property, the owner of a proportional share in common property makes waqf of that share. For example, one who owns one or more shares in a joint stock company makes waqf of those shares and assigns their dividends to be used for the expenditures of a mosque. The joint nature of the latter exists in the ownership before it becomes a waqf, and it may continue after that. On the other hand, the attribute of sharing in a joint-contribution waqf relates to the project as a whole after the person pledges his property; however, there is nothing to prevent the combination of the two. The pledged property may be jointly owned before it is pledged as waqf and then become part of a waqf project with multiple donors.

Fourth: Temporary Waqf

The relevance of temporary waqf to this study is that the waqf donor may wish to pledge cash or securities as waqf temporarily and not permanently. Also, temporary waqf may open the door for people to participate in waqf and encourage acts of righteousness and piety.

What Is Meant by Temporary Waqf

Linguistically, *taʾqīt* means to assign a time for something that is specific to it; that is, to clarify the amount of time and define its limits (Ibn Manẓūr, 1993).

Technically, *taʾqīt* means to define the starting and ending time for an action to take place. *Waqt* is a specified amount of time. It is also said to mean the limit between two things, one known earlier and the other known later (Al-Manāwī, 1989, p. 731). Resolution No. 181 (7/19) of the International

Islamic Fiqh Academy in 2009 states, "*Taʾqīt al-waqf* means a form of waqf for which a time is specified for its beginning and another for its end."

Opinions of *Fiqh* scholars on Temporary Waqf

First Opinion

The Ḥanafīs (Ibn Al-Humām, 2003), the Shāfiʿīs (Al-Anṣārī, 2000) and the Ḥanbalīs (Al-Buhūtī, 1982) were of the opinion that waqf must be permanent and that it is not permissible to stipulate a specific period of time for it.

Second Opinion

The Mālikīs (Dasūqī, n.d.), Al-Zarqā (2004), Abū Zahrah (1971), Al-SarĬāwī (2009, p. 17), Kahf (2000) and the International Islamic Fiqh Academy, in its Resolution No. 181, held the opinion that permanence is not a condition for the validity of waqf. Thus, it is permissible to create waqf for a year or more, for a specified period, and then have the property return to the ownership of the waqf creator or to someone else. Al-Zarqā said, "You see that the Mālikīs' reasoning" in support of temporary waqf "is stronger in terms of evidence, weightier in terms of the objective [of legislating waqf], and more effective in paving the way for the purposes of doing good" (Al-Zarqā, 2004, p. 38). Abū Zahrah says:

> I saw that the majority said permanence is part of the meaning and concept of waqf while a minority of jurists held the opinion that permanence is not part of the meaning of waqf; thus, waqf can be either permanent or temporary. You have learnt that the minority draws their opinion from the meanings and objectives of the Law. By doing so they have made up for their small number by the strength of their evidence. Among this minority is that eminent leader in sound opinion and knowledge of the Sunnah: Imam Mālik. Therefore, the permissibility of creating temporary waqf—along with the strength of its evidence—has gained further strength for being the opinion of one who does not deviate from the Sunnah an inch and who comprehends the aspects of sound opinion (Abū Zahrah, 1971, p. 77).

THIRD ISSUE: THE OPINIONS OF FIQH SCHOLARS ON THE (SHARĪʿAH) RULING FOR CASH WAQF

In this section the study will present the views of the classical *fiqh* scholars on cash waqf followed by the view of the International Islamic Fiqh Academy.

Firstly: Classical Fiqh Opinions on Cash Waqf

The opinions of *fiqh* scholars can be summarized in the following three opinions:

The First Opinion

It is not valid. This was chosen by Ibn Al-Shās of the Mālikī School (Al-Khurashī, 1901); it is one of the two opinions of the Shāfiʿīs (Al-Shīrazī, 1982), and is the famous opinion of the Ḥanbalīs (Al-Buhūtī, 1982). In *Minaḥ al-Jalīl*, it is stated:

> If it means he made waqf [of the money] for the purpose of a loan to someone in need, and he has to replace it with the like thereof, then the opinion in *al-Mudawwanah* and other books is that it is permissible. The opinion stating that is disliked is a weak opinion. The opinion of Ibn Shās prohibiting it is even weaker if it is interpreted according to its apparent meaning. (ʿUlaysh, 1989, vol. 8, p. 111)

It is stated in *al-Fatāwā al-Hindiyyah* "Concerning pledging as waqf perishable property such as gold, silver, food and drink, is not permissible in the opinion of the majority of *fiqh* scholars. What is meant by gold and silver here is silver and gold coins, not jewellery" (Balkhi, 2000, vol. 2, p. 263).

The Second Opinion

It is valid to pledge as waqf but is disliked, which is one of the opinions of the Mālikīs. *Al-Tāj wa al-Iklīl* quotes Ibn Rushd: "As for gold and silver coins and what is not known in the particular, pledging them as waqf is disliked (*makrūh*)" (Al-ʿAbdarī, 1978, vol. 7, p. 137).

The Third Opinion

It is valid to make waqf of cash, which is the opinion of the Mālikī School (Al-Kharashī, 1901, vol. 7, p. 80), one of the two views in the Shāfiʿī School (Al-Nawawī, 1991, vol. 5, p. 513), and a view in the Ḥanbalī School that was favored by Ibn Taymiyyah (Al-Mardāwī, 1995). It is also the implication of the opinion of Muḥammad ibn Al-Ḥasan, since he considered waqf of movable property to be valid provided it is widely practiced (Ibn ʿĀbidīn, 1966).

Secondly: The Opinion of the International Islamic Fiqh Academy on Cash Waqf[5]

A. Making Waqf of Cash: The Academy ruled that making waqf of cash is permissible in its Resolution No. 140 (6/15) in 2004. The second item of the resolution is devoted to the Sharīʿah ruling on cash waqf and states:

1. Making waqf of cash is permissible according to Sharīʿah because the Sharīʿah objective of waqf, which is to retain the real asset and give its usufruct in charity, can be realized in it; also, because cash cannot be specified by specification; rather it is replaced by its equvalent.[6]
2. It is permissible to make waqf of cash for interest-free loans and for investment, whether directly or by the participation of a number of waqf donors in one fund, or by issuing cash shares in favour of the waqf for the purpose of collective participation therein.
3. If the cash pledged as waqf is invested in specific properties—for example, if the waqf administrator uses the cash to buy real estate or uses it to pay for manufacturing something—those assets and properties do not themselves become inalienable waqf property in place of the cash. They may, instead, be sold for continued investment while the permanent waqf property is the original cash amount.

B. Waqf of Securities: Shares and Ṣukūk

The Academy is of the opinion that it is permissible to make waqf of shares and Ṣukūk, as per its Resolution No. 181 (7/19) of 2009. The second item of the resolution was specifically to clarify the Sharīʿah ruling on the waqf of shares and Ṣukūk, stating:

1. The Sharīʿah texts on waqf are unrestricted; thus, they include the permanent and the temporary; separate and proportional diffuse ownership; tangible assets, usufructs and cash; and real estate and movable properties. That is because it is a type of donation and thus encouraged and made broad.
2. It is permissible to make waqf of shares of companies that can be legally owned, and of *Ṣukūk*, intangible rights, usufructs, and investment units, as they are legally recognised properties.

[5] Shariah Standard 33 of the Accounting and Auditing Organization for Islamic Financial Institutions followed them regarding the permissibility of making waqf of cash and securities and of jointly owned properties (AAOIFI, 2014, p. 536).

[6] Abū al-Saʿūd (1997) mentioned in his monograph that repaying the equivalent is treated like returning the thing itself, as in a loan.

3. Making waqf of shares, *Ṣukūk*, rights, benefits and the like is subject to the following rulings:
    a) The basic principle concerning waqf shares is that they shall be retained and their proceeds shall be used for the purposes of waqf. They are not intended to be traded in the financial market. The overseer of the waqf does not have the right to dispose of them except for a weightier interest [of the beneficiaries] or according to the condition stipulated by the waqf donor. Thus, they are subject to the well known Sharīʿah provisions for substitution of assets (*istibdāl*).
    b) If a company is liquidated or the value of a *Ṣukūk* is repaid, it may be replaced by other assets such as real estate or other shares or *Ṣukūk*, based on the condition stipulated by the waqf donor or the preponderant interest of the waqf.
    c) If the waqf donor's intention is that the waqf shall be temporary, it shall be dissolved according to his condition.
    d) If the cash pledged as waqf is invested in the purchase of shares, *Ṣukūk*, or other assets, such shares and *Ṣukūk* shall not themselves be considered as waqf in place of the cash, as long as the waqf donor has not stipulated it. They may be sold for the most beneficial investment in the interest of the waqf, and the initial cash pledged as waqf shall be the waqf asset.
    e) It is permissible to make waqf of benefits, services and cash; for example, the services of hospitals, universities, scientific institutes, telephone and electricity services, and the benefits of houses, bridges and roads.
    f) The pledging of usufruct as waqf for a specified period does not affect the disposal of the asset by the owner of the property since he is allowed to take all legitimate actions, provided that the right of the waqf to the usufruct is maintained.
    g) The waqf of intangible rights shall expire upon the expiry of the legal period prescribed for such rights.
    h) What is meant by *tawqīt* (fixing a time) is that the waqf will last for a certain period, at the end of which the waqf will cease to exit. It is permissible to make a waqf temporary, by the intention of its founder, for all types of waqf properties.
    i) If someone has obtained suspicious or forbidden wealth and the owners are not known, it is possible to free himself from liability and be cleared of its evil by

making waqf of it for various ways of benefitting the general public. However, it cannot be used for purposes meant for worship such as building mosques or printing copies of the Qurʾān. It should also be taken into account that it is prohibited to acquire the shares of *ribā*-based conventional banks and conventional insurance companies.

j) A person who has acquired wealth with a prohibited return may pledge his capital from the total wealth as waqf, and the return will be a reserved fund with the status of charitable endowments. That is because these returns and these funds are to be spent on the poor and needy and for all forms of public benefits when they cannot be returned to their owners. The waqf's manager must act as soon as possible to replace these funds with what is *ḥalāl* in Sharīʿah, even if he has to deviate from the condition stipulated by the waqf donor. That is because the condition stipulated by the waqf donor deserves no consideration when it conflicts with the stipulation of the Lawgiver.

THE FOURTH ISSUE: PURPOSES OF CREATING WAQF OF CASH AND SECURITIES, AND ITS FORMS

Section I: Purposes of Creating Waqf of Cash and Securities

First: Direct Purposes of Creating Waqf of Cash and Securities

It is clear from the statements of the classical Islamic jurisprudents that cash-based waqf has two direct purposes:

The First Purpose

Creation of cash waqf for the provision of loans. This is done when a person pledges a sum of money to be lent to persons who need it on the condition that the loan be repaid. The repayment is considered the means for the continuous survival of the initial fund. It is thus not permissible to give out the money just to be spent. This is the stipulated opinion of Imam Mālik (Al-Khurashī, 1901, v. 7, p. 80) and is the opinion narrated by Al-Anṣārī from Zufar (Ibn Nujaym, 1997).

The Second Purpose

To create cash waqf for the purpose of partnership (*muḍārabah*). This is done by a person pledging a sum of money as waqf, to be given to another person for the purpose of doing business with it. Then the profit will be given to the stipulated waqf beneficiaries. This is narrated from Zufar of the Ḥanafī School (Ibn Nujaym, 1997).

It can be said that these are the direct purposes of cash waqf. As for indirect purposes, they are the various purposes that the profits of the partnership are to be spent upon or that the interest-free loan will be provided to implement. The indirect purposes are all the various well known forms of charity. The study will present some aspects of charity that waqf of cash and securities can be created to support. Then it will present the purposes of waqf as stipulated by waqf creators in the Hashemite Kingdom of Jordan.

Second: Indirect Purposes for Creating Cash Waqf

It has been established in Islamic jurisprudence that waqf cannot be created except for benevolent purposes. These areas are many and diverse, some examples of which are:

A. Educational Endowment

1. Establishing and financing centers for memorizing the Qurʾān.
2. Establishment of schools and universities.[7]
3. Financing students' fees, room and board.
4. Supporting scientific research.
5. Supporting the composition of books.
6. Establishing educational websites.

B. Health-related Waqf

1. Construction of hospitals and health care centers.
2. Provision of health services and medicines.

[7] Al-Qarawiyūn University in Fez, Morocco, is considered the first educational endowment in history. It was built as an educational annex of Al-Qarawiyūn Mosque, which was built by Fāṭimah bint Muḥammad al-Fihrī al-Qayrawānī in 245H/859CE. It was the first in history and continues to function until today. See http://ar.wikipedia.org/wiki

C. Food-related Waqf

3. Establishing restaurants and factories for bottling drinking water and juices and canning food.
4. Providing food and drink for the needy.

D. Housing Waqf

1. Establishing residential apartments for needy families.
2. Establishing shelters for the elderly and for children who have lost their loved ones.

E. Waqf for Travelers

- Establishing rest areas to provide facilities and snacks for travelers on highways.

F. Agricultural Waqf

1. Livestock farms.
2. Crop farms.

It should be noted here that all waqf projects require manpower to implement them and provide the services. These employees may be volunteers or paid employees. If they are paid, they provide employment opportunities for the poor and needy. In this way, waqf projects achieve two charitable goals at once: providing services and employing the poor.

Third:The Reality of the Purposes of Waqf as Per the Stipulations of Waqf Creators in the Hashemite Kingdom of Jordan

The budget of the Directorate of Waqf Programs in the Ministry of Awqaf and Islamic Affairs and Holy Sites for the year 2017 states that the waqf revenues were distributed according to the conditions stipulated by waqf creators as follows:

1. Unconditional waqf constituted 84.3% of the total.
2. Expenditure on mosques constituted 15.1%.
3. Support for the needy constituted 0.13%.
4. Education constituted 0.54%.
5. Healthcare constituted 0%.

It is worth noting that unconditional waqf that is not stipulated for a specific charitable area constituted the greater part of all forms of waqf. This has paved the way for the Ministry of Awqaf to spend on numerous areas of charity. Health care as a specified charitable area is not mentioned

at all in the waqf deeds. We find that waqf stipulations for education constitute a miniscule percentage of about half a percent.

Section 2: Forms of Waqf of Cash and Securities to Achieve the Purposes of Waqf

The study presents the following forms and methods through which cash and securities can be collected and invested in order to provide the necessary funds to be spent for charitable purposes.

1. Creating Cash Waqf in Investment Portfolios

Generally speaking, the idea of an investment portfolio is to collect cash from investors for the portfolio manager to invest this money in one of two ways: *muḍārabah* (partnership) or *wakālah* (agency). In the case of waqf investment portfolios, profits are to be distributed to the purposes for which the waqf was created. This can come in many forms (Kahf, 2009):

a) The entire portfolio is a waqf created for the establishment of a project whose proceeds are spent for charitable purposes. For this, the waqf authority assigns to itself the responsibility of receiving cash donations to finance the establishment of a specific waqf project such as a factory to produce computer disks, the proceeds of which are then spent for a specific waqf purpose such as an orphanage. The purposes can be many and may include a number of charitable purposes at the same time.

b) The waqf portfolio is deposited with an investment institution: The cash waqf takes the form of an investment deposit in a specific Islamic bank or units in a unit fund. The supervisor of the waqf collects the profits of the created cash waqf and distributes them to those for whom the waqf was created.

c) The entire portfolio is pledged as waqf, and its proceeds are spent to establish a charitable project. This happens when cash is collected and invested in a portfolio or deposited in an account with the intention of establishing a specified waqf project such as a mosque, orphanage or hospital. The General Authority for Endowments in Sudan established “Waqf Projects”, and the Endowment Fund in Kuwait established “Endowment Funds”, which are not very different from the idea of waqf *ṣukūk* (Kahf, 2000). It is also possible to invest cash waqf through partnership (*muḍārabah*) in permissible shares, as did

the General Secretariat of Endowments in the Emirate of Sharjah, where the profits reach about 10% annually (Al-Zuhaili, n.d.).

2. Making Waqf of the Cash Proceeds of Real Assets without Pledging the Assets as Waqf

A waqf could be created by pledging the monetary proceeds of a real asset without pledging the real asset as waqf, and this may be permanent and may be temporary and for all or some of the proceeds (Kahf, 2009). Some examples of this are:

- A person may create waqf from the proceeds realized from an investment in a property during the first ten days of Muharram every year.
- A benefactor who owns a parking lot may pledge as waqf the revenues generated from the vehicles parked in his parking lot every Friday.
- The owner of a zoo may pledge as waqf its revenue from a certain month each year.
- The investment risk reserve account in Islamic banks is very close to this type of waqf. It is no different from the kind of waqf we are discussing if we consider the waqf to be temporary, ending when the bank itself is terminated. That is because the familiar texts in the banks' memoranda of association stipulate that the remaining balance be distributed to zakat recipients and the like when the Islamic bank is liquidated.

3. Pledging as Waqf the Reserves of Stock Companies

One of the forms that is accorded the status of cash waqf is pledging as waqf the reserves of joint stock companies. This type of waqf is undoubtedly embodied in a portion of the fixed and current assets. Its status is like that of *muḍārabah* capital, but it is usually treated under the rubric of mandatory reserve on the liabilities side of the balance sheet. It enters by this meaning only within the types of cash waqf (Kahf, 2009.

4. Pledging as Waqf the Accumulated Reserve of the Insurance Surplus

Some *takāful* insurance companies deduct part of the insurance surplus realized in the policy holders' accounts to meet any deficit in the coming years. The basic regulations of the *takāful* insurance companies or their policies may stipulate that the fate of this reserve in case of liquidation of the company is transferred to a waqf (Al-Qūdah, 2010).

5. Pledging Bank Accounts as Waqf (Al-Subhani, 2015)

- Current account: the money is pledged as waqf to provide interest-free loans to the needy in accordance with its condition.
- Investment Account: the profit is pledged as waqf in accordance with its condition.

The bank's management of these accounts may be free of charge or with a charge. In both cases, the bank shall be accorded the status of a trustee unless a case of negligence or infringement is established; then, the bank shall be held liable.

6. Establishment of Islamic Insurance Companies on the Basis of Waqf

Insurance structured on the basis of waqf is one of the modes offered as a Sharīʿah-compliant alternative to commercial insurance. This mode can be summarized as follows: The insurance company establishes a waqf fund and allocates a specific part of its capital to be pledged as waqf for those who are victims [of specified disasters] among the participants in the insurance fund according to the regulations. It is also [pledged] for charitable purposes after the liquidation of the company. This is considered as creating a cash waqf. This part of the money has to be invested via a partnership contract (*muḍārabah*), and the profits become part of the fund for the purposes of the waqf. Those who are interested in insurance shall offer their contributions to the fund as donations pledged as waqf. The participants' ownership of their contributions ends and is transferred to the waqf fund. Since the contributions are not waqf but are owned by the waqf, the insurance company will invest them for the benefit of the fund through the contracts of agency (*wakālah*) or partnership (*muḍārabah*). They, along with the profits from them, will be spent to pay compensations and for other purposes of the waqf. The company shall act as the waqf administrator for a specified fee (Ali, 2012; Abū Ghuddah, 2007; Al-Kurdī, 2011).

THE FIFTH ISSUE: THE EXPERIENCE OF THE HASHEMITE KINGDOM OF JORDAN IN THE WAQF OF CASH AND SECURITIES

Section One: The Position of the Laws of the Hashemite Kingdom of Jordan on Waqf of Cash and Securities

1. Jordanian Civil Law

The explanatory memos of the Civil Code have shown that the source of these articles is a collection of Sharīʿah sources, including the following books:

- Qadrī Pāshā, *Qānūn al-ʿAdl wa al-Inṣāf*,
- Qadrī Pāshā, *Murshid al-Ḥayrān ilā Maʿrifat Aḥwāl al-Insān*
- Ibn ʿĀbidīn, *Al-Ḥāshiyah*,
- *Majalat al-Aḥkām al-ʿAdliyyah* and its commentaries such as *Sharḥ ʿAlī al-Ḥaydar*,
- Al-Khaṣṣāf, *Aḥkām al-Awqāf*,
- Al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*,
- Al-Ramlī, *Nihāyat al-Muḥtāj*,
- Al-Shīrāzī, *Al-Muhadhab*,
- Zuhdī Yakan, *Aḥkām al-Waqf*,
- Muṣtafā Al-Zarqā, *Al-Fiqh al-Islāmī fī Thawbihi al-Jadīd*, and
- Muṣtafā Al-Zarqā, *Aḥkām al-Awqāf*.

With regard to cash and securities waqf, Article 1233 defines waqf as: "the detention of owned property from all forms of disposition and dedication of its benefits to charitable causes, even if that is done at a future date." This definition does not restrict waqf property to real estate only but generalizes its scope to include all forms of property. Thus, money and other forms of wealth are included in the definition.

2. The Law of Endowments and Islamic Affairs in Effect in the Hashemite Kingdom of Jordan, Issued in 2001.

- With regard to the position of the law on cash and securities waqf, it is consistent with the Civil Code. Article (3), Paragraph (a) of the law stipulates that it is permissible to pledge movable properties as waqf, which includes waqf of cash and securities.

Article 31, paragraph (a), of the law addresses the purposes of waqf, stating:[8]

> The Ministry shall establish special programs for *awqāf* for the designated benevolent purposes to spend the proceeds of Islamic charitable endowments on the beneficiary bodies of such programs as per the conditions of the waqf creators. This includes spending on mosques, health care, education and assistance to the needy. It shall also establish general programs for general purpose *awqāf* taking into account the allocation of waqf proceeds to pay for the financing of investment projects first.

Section 2: Fatwas of the General Fatwa Office on the Waqf of Cash and Securities

The Fatwa Office in the Hashemite Kingdom of Jordan has issued fatwas and resolutions explicitly stating that it is permissible to pledge cash as waqf and has even urged people to do so. Some of the fatwas are as follows:

A. Resolution No. (253) (6/2018) dated 22/2/2018: in response to the letter from His Excellency the Minister of Education Dr. Omar Al-Razzaz, in which he said:

> I thank your eminences for your kind efforts and your blessed support to approve an initiative for the Ministry of Education and the Ministry of Awqaf and Islamic Affairs and Holy Sites to launch the "Educational Waqf". The members of the public Jordanian are urged thereby to donate to various aspects of the educational process considering the impact it will have on the development of communities. I would appreciate it if your eminences would kindly issue a statement stating an Islamic legal opinion about the "Educational Waqf" and donation for the purpose of education.

The response states: "Donations to upgrade the educational process and making waqf of funds in favor of the "Educational Waqf" initiative are among the matters demanded by the Sharīʿah. Allah knows best."

[8] This article is part of a set of articles that regulate the establishment of the Foundation for the Development of Awqaf Properties, starting with Article 26 of the Awqaf Law, which states: "An official public foundation shall be established, called the Foundation for the Development of Awqaf Properties. It shall enjoy legal personality and financial and administrative independence. It shall have its own financial liability, independent of the Ministry's. This attribute gives it the capacity to conduct all the activities necessary to fulfill its function. It shall have the capacity to sue and be sued and to be represented in all courts by the public civil attorney or by any attorney it assigns for this purpose."

B. Fatwa no. (3026) dated 22/12/2014, in response to this question: "Is it permissible to establish a bank for the purpose of educating the poor on the basis of Islamic law, by pledging as waqf a certain amount of money from zakat funds?" The response states:

> It is not permissible to pledge zakat funds as waqf because zakat must be paid to the poor. Likewise, it is not permissible to delay doing so beyond the time it becomes obligatory. Therefore, if the money pledged as waqf for the purpose of education is not from zakat funds, there is no legal objection to it, but if it is from zakat funds it is not permissible. Allah knows best.

C. Fatwa No. (1888) dated 12/7/2014, in response to the following question: Are contributions to the construction of a cancer treatment center at King Hussein Cancer Hospital considered a charitable waqf? The response included the following:

> A contribution to building a cancer treatment center at King Hussein Cancer Hospital is a type of continuous charity, which will benefit its donor on the day when neither money nor children will be of any benefit, when the only one who will be saved is the one who comes before Allah with a heart devoted to Him.

Section 3: Practical Examples of Waqf of Cash and Securities in the Hashemite Kingdom of Jordan

The study on this aspect deals with a model of cash waqf for institutional work and also examines two endowment instruments, one that created a cash waqf and the other that created a waqf of shares.

The First Application: An Institutional Model of Waqf: the Jordan Benefits Fund (Waqfiyyah)[9]

The definition of "waqfiyyah" is to engage in the practice of charity waqf work. The idea behind creating the Jordan Benefits Fund is to revive the Sunnah of the Noble Prophet (peace and blessings of Allah be upon him) and create an opportunity for all to do good and encourage them to participate in charitable deeds. It is a self-governing legal entity with independent financial responsibility that engages in the process of waqf development. It also calls [the public] to

[9] See: https://www.jordanbenefitsfund.com

[participate in] waqf and carry out development activities through an integrated vision that takes into account the needs and priorities of society. It has the right to own property, transfer ownership of property and invest the waqf funds.

Goals of the Waqfiyyah

The objectives sought from the Waqfiyyah initiative are:

Reviving the Sunnah of waqf by encouraging [people] to engage in projects that are closer to their hearts and more responsive to their needs.

- Reviving zakat in a way that enhances the zakat giver's conviction in philanthropy.
- Collecting zakat, charities and gifts and distributing them to those who are entitled according to the categories mentioned in the Sharīʿah.
- Helping donors of zakat and charity to deliver their money to the charitable causes they want to support according to the conditions they stipulate.
- Providing housing, medical care and education expenses necessary for poor and needy families.
- Managing and maintaining waqf funds by developing them, regulating their revenues and delivering the latter to the beneficiaries while adhering to the conditions stipulated by the waqf donors and the Sharīʿah.
- Establishing a waqf-based investment portfolio.
- Working on investment in real estate to obtain periodic revenue.
- Meeting the needs of society and citizens in areas that are not properly supported.
- Cooperating and participating with civil society institutions and NGOs in the call to create endowments and in managing waqf projects.
- Utilizing modern technology and means of communication to facilitate people participating in the waqf process.

Financial resources of the Waqfiyyah:

- What is pledged by waqf donors in the form of assets, cash, shares or *ṣukūk* and all that can be pledged as waqf.
- Return on investment of waqf funds.

- Voluntary contributions in kind and cash for waqf.
- Gifts and charities.
- Mandatory zakat.
- The ransom of fasting, expiation, Zakat al-FiÏr and vows.

Various areas for disbursement of Waqfiyyah funds

- Supporting the poor by delivering cash to them.
- Supporting students by paying [their fees] in cash on their behalf.
- Settling the debts of the indebted.
- Helping with cash support in cases of illness and treatment.
- The waqf donors' conditions shall be respected regarding the manner in which the waqf revenue is distributed.
- It is not permissible to take ownership of the waqf's assets or funds or to acquire any right over them by claim of having been in possession of them for a long time, no matter how long the period.

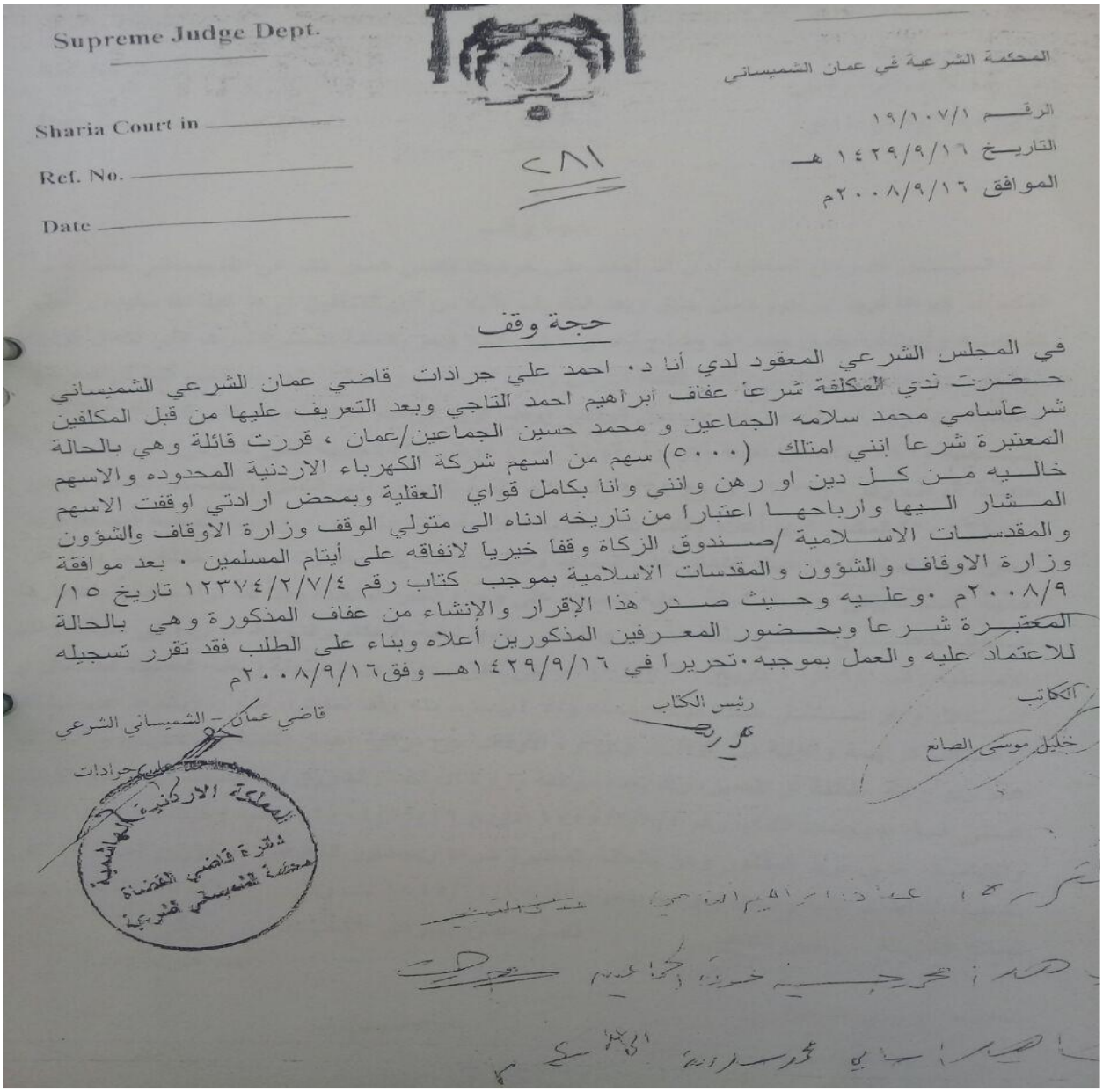
The Second Application: **An Example of a Cash Waqf Deed**

The researcher obtained the deed in the form of a bequest of a bank account. The deed bears the number (3/3/1) and is dated 17/5/1425 H, corresponding to 5/7/2004. It was issued by the Sharīʿah court of ʿAyn al-Basha. The text reads:

> In the Sharīʿah session held in my presence, the legally responsible [woman] Fāṭimah Maḥmūd Yūsuf Al-Ashqar from Buqʿah appeared before me, Sāmī Al-Qudah, the Sharīʿah judge of the ʿAyn al-Basha court. After she had been identified by the legally responsible [men]: Musa Mahmūd Ibrāhim Abū Shanab and Badawī ʿAbdullah Ḥassan Jabr, she stated the following resolution:
>
> > Being of sound mind, I instruct that my account with the Islamic Bank, the Buqʿah branch, account number (71480) and (200080) investment portfolio, be turned into waqf after my demise, whatever the amount and the profits may be. It has to be deposited into the account of the Ministry of of Awqaf and Islamic Affairs and Holy Sites. It shall be used for the construction of a mosque if that is possible. If not, the amount must be paid for the completion of any ongoing mosque project in the Kingdom.
> >
> > While I am still alive, I reserve the right to dispose of the amount and its profit and to use them for my benefit. My pledging this amount as waqf shall take effect upon my demise. I hereby request that my will be registered and implemented.

Accordingly, upon the request and issuance of the resolution by the aforementioned FāÏimah Maḥmūd Yūsuf Al-Ashqar—who is of such a state that her acts are legally approved—in the presence of the aforementioned two men who identified her, I have decided to register it for adoption upon the conclusion of the offering process.
Prepared 17/5/1425H, corresponding to 5/7/2004 CE.

The Third Application: **An Example of Shares Waqf Deed**



Supreme Judge Dept.

Sharia Court in

Ref. No.

Date

المحكمة الشرعية في عمان الشميساني

الرقم ١٩/١٠٧/١

التاريخ ١٤٢٩/٩/١٦ هـ

الموافق ٢٠٠٨/٩/١٦م

حجة وقف

في المجلس الشرعي المعقود لدي أنا د. احمد علي جرادات قاضي عمان الشرعي الشميساني حضرت لدي المكلفة شرعا عفاف ابراهيم احمد التاجي وبعد التعريف عليها من قبل المكلفين شرعاسامي محمد سلامه الجماعين و محمد حسين الجماعين/عمان ، قررت قائلة وهي بالحالة المعتبرة شرعا انني امتلك (٥٠٠٠) سهم من اسهم شركة الكهرباء الاردنية المحدوده والاسهم خاليه من كل دين او رهن وانني وانا بكامل قواي العقلية وبمحض ارادتي اوقفت الاسهم المشار اليها وارباحها اعتبارا من تاريخه ادناه الى متولي الوقف وزارة الاوقاف والشؤون والمقدسات الاسلامية /صندوق الزكاة وقفا خيريا لانفاقه على أيتام المسلمين . بعد موافقة وزارة الاوقاف والشؤون والمقدسات الاسلامية بموجب كتاب رقم ١٢٣٧٤/٢/٧/٤ تاريخ ١٥/ ٢٠٠٨/٩م .وعليه وحيث صدر هذا الإقرار والإنشاء من عفاف المذكورة وهي بالحالة المعتبرة شرعا وبحضور المعرفين المذكورين أعلاه وبناء على الطلب فقد تقرر تسجيله للاعتماد عليه والعمل بموجبه.تحريرا في ١٤٢٩/٩/١٦هـ وفق٢٠٠٨/٩/١٦م

الكاتب

خليل موسى الصانع

رئيس الكتاب

قاضي عمان – الشميساني الشرعي

د. احمد علي جرادات

المملكة الاردنية الهاشمية

دائرة قاضي القضاة

منطقة الشميساني الشرعية

MAIN RESULTS

1. A group of classical fiqh scholars, all contemporary fiqh scholars, and the International Islamic Fiqh Academy held the opinion that it is permissible to pledge cash and movable properties as waqf, as it is also permissible to create joint-contribution waqf, waqf of jointly owned property and temporary waqf.
2. All contemporary fiqh scholars and the International Islamic Fiqh Academy, support the permissibility of pledging securities as waqf.
3. The purposes of cash waqf can be divided into direct purposes, namely lending and investment, and indirect purposes, namely all types of charitable deeds.
4. Nothing in the legislation of the Hashemite Kingdom of Jordan prevents waqf of cash or securities.
5. An advisory opinion was issued by the General Fatwa Office in the Hashemite Kingdom of Jordan authorizing cash waqf.
6. There are waqf deeds for cash and securities in the Hashemite Kingdom of Jordan. Some are individual and some are institutional.

RECOMMENDATIONS

1. It is necessary to find ways to strengthen the idea of creating endowments of cash and securities through more research and studies.
2. Promotional and educational campaigns should be conducted to spread the culture of creating waqf of cash and securities in society and to urge people to do so.
3. A cash and securities waqf fund should be established at the official level of the Hashemite Kingdom of Jordan for the purpose of revitalizing waqf real estate holdings.

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Waqf Substitution and Its Implementation in the Hashemite Kingdom of Jordan

Introduction

Waqf has been one of the widest and most stable venues of righteousness over the centuries. Today we find some charitable endowments from the era of the Prophet (peace be upon him) that are still in existence and serving the purpose for which they were dedicated. However, some factors may appear that prevent a waqf from continuing to fulfill its benefits. For example, its structure may fall into ruin, or it may become wholly or partially nonfunctional, or the designated recipients of its benefits may cease to exist. In some cases, transferring the waqf from one place to another would yield a greater benefit. These issues and the like can be dealt with through what is known as waqf substitution. This study presents *fiqh* views on the issue of waqf substitution and some relevant experiences that Jordan has had. In this regard, the study will present the relevant Jordanian legislation and the view of the General Fatwa Office. Lastly, some cases in which waqf substitution was implemented are discussed.

First: The Research Problem

The research problem can be systematically summarized in the following questions:

1- What are the definitions of waqf and of substitution?

2- What are the views of scholars on the ruling regarding waqf substitution?

3- What are the forms of waqf substitution?

4- What are Jordan's experiences in waqf substitution?

Second: Research Objectives

To answer the above questions, the researcher will attempt to achieve the following objectives:

1- To define waqf and waqf substitution.

2- To present the views of *fiqh* scholars with regards to the ruling on waqf substitution.

3- To discuss the purposes and forms of waqf of money and securities.

4- To discuss Jordan's experiences in waqf substitution by explaining the position of Jordanian legislation, the view of the General Fatwa Office, and some cases in which waqf substitution was implemented.

Research Methodology

In order to achieve the aforementioned objectives, the following approved research methods were adopted:

First: the inductive and descriptive approach: this approach involves tracing the most important texts of *fiqh* scholars that focus on the research issues.

Second: the analytical approach: this entails analysis of the texts related to the research topics and linking them with each other to achieve the desired goal.

Research Plan

Section one: Definition of the study's terms

1. Definition of substitution
2. Definition of waqf.

Section two: Regulations on waqf substitution according to *fiqh* scholars

1. The ruling on mosque substitution
2. The ruling on substitution in case the donor stipulates substitution.
3. The ruling on substitution in case the donor does not stipulate substitution
   Case one: substitution when the benefit is wholly or partially disrupted
   Case two: substitution for what is more useful

Section three: Waqf substitution in Jordan

1. Legal regulation of waqf substitution in Jordan
2. The view of the General Fatwa Office
3. Waqf substitution parameters from the Ministry of Endowments
4. Examples of waqf substitution cases

Section One: Definition of the Study's Terms

First: The Definition of Substitution

a) Linguistically, the language experts did not distinguish between the word *ibdāl* and the word *istibdāl*. Both mean "the replacement of one thing with another".[10]

b) Terminologically, the *fiqh* scholars use *istibdāl* in their discussion of some dealings such as substitution of a rented item and substitution in zakat, sacrifices and vows. They opined that the basic rule is that substitution is permitted in them, provided it is done by persons having legal capacity and that it does not contravene Sharīʿah principles.[11] Regarding substitution (*istibdāl*) in waqf, it means selling the waqf property and buying another asset to replace the first. Then the meaning of waqf substitution was restricted to selling the waqf property for cash. The term *ibdāl* is also used for replacement of the old asset with a new asset.[12] Al-Qaradāghī defined it as "changing the waqf property by a sale or other means to something else".[13]

Second: The Definition of Waqf

a) Linguistically, it means to retain. It is reflected in the saying: "the land is retained for the poor".[14] This meaning is also reflected in a *hadīth* which states: "If you wish, you can retain it and give from it as charity". The term was also used in the Holy Quran as follows: "And stop them; indeed, they are to be questioned"[15] and "If you could but see when they are made to stand before the Fire."[16]

b) Terminologically, given their divergent perceptions and the conditions they set for it, *fiqh* scholars differed on the definition of waqf. The difference in the definition is also rooted in the question surrounding the ownership of the waqf property: does it belong to the donor or to others? Imam Abū Ḥanīfah defined it as: "retention of an

[10] *Lisān al-ʿArab*, the word *badal*, 1:344.
[11] See al-Kasānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 5: 326-331; *al-Mawsūʿah al-Fiqhiyyah al-Kuwaytiyyah,* entry on *ibdāl*, 1:142.
[12] See Ibrāhīm ʿAbd al-Laṭīf al-ʿUbaydī, *Istibdāl al-Waqf: Ruʾyah Sharʿiyyah Iqtiṣādiyyah Qānūniyyah*, (Maṭbūʿāt Dāʾirah al-Shuʾūn al-Islāmiyyah wa al-ʿAmal al-Khayrī, Dubai, United Arab Emirates, 9th edition, 2009), p. 55.
[13] Al-Qaradāghī, *Istibdāl al-Waqf*, p. 2; Muḥammad Sulaymān al-Ashqar, *Majmūʿ fī al-Munāqalah wa al-Istibdāl bi al-Awqāf,* (Muʾassasat al-Risālah, Beirut, 2nd edition), p. 49.
[14] See Ibn Manẓūr, *Lisān al-ʿArab*, 9: 359; Majmaʿ al-Lughah al-ʿArabiyyah, *al-Muʿjam al-Wasīṭ,* 2: 1063.
[15] Sūrat al-Ṣāffāt: 24. Ṭ
[16] Sūrat al-Anʿām: 27.

asset as the property of the donor while donating its benefit in charity. It is like loaning [the asset]."[17] This definition implies that waqf is a charitable donation of benefit while the asset remains the property of the donor and never leaves his ownership. This status allows him to dispose of it by any means that transfers the ownership such as selling it or making a gift or a bequest of it. If the donor dies, it becomes part of his estate, except in three cases mentioned by Imam Abū Ḥanīfah in which the donor cannot reclaim the ownership of the endowment due to specific considerations.[18] However, his two associates (Abū Yūsuf and Muḥammad ibn al-Ḥasan) defined waqf as "retention of an asset with the status that it belongs to Allah, and the donation of its benefit now and in the future".[19] This definition implies that waqf is a binding [disposal] and that the donor is not allowed to dispose of it [afterward] by any act that transfers the ownership. Also, it is not transferred to his heirs after his death because the waqf has left his ownership and become the property of Almighty Allah. Imam al-Shāfiʿī[20] and Imam Aḥmad took the same position in one of two statements from each of them, which is the preferred opinion [in their respective schools].[21] In a second view from each, they opined that the waqf becomes the property of the beneficiaries, although their ownership does not allow them to dispose of it by any means that would transfer the ownership. Also, it cannot be inherited after their death because their ownership is not full ownership; [it could be called] nominal ownership.[22] The Mālikī School defined it as: "granting owned usufruct—even [if the donor owns it] by a [rental] fee—or the yield [of an asset] to a beneficiary by a particular wording for a period specified by the donor"[23] It may be understood from this definition that they consider waqf to be a binding [transaction];

[17] *Fatḥ al-Qadīr*, 6: 19, 191; *al-Durr al-Mukhtār*, 6: 519; al-Ṭarāblusī, *al-Isʿāf*, p. 3.

[18] The three cases are:

1) When a judge, in case of dispute, makes a pronouncement that the waqf is binding.
2) When the waqf creator changes its form from waqf to a will by saying, for example, "When I die, this land of mine will become charity." It then takes the rule of a bequest and becomes binding on the heirs.
3) When he makes a waqf of land to make it a mosque, builds it, and allows people to pray in it. See al-Kāsānī, 6: 218.

[19] *Fatḥ al-Qadīr*, 6: 191; *al-Durr al-Mukhtār*, 6: 521-522; Shaykh ʿAlī Ḥasb Allah, *Khulāṣat Aḥkām al-Waqf*, p. 5.

[20] Al-Nawawī, *Taḥrīr Alfāẓ al-Tanbīh*, p. 464.

[21] Ibn Qudāmah, *al-Mughnī*, 8:186.

[22] Dr. Muḥammad Muṣṭafā Shalabī, *Aḥkām al-Waṣāyā wa al-Awqāf*, p. 307.

[23] *Al-Sharḥ al-Ṣaghīr ʿalā Aqrab al-Masālik*, 4: 97-98.

also, that the subject matter can be either real estate having a yield or usufruct such as a lease; also, it can be temporary. Furthermore, the ownership of the waqf belongs to the donor, but he is prevented from disposing of it by any means that transfer the ownership. Likewise, the donor cannot rescind his waqf; he is obliged to donate its usufruct in charity throughout the duration of the waqf.

In summary, waqf means retaining the waqf property and giving out the benefits to the beneficiaries.[24]

Section Two: *Fiqh* Scholars' Views on the Rules of Waqf Substitution

Since waqf is usually intended to provide its benefits permanently to its stipulated beneficiaries, waqf substitution could be a means by which corrupt individuals terminate the waqf and take it over. Therefore, some donors take steps to prevent waqf substitution in the future by stipulating in the waqf deed that the waqf property cannot be substituted. The problem arises here that the benefit of the waqf may not be realized, in part or in full, except by substitution, or the waqf administrator (*nāẓir*) may perceive that substitution will lead to a greater benefit than the current benefit of the waqf. The study decided to differentiate between substitution of *masjids* (mosques) and substitution of other endowments, given the exalted status of the mosque. The views of *fiqh* scholars regarding the regulations of waqf substitution are presented as follows:

First: The Ruling on *Masjid* Substitution

Fiqh scholars were strict regarding the ruling on mosque substitution, given its great status. Being attributed to the Lord of the Worlds elevates its status.

The views of *fiqh* scholars regarding the issue are as follows:

The Ḥanafī School: Ḥanafī scholars are not unanimous on the ruling regarding mosque substitution. The Ḥanafī, al-Marghīnānī, said:

[24] This definition is provided by al-Imām al-Muwaffaq in *al-Mughnī*, vol. 6, p. 184. This is the definition adopted by Dr. Muḥammad al-Kubaysī in his book *Aḥkām al-Waqf fī al-Sharīʿah al-Islāmiyyah* after he presented and discussed a group of definitions given by the jurisprudential schools, 1: 85-88.

> If a mosque and its surroundings are ruined and it is not being used, it remains a mosque according to Abū Yūsuf. According to Muḥammad, it reverts to the ownership of the builder (the donor), or to his heirs after his death, because it was dedicated for devotion to Allah but is no longer serving that function, so it is like the mats of a mosque and plants [growing on its grounds]. However, Abū Yūsuf opined that the mosque mats and its plants should be transferred to another mosque.[25]

The Malikī[26] and Shāfiʿī[27] Schools: It is not allowed to substitute or sell a mosque even if it is ruined, based on the apparent meaning of texts that indicate the impermissibility of selling waqf property. For example, ʿUmar said, "The asset itself should not be sold or given as a gift."[28] That is because what is not allowed to sell when its benefits exist is also not allowed to sell when its benefits have vanished; however, the materials in the ruined mosque should be transferred to another mosque.

The Ḥanbalī School: It is allowed sell it and to buy another with its price. There is no difference between a mosque and any other asset in this regard.[29] It was mentioned in *al-Mughnī*:

> If a waqf is ruined and its benefits cease, it can be sold. For example, a house that has collapsed; or land that has become infertile and cannot be restored; or a mosque in a village whose inhabitants have moved away so that there is no one left to pray there; or a mosque that is not spacious enough for the worshippers and cannot be expanded; or a mosque of various sections that cannot be rebuilt except by selling some of the sections; it is allowed to sell part of it to rebuild the other parts. If none of it can be used, all of it should be sold.

Two other cases would take the same rule: fear of robbers, or the place is filthy so that the prayer cannot be offered in it.[30]

Ibn Taymiyyah[31] mentioned that if a mosque is located in a place difficult for people to benefit from it, it should be sold and the money should be used to buy another mosque in

[25] *Al-ʿInāyah* with *Fatḥ al-Qadīr,* 6: 236-237.
[26] Al-Dasūqī, *al-Sharḥ al-Kabīr maʿa al-Ḥāshiyah*, 4: 91.
[27] Al-Ramlī, *Nihāyat al-Muḥtāj ilā Sharḥ al-Minhāj*, 5: 395; *al-Ghāyah al-Qaṣwā*, 2: 649; *al-Rawḍah*, 5: 357.
[28] *Ṣaḥīh al-Bukhārī* with *Fatḥ al-Bārī*, 5: 399; *Ṣaḥīh Muslim*, 3: 1255.
[29] Zayn al-Dīn al-Munjī, *al-Mumtiʿ Sharḥ al-Muqniʿ*, (Dār Khiḍr, Beirut, 1997), 4: 150.
[30] Ibn Qudāmah, *al-Mughnī*, 5: 632.
[31] *Majmūʿ al-Fatāwā*, 31: 212 passim.

another place. Also, the [lamp] oil and mats of one mosque could be transferred to another mosque if they are of no use in the original mosque. In fact, Aḥmad opined that the mats and oil that are of no use in a mosque can be given away to the poor living nearby. He supported this by the practice of ʿUmar ibn al-KhaÏÏāb (may Allah be pleased with him), who used to divide the covering of the Kaʿbah among the Muslims because the Muslims are entitled to benefit from the mosques. In addition, the justification for using the waqf for its like is found in the practice of ʿAlī (may Allah be pleased with him) when he collected money for a slave who had contracted to buy his freedom. More was collected than the amount required to purchase his freedom so ʿAlī used the surplus for another slave who had contracted to buy his freedom. The donors gave money for purchasing the freedom of a slave and when the particular slave was no longer in need, it was spent on a similar case.

Substituting a Mosque for Something Else for a Benefit

This is in a case where the benefit of a mosque still exists, but there is a greater benefit for Muslims if the mosque were substituted for another thing. There are two views on this case in Aḥmad's School, and his disciples differed over it. However, permissibility is the more apparent position in the texts and has more evidence to support it. It was mentioned that when ʿAbdullah ibn Masʿūd went to preside over the Bayt al-Māl (public treasury) in Kūfah, Saʿd ibn Mālik had built the structure and had turned a part of the date market into a mosque. A man was caught trying to tunnel into the Bayt al-Māl. [They] wrote to ʿUmar about that, and ʿUmar replied: "Don't cut the man's hand. The mosque should be moved so that the Bayt al-Māl is in front of the *qiblah* because there will always be worshippers in the mosque." ʿAbdullah did so and the layout remained like that. Ṣāliḥ reported that his father said: "The attempt to bore into the Bayt al-Māl was made from the Kūfah Mosque. ʿAbdullah ibn Masʿūd then moved the mosque. The present-day date market is situated in the old location of the mosque, and the mosque is now located where the date market used to be."[32]

Al-Mardāwī reported that Ṣāliḥ said: "It is allowed to move a mosque for public benefit. It is one of the unique views [of the Ḥanbalī School]."[33]

[32] Ibid., 31: 215, 216, 217.
[33] *Al-Inṣāf*, 7: 95.

Qāḍī Abū Yaʿlā commented on Abū Dāwūd's narration [of Imam Aḥmad's view] about a mosque when the worshippers decide to raise it up and put a water dispenser and shops under it, but some of them don't want that. [Imam Aḥmad] said that the decision of the majority should be considered, and there is nothing wrong in it. Abū Yaʿlā said, "The apparent basis for the decision was that the need called for it as there would be benefit for the mosque in doing so."[34] He further mentioned the strained and unnatural interpretation by some adherents of the School that Aḥmad's ruling in the narration was about the beginning stage before the mosque had been built. Abū Yaʿlā said:

> This is incorrect as it negates the text. The text is clearly about a mosque that has already been built, not a mosque that is about to be built. That is because there is no disagreement regarding a mosque that is about to be built.

Ibn Taymiyyah replied to those who hold the view that substitution is not allowed except when [the mosque] can no longer be used. He said:

> They have no evidence from the Sharīʿah nor any text from the founder of the School. Rather, the Sharīʿah evidence and the statements of the founder of the School indicate the opposite. It is reported that Aḥmad said: "If a mosque is not spacious enough to contain the congregation, it is allowed to transfer it to a more spacious place." The narrowness of the mosque does not render it useless. The usefulness remains as it was; only the number of worshippers has increased; and it is possible to build another mosque for them. It is not a condition of a mosque that it should contain everybody. Despite that, it is allowed to shift the place of prayer to another mosque because people gathering in one mosque is better than their assembly in two mosques. That is because the larger the number of people in a congregation the better. The Prophet, peace be upon him, said: "The prayer offered by a man with another is better than his prayer by himself; the prayer he offers with two other men is better than his prayer with one other man. The more [people pray together] the more beloved it is to Almighty Allah."[35]

Ibn Taymiyyah opined that selling a waqf and using the money to buy a substitute is allowed when the substitute has more benefits. The permissibility is not limited to cases of dire necessity (*ḍarūrah*) or the inability to derive any benefit from it at all. The justification of substitution is that the [current] waqf has less benefit while the substitute is more beneficial, or that there is a need (*ḥājah*). What is meant by need here is completion of the benefit

[34] Ibid., 31: 217

[35] *Sunan Abū Dāwūd*, Kitāb al-Ṣalāh, printed with *ʿAwn al-Maʿbūd*, 2: 260; *Musnad Aḥmad*, 5: 145.

because insufficient benefit creates a lack that calls for its completion. This is considered a need similar to the need that makes it permissible to wear silk—which is normally forbidden for men—if they suffer from itchy skin.[36]

The Ḥanbalī School justifies this opinion with *āthār* (traditions of the Companions and the generation that succeeded them) and rational evidence as follows:

First: *Āthār*

1. The acts of ʿUmar and ʿUthmān, who changed the structure of the Prophet's Mosque. The angle of reasoning: These rightly guided Caliphs replaced the bricks and tree trunks that had been dedicated as waqf. These [cases] were very famous and yet no one objected to their acts. There is no difference between substituting one building for another building and substituting one lot for another lot when the need calls for doing so.
2. ʿUmar wrote to Saʿd when he was informed about the attempt to tunnel into the Bayt al-Māl in Kūfah: "The mosque should be moved so that the Bayt al-Māl is in front of the *qiblah* because there will always be worshippers in the mosque."[37] Ibn Qudāmah commented that the incident happened in the presence of the Companions and none of them objected. It was thus consensus.[38]
3. It was reported by al-Bayhaqī and al-Khallāl from ʿAlī ibn Abī ʿAbdullah al-Madīnī, from his father, from ʿAlqamah, that his mother said: "Shaybah ibn ʿUthmān al-Ḥajjī went to ʿĀishah (may Allah be pleased with her) and said: "O Mother of the Believers, the [former] cloth coverings of the Kaʿbah pile up in our possession and become too many. We have taken to digging deep wells and burying them to prevent those in states of ritual impurity and menstruating women from wearing them." ʿĀʾishah (may Allah be pleased with her) replied: "You have not done well. What you have done is terrible! There is no harm if those in states of ritual impurity and menstruating women wear the cloth that used to cover the Kaʿbah once it has been removed from it. Instead, sell the cloth and spend the proceeds on the poor or in the cause of Allah."

[36] *Majmūʿ al-Fatāwā*, 31: 225-226.
[37] Ibn Qudāmah, *al-Mughnī*, 5: 632-633.
[38] Ibid.

> After that Shaybah would send the cloth to Yemen to be sold and would spend the proceeds on the poor or in the cause of Allah or on wayfarers.[39]

Second, Rational Evidence

The benefit of a waqf requires that its effects remain in whatever possible form. It is better that a waqf be active and beneficial than to be neglected and dormant. Ibn ʿAqīl said:

> The waqf is [supposed to be] permanent. If it is not possible to maintain it in a particular form, then it becomes incumbent to maintain its purpose, which is to benefit permanently from another asset. Substitution can be considered tantamount to preserving the assets. Our inflexible insistence on maintaining a particular asset when it is no longer functional causes the loss of the objective. This can be compared to a sacrificial animal when it becomes clear that it cannot complete the journey [to Makkah]; it should be slaughtered where it is, even if its slaughter is [originally] designated for [Makkah]. When the objective cannot be fully achieved, the focus should be on achieving what is possible of it and foregoing the particular location, which has become impossible. Making [the location] the focus when it cannot be achieved would cause the total loss of all benefit. The same is the case of a waqf that no longer yields benefits.[40]

The preferred opinion:[41] the view of the Ḥanbalī School is the preferred opinion because a waqf, although it attracts rewards from Allah, has a rationally discernible purpose. It is not an act of purely devotional worship for which one does not inquire about objectives and reasons. The objectives of both the Lawgiver and the waqf donor are clear, that the rewards should endure for as long a time as possible. That is why it is called *ṣadaqah jāriyah* (ongoing charity). Therefore, it is obligatory to maintain the waqf property and not substitute another item for it, provided the original waqf property is still serving the purpose for which it was dedicated, which is to provide benefit in the desired manner.

If, however, the waqf does not serve the purpose for which it is dedicated—for example, a mosque when the worshippers have all moved away from the location, or a horse designated for jihad when it becomes old—there are two opinions:

[39] *Al-Sunan al-Kubrā*, 5: 195.
[40] Ibn Qudāmah, *al-Mughnī*, 5:633.
[41] Al-Qarādāghī, *Istibdāl al-Waqf*, p. 8.

First, the mosque should be left unused and the horse should be left unused till it dies, and thus the waqf donor's reward would cease.

Second, substitution. The mosque in question should be substituted or sold and the proceeds used to buy another place for a mosque even if it is smaller than the first. The second choice leads to the preservation of Sharīʿah objectives and the intentions of the donors. Ibn Qudāmah said: "The objective is to preserve the benefit of the waqf that is possible to preserve and prevent it from being lost, and this cannot be achieved except by these means."[42]

Second, the ruling regarding waqf substitution if the donor stipulates substitution

Example: the waqf donor may stipulate in the waqf document that he or the *nāẓir* shall have a right to substitute the waqf for another when he chooses to do so, or to sell the waqf and buy another piece of land with the proceeds.

The first opinion: the waqf is valid, but the stipulation is invalid. This view was held by the Ḥanafī scholar Muḥammad ibn al-Ḥasan and by the Ẓāhirī School.[43]

The second opinion: the waqf is valid and the stipulation is effective. This view is held by Mālikī School[44] and by the Ḥanafī scholars Abū Yūsuf, Hilāl, and al-Khaṣṣāf .[45]

Ibn Nujaym said: "They unanimously agreed that if the donor stipulates waqf substitution, both the waqf and the stipulation are valid and the donor has the authority to substitute."[46] Ibn al-Humām said:

> If he made substitution once, the donor has no right to make substitution a second time because the stipulation has expired with the first substitution, unless his stipulation is worded to allow for repeated substitution. Also, the *nāẓir* cannot do waqf substitution unless it is stipulated that he can.

[42] Ibn Qudāmah, *al-Mughnī*, 5:633
[43] Ibn Ḥazm, *Al-Muḥallā*, 10:188.
[44] *Ḥāshiyah al-Dasūqī ʿalā al-Sharḥ al-Kabīr*, 4:89.
[45] *Ḥāshiyat Ibn ʿĀbidīn*, 3:387.
[46] *Al-Baḥr al-Rāʾiq Sharḥ Kanz al-Daqāʾiq*, Dār al-Wafāʾ (Beirut, 3rd edition, 1993), vol. 5, p. 1239.

It was mentioned in the *Fatāwā* of Qādī Khān: "The view of Hilāl and Abū Yūsuf is correct because this stipulation does not invalidate the waqf. That is because a waqf is a transfer from one piece of land to another…and if it results in the establishment of another waqf, it would not be an invalid stipulation. It would be invalid to stipulate that the waqf shall not be permanent, but this is permanence in meaning."[47] Qādī Khān mentioned scholarly consensus on this case, saying:

> It is unanimously agreed that if the donor stipulates substitution for the waqf, both the waqf and the stipulation are valid and the donor has the authority to substitute. However, in the absence of a stipulation of substitution, it was mentioned in *al-Siyar* that substitution cannot be done except with the permission of the judge.[48]

They argued that the ruling of waqf is permanence and bindingness, but neither is restricted to a particular item. They are both possible with another productive asset since fruitful yields are the basis for the waqf structure.[49]

Absolute and restricted stipulation: if the donor stipulates substitution in the waqf, the stipulation could be absolute or conditional.

Absolute stipulation: a property dedicated for waqf can be sold or substituted by another property of the same nature. It is not permissible to sell it for clearly less than the market value because the waqf manager is like an agent.[50] Substitution of waqf cannot be done a second time if repeated substitution is not stipulated. That is because the stipulation ends once it has been exercised.[51]

Restricted stipulation: It is not permitted to go beyond the stipulation regarding substitution. For example, if it is stipulated that substitution involve a piece of land in a specific location, it is not allowed to substitute a piece of land in another place, let alone

[47] *Fatāwā Qādī Khān*, footnoted in *Al-fatāwā al-Hindiyyah fi madhab al-Imām al-Aʿẓam Abī Ḥanīfah al-Nuʿmān,* authored by al-Shaykh Niẓām and a group of scholars in India. See also *Fatāwā Qāḍī Khān,* (Dār Iḥyāʾ al-Turāth al-ʿArabī, Beirut 4th edition, 1986), vol. 3, p. 306.
[48] *Fatḥ al-Qadīr,* 6:228.
[49] See al-ʿAbīdī, *Istibdāl al-Waqf*, p. 62.
[50] See *Al-Baḥr al-Rāʾiq,* 5:240; *Fatḥ al-Qadīr,* 5:440.
[51] See *Fatḥ al-Qadīr,* 5:440.

substitution of a house. That is because [the manager] has no right to change the [founder's] stipulation.[52]

Third, the ruling on waqf substitution when the donor does not stipulate it

The views of the *fiqh* scholars regarding waqf substitution that has been stipulated in the waqf deed were clarified in the previous section. In this section, the study will explain the views of *fiqh* scholars regarding waqf substitution when it is not stipulated in the waqf deed. Circumstances may occur to the waqf that require the *nāẓir* to investigate the possibility of waqf substitution; for example, a waqf becoming wholly or partially nonfunctional. Sometimes, the waqf may still be fully functional, but the *nāẓir* may deem substitution to yield a greater benefit. What are the views of the *fiqh* scholars regarding this?

Case one: the views of the *fiqh* scholars regarding the waqf when it becomes wholly or partially nonfunctional

A waqf may become wholly nonfunctional; for example, a piece of farmland may become so salty that nothing, or hardly anything, grows there.

A. The Ḥanafī School: it was mentioned in *Radd al-Muḥtār*:

> Waqf substitution is permissible whether it is stipulated or not, if it becomes fully nonfunctional such that it yields no benefit or does not cover the expenses [of managing it]. Substitution is allowed in these cases, according to the most authentic view, if it is done with the permission of the judge and for the benefit it entails.[53]

It was mentioned in *al-Hidāyah*: "Whatever is destroyed of waqf buildings and tools, the judge can order the yield [of the waqf] to be spent on its repair if necessary. If it cannot be restored, then it can be sold."[54]

B. The Malikī School: it is not allowed to substitute a waqf that is still functional. If the waqf is nonfunctional and could not be revived, there are two views on it:

[52] *Sharḥ Fatḥ al-Qadīr,* Kamāl al-Dīn Muḥammad ʿAbd al-Wāḥid, (Dār Iḥyāʾ al-Turāth), 5:440.
[53] *Radd al-Muḥtār ʿalā al-Durr al-Mukhtār*, 3:387.
[54] *Al-Hidāyah maʿ Fatḥ al-Qadīr*, 6:228-244.

i. Waqf substitution is disallowed. This view is held by Imām Mālik in a narration. Al-Kharashī mentioned:

> Mālik said a waqf property should not be sold even if it is destroyed. The ruined remnants of the *awqāf* of early Muslims indicates that it is not permitted to sell waqf[55]

ii. Waqf substitution is allowed. This is the view held by Rabīʿah, Mālik's teacher. It is one of the narrations of Abū al-Faraj from Mālik and Ibn Rushd, but it is stipulated that it realize a benefit and be done with a judge's order.[56]

C. The Shāfiʿī School: waqf substitution is not allowed, as per the reliable view in the School. Al-Anṣārī said: "A waqf should not be sold even if it is ruined."[57] It was mentioned in *Fatḥ al-Muʿīn*:

> If a waqf tree dries out or is uprooted by the wind, the waqf still remains valid, and the tree should not be sold or gifted out. The beneficiaries should derive benefit from it even by converting it into doors."[58]

However, some opined that it should be sold because the benefit stipulated by the donor has ceased to exist.[59]

D. The Ḥanbalī School: in one narration [from Imam Aḥmad], waqf substitution is not allowed if the waqf is still functional, but it is allowed if it is nonfunctional. Al-Mardāwī said:

> Be aware that a waqf will be either nonfunctional or functional. If a waqf is still functional, it is absolutely disallowed to sell or substitute it. This is mentioned in the narration of ʿAlī ibn Saʿīd in which [Imam Aḥmad] said: "It should not be sold nor substituted unless it is nonfunctional." If a waqf is nonfunctional, the authentic opinion of the School is that it be sold. That is the majority view.[60]

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[55] Al-Kharashī, *Sharḥ Mukhtaṣar Khalīl*, 7:95

[56] See ʿUlaysh, *Minaḥ al-Jalīl ʿalā Sharḥ Mukhtaṣar Sīdī Khalīl,* (Dār al-Fikr), 8:154.

[57] *Minhāj al-Ṭullāb,* 1:66.

[58] Abū Bakr otherwise known as al-Sayyid al-Bakrī, *Ḥāshiyat Iʿānat al-Ṭālibīn ʿalā Ḥilli Alfāẓ Fatḥ al-Muʿīn li Sharḥ Qurrat ʿAyn bi Muhimmāt al-Dīn,* (Dār al-Fikr, Beirut, 1993), 3:212.

[59] Al-Ramlī, *Nihāyat al-Muḥtāj ilā Sharḥ al-Minhāj,* (Dār al-Kutub al-ʿIlmiyyah), 5:394.

[60] Al-Mardāwī, *al-Inṣāf fī Maʿrifat al-Rājiḥ min al-Khilāf,* 7:94.

> On the other hand, Ibn Taymiyyah[61] permitted waqf substitution whether the waqf is functional or nonfunctional as long as there is benefit in it.

Case two: Substitution of a waqf with another waqf that has more benefits

Example: a waqf may be functional, with its benefits still being made available to the beneficiaries, but there is an opportunity to replace it with another waqf that will realize greater benefits. Is the substitution permissible? What are the views of *fiqh* scholars on this matter?

The first view: it is permissible. This view was held by Abū Yūsuf and Muḥammad. The fatwa in the Ḥanafi School is based on this view.[62] This view was also held by Imām Aḥmad,[63] and Ibn Taymiyyah[64] reported it from Abū Thawr and Ibn Ḥarbaway, a Shāfiʿī judge in Egypt.[65] The view was also held by Ibn Qāḍī al-Jabal in his book *al-Munāqalāt bi al-Awqāf*.[66]

It was reported from Muḥammad ibn al-Ḥasan:

> If the yield of a piece of land becomes weak and the trustee finds another having a greater yield, he has the authority to sell the first and use the proceeds to buy the land with the greater yield.[67]

Ibn ʿĀbidīn said:

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[61] See *Maṭlab Istibdāl al-Masjid.*

[62] See Ibn Nujaym, *Al-Baḥr al-Rāʾiq,* 5:223

[63] A Ḥanbalī *fiqh* scholar known as Ibn Qāḍī al-Jabal al-Ḥanbalī wrote a book called *al-Munāqalāt wa al-Istibdāl bi al-Awqāf wa al-Ifṣāḥ ʿammā Waqaʿa fī Dhālika min al-Nizāʿ wa al-Khilāf*. In this book, many narrations, reports and opinions regarding the matter in the Ḥanbalī School were mentioned. The evidence indicate its permissibility. The author mentioned the evidence of those who have contrary opinion and responded to it. After review, the book has 121 pages. Afterwards, Jamāl al-Dīn al-Mardāwī wrote a paper in response to *al-Munāqalāt* called *al-Wāḍiḥ al-Jalī fī Naqḍ Ibn Qāḍī al-Jabal al-Ḥanbalī*. The essay comprises 12 pages. Another person then responded to that essay with a paper called *Fī al-Munāqalāt bi al-Awqāf*. The researcher said he was not aware of the third author's name. It was probably written by Ibn Zurayq al-Ḥanbalī who died in 891 A.H. The essay comprises 15 pages. The three essays were edited by Prof. Dr. Muḥammad Sulaymān al-ʿAshqar. The books were printed in one volume by Muʾassasat al-Risālat. The researcher used the third edition of the book, published in 2001.

[64] See *Majmūʿ al-Fatāwā*, 31:253.

[65] Ibid.

[66] *Al-Munāqalāt bi al-Awqāf*.

[67] See Ibn Nujaym, *Al-Baḥr al-Rāʾiq,* 5:223

> If someone wants to replace a waqf asset—other than a mosque—with another that has a greater yield and better location, it is allowed, based on the view of Abū Yūsuf. The [Ḥanafī] fatwa is based on it.[68]

Ibn Taymiyyah was asked about the ruling of the Ḥanbalī School on replacement of a waqf whose benefits have not stopped with a waqf better than it. He said in response: "There are two opinions on this issue in the Ḥanbalī School. The view of Abū Thawr and others is that waqf substitution is permissible."[69]

The second view: it is not permitted. This view is held by the Mālikīs[70] and the Shāfiʿs.[71] It is also a view in the Ḥanafī School[72] and a narration in the Ḥanbalī School.[73] Al-ḤaÏÏāb said in his study: "If the benefit of waqf still persists, there is consensus that the waqf should not be sold."[74] It is stated in *al-Tāj wa al-Iklīl*: "It is absolutely forbidden to sell a waqf that has become dilapidated."[75] Al-Anṣārī said: "A waqf should not be sold even if it has become ruined."[76] It was mentioned in *al-Baḥr al-Rāʾiq*: "According to Abū Yūsuf, waqf substitution is permissible without any condition when the yield of the land becomes meager. We do not give fatwa according to this view."[77]

The evidence of those that say waqf substitution is permitted[78]

4. The acts of ʿUmar and ʿUthmān, who changed the structure of the Prophet's Mosque. ʿUmar changed the structure with bricks and tree trunks while ʿUthmān built the walls with engraved stone.[79]

[68] *Ḥāshiyat Ibn ʿĀbidīn*, 4:388.
[69] *Al-Fatāwā al-Kubrah, 4:282*
[70] *Al-Tāj wa al-Iklīl,* 6:42.
[71] Al-Anṣār, *Minhāj al-Ṭulāb,* 1:66.
[72] *Al-Baḥr al-Rāʾiq,* 5:223.
[73] Al-Mardāwī, *al-Inṣāf,* 7:101.
[74] Abū Zakariyyā Muḥammad al-Ḥaṭāb, *Risālat fī Ḥukm Bayʿ al-Aḥbās,* 2007, p. 29.
[75] *Al-Tāj wa al-Iklīl,* 6:42.
[76]*Minhāj al-Ṭullāb,* 1:66.
[77] *Al-Baḥr al-Rāʾiq,* 5:223.
[78] Ibn Qāḍī al-Jabal al-Ḥanbalī mentioned in his book called *al-Munāqalāt wa al-Istibdāl bi al-Awqāf wa al-Ifṣāḥ ʿammā Waqaʿa fī Dhālika min al-Nizāʿ wa al-Khilāf* eleven items of evidence indicating permissibility of waqf substitution. I summarized the most important of them and some other supporting evidence from other books.
[79] It was reported by al-Bukhārī in *Kitāb al-Ṣalāh*, the chapter on construction of mosques.

The angle of reasoning: the Companions replaced the bricks and tree trunks that had been dedicated as waqf. This was one the most famous issues, and no one objected. There is no difference between substituting one building for another building and substituting one lot for another when the need calls for doing so.[80] None of the Companions objected to this, which qualifies as tacit consensus.

5. ʿUmar wrote to Saʿd when he was informed about the attempt to tunnel into the Bayt al-Māl in Kūfah: "The mosque in the date market should be moved so that the Bayt al-Māl is in front of the *qiblah* because there will always be worshippers in the mosque."[81]

   The angle of reasoning: the mosque was still functional, but ʿUmar substituted it for the protection of the Bayt al-Māl.[82] This happened in the presence of the Companions, but none of the Companions objected, and it is thus consensus.[83] Since this incident indicates the permissibility of substituting a mosque, its indication is even stronger for the permissibility of substituting other things such as plants and buildings.[84]

6. It was reported by al-Bayhaqī and al-Khallāl from ʿAlī ibn Abī ʿAbdullah al-Madīnī, from his father, from ʿAlqamah, that his mother said: "Shaybah ibn ʿUthmān al-Ḥajjī went to ʿĀʾishah (may Allah be pleased with her) and said: "O Mother of the Believers, the [former] cloth coverings of the Kaʿbah pile up in our possession and become too many. We have taken to digging deep wells and burying them to prevent those in states of ritual impurity and menstruating women from wearing them." ʿĀʾishah (may Allah be pleased with her) replied: "You have not done well. What you have done is terrible! There is no harm if those in states of ritual impurity and menstruating women wear the cloth that used to cover the Kaʿbah once it has been removed from it. Instead, sell the cloth and spend the proceeds on the poor or in the cause of Allah." After that Shaybah would send the cloth to Yemen to be sold and would spend the proceeds on the poor or in the cause of Allah or on wayfarers.[85]

[80] *Al-Munāqalāt bi al-Awqāf*, p. 101.
[81] Ibn Qudāmah, *al-Mughnī*, 5:632-633.
[82] *Al-Munāqalāt bi al-Awqāf*, p. 92.
[83] Ibid; see *Sharḥ al-Zarkashī*, 2:203.
[84] See *Majmūʿ al-Fatāwā*, 31:229.
[85] *Al-Sunan al-Kubrā*, 5:159.

The angle of reasoning: our mother ʿĀʾishah (may Allah be pleased with her) held that it is permissible to sell the cloth coverings of the Kaʿbah and spend the proceeds on the poor or in the cause of Allah. This is a substitution for a benefit.[86]

Evidence of those who say waqf substitution is not permissible[87]

The Prophet (peace be upon him) said to ʿUmar (May Allah be pleased with him): "Give charity from the asset; it should not be sold or given away or inherited, but its fruits can be spent."[88]

The angle of reasoning: the *ḥadīth* is general and explicit that it is not permissible to sell or swap a waqf.

Ibn Qāḍī al-Jabal al-Ḥanbalī discussed this evidence from many perspectives, the most important of which are:[89]

a. The waqf cannot be sold because of the donor's stipulation to that effect, not due to the essential nature of the waqf itself.
b. The sale that is forbidden is the one that would negate the waqf entirely. If we posit that [the *ḥadīth*] is of general indication, it has been limited by the previously cited evidence that is more specific.

[86] See *al-Munāqalāt bi al-Awqāf*, p. 111; ʿAbd al-Raḥmān al-Salmī, "Istibdāl al-Waqf Alladhī Lam Tataʿṭṭal Manāfiʿuhu bi Waqf Khayr minhu fī al-Fiqh al-Islāmī", *Majallat Jāmiʿat al-Malik ʿAbd al-ʿAzīz al-Iqtiṣād al-Islāmī,* vol. 24, no. 1, 2011, p. 18.
[87] Those who say waqf substitution is not permissible provided many items of evidence. I provided the most important of them. Ibn Qāḍī al-Jabal al-Ḥanbalī and those who rebutted him extensively discussed that evidence.
[88] It was reported by al-Bukhārī in *Kitāb al-Waṣāyā, bāb Mā li al-Waṣiyy an Yaʿmal fī Māl al-Yatīm wa Mā Yaʿkul minhu bi Qadar ʿAmālatihi;* it was reported by Muslim in *Kitāb al-Waṣiyyah, bāb al-Waqf.*
[89] p. 115.

Section Two: Waqf Substitution in Jordan

First, Legal Regulation of Waqf Substitution in Jordan.

A. **Jordanian Civil Law regulates waqf substitution in the following sections:**

- Article (1237) provides for the donor to stipulate for himself or others the right to change or substitute a waqf.
- Article (1237) paragraph (1) stipulates that if the donor, when setting up the waqf, gives to himself or others the right to change, exchange, give, deprive, increase, decrease, modify and substitute [the waqf], he or that other party can exercise the right in the way it is explained in the waqf affidavit.
- Article (1238) paragraph (2) states that if the waqf is accompanied by an invalid condition, the waqf remain valid but the condition is invalid.
- Article (1239) excludes mosques, stipulating that it is not permissible to substitute a waqf mosque or the purpose for which it is dedicated.
- Article (1240) clarifies that any condition that is contrary to a Sharīʿah rule, or disrupts the benefit of the waqf, or deprives the beneficiaries of the waqf's benefits shall be given no consideration.

B. **Waqf Law for the Year 2001**

It provides for the powers and authority of the Endowments Council, which includes approval of waqf substitution. The text of Article (7) paragraph (a) item (7) provides for the approval of substitution of waqf properties with the permission of the competent Sharīʿah court when there is a legitimate justification.

Second, the opinion of the General Fatwa Office regarding waqf substitution.

Decree No. (190) (10/2013) Ruling on turning an old mosque into a Quran memorization center. Dated (27/11/1434 AH), corresponding to (3/10/2013 CE).

Praise be to Allah, the Lord of the Worlds, and peace and the blessings of Allah be upon our master Muhammad, his family and companions.

The Council of Fatwa, Research and Islamic Studies at its eighth session, held on Thursday 27/11/1434H), corresponding to (3/10/2013 CE), has considered the question received from the Secretary General of the Ministry of Awqaf and Islamic Affairs and Sanctities in which he stated:

I would like to inform you that the daily obligatory prayers are not offered in some of the old mosques because of the construction of new mosques near them. Kindly explain the Islamic ruling on converting these mosques into Quran houses or Islamic centers.

After studying and deliberating the opinion, the Council decided the following:

Originally, *fiqh* scholars were of the view that a waqf should not be sold, given away or substituted, because it is no longer owned by the donor. The donor is not permitted to dispose of the waqf in any manner that negates its usefulness. However, some *fiqh* scholars excluded some cases in which the waqf may be substituted due to the necessity of realizing benefit. This view is held by the Ḥanbalī School. Imam al-Mardāwī said: "Every waqf that is perceived will stop yielding benefits can be sold. This was firmly stated in *al-Riʿāyah,* and it is a very strong view when that is the preponderant supposition." (*al-Inṣāf*, 7:103). The cessation of benefits does not refer to the ruin of the waqf; it also includes anything that prevents deriving full benefit from the waqf. It is stated in *al-Inṣāf* (7:103): "What is meant by disruption of waqf benefit is the intended benefits, by destruction or other [causes], even by the mosque becoming too small [to accommodate all] the worshippers or by the neighborhood going bad." The abandonment of old mosques for new mosques—as mentioned in the question—can be categorized [as a type of disruption of benefit] as mentioned by the Ḥanbalī scholars in the abovementioned texts.

Accordingly, there is no objection to turning these mosques into Qurʾān houses for some benefits instead of letting them lie idle. This should be done under the supervision of a Sharīʿah committee that verifies and ensures the implementation of the previously mentioned conditions of the *fiqh* scholars. However, the Ministry of Awqaf should be cautious about cancelling their status as mosques while at the same time benefiting from them by using them for Quranic memorization. There is no contradiction between the two, especially as there remains the possibility of opening them to worshippers in the future if the other mosques are not spacious enough for all the worshippers. Allah knows best.

Third, Waqf Substitution Parameters

It is stated that the following parameters should be observed in the substitution process:

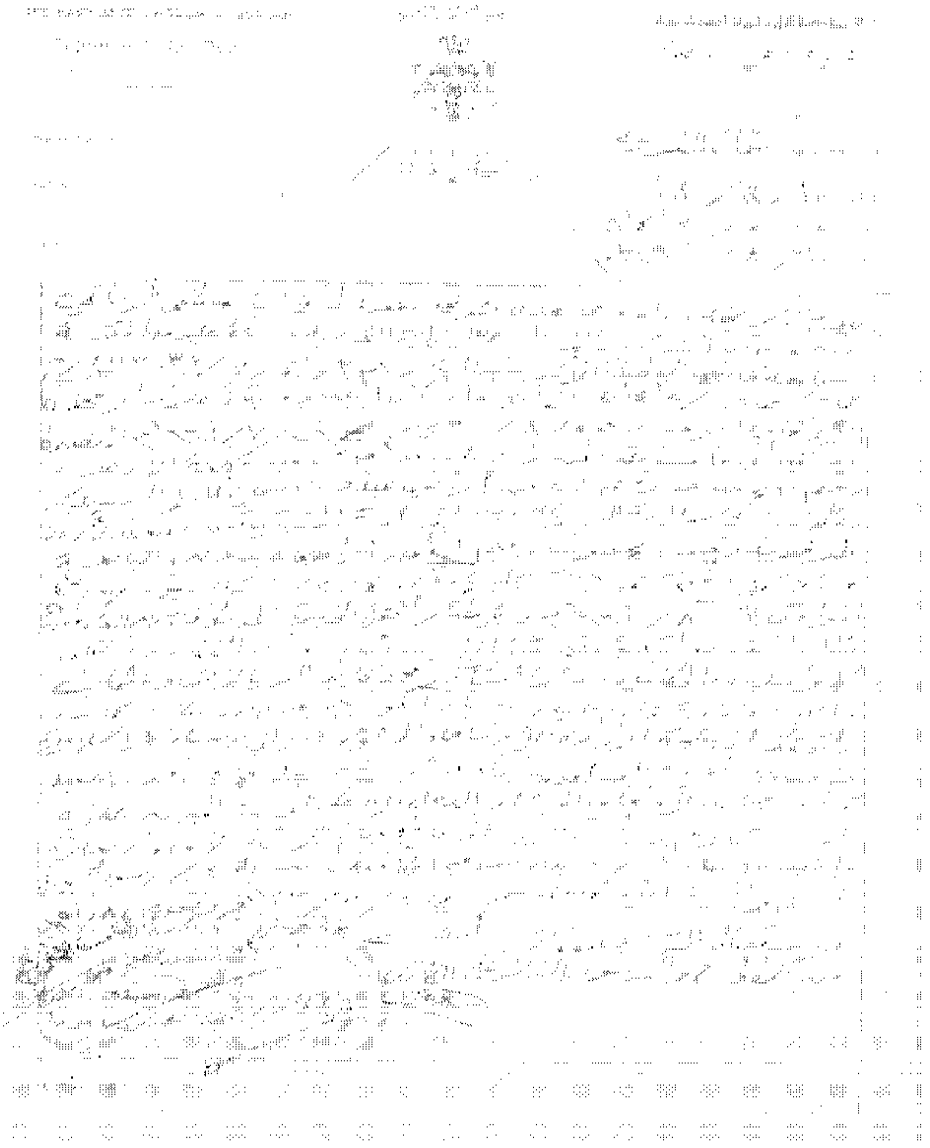
- There should be a necessity for the substitution.
- The replacement should not be of less value than the original.
- Favoritism, as well as any cause for accusation or suspicion, should be avoided in the substitution process.
- The replacement should be rapidly purchased except what is dictated by the circumstances.
- The substituted waqf should not be released except after the actual delivery of the replacement.

Fourth, examples of waqf substitution cases:

نظام الأملاك
وزاره الاوقاف
MNAWAFLEH

إدخال معلومات الوقف

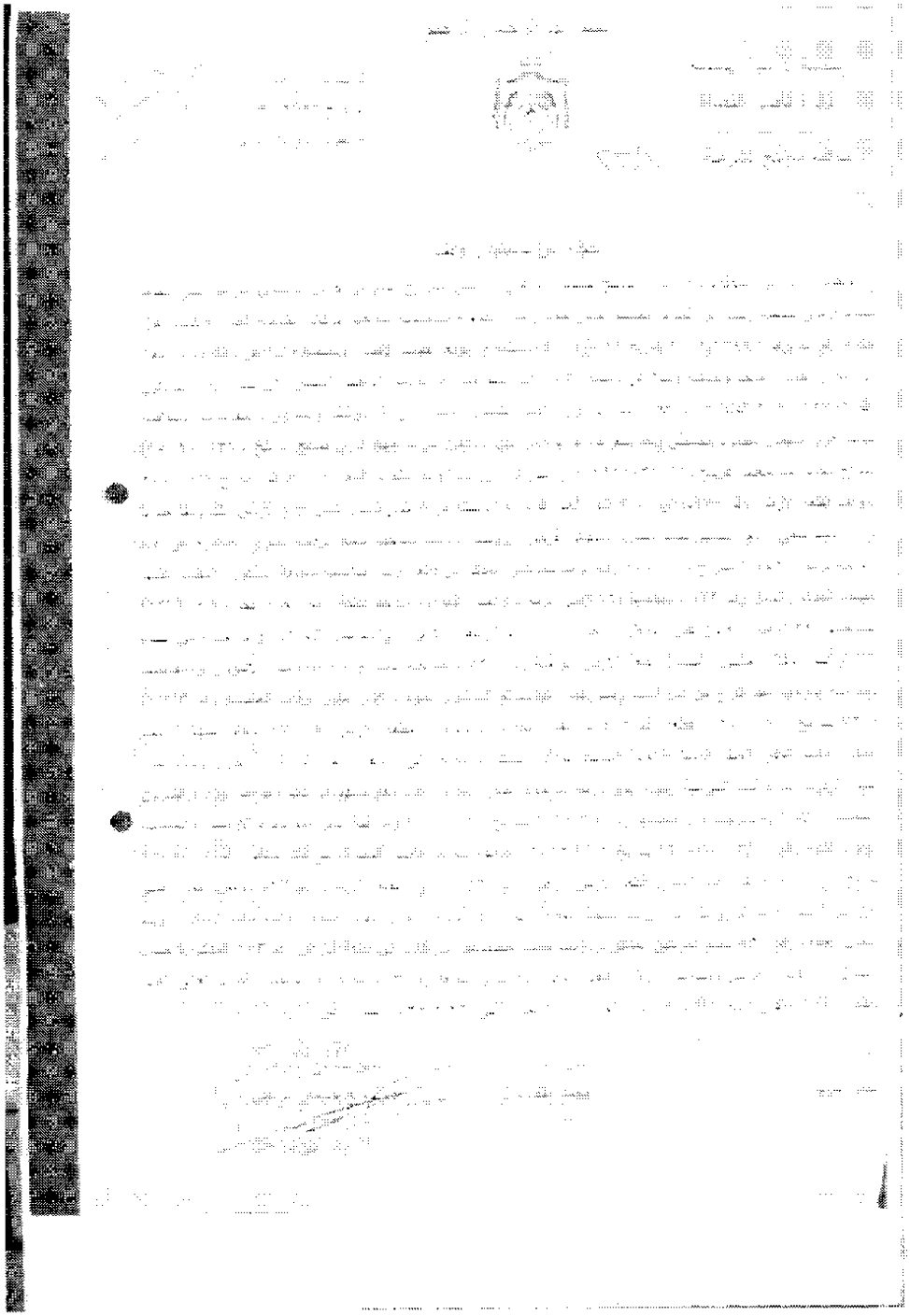
التاريخ ٢٠١٧/١٠/٢٤
الوقت ١٢:١٠
MLKENT01



نظام الأملاك
وزارة الاوقاف
MNAWAFLEH

إدخال معلومات الوقف

التاريخ ٢٠١٧/١٠/٢٤
الوقت ١٣:١٠
MLKENT01



The Second Area of Discussion:

A Brief Look at Saudi Arabia's Experience **in Growing Endowment Funds and Administrative Expenses of Waqf and the Parameters for Receiving Wages from it**

by

Al–Ayyashi al–Sadiq Faddad

Introduction

Waqf is a charitable institution that has provided much benefit in the past and still continues to do so. If this social institution has been afflicted during this era with certain shortcomings in performing its economic and social roles, it is due to a number of historical, political, legislative and economic factors.

One of the most important aspects of caring for this institution, to which all of us must give our utmost concern, is to devote attention to the Sharīʿah rulings regarding all its administrative and organizational matters and the investment of its resources. Special [attention must be paid] to the stipulations of the waqf endowers and how to deal with them in light of developments in the purposes of waqf and the areas [of its application].

One of the top priorities of research in waqf affairs is its jurisprudential rulings and reformulating the *fiqh* of waqf. [There is a need to] collect the scattered issues and subtopics from the books of the scholars and present them in a fresh way that can be easily distributed among those engaged in administering waqf institutions. [We need to] build on this rich scholastic heritage and the intellectual efforts of jurists through the ages in dealing with certain contemporary problems, finding appropriate solutions, and establishing parameters for those applications.

Moreover, we need to pause to reflect on the endowment experiences of a number of Muslim countries that have contributed greatly to the development of endowments and activation of the role of the institution of waqf in the sustainable development of societies. We shall present herein a model from among those experiences and its contribution to the development of this formula that makes a gift ongoing and the reward for it perpetual even after the death of the charitable donor.

In conformity with the letter from the Academic Committee of the Conference commissioning [this research], I shall deal in this short paper with two important topics in the studies of endowments. One is a brief overview of the experience of Saudi Arabia in the development of endowments. The other relates to a *fiqh* issue of waqf concerning the administrative expenses of the waqf administration and the parameters of the managers' wages.

Concern for this aspect is a necessary condition for reviving the mission of the waqf institution, promoting its economic and social role, and restoring this pioneering institution to its earlier nature when it was a source of funding for all social, health and religious facilities.

In response to the request of the Academic Committee of the Conference, I am making this attempt—granted a meager one—to contribute to the dissemination of waqf knowledge. May Allah make it beneficial and reward us for it.

We will present the subject through two main topics:

The First Topic: Expenses of the Administration of Endowments, and Wage Parameters

The Second Topic: The Experience of Saudi Arabia in the Development of Endowments

These two topics are preceded by an introduction and succeeded by a conclusion for findings and observations.

Success is from Allah.

A Brief Look at Saudi Arabia's Experience in Growing Endowment Funds

Preface

No researcher can adequately review the experience of the Kingdom of Saudi Arabia in the development of endowments in its territory in just a few pages. That is because of the rich intellectual legacy and multi-faceted practical applications and because it covers all walks of life.

Moreover, this experience comprises various stages through the historical eras, each stage having been characterized by the continuous development of the endowments. They have had a prominent role in serving the communities in the various regions of the Arabian Peninsula and in fulfilling their public and private needs as various political authorities have succeeded one another there. Thus, the experience of endowments in the Kingdom of Saudi Arabia draws upon a massive historical experience. They have been able to evolve through different stages to respond to the needs of their communities, varying according to the prevailing economic conditions. However, the provision of housing and shelter services for the pilgrims coming for hajj and *ʿumrah* and to visit Madinah have taken first place. Other [prominent objectives have been] accommodations for students of knowledge, schools and academic institutes, health centers, springs and wells, and libraries. All of these have contributed notably to the development of facilities for education, health, taking care of the poor and indigent of all races, and providing water to pilgrims as well as services that facilitate the performance of their pilgrimage rites. Particular attention has been given to the endowments of the Two Holy Mosques and their accompanying evolution throughout the ages.

To concisely explain this experience through its various phases will require dividing it into discrete stages. We shall simply provide brief highlights of each stage to reveal their most important features.

Based on personal judgment, I will treat it as two main distinct stages:

The first stage: from the Ottoman Empire to the issuance of the Supreme Council of Awqaf Act (1386 H/ 1967 CE).

The second stage: From the issuance of the Supreme Council of Awqaf Act to the establishment of the General Authority for Endowments and the issuance of its Act on 27/2/1437H, corresponding to 09/12/2015 CE.

The First Stage

From the Ottoman Empire to the Issuance of the Supreme Council of Awqaf Act

The Arabian Peninsula was singled out by Allah as the locus of revelation and the land of the Two Holy Mosques. Endowment became known in the first period of Islam through the noble guidance of the Prophet (peace and blessings of Allah be upon him) by urging perpetual charity and [informing of] the immensity of its reward. He urged that property be made inalienable for charitable purposes. In fact, the Prophet (peace and blessings of Allah be upon him) personally established endowments. In this regard, Ibn Ḥajar narrated that Saʿd ibn Muʿādh said: "We asked about waqf in Islam. The Muhājirūn said [the first instance was] the charity of ʿUmar. The Anṣār said: [The first instance was] the charity of the Prophet (peace and blessings of Allah be upon him)." Ibn Ḥajar commented, "The first charitable endowment in Islam comprised the lands that Mukhayrīq bequeathed to the Prophet (peace be upon him) and which the Prophet (peace be upon him) turned into a waqf."[90]

This noble guidance and practical Sunnah launched the collective practice of the honorable Companions. None of them who had property and ability refrained from making an endowment of something. The Tābiʿīn and those who followed them in good emulated their practice, such that their endowments have remained to the present to bear witness to their excellent compliance with the noble guidance of the Prophet (peace be upon him). They sacrificed this transitory world out of desire for Allah's generosity in the Hereafter and to help their brothers to overcome adversity and misfortune.

Leading scholars often cited the endowments of the Companions in Makkah and Madinah [as evidence for] the validity and permanence of waqf. For example, Imam Shāfiʿī confirms this by saying: The endowments of the Companions were well known among the Muhājirūn and Anṣār, such as ʿUmar's waqf of his property at Thamgh and his house at Marwā and ʿUthmān's waqf of the well of Biʾr Rūmah. There is also the waqf by Saʿd ibn Abī Waqqās of his home in Madinah,

[90] Ibn Ḥajar, *Fatḥ al-Bārī*, 5:402.

the waqf by ʿAmr ibn al-ʿĀṣ of al-Raht in Ṭāʾif, Fāṭimah's waqf for the benefit of Banī Hāshim and Banī al-Muṭṭalib, and ʿAlī's waqf of his land in Yanbuʿ.[91]

This collective practice proceeded apace, and the interest of Muslims in waqf, particularly the benefactors among them, grew throughout every corner of the world. They allocated some or all of their money to build endowments in the land of the Two Holy Mosques for all legitimate purposes. In fact, it went beyond that to the rulers of the Muslims, who donated the lion's share of those endowments.

When the Caliphate came to the Ottoman Empire, it paid great attention to the endowments in all the lands under its jurisdiction, to their regulation and administration, and to generalizing their objectives and beneficiaries. Endowments witnessed a clear renaissance that benefited the lands and the people, including the land of the two Holy Mosques. The regulations decreed by the Ottoman state for endowments were applied there. A number of jurisprudential codifications of the provisions of waqf began to become popular and became a source of all the later waqf regulations. The most important of these was *Majallat al-Aḥkām* (1293 H). A decree was issued requiring the application of the articles of *Majallat al-Aḥkām* in all the lands under Ottoman rule. There was also the codification set by the editor of *Majallat al-Aḥkām al-ʿAdliyyah*, and the Head of the Court of Cassation in the Ottoman Empire, Shaykh ʿUmar Ḥilmī (1307 H-1889 CE), titled *Itḥāf al-Akhlāf fī Aḥkām al-Awqāf*.[92] There was also the work of the eminent scholar Muḥammad Qādrī Pāshā, Minister of Justice in Egypt (d. 1306 H/1888 CE), who drafted a set of laws that included the provisions of waqf, which he called *Al-ʿAdl wa al-Inṣāf fī Mashākil al-Awqāf*. It consisted of 646 articles and was published in 1893 CE.

When the rule passed to the Saudi state and its unifier, King Abdul Aziz Al-Saud, he entrusted the supervision of waqf to the judiciary in most regions of the Kingdom. He left the regulations in the lands of the Two Holy Mosques, Makkah and Madinah, as they had been during the Ottoman Empire until the state had been fully established. Thereupon, the Kingdom's regulations were issued through royal decrees (1345 H/1926 CE) that encompassed the region of the Two Holy

[91] See Abū al-Qāsim al-Rāfiʿī, *Sharḥ Musnad al-Shāfiʿī*, 4:62.

[92] Translated from Turkish into Arabic by Muḥammad Kāmil al-Ghazzī al-Ḥalabī; edited by ʿAbd al-Sattār Abū Ghuddah (Dallah al-Barakah Publications).

Mosques. The *awqāf* were also included, and their administration was placed directly under the auspices of the King's deputy, and they had a board of directors of immense importance.

This was followed by the circular issued in 1353 AH/1934 CE, which decreed the unification of the *awqāf* of the Two Holy Mosques (of Makkah and Madinah) and brought its branches together under one administration. In 1381H/1961 CE the Ministry of Hajj and Endowments was established to administer waqf affairs, look after them, invest their resources, and disburse their revenue to the beneficiaries.[93] This organization was in place for a period of time.

The Second Stage

From the Issuance of the Supreme Council of Awqaf Act to the Establishment of the General Authority for Endowments

As the role of waqf increased through the work of the Ministry of Hajj and Endowments to organize this sector, the properties of *awqāf* increased and their assets became diversified. The need arose for broader and more comprehensive administration of it to keep pace with the development and growth of this sector. The Supreme Council of Awqaf Act was promulgated in 1386 AH/1966 CE, and remained in effect until recently. Successive amendments were issued to meet the needs of the development and growth of endowments, especially after the establishment of the Ministry of Islamic Affairs and Endowments and Call and Guidance in 1414 H/1993 CE, which became responsible for, and supervisor over, endowments in the Kingdom as a whole. An agency in the Ministry was assigned to deal specifically with endowments. The Ministry has been assigned oversight of the public charity endowments, and these are under the Minister's purview. He also presides over the Higher Council for Endowments to administer all waqf affairs.

In addition to the important efforts undertaken by the Council, it issues regulations for charitable endowments. The Council of Ministers issued a resolution about them in 1393 H/1973 CE that

[93] See Ṣāliḥ ibn Ghannām Al-Sadlān, *ʿInāyah al-Daʿwah al-Islāḥiyyah fī al-Jazīrah al-ʿArabiyyah bi al-Waqf*, p. 25-6; ʿAbd al-Raḥmān al-Ḍaḥyān, *Idārah al-Awqāf al-Islāmiyyah wa al-Tajribah al-Saʿūdiyyah*, pp. 111-3.

defined charitable endowments as public charitable entities, determined their management and the ways to replace their assets, and divided the regions into five administrative regions.[94]

The administration of endowments under the supervision of the Ministry has taken important organizational dimensions. Anyone who examines the website of the Ministry since it began managing them would conclude that it has ably detailed the organization, management and governance of endowments in the form of departments specialized in:

- Inventory, documentation and protection of endowments;
- Development and investment;
- Collecting the yield and distributing it the beneficiaries according to the stipulations of the waqf founder;
- Calling for endowments and encouraging people to establish them.

The Ministry has continued to manage the affairs of endowments through its agency and its various departments; however, the archaic organization and its failure to cope with the needs of the times made manifest the need for a new organization.

The General Authority for Endowments was established. The Council of Ministers issued a resolution approving the new act organizing the Authority on 25/02/1437 H corresponding to 07/12/2015 CE. The General Authority for Endowments in accordance with the act is a public body with an independent legal personality which enjoys administrative and financial independence. The aims of the Authority include the organization, maintenance, development and growth of endowments in order to achieve the stipulations of their founders and enhance their role in economic and social development and social solidarity, in accordance with the objectives of the Sharīʿah.[95]

The establishment of the Authority is considered a culmination of [developments] witnessed in recent decades [signaling] a unique renaissance of endowments in diverse regulatory, administrative and judicial spheres. The Kingdom's 2030 economic vision has made waqf one of the important axes for achieving its objectives in society and initiating sustainable development that will benefit present and future generations, God willing.

[94] ʿAbd al-Raḥmān al-Ḍaḥyān, *Idārah al-Awqāf al-Islāmiyyah wa al-Tajribah al-Saʿūdiyyah*, pp. 113-4.
[95] See: General Authority of Endowments Statute, *op. cit.*

The value of the assets received by the General Authority of Endowments amounted to approximately 54 billion riyals, while the Kingdom's courts register more than 600 new endowments a year. (These are the public charitable endowments and do not include the family trusts, which constitute a deep cultural [resource], especially in the Hijaz region.) They also do not include charitable endowments initiated by businessmen nor King Abdul Aziz's waqf of the Two Holy Mosques. They also do not include the *awqāf* of Saudi universities that have been recently activated for their financial sustainability through endowments; nor do they include the endowments of charities and *daʿwah* offices to ensure their financial sustainability and charitable purposes.[96]

It is difficult to list all the waqf projects that were launched before the General Authority for Endowments and were strengthened by the issuance of the Act [establishing] the Authority. I may refer only to the development of waqf and its contribution to the realization of social needs, especially in health, education, housing and other various endowment projects.

The Kingdom, represented by several governmental and private sectors, launched endowment projects that directly achieve social and economic objectives of the society. The most important of these projects are:

- The waqf of King Abdul Aziz in Makkah, an investment waqf whose revenues go to the Grand Mosque in Makkah. It is one of the greatest endowments on the global level in its financial value and its achievement of exalted goals and services for all Muslims.
- The International Islamic Relief Foundation, and its huge project "Sanabel Al-Khair", which is registered as a limited liability company. It is one of the earliest of the modern endowment formulas developed at the level of the whole Islamic world, founded in 1412H (1991 CE). The aim of its establishment was to revive the Sunnah of waqf. The target capital was to raise SR1 billion over ten years, to be invested, with the proceeds of investment to be used to finance the programs of the Authority and charitable projects in the areas of social welfare, health and relief of weak Muslims around the world, refugees, emigrants, widows, orphans and other distressed persons around the world.

[96] Interview with Mr. ʿAbdullāh al-ʿAjlān, Chairman of the Awqaf Committee in the Riyadh Chamber, in *Al-Iqtiṣād* newspaper.

- University endowments: Most of the bylaws of university endowments—such as the Endowments of King Saud University, the Endowments of King Fahd University of Petroleum and Minerals, the Endowments of King Khalid University, the Scientific Waqf at King Abdulaziz University and others—stipulate that the endowments aim to provide community partnerships to provide the necessary permanent financial resources for promoting scientific research and creating contemporary mechanisms of social solidarity and charitable work at the universities.

  I may use the endowments of King Saud University as an illustrative model of these endowments. The University's vision statement articulates its aspiration to be the leader in educational endowments and provide a sustainable financial future for King Saud University. The University invests its endowments in a diverse and sophisticated real estate portfolio that meets the needs of the University through, among others, hotel, office, commercial, health and conference services. All these services are provided in huge towers in distinguished sites that generate a rewarding return to the endowments and which have been established with multiple partnerships with the governmental, private, and charitable sectors.
- The Endowment Fund for Housing Support in the Kingdom, supervised by the Ministry of Housing, is one of the most recent projects. It was announced in cooperation with the Islamic Development Bank to contribute to achieving Saudi Arabia's Vision 2030 and the 2020 National Transition Program. A memorandum of understanding has been signed to study the establishment of the Fund to support affordable housing by providing loan guarantees to low-income beneficiaries in Saudi Arabia to provide adequate housing for needy families.
- Health Endowment Fund: The Ministry of Islamic Affairs, Call and Guidance announced this as part of a project establishing endowment funds for various developmental fields, including health and education, to revive the concept of waqf as a source of funding for social work. Officials in the Ministry of Health and the Ministry of Islamic affairs are likely to take care of this initiative by activating these funds and enhancing their role to achieve their objectives, by Allah's power and enablement.

Waqf assets in the Kingdom are diversified into real estate assets for direct use. The most prominent of these are mosques and their schools, waqf libraries, schools and academic institutes,

the oldest of which is al-Madrasah al-Solatiyyah in Makkah (1285 AH) and its endowments; also Madāris al-Falāḥ in Jeddah (1323), and Madrasah al-ʿUlūm al-Sharʿiyyah in Madinah (1348 H). And there are many other endowments that are difficult to enumerate.

There are the endowments of wells and springs such as Waqf ʿAyn al-ʿAzīziyah, which was established by King Abdul Aziz, who bought springs in Wadi Fatima, connected them to Jeddah, and made a waqf of them.

There are also investment *awqāf*, which comprise a diverse portfolio of endowments, some of them cash investment funds and others real estate and buildings for investment and distribution of the rent. The best examples of this are charities that create diverse investment endowments for particular purposes. For example, the King Faisal Foundation; the Prince Sultan Charitable Foundation; the Al Rajhi Charitable Foundation and the residential, commercial, educational endowments it manages; the ʿAbdul-ʿAzīz bin Bāz Charitable Foundation, the Islamic Waqf Foundation and other institutions and associations that have a variety of endowments.

One of the most important practical examples of investment endowments is Makkah Company for Construction and Development, which includes in its capital the contributions of many endowments that were around the Ḥaram al-Makkī and became shareholders by contributing to the capital of the company. According to the report of the Board of Directors for the fiscal year that ended 30/4/1433H, the revenues of the *awqāf* that contributed capital to the company (general endowments and family trusts) amounted to 404 million riyals over the past nineteen years (including capital-increase shares). That is 842% of their total income before their capital contributions to the Company (based on an average of 19 years), amounting to SR 48 million, distributed as follows:

- The revenues of the Ministry of Islamic Affairs and Endowments during the last nineteen years amounted to 160 million riyals, or 1067% of its total income before contributing to the Company (based on an average of nineteen years), from a contribution of SR 15 million.

- The Ministry of Water and Electricity (Ayn Zubaydah Waqf) whose revenues during the past nineteen years (including capital-increase shares) amounted to 32 million riyals. It *awqāf* had been completely decrepit with zero income before its contribution to the Company.

- Family trusts whose revenues during the past nineteen years (including capital-increase shares) amounted to SR 212 million, or 662% of their total income of SR 33 million (based on an average of 19 years) before their contribution to the Company.

- The total revenues of all the endowments that have participated in the Company during the past nineteen years amounted to 404 million riyals compared to the value of their current contribution to the Company, amounting to 186 million riyals, an increase of 218 million riyals. (Note that the increase in the share capital absorbed the profits from 1427H).

The profit distributed during the past years and the proposed profits for the fiscal year 1432/1433H amount to 3,548 million riyals or 231% of the company's capital. (Note that the increase in the share capital absorbed the profits from 1427H).[97] There are also the endowments by private individuals such as the endowments of Shaykh Sulayman Al-Rajhi, whose assets are in the billions of dollars. This is one of the most important international charitable endowments and also owns various investment companies and shares in other companies. It also has a holding company that manages all the companies owned by the waqf. This is in addition to charitable, scientific, educational and health institutions and the combating of poverty through the establishment of micro and small enterprises.

This is the tip of the iceberg of Saudi Arabia's experience with endowments, and naturally a few pages like this cannot encompass its diverse details. I have merely referred to the main features of this experience. It remains to say that this experience has a broad future horizon, especially in view of the Kingdom's Vision 2030. There is a need to pay attention to and take care of it by monitoring the impact of endowments and how they can contribute to achieving this promising vision in specialized academic forums and seminars. Allah is the disposer of success and the guide to the straight path.

[97] See the *Al-Riyadh* newspaper website: http://www.alriyadh.com/2012/07/25/article754581.html

Administrative Expenses of Waqf and the Parameters for Receiving Wages from it

Part One

Waqf Provisions Related to the Administrative System

The *Nāẓir* (Trustee Manager) and Those Covered by the Same Ruling

Preface

This section will deal with the main provisions and rules that are considered an important introduction to explaining the [rules of] expenses, administrative costs and wages of managers, whether they are related to the remuneration of the supervisor (*nāẓir*) or those acting as his representatives. [This will be done] by [examining] the concept of waqf, its legitimacy, the financial liability of the waqf, authority over it, the stipulations of the waqf endowers, and their relationship with the administrative expenses of the waqf. That is in light of the following subjects:

The First Subject

Waqf: The Concept and Its Legitimacy

Waqf, linguistically, means to hold [something] back. The plural is *awqāf*. It is also called *ḥabs* (with the same linguistic meaning)[98] and *tasbīl*. It may be said that someone made *tasbīl* of fruit when one donates it for charitable purposes.[99]

Technically, scholars differed in explaining its meaning due to their differences regarding its nature: whether it is binding, whether ownership of the property donated as waqf is transferred, and whether waqf is considered a contract in which the intention of the contracting parties is given consideration, or is it a relinquishment [of ownership rights]?

Jurists' definitions reflect the main principles according to the orientation of each *fiqh* school.

On the whole, however, we can choose from these definitions the definition of the Ḥanbalīs, which, although short, conveys the intended meaning. They said that waqf is "to make an asset inalienable

[98] See al-Azharī, *Al-Zāhir*, p. 260.
[99] Al-Fayyūmī, *Al-Miṣbāḥ al-Munīr*, p. 265.

and assign its usufruct to charity".[100] Abū Zahrah considered this definition the most comprehensive of them all.[101]

The components of this definition are [first] that waqf consists of making an asset (having financial value) inalienable; thus, it cannot be disposed of by selling, pledging or gifting it, and it is not transferred by inheritance. [Second,] the benefit of that asset (the yield) is provided to the waqf beneficiaries according to the stipulations of the waqf endower (*wāqif*).[102]

This definition is sound because:

1. It is borrowed from the guidance of the Prophet (peace be upon him) to ʿUmar ibn al-Khaṭṭāb, as we shall see.
2. It focuses on the reality of waqf without going into details and subdivisions additional to its essence and reality.[103]

Waqf is a devotional act whose performance is recommended. Its legitimacy is indicated by general texts of the Holy Qurʾān and explained in greater detail by *ḥadīths* from the Prophetic Sunnah. The Companions practiced it and unanimously agreed on its legitimacy, as has been transmitted by the scholars, who all endorsed it, with the exception of a view reported from Qāḍī Shurayḥ and a narration of Abū Ḥanifah.

The basis for the legitimacy of waqf, as Ibn Ḥajar[104] mentioned, is the *ḥadīth* about the waqf of ʿUmar ibn al-Khaṭṭāb (may Allah be pleased with him), which was narrated by Imam Bukhārī and others. Ibn ʿUmar reported that ʿUmar acquired a piece of land in Khaybar. He came to the Prophet (peace be upon him) seeking his advice about it, saying it was the most valuable property he had

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[100] Ibn Qudāmah, *Al-Mughnī*, 8:184; Al-Zarkashī, *Sharḥ al-Zarkashī ʿalā al-Khiraqī*, 4:268; Ibn ʿAbd al-Hādī, *al-Durr al-Naqī*, 9:464. This definition has been criticized for not including all the conditions of waqf. See al-Balaʿī, *al-Maṭlaʿ*, p. 285; Ibn ʿAbd al-Hādī, *al-Durr al-Naqī*, 2:464. For the definition of waqf and discussion of the definitions in the other jurisprudential schools, see the following:
Ḥanafīs: Al-Sarakhsī, *al-Mabsūṭ*, 12:27; Ibn ʿĀbidīn, *Al-Ḥāshiyah*, 3:493; Al-Qūnawī, *Anīs al-Fuqahāʾ*, p. 197; Al-Mujaddidī al-Barakatī, *al-Taʿrīfāt al-Fiqhiyyah*, p. 536.
Mālikīs: Al-Raṣṣāʿ, *Sharḥ al-Raṣṣāʿ*, 2:411; Al-Ḥaṭṭāb *Mawāhib al-Jalīl*, 6:18; Al-Kharashī, *Sharḥ Mukhtaṣar Khalīl*, 7:78; Al-Banānī, *Ḥāshiyat al-Banānī ʿalā al-Zarqānī*, 7:74.
Shāfiʿīs: Al-Nawawī, *Taḥrīr Alfāẓ al-Tanbīh*, p. 237; Taqī al-Dīn al-Balāṭunisī, *Taḥrīr al-Maqāl*, p. 173; Al-Sharbīnī, *Mughnī al-Muḥtāj*, 2:376; Al-Sharbīnī, *Al-Iqnāʿ fī Ḥal Alfāẓ Abī Shujāʿ*, 2:26; Al-Manāwī, *Taysīr al-Wuqūf ʿalā Ghawāmiḍ Ahkām al-Wuqūf*, 1:16; Al-Ramlī, *Nihāyat al-Muḥtāj*, 4:259.
[101] Abū Zahrah, *Muḥāḍarāt fī al-Waqf*, p. 44.
[102] Ibid., p. 45.
[103] Al-Kubaysī, *Ahkām al-Waqf*, 1:88.
[104] See Ibn Ḥajar, *Fatḥ al-Bārī*, 5:402.

ever owned. The Prophet (peace be upon him) told him, "If you like, you may hold back the property and give its produce as charity on the condition that it cannot be sold or given as a gift or inherited." Ibn ʿUmar said: "ʿUmar made a charitable donation of it, declaring that the property must not be sold or given as a gift or inherited. [He devoted its produce] to the poor, [his] relatives, to the emancipation of slaves, and for guests and wayfarers. And [he added that] there is no blame on the one who administers it to consume from it according to what is customary without appropriating it as [his own] property."[105]

More than one scholar explicitly stated that the Companions were of consensus about the validity of waqf. The author of *al-Mughnī* said that Jābir (may Allah be pleased with him) said, "There was not one of the Companions of the Prophet (peace be upon him) having the means who failed to make an endowment, and this was consensus on their part. Any of them who had the means would establish a waqf, and it became well known, and no one objected. It was thus consensus."[106]

Ḥāfiẓ Ibn Ḥajar quoted Imam Tirmidhī, who said: "We do not know of any controversy among the Companions and the early scholars about the permissibility of making an endowment of land. It is [however] reported from Shurayḥ that he disapproved of waqf."[107]

The author of *al-Isʿāf*, after mentioning the endowments of the Companions, said: "This is consensus from them on the permissibility of waqf and that it is binding. That is because the need for it is pressing."[108]

Waqf is a kind of righteousness that is meant to bring one closer to Allah, and it is kindness to those in need and cooperation in righteousness and piety. If people have dominion over their wealth, there is no harm in spending that wealth for religious, social or economic objectives of general benefit.

The jurists divide waqf into three types:

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[105] *Ṣaḥīḥ al-Bukhārī*, 2:70. For the *ḥadīth* of ʿUthmān's waqf of Biʿr Rūmah, see Al-Zaylaʿī, *Naṣb al-Rāyah li Aḥādīth al-Hidāyah*, 3:477. Imam al-Bukhārī alluded to the spring of Rūmah in a *ḥadīth* on the authority of Abū ʿAbd al-Raḥmān that when ʿUthmān was besieged, he said from a high place, "I adjure you, and I address this only to the Companions of the Prophet (peace be upon him), do you not know that the Messenger of Allah (peace be upon him) said, 'Whoever digs the well of Rūmah shall have paradise'? I dug the well." See *Ṣaḥīḥ al-Bukhārī*, 3:198, Kitāb al-Waṣāyā, Bāb Idhā Waqafa Arḍ aw Biʾr.

[106] Ibn Qudāmah, *Al-Mughnī*, 8:186.

[107] Ibn Ḥajar, *Fatḥ al-Bārī*, 5:402. The report about Shurayh was collected by Bayhaqī, *Al-Sunan al-Kubrā*, 6:163.

[108] Burhān al-Dīn al-Ṭarāblusī, *al-Isʿāf fī Aḥkām al-Awqāf*, p. 13.

1. A charitable or "general" waqf: It is the intention of the endower to spend the proceeds of the waqf for categories of good that will never end, whether these are particular [groups of] persons such as the destitute and the poor, or public areas such as mosques, schools, hospitals, etc.
2. A family or "private" waqf: It is also called an endowment for progeny.[109]…The proceeds are allocated for the endower first, and then for his children, and then for a recipient category of charity that will never end.
3. Joint waqf: it is one in which the benefits are allocated for both [the endower's] progeny and a charitable category.[110]

Some of the contemporary civil laws that regulate endowments in some Muslim countries have explicitly mentioned joint waqf; for example, the Syrian law on dissolving family waqf and joint waqf (Article 1),[111] the Sudanese Civil Code in Article 907, and the Jordanian Civil Code in Article (223).[112]

The Second Subject
The Financial Liability of a Waqf and Authority over It

Preface: To explain the expenses particular to waqf administration, it is appropriate to explain the financial liability of a waqf and its legal personality, which are the main foundations for the dealings of the waqf administration. [It is also fitting] to discuss authority over [the waqf] and the expenses particular to waqf administration.

1. The Financial Liability of a Waqf, and Its Legal Personality

The *fuqahāʾ* (Muslim jurists) defined *dhimmah* as "an attribute that qualifies a person to have things become incumbent for him and upon him".[113] Legal scholars generally refer to it as legal personality, and *dhimmah* in this sense is the nexus of rights and duties.

[109] Darwaysh ʿAbd al-ʿAzīz, *Tajribat al-Awqāf fī al-Mamlakah al-Maghribiyyah*, p. 11.
[110] Ibn Qudāmah, *Al-Mughnī*, 8:233; Al-Buhūtī, *Kashshāf al-Qināʿ*, 4:258; *Majallat al-Aḥkām al-ʿAdliyyah*, p. 279.
[111] See *Al-Marsūm al-Tashrīʿī* 76, 16 May, 1949 regarding the abolishment of family trusts and hybrid trusts, their dissolution and the liquidation of their assets.
[112] ʿAlī al-Naṣrī, *Dirāsah Ḥawl Anẓimah wa Qawānīn al-Waqf*, p. 162.
[113] Al-Mujaddidī al-Barakatī, *al-Taʿrīfāt al-Fiqhiyyah*, p. 300; Al-Jurjānī, *Al-Taʿrīfāt*, p. 143.

The legal personality of the waqf is based on the view of those scholars who say that the waqf property is no longer owned by the waqf founder but has also not become the property of the beneficiary.[114] This means that the waqf has a separate existence from the liability of the person who established it and from that of the beneficiary. Therefore, we find that the jurists unanimously agreed on the permissibility of borrowing on behalf of the waqf when doing so is in the interest of the waqf or [in cases of] legitimate need or dire necessity. The dispute between them [only] occurred over whether the borrowing requires the permission of the ruler or a judge.[115]

Likewise, the *fuqahāʾ*, taking into consideration the legal personality of the waqf, allowed the *nāẓir* to lease and to purchase by deferred payment on behalf of the waqf. All these liabilities are liabilities of the waqf and not of the manager himself.[116]

This is despite the view of some Ḥanafīs that the waqf has no liabilities and rights of its own and who append them instead to the liabilities and rights of the waqf manager. Ibn ʿĀbidīn commenting on a statement by al-Ḥaṣkafī, says:

> As for the waqf, it has no capacity for liabilities or rights. [As for] the poor, although they do have the capacity for liabilities or rights, due to their great number it cannot be imagined that [the settling of liabilities] be demanded of them. Therefore, [the liabilities] do not become binding except upon the waqf manager.[117]

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[114] There are three opinions regarding the cessation of the waqf founder's ownership of the waqf asset:

1. The ownership of the waqf asset is transferred to the waqf beneficiaries. This is the famous view of the Shāfiʿīs and is also the official view of the Ḥanbalīs when the waqf beneficiaries are specific persons like Zayd or 'Amr or a limited number of persons; for example, the children of so-and-so. It is also a view of the Shīʿah.
2. The waqf founder's ownership of the waqf asset ceases but is not transferred to the waqf beneficiaries; rather, it is considered legally to be the property of Allah. It is the position of Abū Ḥanīfah's associates Abū Yūsuf and Muḥammad ibn al-Ḥasan, and it is the position represented in Ḥanafī fatwas and the dominant view in the Shāfiʿī School. It is also the Ḥanbalī view when the waqf is for a mosque, school, aqueduct, the poor, or the like.
3. The waqf founder's ownership of the waqf asset does not cease; he remains the owner. It is the Mālikī view regarding everything but a mosque. It is also Abū Ḥanīfah's view and a view of the Ḥanbalīs and the Shīʿah. See: Al-Samarqandī, *Tuḥfat al-Fuqahāʾ*, 3:375; Ibn al-Humām, *Fatḥ al-Qadīr*, 6:206; Al-Dardīr, *Al-Sharḥ al-Ṣaghīr*, 5:423; Al-Ṣāwī, *Bulghāt al-Sālik*, 5:423-4; Al-Qarāfī, *Al-Furūq*, 2:111, difference no. 79; Al-Nawawī, *Taḥrīr Alfāẓ al-Tanbīh*, p. 237; Al-Sharbīnī, *Mughnī al-Muḥtāj*, 2:389; Ibn Qudāmah, *Al-Mughnī*, 8:186; Al-Zarkashī, *Sharḥ al-Zarkashī ʿalā al-Khiraqī*, 4:270; Abū Zahrah, *Muḥāḍarāt fī al-Waqf*, p. 99.

[115] See Ibn al-Humām, *Fatḥ al-Qadīr*, 6:240; Ibn ʿĀbidīn, *Al-Ḥāshiyah*, 3:399-400; Al-Baghdadi, Muhammad ibn Ghannām, *Majmaʿ al-Ḍamānāt*, p. 326; Al-Ramlī, *Nihāyat al-Muḥtāj*, 5:397; Al-Manāwī, *Taysīr al-Wuqūf*, 1:137. Al-Dusūqī, *Ḥāshiyat al-Dusūqī ʿalā al-Sharḥ al-Kabīr*, 4:89; Al-Ṣāwī, *Ḥāshiyat Al-Ṣāwī (Bulghāt al-Sālik ilā Aqrab al-Masālik)*, 4:120; Al-Mardāwī, *Al-Insāf*, 7:72; Al-Buhūtī, *Kashshāf al-Qināʿ*, 4:267; Al-Ḥaṣkafī, *Al-Durr al-Mukhtār*, 4:489; Al-Ṭarāblusī, *Al-Isʿāf*, p. 61.

[116] For details, see: Al-Khayyāṭ, *Al-Sharikāt*, 1:217.

[117] Ibn ʿĀbidīn, *Al-Ḥāshiyah*, 24:439.

Contemporary scholars have confirmed that the apparent meaning of many statements of the Ḥanafīs indicate that they do consider the waqf to have an independent financial liability; for example, Shaykh ʿAlī al-Khayyāf in his book *Al-Ḥaqq wa al-Dhimmah (Right and Liability)*, Shaykh Muṣṭafā al-Zarqā in his book *Naẓariyyat al-Iltizām (The Theory of Obligation)*, and others.

2. Authority over the Waqf

What is meant by authority over the waqf is the administration that looks after the interests of the waqf by preserving its assets, profitably employing them, investing them, and spending the proceeds as stipulated by the waqf founder. The one who has this mandate is called the *mutawallī* (overseer) or *nāẓir* (supervisor) or *qayyim* (manager) of the waqf.

A *nāẓir* is a person who is responsible for a property or an agency or a group of people, one who takes care of them and manages their affairs. This would include the supervisor of a waqf and the headmaster of a school.[118]

As a technical term, it is defined as: whoever manages a waqf and the development of its resources and bears responsibility for its administration, whether it is an individual, group, institution, ministry or the like.[119]

The jurists in general affirm the following as being eligible to administer a waqf:[120]

1. The waqf founder: this is while he is alive and fulfills the Sharīʿah conditions of a manager. This is, according to many scholars, even if he did not stipulate it. It is, according to one narration, the opinion of Abū Yūsuf of the Ḥanafīs. However, in the view of Muḥammad [ibn al-Ḥasan], his authority to administer would not be established unless he stipulates it, which is also the doctrine of the Shāfiʿīs. The waqf founder can either manage the waqf himself or appoint an agent to act on his behalf. As for the Mālikīs, they do not allow the waqf endower to manage it even if he stipulates [the function] for himself.[121]
2. The authorized agent of the waqf founder, or whomever he chooses by stipulation.

[118] Qalʿahji and Qunaybī, *Muʿjam Lughat al-Fuqahāʾ*, p. 427.
[119] *Tawṣiyyāt Muntadā Qaḍāyā al-Waqf al-Fiqhiyyah al-Awwal*, (Kuwait: 2003), p. 416.
[120] See Al-Ḥaṣkafī, *Al-Durr al-Mukhtār*, 4:379; Al-Ḥaṭṭāb *Mawāhib al-Jalīl*, 6:37; Al-Shīrāzī, *Al-Muhadh • dhab*, 1:445-6; Al-Sharbīnī, *Mughnī al-Muḥtāj*, 2:393; Ibn Qudāmah, *Al-Mughnī*, 8:236-7; Al-Ṭarāblusī, *Al-Isʿāf*, p. 53;
[121] See Al-Ṣāwī, *Ḥāshiyat Al-Ṣāwī maʿa al-Sharḥ al-Ṣaghīr li Al-Dardīr*, 4:114; cf. Al-Kharashī, *Sharḥ Mukhtaṣar Khalīl*, 7:158; and Al-Ḥaṭṭāb *Mawāhib al-Jalīl*, 6:25.

3. The judge as the representative of the ruler. This is in case the waqf founder dies without appointing anyone to administer the waqf. This is if the beneficiaries are the general public or a group of undefined number. If, however, the beneficiaries are specific human beings of limited number or a single person, then according to some jurists, the administration devolves to the beneficiaries since the benefit of the waqf is designated for them. As the author of *al-Mughnī* said: "…because it is his property and its benefit is for him, so his consideration of it would be like that of his own property that he owns without restrictions."[122] The aforementioned was summed up by al-Ḥaṣkafī, who said: "For the waqf founder to give himself authority over the waqf is permissible by consensus;...then it is for his authorized agent, if there is one. If not, then it is for the ruler."[123] The *fuqahāʾ* (may Allah have mercy on them) spoke about the conditions of the waqf manager, which are the general conditions of an agent. These include being adult, rational, competent to deal with money, and trustworthy such that he strives in all his actions to realize the interest of the waqf and its beneficiaries and to implement the valid conditions of the waqf founder.[124] As for dismissing the *nāẓir* from administering the waqf, it does take effect if he is appointed by the waqf endower or the judge and [the appointer] decides to do so for some reason.[125]

The Third Subject
The Conditions Stipulated by Waqf Founders

What is meant by the stipulations of the waqf founders, and how are they related to the topic?

What is meant by these stipulations are the conditions that the waqf founder lays down when establishing the waqf and includes in the waqf document. They are generally similar to the conditions in contracts, which scholars have explained in detail in the theory of contracts and

[122] Ibn Qudāmah, *Al-Mughnī*, 8:237.
[123] Al-Ḥaṣkafī, *Al-Durr al-Mukhtār*, 4:379.
[124] See Al-Ḥaṭṭāb *Mawāhib al-Jalīl*, 6:37; Ibn ʿĀbidīn, *Al-Ḥāshiyah*, 4:380-1; Al-Sharbīnī, *Mughnī al-Muḥtāj*, 2:393-4; Ibn Qudāmah, *Al-Mughnī*, 8:237-8.
[125] See Ibn ʿĀbidīn, *Al-Ḥāshiyah*, 3:427; Al-Sharbīnī, *Mughnī al-Muḥtāj*, 2:394.

conditions, and these have been the subject of extensive study and research in classical and contemporary books of jurisprudence.[126]

Imam Shāṭibī (may Allah have mercy on him) looked at these conditions as acts of the *mukallaf* (any person subject to Divine prohibitions and commands), which are either acts of worship or transactions. He stated that in acts of worship it is not sufficient that a condition not conflict with a [Sharīʿah] principle or the nature and implications of the contract; suitability must also be apparent. That is because the basic rule is the *mukallaf* should not proffer [a condition] except by [Divine] permission. That is because worship is based on abstention [from what is not explicitly prescribed]. As for customary acts, it is sufficient to avoid conflicting [with a Sharīʿah text or principle] since the original rule is permission until the evidence indicates otherwise.[127] Therefore, those who looked at waqf as a devotional act of worship prohibited absolute freedom of stipulation on the part of waqf founders. Among these are the Ḥanbalīs, who are considered to be the most accepting of conditions in contracts in general. Those who look it as a type of transaction, such as the Ḥanafīs and Mālikīs, applied to it the rules for conditions in transactions.[128]

The basic rule regarding the conditions of waqf founders that are considered valid in the Sharīʿah is that they are binding upon the waqf manager, who has no right to violate them. The *fuqahāʾ* enshrined this principle in their famous maxim on waqf conditions: "The condition of the waqf founder is like a text of the Lawgiver,"[129] that is, with regard to the obligation to act in accord with it and to [the rules for] understanding its indications. However, the implementation of the conditions should only be done when they are in obedience to Allah and realize benefit for people. Whatever is contrary to that merits no consideration.[130] These conditions do not have a single status, nor are they all of one kind. Therefore, Ibn al-Qayyim divides them into four categories: conditions that are *ḥarām* (prohibited) in the Sharīʿah, conditions that are disliked, conditions that entail abandoning what is obligatory, and conditions that entail what is obligatory. The first three categories have no sanctity and are given no consideration while the fourth category comprises the

[126] For greater detail, one can refer to the following: Al-Nawawī, *Al-Majmūʿ*, 9:269-79; Ibn Ḥazm, *Al-Muḥallā*, 8:412-20; Ibn Rushd, *Bidāyat al-Mujtahid*, 2:202-9; Ibn Taymiyyah, *Majmūʿ al-Fatāwā*, 29:126-80; Abū Zahrah, *Ibn Ḥanbal*, pp. 384-96; Al-Zarqā, *Al-Madkhal al-Fiqhī al-ʿĀmm*, 1:461.
[127] Al-Shāṭibī, *Al-Muwāfaqāt*, 1:196-8.
[128] Abū Zahrah, *Muḥāḍarāt fī al-Waqf*, p. 148.
[129] Ibn Nujaym, *Al-Ashbāh wa al-Naẓāʾir*, p. 195; Ibn ʿĀbidīn, *Al-Ḥāshiyah*, 4:400-32 (Regarding the statement, "The condition of the waqf founder is like a text of the Lawgiver".)
[130] Ibn al-Qayyim, *Iʿlām al-Muwaqqiʿīn*, 2:96.

conditions that must be followed and given consideration.[131] The scholars sometimes reject these conditions and invalidate the waqf; at other times they rule the waqf to be valid and invalidate the condition.

An abbreviated summary of what the jurists, especially the Ḥanafīs, mentioned about these conditions is as follows:[132]

1. **Invalid conditions that invalidate the waqf:** These negate the binding nature and permanence of the waqf according to those who view [permanence an essential feature]; for example, the waqf founder stipulates the right to dispose of the waqf by selling it, gifting it, etc., or that the waqf will return to his heirs after his death, or that ownership will return to them in case of need.
2. **Invalid conditions that do not invalidate the waqf:** These are invalid and merit no consideration; however, the waqf is still valid despite them. These are generally conditions that do not realize any interest for the beneficiaries, such as a stipulation by the waqf founder not to remove the manager even if he is treacherous, or a condition that the property should not be replaced with another even if it becomes decrepit. According to some *fuqahāʾ*, the waqf is valid while the condition is invalid.
3. **Acceptable conditions that must be followed:** These are ones that do not contradict the nature and implications of the contract, such as a stipulation that the proceeds of the waqf be for a certain party, or a stipulation that the manager has the right to increase or decrease the payments to the entitled recipients, and other similar stipulations.

The relationship of these stipulations to the issue of administrative expenses is that these expenses are usually the subject of the stipulations of the waqf founders, especially regarding the remuneration of the manager or board members. A stipulation may also allocate a percentage of the income for maintenance and repairs, or fix a certain percentage of the income for specific beneficiaries, or other conditions that the waqf founders wish to include in the waqf deed and require the manager to abide by.

[131] Ibid.

[132] See, for more on this topic: Al-Dardīr, *Al-Sharḥ al-Ṣaghīr*, 5:403; Al-Ṣāwī, *Bulghāt al-Sālik*, 5:403, passim; Al-Ṭarāblusī, *Al-Isʿāf*, 32-9; Ibn Nujaym, *Al-Baḥr al-Rāʾiq*, 5:258; Ibn ʿĀbidīn, *Al-Ḥāshiyah*, 4:343; Ibn Qudāmah, *Al-Mughnī*, 8:191-3; Al-Anṣārī, *Asnā al-Maṭālīb*, 2:468; and Abū Zahrah, *Muḥāḍarāt fī al-Waqf*, p. 151.

Section Two

The Administrative Expenses of the Waqf, and Parameters of Remuneration

The general rule for the conduct of the waqf manager

The act of the waqf manager, or anyone acting in that capacity such as the board of directors or others, is restricted to [realizing] the interests [of the waqf and its beneficiaries]. It is stated in *Al-Ashbāh*: "A judge's actions in what he has authority over of the wealth of orphans, estates and endowments is limited by *maṣlaḥah* (realizing their interests). If they are not based on that, they are not valid."[133] The assignee may do all that is dictated by the interests of the beneficiaries. It is stated in *Al-Isʿāf*:

> It is not permissible for him to build houses for rental on [agricultural] waqf land because [such] land is [best] used for agriculture. If, however, the land is adjacent to the houses of a town, and people want to rent those houses, and the rental of the houses is greater than the yield from agriculture, in that case he may build since that usage is more beneficial to the poor.[134]

The majority of *fuqahāʾ* have agreed in general that the waqf founder has the right to [stipulate] rental of the waqf assets at the market rental rate.[135]

The Ḥanafīs took the view that a rental for markedly less than the market rental rate could render the contract voidable (*fāsid*). In fact, it is stated in *Al-Baḥr* that it would be considered betrayal by the manager if he knew [it was too low].[136]

The Ḥanbalīs considered the contract to be valid if the manager rented for less than the market rental, but they said the manager is liable for the rental shortfall, similar to what happens to an agent who sells for less than the market price.[137] Ibn Rajab commented in *al-Qawāʿid* on the rule regarding the transgression of an agent, saying:

> This is why Qāḍī [Abū Yaʿlā] made analogy [of this case] in *al-Mujarrad*—as did Ibn ʿAqīl in *al-Fuṣūl*—to the sale of an agent. They declared it valid and made him liable for the

[133] Ibn Nujaym, *Al-Ashbāh wa al-Naẓāʾir*, 1:107, 202.
[134] Al-Ṭarāblusī, *Al-Isʿāf fī Ahkām al-Awqāf*, p. 62.
[135] See Ibn ʿĀbidīn, *Al-Ḥāshiyah*, 4:402; Al-Ṭarāblusī, *Al-Isʿāf*, p. 62; Ibn Nujaym, *Al-Ashbāh wa al-Naẓāʾir*, p. 194; Al-Kharashī, *Sharḥ Mukhtaṣar Khalīl*, 7:99; Al-Mardāwī, *Al-Insāf*, 7:73; Al-Sharbīnī, *Mughnī al-Muḥtāj*, 2:395.
[136] Ibn ʿĀbidīn, *Al-Ḥāshiyah*, 4:407.
[137] Al-Mardāwī, *Al-Insāf*, 7:73.

> deficiency. A similar case is when a waqf manager leases for less than the market rental rate.[138]

The Mālikīs take a similar approach to the Ḥanbalī approach, but they differentiate between a case where the manager is wealthy—in which case he is liable for [completing] the full market rental rate—and a case where the manager is insolvent. In that case, the difference would be required of the lessee as he is directly [involved].[139]

One of the most important duties of the waqf manager, according to the juristic consensus, is to make the waqf flourish and keep it in good repair, whether or not the waqf founder stipulated it.[140] Imam al-Nawawī said: "The function of the manager is to make [the waqf] flourish, lease [its assets], collect the yield, distribute it to the beneficiaries, and preserve the assets and the yields."[141] The author of *Al-Insāf* detailed the functions of the manager thus:

> The function of the manager: preserving the waqf, making it flourish, leasing, cultivation, [defending its rights in] disputes, and collecting the proceeds…exerting effort to develop it, spending in various ways to make it flourish, repairing it, and giving [the proceeds] to the due recipients.[142]

One of the prudent accounting measures to be taken by the manager is to hold back a portion of the income each year to deal with contingencies. Some *fuqahāʾ* have ruled that the manager may reserve a sum from the annual waqf proceeds for use, when necessary, in the construction and maintenance of the waqf, even if there is no immediate need. It is stated in *Al-Ashbāh*:

> If the reconstruction of the waqf is appointed for a certain year, and a certain portion is deducted from [the payment to] the beneficiaries, all or some of them, the deducted amount is not a debt on the waqf, since they have no right to the yield during the reconstruction period. Rather, at the time of need, reconstruction takes precedence. What is in *al-Dhakhīrah* indicates that if the manager makes payments to [the beneficiaries] when there is a need for reconstruction, he is liable."[143]

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[138] Ibn Rajab, *Al-Qawāʿid*, p. 63.
[139] Al-ʿAdawī, *Ḥāshiyat al-ʿAdawī ʿalā Sharḥ Al-Kharashī*, printed on the margins of *Sharḥ Al-Kharashī*, 7:99;
[140] Al-Nawawī, *Rawḍat al-Ṭālibīn*, 5:348; Al-Sharbīnī, *Mughnī al-Muḥtāj*, 2:394; Al-Ṭarāblusī, *Al-Isʿāf*, p. 60; Ibn ʿĀbidīn, *Al-Ḥāshiyah*, 4:366; Al-Mardāwī, *Al-Insāf*, 7:67; Al-Kashnāwī, *Asʜal al-Madārik Sharḥ Irshād al-Sālik fī Madhhab al-Imām Mālik*, 3:108.
[141] Al-Nawawī, *Rawḍat al-Ṭālibīn*, 5:348.
[142] Al-Mardāwī, *Al-Insāf*, 7:67.
[143] Ibn Nujaym, *Al-Ashbāh wa al-Naẓāʾir*, p. 203.

The Ḥanafī scholar Ibn Nujaym discussed at length the ways in which the manager should deduct part of the income for maintenance.[144]

All the acts mentioned by jurists are part of the basic acts and disposals that should be undertaken by the manager or his representative, and these actions result in expenses to be borne by the waqf, which will be discussed next.

Collective management of the waqf by an institution whether it is an organization, ministry or other

It has been previously affirmed that jurists say a judge or the ruler would have authority over a waqf in case the waqf founder did not appoint a manager or if the waqf founder is unable to administer it. This provided justification for the supervision and control of *awqāf* by a competent government authority.

Likewise, the approach of some jurists that the waqf beneficiaries have the right to exercise authority over the waqf can be utilized in allowing them representation in the management of the waqf through either the General Assembly or the Board of Directors.

Jurists have also discussed the amalgamation of several *awqāf* under one administration in the form of a civil or governmental institution. They referred to it as multiple waqf founders (collective endowment) whether [they are] for one purpose or for more than one purpose. Al-Sarakhsī said: "If each of them donates half of the charity for a waqf for the benefit of the poor, and the ruler appoints one man to administer it, and they hand it over to him, it is permissible." He emphasized that by saying, "All the charitable donations have become one donation despite the large number of donors."[145]

One of the benefits of collective endowment is that it makes it easier to mobilize resources by reducing the size of contributions. That is because one of the most important problems of waqf management in the present era is the lack of liquidity and the reluctance to establish endowments or waqf-based associations that get their resources from the public. One of the reasons for this may be the understanding that associates endowments with wealth and affluence. This approach helps

[144] Ibid., p. 205.
[145] Al-Sarakhsī, *al-Mabsūṭ*, 12:38-9.

encourage people to set up endowments and trust funds for charitable purposes, particularly through issuing a *ṣukūk* in various denominations and inviting all people to subscribe to it. This is referred to in contemporary financial thought and its applications as the democratization of finance through securities or crowdfunding.

Administrative Expenses and the Salary of the Manager

Based on the aforementioned duties and works of the manager or his representative, the expenses of the waqf consist primarily of the remuneration of the manager, or one acting as his representative, or whomever he employs for the benefit of the waqf, whatever the type of service provided. These are what is known as the "aggregate fees of the manager". There are also other administrative expenses including current expenses.

[The discussion will] start with the remuneration of the manager and all that relates to it and will then [proceed to] all the other administrative expenses.

The Manager's Compensation (*Ujrah*), and Its Parameters

Linguistically, *ujrah* (also, *ajr*) is used to refer to compensation for rental or labor.[146]

What is the compensation of the manager? The compensation of the manager represents what he deserves for the work and services he performs on behalf of the waqf. It was defined as: "the financial remuneration for the manager's direct management of the waqf and responsibility for it".[147]

The legality of the manager's remuneration

First: The legality of the manager's remuneration for his work is based on the legality of leasing the labor of a human being, also known as leasing the usufruct of persons. That is affirmed by the Qurʾān, the Sunnah and consensus.

[146] Ibn Fāris, *Muʿjam Maqāyīs al-Lughah*, 1:62 (أجر); Ibn Manẓūr, *Lisān al-ʿArab*, 4:10.
[147] *Tawṣiyyāt Muntadā Qaḍāyā al-Waqf al-Fiqhiyyah al-Awwal*, p. 416.

As for the Holy Qurʾān, there is the statement of Allah, the Blessed and Exalted: "He said, 'I want to marry one of my two daughters to you on the condition that you work for me for eight years.'"[148] The work was tending sheep.[149] Al-Qurṭubī said, "It is evidence that the hiring of labor was known to them and that they considered it valid. The same has been the case in every nation as it is a necessity of existence."[150] The fundamental principle that applies here is that the legislation of previous prophets is legislation for us unless there is evidence of abrogation, according to the more authentic of two narrations [from Imam Aḥmad].[151]

There is also Allah's statement: "If they suckle [your children] for you, give them their remuneration."[152] This is an explicit command from the Almighty to pay the wet nurse for the service of breastfeeding.[153]

As for the Sunnah, there are many relevant *ḥadīths*, including the statement of the Prophet (peace be upon him): "Allah, the Exalted, said, 'I will be the antagonist of three persons on the Day of Resurrection: a man who swore by Me and then betrayed [the oath]; a man who sold a free man and consumed the price; and a man who hired a worker and received [his labor] in full but did not pay him.'"[154] Ibn Ḥajar said: "Whoever hires a worker and does not fulfill his right is similar in meaning to the one who sold a free person and consumed his price in that he has received the full benefit of his labor without compensation, so it is as if he enslaved him."[155] There is also the *ḥadīth*: "Give the worker his wage before his sweat dries."[156] There are other *ḥadīths* on the topic, but this is not the forum for listing them.

As for *ijmāʿ*, it has been narrated that *ijārah* (leasing) has been unanimously agreed upon by the *ummah* since the time of the Ṣaḥābah until the following eras. No consideration is to be accorded to anyone who disagreed [afterward] because he opposed *ijmāʿ*.[157]

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[148] Sūrah al-Qaṣaṣ, v. 26.
[149] Al-Māwardī, *al-Nukut wa al-ʿUyūn*, 4:248.
[150] Al-Qurṭubī, *Al-Jāmiʿ li Aḥkām al-Qurʾān*, 12:267.
[151] Qāḍī Abū Yaʿlā, *Al-ʿUddah fī Uṣūl al-Fiqh*, 2:392; Al-Qarāfī, *Al-Furūq*, 4:9.
[152] Sūrah al-Ṭalāq, v. 26.
[153] Al-Qurṭubī, *Al-Jāmiʿ li Aḥkām al-Qurʾān*, 18:168.
[154] *Ṣaḥīḥ al-Bukhārī*, 3:82; on the authority of Abū Hurayrah; cf. the *Sunan* and *Musnads*.
[155] See Ibn Ḥajar, *Fatḥ al-Bārī*, 4:418.
[156] *Sunan Ibn Mājah*, 2:817; declared authentic by Shaykh Al-Albānī in *Ṣaḥīḥ al-Jāmiʿ al-Ṣaghīr*, *ḥadīth* no. 1055 and *Ṣaḥīḥ al-Targhīb wa al-Tarhīb*, *ḥadīth* no. 1877. Cf. the *Sunan* and *Musnads*.
[157] Al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 4:173; Qāḍī ʿAbd al-Wahhāb, *Al-Ishrāf ʿalā Nukut Masāʾil al-Khilāf*, 2:652.

Second: Direct evidence for the legality of the manager's remuneration

1. **The *ḥadīth* of ʿUmar (R.A.)**

The evidence for the legality of the manager's remuneration is the *ḥadīth* of ʿUmar ibn al-Khaṭṭāb, which as previously mentioned, is the evidence for the legitimacy of waqf itself, as was stated by the scholars.

The *ḥadīth* of ʿUmar has already been presented. ʿUmar acquired a piece of land in Khaybar. He came to the Prophet (peace be upon him) seeking his advice about it, saying it was the most valuable property he had ever owned. The Prophet (peace be upon him) told him, "If you like, you may hold back the property and give its produce as charity on the condition that it cannot be sold or given as a gift or inherited." Ibn ʿUmar said: "ʿUmar made a charitable donation of it, declaring that the property must not be sold or given as a gift or inherited. [He devoted its produce] to the poor, [his] relatives, to the emancipation of slaves, and for guests and wayfarers. And [he added that] there is no blame on the one who administers it to consume from it according to what is customary without appropriating it as [his own] property." The relevant wording here is "there is no blame on the one who administers it to consume from it according to what is customary without appropriating it as [his own] property."[158] In a narration from Nāfiʿ, "…without claiming it as originally being his".[159]

Thus, ʿUmar emphasized three important issues in his waqf:

a. The person who supervises the waqf is permitted to take from the proceeds for his needs, but its parameter is that it should be according to customary decency as per the requirements of time and place.
b. The wording "غير مُتَمَوِّلٍ به" means that he shall not take ownership of any part of the asset itself.[160]
c. The wording "غير متأثل" means that he shall not pretend that it was originally his property.[161]

Al-Bukhārī put this *ḥadīth* under a chapter heading that indicates he understood it to indicate the permissibility of the waqf manager's expenses being derived from the waqf. He said: "The

[158] *Ṣaḥīḥ al-Bukhārī*, 2:70.
[159] Ibid., 3:198.
[160] Ibn Ḥajar, *Fatḥ al-Bārī*, 5:401.
[161] Al-Shawkānī, *Nayl al-Awṭār*, 6:29.

expenses of the manager are [the responsibility] of the waqf."[162] Al-Suyūṭī said in *Al-Dībāj*: "This is the evidence for remuneration for managing the waqf."[163]

2. The *ḥadīth* of Abū Hurayrah (R.A.)

Abū Hurayrah quoted the Messenger of Allah (peace be upon him) as saying, "My heirs cannot share even a dinar [from my legacy]. What I leave behind—after paying the maintenance allowance to my wives and remuneration to the one who manages it for me—is [to be spent in] charity."[164] Ibn Baṭṭāl said in his commentary on this *ḥadīth*:

> It is clear from this that the worker (the manager) of the waqf has the right to be paid from it (i.e., the waqf) for his work and his taking care of it. This is not to be considered a change to the waqf or a breach of the conditions of the waqf founder when it is dedicated to specific beneficiaries, for there is no escaping the need for a manager to manage the property.[165]

Ibn Ḥajar said in *Fatḥ al-Bārī* when explaining this *ḥadīth*: "It indicates the legitimacy of remuneration for a worker for the waqf."[166]

The manager is entitled to expenditure for his work and his wage if he was appointed in one of the legitimate ways mentioned above, and fulfills the abovementioned conditions, and he did what was required of him as mentioned above in the duties of the waqf manager.

How Much Should the Manager Receive?

The waqf manager's wage is subject to a number of conditions. The waqf founder may stipulate it in the waqf deed as either a fixed sum or a percentage of the income. Alternatively, the waqf founder may leave it open without stipulating a specific wage for the manager.

The Waqf Founder Stipulates a Certain Wage for the Manager

This stipulation will fall into one of three cases:

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[162] *Ṣaḥīḥ al-Bukhārī*, 4:12.
[163] Al-Suyūṭī, *Al-Dībāj ʿalā Ṣaḥīḥ Muslim Ibn Ḥajjāj*, 4:229.
[164] *Ṣaḥīḥ al-Bukhārī*, 4:12; and *Ṣaḥīḥ Muslim*, 3:1382.
[165] Ibn Baṭṭāl, *Sharḥ Ṣaḥīḥ al-Bukhārī*, 8:201.
[166] Ibn Ḥajar, *Fatḥ al-Bārī*, 5:406.

First: what is stipulated as the manager's remuneration is equal to the market rate for equivalent work.

Second: it is less than the market rate for equivalent work.

Third: it is more than the market rate for equivalent work.

The first case: If the wage stipulated by the waqf founder is equal to the market rate for equivalent work, the *fuqahāʾ* agree that his stipulation is to be executed because the stipulated wage is fair, it will realize the purpose of the waqf, and takes into consideration its interests.

The second case: If the wage stipulated by the waqf founder is higher than the market rate, the *fuqahāʾ* disagree whether this stipulation is to be accepted. The majority of *fuqahāʾ*, including the Ḥanafīs, Mālikīs and Shāfiʿīs, say that the condition is to be executed. Thus, the manager shall have what the waqf founder stipulated even if it is more than the market rate, although they differ in some of the details as follows:

The Ḥanafīs: They said that the manager appointed by the waqf founder is entitled to what the waqf founder stipulated he be paid even if it is higher than the market rate. They also extended the ruling to a manager who is not appointed by the waqf founder; for example, if he is appointed by the judge and the waqf founder stipulated nothing for him per se.[167]

The Mālikīs: They said that the manager is entitled to what the waqf founder fixed for him, whether he is appointed by the waqf founder or the judge. The exception is an opinion reported from Ibn ʿAṭṭāb that if the manager is appointed by the judge, and waqf founder did not stipulate any sum for him, his wage comes from the public treasury (*bayt al-māl*) and not from the income of the waqf. Al-Dasūqī reported [the general opinion] that this view is weak.[168]

The Shāfiʿīs: They said that the condition is enforced, even if it is higher than the market rate, as Māwardī explicitly stated, provided that the waqf founder is not the manager. If he is the manager and stipulated for himself higher than the market rate, he is entitled only to the market rate.[169]

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[167] See Ibn Nujaym, *Al-Ashbāh wa al-Naẓāʾir*, p. 235; Ibn ʿĀbidīn, *Al-Ḥāshiyah*, 4:451; Ibn ʿĀbidīn, *Qurrat ʿAyn al-Akhyār*, 7:471.

[168] Ibn ʿArafah, *Al-Mukhtaṣar al-Fiqhī*, 8:491; Al-Dardīr, *Al-Sharh al-Kabīr maʿ Ḥāshiyat al-Dusūqī*, 4:88; Al-Ṣāwī, *Ḥāshiyat Al-Ṣāwī*, 4:118-9.

[169] Ibn Ḥajar al-Haytamī, *Al-Fatāwā al-Fiqhiyyah al-Kubrā*, 2:42; Al-Sharbīnī, *Mughnī al-Muḥtāj*, 3:554; Al-Ghamrāwī, *Al-Sirāj al-Wahhāj*, p. 307.

The Ḥanbalīs: They said that if the waqf founder stipulated for the manager a fixed amount equivalent to the market rate, it shall be specifically for the manager and not for the trustees or employees. The latter can receive their dues from the waqf income. If, however, the remuneration is more than the market rate, the manager shall receive the market rate and the excess shall be paid to his assistants. They shall not have recourse to [the rest of] the waqf income.[170]

The third case: The waqf founder appointed less than the market rate. In this case, some jurists ruled that the manager can ask a judge to complete his remuneration so that it be brought up to the market rate.[171]

In case the waqf founder has not fixed a wage for the manager from the waqf [proceeds], some jurists have linked it to the manager's [approach to the] work. If the manager is a professional and it is his custom to receive the market wage for his work, he is entitled to the market wage. If, however, he is not accustomed to receiving remuneration for his work, he is not entitled to anything because he is considered a volunteer.[172]

No remuneration has been fixed for the manager

If the waqf founder has not fixed a wage for the manager, jurists have differing opinions about that:

The Ḥanafīs said: If the waqf founder did not appoint a wage for the manager, then he shall have no remuneration, according to the correct view [in the School]. He is similar to one who washes [the dead] and the like. If the manager raises the matter to the ruler to decide on his remuneration, it is similar to a guardian who has been appointed to look after a child's wealth and takes the matter to a judge to fix a remuneration for him.[173] In this case, some Ḥanafīs affirmed that the manager is entitled to payment for specific tasks.[174] It would be appropriate to quote here the text of Ibn Nujaym briefly summarizing the Ḥanafī view and explaining all the cases:

[170] See: Al-Buhūtī, *Kashshāf al-Qināʿ*, 4:271; Ibn Mufliḥ, *Al-Furūʿ*, 7:361; Al-Mardāwī, *Al-Inṣāf*, 7:58; Muṣṭafā al-Suyūṭī, *Maṭālib Ulī al-Nuḥā*, 2:418.
[171] See: Ibn ʿĀbidīn, *Al-Ḥāshiyah*, 4:451.
[172] Al-Buhūtī, *Kashshāf al-Qināʿ*, 4:217.
[173] Al-Ghamrāwī, *Al-Sirāj al-Wahhāj*, p. 307.
[174] Ibn Nujaym, *Al-Baḥr al-Rāʾiq*, 5:264.

> The precise formulation is that if the waqf founder appointed something for [the *nāẓir*], he is entitled to it, whether it is a little or a lot, as per what he stipulated for him. This would be whether he does work or not since he did not stipulate it as remuneration for work. This is understood from our statement, "as per what he stipulated for him". If [the waqf founder] did not appoint anything for him and the judge appoints for him the market wage, it is permissible. If he appoints for him more than the market equivalent wage, he is forbidden to take the excess above the market equivalent wage. This is if he works; if he does not work, he is not entitled to any remuneration. A similar position has been explicitly stated in *Al-Ashbāh*, in the Book of Legal Claims. If the judge appoints him and does not appoint anything for him, [the following should be] considered: if it is customary for him not to do anything except for the market wage, he has the right to the market wage because customary practice is like a [contractual] term. Otherwise, he shall have nothing. So take advantage of this formulation, for it is obligatory to proceed accordingly.[175]

As for the Shāfiʿīs, their view has already been stated: if the waqf founder did not allocate anything to him, he is not entitled to a wage, even if he raises the matter to a judge. [176]

As for the Mālikīs: Ibn ʿArafah quoted Ibn Fattūḥ: "The judge has the right to assign a monthly wage for the person he appoints to manage the waqf. He would use his judgment to decide how much in accord with his work. That is what the leading scholars [of the School] actually did." [177] Al-Qarāfī said that the judge has the right to assign an amount for the manager from the income of the waqf if no amount has been named for him. [178] A number of imams quoted the view of Ibn ʿAṭṭāb, who said that the manager is not allowed to take anything from the income of the waqf and that, instead, his wage should be paid by the public treasury. If he takes it from the waqf, it should be taken from him, and his recourse would be to the public treasury. If he is not given anything from it, his reward will come from God. This opinion was judged weak.[179] Some have restricted this situation to when the waqf founder has not appointed anything for him.[180]

The Ḥanbalīs: The basic rule, according to them, is that no trustee manager of wealth should take from it except the lower of two: either the market wage or consuming what is reasonable.[181] Abū al-Khaṭṭāb and others applied the same rule to the waqf manager, saying he should consume what is reasonable.[182] This is even if he is not in need, by analogy with the worker who collects and

[175] Ibid. Cf. Ibn ʿĀbidīn, *Al-ʿUqūd al-Durriyyah*, 1:208.
[176] Al-Ghamrāwī, *Al-Sirāj al-Wahhāj*, p. 307.
[177] Al-Ḥaṭṭāb *Mawāhib al-Jalīl*, 6:40.
[178] Al-Dasūqī, *Ḥāshiyat al-Dasūqī*, 4:88.
[179] Al-Ḥaṭṭāb *Mawāhib al-Jalīl*, 6:40.
[180] Al-Dasūqī, *Ḥāshiyat al-Dasūqī*, 4:88.
[181] See: Ibn Mufliḥ, *Al-Furūʿ*, 4:325.
[182] Al-Buhūtī, *Kashshāf al-Qināʿ*, 2:295.

distributes zakat. Likewise, they linked the wage of the manager and his assistants to his work, in the event the waqf founder did not fix a wage for him, since it is customary that the manager and the workers with him provide their labor for pay, and it is what they expect. Otherwise, the manager is only entitled to that by which he can live at an average decent level,[183] as per the previously mentioned principle.

Other Administrative Expenses

There are a number of actions that the manager should undertake which entail expenses and costs. These include the wages of assistants and those assigned various tasks such as maintenance and repairs, everything that preserves the waqf, recovers its rights from others, develops and invests its resources, current (regular) expenditures on management, and the marketing of projects. Among the most important of these expenses is everything related to maintaining the permanence of the waqf assets and their serviceability for rendering benefits. They include:

The Expenses of Developing and Maintaining the Waqf Asset

The waqf manager would draw these from the waqf's resources when the waqf founder stipulates it. It is stated in *Asnā al-Maṭālib:* "Section: The expenses of the waqf property, the supplies for equipping it, and its development, when the waqf founder has made stipulations for it, shall come from its wealth."[184] If no stipulation was made, the most reasonable [preference] would be to make the beneficiaries responsible for it if they are specific persons. That is because they are receiving the benefits from the waqf asset; therefore, they must repair whatever is in need of repair in it, based on the maxim, "The right to benefit [from something] goes with responsibility [for it]." [185] If the one having the right of occupancy refuses to do the maintenance, the judge will lease it and have its maintenance done from the rental proceeds. [186] Imam al-Sarakhasī added that if the waqf beneficiary declines to do the maintenance and is unable to do so because he is poor, the judge

[183] Ibid., 4:217.
[184] Al-Anṣārī, *Asnā al-Maṭālīb*, 2:437; Ibn Ḥajar al-Haytamī, *Al-Fatāwā al-Fiqhiyyah al-Kubrā*, 6:289; Umayrah and Barlasī, *Al-Ḥāshiyatān*, 3:110.
[185] Al-Kubaysī, *Ahkām al-Waqf*, 2:193.
[186] Mullah Khusraw, *Durar al-Ḥukkām Sharḥ Ghurar al-Ahkām*, 2:137.

will lease it and have its maintenance done from the rental proceeds.[187] If the expenditure is not possible due to the inability or absence of the waqf beneficiary, the waqf should be sold and its price spent on another waqf property, out of necessity, if it cannot be leased.[188] But if it is not for specific beneficiaries—for example, the poor—then the most reasonable [solution] would be for the maintenance to be the responsibility of the public treasury.[189] If the waqf property becomes useless, the manager may replace it with another asset that fulfills the purpose of the waqf founder and his stipulations. That is according to the jurisprudential views on substitution (*istibdāl*). It can also be revitalized from the surplus of other endowments having the same purpose.

In his research on the consideration of *maṣlaḥah* (benefit), Shaykh ʿAbd Allah ibn Bayyah quoted many latter-day Mālikī scholars and others saying that it is permissible to use the surplus of a waqf for other benevolent purposes and to spend the money that was earmarked for one benevolent purpose for other benevolent purposes if there is benefit in doing so.[190]

The waqf manager must do everything that makes the waqf beneficial to the beneficiaries as intended by the waqf founder. He manages the waqf, is keen to develop it, discharges the obligations it owes, collects the debts owed to it by others, and concludes agreements and contracts; and all this shall be according to the conditions of the waqf founder. This makes him directly responsible for the disbursement of money for the actual purposes [intended by the founder]; otherwise, he would be considered remiss.

Expenditure on management requirements should be moderate [and reasonable] in order to maintain the waqf's funds.

If the administration of the waqf is by a governmental administrative authority and it appoints managers in consultation with the judiciary, it would be better for the government to bear the administrative expenses from the general budget of the state. That is because endowments provide social and economic services to the entire community and contribute to sustainable economic development. Thus, the endowment proceeds would be fully allocated for projects of public

[187] Al-Sarakhsī, *al-Mabsūṭ*, 6:221; Ibn al-Humām, *Fatḥ al-Qadīr*, 6:221-2.
[188] Al-Buhūtī, *Kashshāf al-Qināʿ*, 4:266; Al-Ruḥaybānī, *Maṭālib Ulī al-Nuḥā*, 4:242-3.
[189] Ibid.
[190] Pp. 15-6. He quoted texts from *Al-Miʿyār*, 7:187; and *Ḥāshiyat al-Rahūnī*, 7:150-1.

benefit. This is what some countries such as Kuwait do; it bears all the administrative expenses of the General Secretariat of Awqaf, including salaries and employee incentives.

The Approach of Some Waqf Laws to Maintenance

The UAE law on waqf and the Kuwait Waqf Act indicate that a percentage of rents must be allocated for maintenance, which should not exceed 5% of the net proceeds of the waqf real estate portfolio.[191] The UAE law states that if the provision is not sufficient for the maintenance, the waqf manager must raise the matter to the court to cover the excess expenses from the reserves or the rest of the waqf yield or to sell some waqf assets to cover these expenses. [192]

The Sudanese law leaves the determination of the ratio to the discretion of the board of directors.[193] The Advisory Law on Waqf states:

> The proportion of the administrative expenses of the waqf, including the remuneration of the supervisor and the salaries of those working in it, shall not exceed the percentage of the endowment proceeds determined by the Executive Regulations. In cases of extreme necessity mentioned in the Regulations, this percentage may be exceeded for a limited period of time and shall not exceed double the percentage referred to.[194]

The Executive Regulations specifically set out the proportion of expenditures: "Administrative expenses for the waqf, including the remuneration of the manager and the salaries of the employees, shall not exceed 15% of the waqf income."[195]

The Chosen Opinion Regarding the Amount of the Manager's Wage

The final result of the opinions of the jurists in determining the remuneration of the manager is that the principal reference is the stipulation of the waqf founder. If the waqf founder stipulates something for the manager, his stipulation should be implemented even if it is more than the market wage. In case he made no stipulation:

[191] See the United Arab Emirates Draft Law on Waqf, 1999, Article 30; Explanatory Memorandum to the Kuwait Draft Law on Waqf, 1977, Article 30.
[192] See the United Arab Emirates Draft Law on Waqf, 1999, Article 31.
[193] See the Republic of Sudan, Islamic Endowments Authority Act, 1996, Section 6, Article 27-2B.
[194] See Draft Advisory Law on Waqf prepared by the Islamic Development Bank and the General Secretariat of Endowments of Kuwait, Article 29.
[195] See the Executive Regulation for the Advisory Draft Law on Waqf, Article 146.

If the manager is a private individual appointed by the waqf founder or the judge, the wage should not exceed the market equivalent wage as determined by experts. If the management is done by an institution or body or ministry, they shall adhere to the rules of fixing wages in the country according to criteria related to the standard of living, economic conditions, academic and professional qualifications and experience. These are the factors which ultimately determine the market equivalent wage.

The wages of the manager shall be borne by the proceeds of the waqf under his supervision, and it will then be accounted for within the general budget of the Department of Awqaf.

This is the conclusion of the first forum on jurisprudential issues in waqf. The text of the resolution states:

> The wage shall be as stipulated by the waqf founder, unless it is less than the market equivalent wage, or as determined by the institution or ministry. Determination of the market equivalent wage shall be subject to the following considerations:
> The wage of the manager shall be what is fixed by the waqf founder. Otherwise, it shall be the market equivalent wage commensurate with the changing economic and social conditions, the nature of the work, academic qualification, experience and specialization. The wage of the manager may be a specific amount or a percentage of the proceeds.[196]

Determining the Wage in the Laws of the Kingdom of Saudi Arabia

First of all, the Supreme Council of Awqaf Statute, issued in 1386H, did not deal with the wage of the manager. It only referred to the fees of the members of the Council and sub-councils, fixing a remuneration for members for each meeting, along with travel and accommodation expenses when needed, and stated that they shall be borne by the budget of the Ministry of Hajj.[197]

The statute of the General Authority of Endowments in the Kingdom does not directly deal with the remuneration of the manager whether the Authority itself is the manager or the management is done by others. Article 4 of the statute of the Authority only states:

[196] *Tawṣiyyāt Muntadā Qaḍāyā al-Waqf al-Fiqhiyyah al-Awwal*, p. 416.
[197] See the Supreme Council of Awqaf Statute, issued by Royal Decree M/35, dated 18/07/1386H, Article 4, paragraph 4, and Article 7, paragraph 6, and Article 12.

> The Authority shall receive, as consideration for its management, a fee for the management of endowments that have another manager but the management of which has been entrusted to [the Authority]. The Council shall determine this consideration after the agreement with the waqf founder or the manager, on the condition that the percentage of the remuneration shall not exceed 10% of the annual net income of such endowments.[198]

In this case, the fee shall be determined in accordance with the agreement with the waqf founder or the manager, not exceeding 10% of the net income.

This is what is generally applied in the courts. Judgments in the courts of the Kingdom have dealt with the remuneration of the manager and its amount.[199] One who examines these rulings will conclude that they entail determining the remuneration of the manager under the rubric of the equivalent market wage (*ajr al-mithl*) according to time and place. Their Sharīʿah or legal basis for that is stated in *Kashshāf al-Qināʾ* as follows:

> If the waqf founder has not fixed anything for the manager, then the principle of the [Ḥanbalī] School is that if he is known for taking the market rate (i.e., *ajr al-mithl*) for his work; i.e., that he operates on the basis of charging remuneration for his work, then he shall have the market rate (i.e., *ajr al-mithl*) for his work. If not—i.e., he does not operate on the basis of charging remuneration for his work, then he shall have nothing because he is considered to be working as a volunteer. This is clear regarding those who work for the *nāẓir* (waqf trustee). As for the *nāẓir*, it has already been mentioned that if no remuneration has been fixed for him, he should take a reasonable amount.[200]

In case number 441 before the Court of First Instance in Makkah 11/01/1435H, a waqf beneficiary (the plaintiff) filed a lawsuit against the *nāẓir* (the respondent) that the remuneration he receives for management, which is one-tenth (10%) of the waqf yield, is too much and detrimental to the interest of the beneficiaries. He demanded that the remuneration be only 2.5% of the waqf yield. After the Court presented the matter to the Panel of Experts, it issued Court Decision No. 35112737 that the *nāẓir* is entitled to deduct one-tenth (10%) of the waqf proceeds as remuneration for his work. It is appropriate and in the interest of the waqf and its maintenance, and it is also the custom for similar endowments. The Court of Appeal approved the judgment.[201]

[198] General Authority of Endowments Statute, issued by Royal Decree M/11, dated 26/02/1437H.
[199] See Ministry of Justice, *Majmūʿat al-Ahkām al-Qaḍāʾiyyah*, 1435H, 6:226.
[200] Al-Buhūtī, *Kashshāf al-Qināʿ*, 4:271.
[201] See: "The Considerations of the Claim and the Decision of the Court and the Ratification of the Appeal" in Ministry of Justice, *Majmūʿat al-Ahkām al-Qaḍāʾiyyah (Collection of Litigation Rules)*, 1435H, 6:226-232.

The answer of Shaykh Muḥammad ibn Ibrāhīm to a question put to him about a judicial ruling is found in his fatwas under the title "the wage of the waqf supervisor shall be the market equivalent wage". [He commented] that if the judge's decision regarding the remuneration of the manager is based on the market equivalent wage as determined by experts, there is no objection, and this is done by referring to the trustworthy experts.[202]

Some scholars[203] have concluded from their presentation of the rulings of the courts in a number of cases that the courts in Saudi Arabia consider market equivalence in determining the remuneration of the *nāẓir*, according to time and place. This is because the wage varies according to the current practice at the time of the judicial case, and this is what realizes justice.

Determining the Wage of the Manager in Modern Waqf Laws

Some laws leave the authority to determine the fees of the *nāẓir* to the boards of the departments concerned with waqf affairs; for example, the Sudanese Endowment Law, which leaves power to the Board of Directors of the General Authority for Endowments. The law stipulates, "The Board of Directors may grant a monthly allowance to each waqf manager as consideration for his supervision and management. The amount shall be determined on a case-by-case basis."[204]

The Kuwaiti draft law provides that every worker in a waqf shall be paid. As for the waqf manager, he shall not have a wage if he offers his services as a volunteer. If, however, he does not work except for remuneration and the waqf donor fixed a wage for him comparable to the market wage, he is entitled to it. If nothing at all has been assigned to him, or more than what is appropriate has been assigned to him, the court may pay him the equivalent market wage when he so requests.[205]

Meanwhile, the Yemeni law considers that if the supervisor of endowments—which is the Ministry of Awqaf and Guidance—is assigned to manage the waqf of minors' funds, it shall have the fee

[202] See: *Fatāwā wa Rasāʾil Samāhat al-Shaykh Muḥammad ibn Ibrāhim ibn ʿAbd al-Laṭīf Āl al-Shaykh*, collected and arranged by Muḥammad ibn ʿAbd al-Raḥmān ibn Qāsim (Makkah: Saudi Government Publications, 1399), 9:93.
[203] Muḥammad ibn ʿAbd al-Raḥmān Āl Khālid, *Ahkām al-Waqf ʿalā al-Dhuriyyah fī al-Sharīʿah al-Islāmiyyah: Dirāsah Muqāranah maʿa al-Tatbīq al-Qaḍāʾī fī al-Mamlakah al-Saʿūdiyyah al-ʿArabiyyah* (1996 CE/1416H), 2:465.
[204] The Republic of Sudan, Islamic Endowments Authority Act, 1996, Article 15.
[205] Explanatory Memorandum to the Kuwait Draft Law on Waqf, 1977, Article 33.

named for the trustee manager. In case no fee has been specified, the Ministry shall deduct 5% of the proceeds of the estates that it manages as consideration for its work.[206]

The draft law on waqf stipulates that the waqf supervisor shall receive a financial allowance determined by the waqf founder. If the waqf founder does not specify the amount to be paid to the manager, it shall be determined by the administrative authority supervising the waqf, and it shall be within the limits of the equivalent market wage. The competent court may decide to award the *nāẓir* a special award (the court shall determine its amount), in the event the net profit from investment of endowment assets increased the previous year by not less than 15%.[207]

As for the Syrian law, it annulled all existing authorities and supervisory entities over waqf and their employee positions, transferred them to the Directorate of Islamic Endowments, and appointed compensation for them. As for employees with religious functions, it made them subject to the classifications of religious personnel. The draft law also allocates 10% of the net income of charitable endowments to the national defense on an ongoing basis, to be paid each year.[208]

[206] Decree of the Republic No. 23 of 1992 on Waqf, Chapter 3, General and Final Provisions, Paragraph 8.
[207] Advisory Draft Law on Waqf, Article 28 غ.
[208] The Syrian Republic, Legislative Decree, No. 128, 1949 CE, Articles 5-6.

The Third Area of Discussion:

Rulings on Cash Waqf and Its Investments

by

Dr. Husayn Hamid Hassan

IntroductionThe conference management requested me to write a brief paper on cash waqf focusing on the following:

1- Does the waqf capital bear the costs of investment?

2- The means of cash waqf investment;

3- Decrease in the value of investment units;

4- Sharīʿah-compliant means of guaranteeing the waqf capital.

First: The Ruling on Cash Waqf

Contemporary *fiqh* scholars agree on the permissibility of cash waqf of all kinds, coins or notes, local or foreign. That is because waqf of cash of all types realizes the objective of waqf, which is the perpetual dedication of property and the charitable donation of its benefit.

The International Islamic Fiqh Academy endorsed the permissibility of cash waqf in its Resolution No. 140 (5/15): "Second: Cash waqf is permitted because it meets the objective of waqf, which is the perpetual dedication of property and the charitable donation of its benefit. Also, because money does not become specified by specification; it is only [replaced by] substitutes that take its place."

Similarly, AAOIFI's Shari'ah Standard No. 33 (3/3/4/3) states:

> Waqf is permissible in money. The income generated from utilization of the money is to be spent while retaining the principal amount. Utilization may include, for instance, Shari'ah-based lending as well as permissible and safe investments like Mudarabah where the profit share owned by the Waqf goes to beneficiaries.

1-Does the Waqf Capital Bear the Costs of Investment?

The capital of the waqf is cash donated to it. If it is invested according to any mode of Sharīʿah investments, the costs and expenses of this investment are deducted from the return, and the rest is the profit. That is because the profit is the surplus beyond the capital. If the profit only covers the costs and expenses of this investment, it is considered part of them in order to maintain the waqf capital intact. In that case, there will be no net profit to be distributed to the beneficiaries.

On the other hand, if the profit is not sufficient to cover the costs and expenses, or there is no profit at all, the costs shall be deducted from the waqf capital and hence the waqf will diminish.

By nature, Islamic investment—however much precaution is taken against risk—is subject to the rules of *al-ghunm bi al-ghurm* (whoever receives the benefit must bear the cost) and *al-kharāj bi al-ḍamān* (gain accompanies liability for loss).

Therefore, the permission to invest waqf capital Islamically without exposure to any risk at all is inconceivable. The reason is that investment modes having a guaranteed profit are simply *ribā,* even if it is called investment. Loaning the money donated for waqf in interest-based loans is *ḥarām* because the borrower guarantees the capital plus the interest.

We shall see that hedging is mandatory insofar as choosing the forms and contracts of Sharīʿah-compliant investments and in taking all the Sharīʿah-compliant forms of security to keep risks to the minimum. Still, Islamic investments are open to all types of risks, such as credit risk, market risk, currency price, etc.

To invest money through *muḍārabah* for a share of the profits earned—even if all the Sharīʿah-compliant methods of hedging are taken—exposes it to risks. The *muḍārib* may earn profits, which will be shared between the waqf and the *muḍārib* according to the terms of the *muḍārabah* agreement, or he may incur losses due to causes beyond his control and which he could not have avoided. In that case, the capital would absorb the loss; i.e., the cash that has been donated as waqf, even if it results in the loss of the capital in its entirety. The *muḍārib* is not liable if the loss was not the result of his transgression, negligence or violation of the terms of the *muḍārabah* contract. That would be similar to the destruction of tangible property that has been turned into a waqf; the waqf would end as a result.

The waqf trustee may choose investment modes, like *murābaḥah* and *istiṣnāʿ*, that would avoid particular types of risks. In these modes, the buyer guarantees the price, which becomes a debt for which he is liable. These contracts would expose the waqf to credit risk rather than market risk.

To sum up, the waqf capital does not bear the investment costs. If there are profits from the investment, they will be used to cover all or some of these costs. That means there will be no profits from this investment unless the capital, i.e., the cash waqf, remains intact. The profit that is distributed among beneficiaries is the net profit after the intact cash waqf has been deducted.

2- The Means of Cash Waqf Investment

Cash waqf can be invested through any of the various modes and contracts of Islamic investments:

First: Financing Modes Such as *Murābaḥah, Istiṣnāʿ* and *Salam*

A. *Murābaḥah*: The cash endowed to the waqf is used to buy the *murābaḥah* commodity, which is then sold to the party who promised to buy it by one deferred payment or in installments. The price comprises the cost plus the promised profit margin. The cost represents the money endowed to the waqf, and the profit margin is the return distributed by the waqf trustee (*nāẓir*) to the beneficiaries.

B. *Istiṣnāʿ*: The waqf trustee enters into an *istiṣnāʿ* contract with a purchaser. The desired commodity is manufactured for a price (usually deferred) that includes the cost plus the agreed profit margin. The cost represents the money endowed to the waqf, and the amount that remains after the cost is the profit (the return) that is added as compensation for the deferral. This is the waqf return which is distributed to the beneficiaries as per the stipulations of the waqf donor. Further, part of the profit (the amount in excess of the beneficiaries' needs) may be invested as stipulated by the waqf document. The waqf trustee does not manufacture the commodity personally. After the first contract with the purchaser is concluded, the waqf trustee enters into a parallel contract with a manufacturer and pays him. When the item is ready, the trustee delivers it to the purchaser.

C. *Salam*: the waqf trustee enters into a *salam* contract with a seller. The trustee (buyer) pays in advance during the contract session. The subject matter is delivered at a specified future date or dates, and [the trustee] then sells it in the market. The endowed cash is used to make the advance payment while the profit margin from the later sale is the return distributed by the trustee to the beneficiaries. Part of the profit may be invested as stipulated by the waqf document. Sometimes, the subject matter of a *salam* contract is sold for less than its original price, which means that the waqf will suffer a loss. As has already been stated, this is the nature of Islamic investment.

Second: Forms of Investment Such As *Muḍārabah, Mushārakah* and *Wakālah bi Istithmār*)

A- *Muḍārabah*: The trustee enters into a *muḍārabah* contract with a *muḍārib* (entrepreneur). The trustee provides the capital (cash waqf) to the *muḍārib* and agrees with him on the way that profit

will be distributed between the waqf and *muḍārib*. The waqf's share of the profit is the return given to the beneficiaries according to the stipulations of the waqf donor. Since there can be no profit until the capital has been recovered intact, the profit that will be distributed is the net profit after the deduction of all expenditures and costs. That is because the profit is used to protect the capital, and that is how the capital is protected.

As earlier mentioned, if the *muḍārabah* investment does not gain a profit and the capital is still available after expenses have been paid, it is returned to the trustee.

For example, let us suppose that the cash waqf (the capital) invested in the *muḍārabah* is 1000, the revenues are 1500, and the costs are 500. The costs and expenses are deducted from the 1500, leaving 1000, which is the capital amount. However, if the revenues are 2000, the net profit (500) is to be shared between the waqf and the *muḍārib*. If the revenues are 1000 and the costs are 500, the loss is 500, which shall be borne by the waqf, the capital provider. The *muḍārib* is not liable if the loss is not due to transgression, negligence or breach of the contract terms.

If the revenues are 1200, the *muḍārabah* profit of 200 will be shared between the waqf and the *muḍārib*. The waqf's share in this case shall not be distributed among the beneficiaries; rather, it will be used to restore the capital to 1000 if there is a need, for that is given priority over distribution. The waqf trustee, when entering into an investment contract, has to take all lawful precautionary measures to protect the capital from potential loss.

B- ***Mushārakah***: The waqf trustee enters into a *mushārakah* contract with someone having an investment project in which the trustee is a partner. The profit, if any, is shared by the waqf and the other partners. The waqf's capital contribution is the cash donated to the waqf, and its profit share will be divided among beneficiaries as per the stipulations of the waqf donor, if there is no need to top up the waqf capital.

The two rules mentioned about *muḍārabah* also apply here: i) the net profit should be divided after costs and expenses have been deducted and the capital has been fully recovered; ii) the managing partner is not liable if the loss is not due to negligence or breach of terms or stipulations of the *mushārakah* contract.

Also, costs and expenses are not borne by the waqf capital invested in *mushārakah* as long as there is profit in surplus of the capital. Instead, the costs are deducted from the profit, and the remaining sum, if any, is divided between the partners. If the costs exceed the profit, the partners bear the loss, provided it did not occur because of the managing partner.

C- *Wakālah* for investment: The waqf trustee enters into a *wakālah*-for-investment contract with an investment agent. The waqf funds, or some of them, are turned over to the agent, who invests them in return for a specific fee. The amount that remains after the *wakālah* fee has been paid is the profit (the return) given to the beneficiaries.

What was said about *muḍārabah* and *mushārakah* in terms of investments costs and the agent's liability also applies here. The *wakālah* capital (cash waqf) does not bear the investments costs, which are covered by the profit. The residual amount, after the *wakālah* fee has been deducted, is given to the beneficiaries as long as the amount of the cash waqf remains intact.

According to jurists, the costs of investment include: warehouse and brokerage fees; shipping and insurance; the wages of porters, those who bid for goods and brokers; travel allowance of the *muḍārib*, agent or managing partner; as well as other expenses usually borne by the *muḍārabah*, *wakālah* and *mushārakah* ventures.

To sum up, the waqf's profit share in *muḍārabah*, *wakālah* for investment and *mushārakah* cannot be divided among the beneficiaries unless the waqf capital is intact.

3- Decrease in the Value of Investment Units

When money is invested in the purchase of fund units, investment portfolios or Islamic *ṣukūk*, it is an investment in property rights, subject to the Sharīʿah rules of *al-ghunm bi al-ghurm* (whoever receives the benefit must bear the cost) and *al-kharāj bi al-ḍamān* (gain accompanies liability for loss). In other words, the investment manager, whether *muḍārib* or agent, is not liable. Therefore, this investment is exposed to all types of risks, although all the Sharīʿah-compliant precautionary measures referred to earlier must be taken. Therefore, the price of investment units or *ṣukūk* may increase or decrease; they may gain a profit or make a loss. That is on the assumption that the investment manager did not transgress, act neglectfully or violate Sharīʿah rules or the terms of the contract.

If the value of the unit or *ṣukūk* decreases, it is compensated for from the profit in order to maintain the capital (cash waqf) that was invested in the purchase of units or *ṣukūk*. If there is no profit, the capital becomes devalued and the residual amount is considered the cash waqf.

This is not unprecedented in the waqf system. For example, when a waqf is a tangible property that is completely destroyed and there is no substitute for it, the waqf comes to an end. Alternatively, property such as a house may be partially destroyed from an earthquake, in which case the value of the remaining property is considered the waqf. Similarly, if cash waqf is invested in the purchase of fund units, investment portfolios or *ṣukūk* and the value goes down and could not be compensated for from the profit, return or revenue, what remains thereof is the waqf.

It is worth noting that the waqf is compensated by the return or revenue of the current year only rather than the returns of previous years that were already distributed to the beneficiaries.

Let us assume that the value of the fund unit or the certificate representing the assets of the fund or the *ṣukūk* decreases by 10%; however, the fund or the *ṣukūk* gains a net profit of 10% ready to be distributed to the beneficiaries. These profits would be used to restore the waqf capital (i.e. the value of the unit or *ṣukūk*). If the profits are 15%, then 10% would restore the capital and 5% would be for distribution to the beneficiaries. However, if the profit share is 5%, it would be used to restore the capital; the capital would lose 5% of its value, becoming 95% of its original value.

4- Sharīʿah-compliant Means of Guaranteeing the Waqf Capital

As already mentioned, it is permitted to invest cash waqf via various modes and contracts of Sharīʿah-compliant investments, and the capital or return cannot be guaranteed. One of the salient features of Islamic investment is risk-sharing rather than risk transfer. By contrast, the conventional financial system is based on the transfer of risk from the financier to the entrepreneur, as exemplified in the interest-based loan, where the borrower has to guarantee the principal amount plus the interest.

There are, thus, no Sharīʿah-compliant ways to guarantee the waqf capital; however, there are precautionary means to minimize risk. One may, for instance, select a particular investment formula/contract in place of another. As we mentioned earlier, *murābaḥah* and *istiṣnāʿ* create a debt for which the buyer is liable; thus, the waqf trustee might be exposed to credit risk rather than

the market risk that the capital is exposed to in *muḍārabah*, *mushārakah* and *wakālah* for investment.

The Dubai Financial Market issued a standard on hedging risks by permissible means or even means that are obligatory to use. To avoid repetition, we are attaching it as an appendix, along with AAOIFI's Shari'ah Standard No. 45, "Protection of Capital and Investments" and the chapter "Hedging Rules Limits" of the book titled *Uṣūl ÖabÏ al-Muʿāmalāt al-Muʿāṣirah* (*The Basic Parameters of Contemporary Transactions*) by Shaykh Walīd ibn Hādī.

Of course, these standards do not guarantee the invested capital or the return. They are instead concerned with analyzing investment risks and developing and inventing means of protection against these risks in a way that does not negate the owner's bearing the risks of investing, exploiting and utilizing his asset in return for his exclusive right to the return from doing so.

In conventional finance, there is an integrated theory of risks. These are the risks related to the interest-based loan, which is the only product of the conventional finance industry. The traditional financial institutions receive deposits through an interest-based loan contract. They then use them, along with shareholders' equity, in financing their customers through interest-based loan contracts. The profits of these institutions represent the spread between the interest they pay and the interest they charge, in addition to fees for services they provide to customers, some of which are not Sharīʿah compliant.

Muslim jurists did not pay attention to the theory of risk (its analysis, management and hedging against it) unlike traditional bankers. Many universities and institutions have conducted such studies on conventional banks although they only deal in one product, the interest-based loan. Islamic law, on the other hand, deals with countless Sharīʿah-compliant contracts and products: *muḍārabah*, *mushārakah*, *wakālah* for investment, *murābaḥah*, *istiṣnāʿ*, *salam*, financing and operating leases, and sharecropping contracts like *muzāraʿah*, *mughārasah* and the like. Each of these contracts or forms requires an in-depth study of its risks and the ways to hedge against and manage them. Most universities and research centers are oblivious to the risks of Islamic instruments although some such as Basel 1, 2 and 3 have studied these risks.

In my opinion, hedging is not only permitted in Sharīʿah but required. This is in accordance with the preservation of property, which is one the five universal principles given consideration by every civilization. The preservation of property occurs positively through wealth creation by

investing it via Sharīʿah-compliant methods so that it is not consumed by zakat. It also occurs negatively by protecting it from potential risks using means that do not contravene the definitive Sharīʿah principles that govern Islamic finance.

According to jurists, risks—which correspond to the term *gharar*—are divided into three categories:

1-Excessive risks or *gharar*, which invalidate the transaction; for example, selling a non-existent commodity (such as the sale of the fruits of a particular orchard for a period of five years); selling a commodity not owned by the seller and which he has no ability to deliver (such as selling birds in the air or fish in water); selling something when its type or quality or quantity are unknown to the buyer (for example, selling the contents of a box without the buyer knowing what is inside it). It would also apply to a deferred payment when the payment date is unknown; that is, any uncertainty regarding the period; for example, "I have sold you my car for 100 with delivery after a while." In summary, excessive *gharar*, which invalidates the contract, is uncertainty about the existence of the subject matter, its delivery, its type, attributes and amount, and the time of delivery. This type of *gharar* is obligatory to avoid because it renders the contract void.

There is another kind of risk that is unavoidable in Islamic economics and finance and is governed by comprehensive and definitive rules such as *al-ghunm bi al-ghurm* (benefit from something entails liability for its attendant loss) and the principle of risk sharing rather than risk transfer. This includes the responsibility of the owner for the risks of his property in return for his exclusive right to the returns and profits that come from it.

Some researchers have created confusion between hedging, protection against risk, and the assurances a creditor takes from his debtor or a third party. We should make a distinction between them:

Guarantee: is an entity undertaking to bear, in the event of risk occurrence, the resultant loss although, according to Sharīʿah, they are not liable. For example, in *muḍārabah*, *mushārakah*, and *wakālah* for investment, it is not permissible for the *muḍārib*, agent, or managing partner to bear liability for the attendant risks or the resultant damages, whether or not their liability is stipulated in the contract. The Mālikī jurists have a unique opinion [permitting] these parties to voluntarily offer a guarantee after the contract has been signed and after the activity has been executed. The majority of scholars oppose them in this.

The majority of jurists argue that a tenant and a pledgee are examples of a group of entrusted persons who are not liable. Jurists differ regarding the status of the recipient of property for safekeeping and the borrower of a non-fungible asset: are they guarantors or trustees? Some say they are guarantors in some cases but not others. Mālikī jurists differentiate between things that can be kept in a hidden place (which are guaranteed) and things that cannot be kept in a hidden place (no guarantee)….An independent third party may provide, without consideration, a guarantee to make up financial loss or damage to property. It is permissible if it is provided in an independent contract.

- **Protection**: these are means taken by the capital provider or his representative to protect the capital from destruction, damage and loss. This protection by Sharīʿah-compliant methods may or may not succeed. It differs from a guarantee as the guarantor is committed to protecting the money under all circumstances by voluntarily compensating the owner. The Sharīʿah has prohibited the latter in some cases and has put in place parameters governing it.

-As for types of **assurances**, like a pledge, guarantor or documentation, they are not directly related to the debt or commitment. The secured debt is valid, and the debtor has to pay it. However, for fear that the debtor may go bankrupt, or be interdicted, or delay or refuse payment, the creditor takes from him or from a third party a means of assurance that he will receive full payment by other means.

Principle 51: Precise Limits in the Rules of Hedging

This section is taken from research on hedging by Dr. Abd al-Sattar Abu Ghuddah. The author devotes the discussion of this principle to methods of protection and hedging against currency exchange risk. He refers to cases where institutions or people need to hedge. After defining hedging, the author mentions various protection methods used by Islamic financial institutions.

The Definition of Hedging

According to the author,

> If a person has a financial obligation to pay via a particular currency and fears a change in its value, then he resorts to hedging. Hedging is a process whereby assets/rights invested in a currency that it is feared will lose value are converted into a strong currency in order to protect those assets/rights. The same process is used to cover financial obligations in currencies that are feared will have a high exchange rate. The coverage process is significant to importers and investors who have to wait several months to settle their rights or obligations in foreign currencies. If the currency being deployed is different from the investment currency, protection must be sought.

Sharīʿah Means of Protection

The author states:

> **1-Exchange of loans/deposits**. The exchange of deposits (loans) means the bank deposits the currency (for example, Japanese yen) that it wants to temporarily dispose of—or that it does not have opportunities to directly invest—in a current account (exchange of loans) or an investment account (exchange of deposits) at a bank that wants this currency and has investment opportunities for it. Each of the two banks invests the currency deposited with it and gains the investment return for itself. When the deposit term ends, each bank refunds the deposit.
>
> **2-*Murābaḥah* with a third party**
>
> Using *murābaḥah*, the bank purchases goods from a party in dollars for a deferred price at a fixed date. Then, the bank (the purchaser) sells the goods to another party in euros, with a deferred price at the same fixed date in which the bank pays the price in dollars. The result [could be] that the dollar decreases while the euro increases at that date.
>
> **3- *Murābaḥah* with the same bank**

Murābaḥah with the same bank [works the same as] a sale contract with another party. Apparently, this would not be classified as *bayʿ al-ʿīnah* (sale and buyback), which is to buy a commodity at a spot price and sell it for a greater deferred price (or to buy it for a deferred price and sell it for a lesser spot price) with the same currency. However, in the case in question, both prices are deferred to the same date in different currencies. Still, some may argue this transaction is a trick to exchange dollars for euros without taking possession of the counter-values. Anyway, it is not allowed to stipulate the second transaction in the first.

4-Unilateral binding promise

A unilateral binding promise is obtained from one of the two parties to exchange the deployed currency for the invested currency at a price specified in the promise document, without any commitment from the entity purchasing the currency. Safety is achieved thereby from exchange rate risk.

5-The capital is divided between *murābaḥah* and other investments

By dividing the capital between *murābaḥah* and investment projects (stocks and commodities), the profit of *murābaḥah* would cover possible losses from the investments.

6-ʿ*Urbūn* (earnest money)

It is used in the trading of shares at the time of purchase, giving the investor the right to terminate the transaction and enter into *murābaḥah* with part of the capital. If the main investment process (share trading) will result in a loss, he has the right to annul the transaction by forfeiting the *ʿurbūn*, but the loss would be made up by the *murābaḥah* profit.

The author has enumerated six Sharīʿah-compliant means of protection derived from actual practice. In fact, the means of protection and hedging in the Sharīʿah are unlimited, subject to *ijtihād* according to the principles of *ijtihād*, the Sharīʿah rules of deduction, the principle of preservation of wealth—which is one of the five universal principles—and the Sharīʿah parameters.

The Sharīʿah prohibits a guarantee [of the capital and/or profit] by the trustee in a contract such as *muḍārabah*, *mushārakah*, or *wakālah* for investment. Despite that, it has opened the door wide open for developing and innovating new means of protecting wealth and hedging against its destruction, provided they do not conflict with an explicit Sharīʿah text or a definitive Sharīʿah ruling.

The author has commented on the above Sharīʿah means of protection:

1-Exchange of loans/deposits

AAOIFI's Shari'ah Standards have explicitly mentioned it, Sharīʿah bodies have approved it, and it has been adopted by some Islamic banks, funds and investment portfolios. The Shari'ah Standards state that there shall be no condition stipulating reciprocity in the documents involved in the exchange of loans or deposits, This means, according to some researchers, that the Standards have accommodated collusion, implicit agreements, and the standard practice of banks, given the necessity and the dire need for hedging in Islamic transactions. This is in line with the Shāfiʿī School, which argues that the condition that annuls the contract if stipulated in it has no effect if it is pre-agreed by the contracting parties or has become an established custom.

The author has thoroughly explained the method of exchange. Each bank deposits with the other bank the currency it does not currently need but will need in the future. The maturity date is the same, and neither bank charges the other; they use the exchange rate to keep the deposits equal.

2-*Murābaḥah* with a third party

The hedging bank buys goods from a party with a currency (say, dollars) for a deferred price at a fixed date. Then, the bank sells the goods to another party in, say, euros for a deferred price at the same fixed date. By doing this the bank disposes of the dollars and gets euros at the same date. According to the author, the result is that the dollar will have decreased while the euro will have increased on that date, which is what the hedging party intends. This is clearly a legitimate way to protect against the risk of currency fluctuation and is consistent with the Sharīʿah objective of protecting wealth from loss.

3-*Murābaḥah* with the same bank

It is when the bank sells goods in a certain currency (say, dollars) to another bank for a deferred price, and then buys from this bank other goods with a different currency, (say, euros) for a deferred price at the same fixed date. When the date is due, the first bank takes the dollars and gives euros to the other bank.

The author argues that this is not a violation of the Sharīʿah in the form of *bayʿ al-ʿīnah* because the conditions of *bayʿ al-ʿīnah* are absent here. *Bayʿ al-ʿīnah* is to buy a commodity on spot and sell it for a greater deferred price (or to buy it for a deferred price and sell it for a lesser spot price) with the same currency. However, in the case in question, the two prices are deferred to the same date in different currencies.

The author, however, admits that this transaction might be taken as a trick to exchange dollars for euros without taking possession of the counter-values. It can be argued here that the second transaction is not stipulated in the first transaction, which makes the intention of a deferred currency exchange more remote, especially according to the Shāfiʿī School.

4-Unilateral binding promise

The practice of Islamic banks is predicated on the permissibility of promising to buy or sell a currency for another currency at a certain date, or within a certain time period, at an exchange rate stipulated in the promise document. On that date, offer and acceptance are exchanged, and thereby the currency exchange is concluded. The currencies are exchanged at that time if the contracting parties are physically present. If they are not present, the exchange occurs as soon as possible, not exceeding two working days.

Such promises are approved by the Shari'ah standards and Sharīʿah bodies and are applied by Islamic banks in many transactions, especially treasury transactions. Still, other Sharīʿah bodies, internal auditing and supervision bodies complain about the large number of violations in the execution of these exchanges. Treasury departments explain that they lack advanced computer systems to deal with the international banks. At any rate, there has been a noticeable gradual decline in the percentage of such violations.

5- Dividing the capital between *murābaḥah* and investment

This is a means of hedging used in investment and hedge funds. And there is no disagreement about its legality as the investment manager is authorized, or even requested, to invest according to this method.

6- ʿ*Urbūn*

There is no disagreement among Ḥanbalī jurists about the permissibility of ʿ*urbūn*. Many Islamic banks, investment funds and portfolios use this type of sale to hedge against losses. It comprises an investment of part of the *wakālah*/*muḍārabah* capital via a *murābaḥah* contract in which the return is fixed and the price guaranteed by the buyer. Then a commodity is purchased using ʿ*urbūn* [i.e., paying a deposit counted as part of the price]. If the price rises, the investor proceeds with the purchase, but if the price falls he annuls the transaction and loses the ʿ*urbūn*. The loss is compensated by the *murābaḥah* profit.

AAOIFI has issued a standard on hedging, as has the Dubai Financial Market, and it is a good standard. It presents other instruments, methods and means for hedging and lays down parameters, so it should be referred to. From another perspective, in my opinion, hedging needs further research by research centers and international assemblies. The reason is that the present risk theory, with its types, analysis and means of hedging against them, is thoroughly imbedded in the conventional financial universe. It is time to do new research on hedging from the perspective of the Sharīʿah. I have advised some of my students to write their PhD theses on this topic in Islamic and foreign universities.

Dubai Financial Market Standards on Sharīʿah-Compliance

Introduction

All praise is due to Allah, Lord of the Worlds; and Allah's peace and blessings be upon His last Messenger, his family, his noble Companions, and all those who follow them in righteousness until the Day of Judgment. The need for hedging within Islamic banks and financial institutions stems from their commitment to adhere to the general objectives of the Sharīʿah, which include the protection of wealth. The administrators of these institutions realize that they receive, through the contracts of *wakālah* or *muḍārabah*, the funds of both the shareholders as well as the investment fund account holders for the purpose of making profits. The administration of these funds is implemented on a trust basis; therefore, fund managers cannot be held liable for the loss, if any, except in cases of misconduct, negligence or breach of contract conditions. However, if safeguarding funds is one of the fund managers' duties, the means to achieve this, which is through hedging, becomes a duty in itself. The Dubai Financial Market (DFM) plays an effective role in providing normative frameworks consistent with the provisions of the Sharīʿah, being the first financial market to operate by Sharīʿah principles on a global scale since 2007. It exerts tireless efforts to consolidate Dubai's position as an international capital for the Islamic economy. In that context, as well as the increasing importance of hedging and its significance for economic activities, the DFM has issued its own standard on hedging so that it may form a point of reference for Islamic banks and financial institutions to safeguard their funds without violating the rules of Sharīʿah. The DFM Fatwa and Sharīʿah Supervisory Board has studied all standards and fatwas related to hedging issued by reliable bodies, after which this new standard was prepared. It is the latest in a series of standards issued by DFM, joining its standards on *ṣukūk* and shares.

The DFM Fatwa and Sharīʿah Supervisory Board presents this Standard to all Islamic finance stakeholders to help achieve further progress, development and support of the following:

- Transactions of Islamic banks and Islamic financial institutions;
- Investment and leasing companies;
- *Takāful* and re-*takāful* insurance companies;
- *Ṣukūk*, Islamic funds and investment portfolios;
- Financial studies, particularly those related to risk management;

• Legislation compatible with the provisions and principles of the Sharīʿah.

This standard defines all types of risks according to their location and nature. It sets parameters for valid hedging instruments and explains these instruments, giving special attention to their underlying contracts. It details the relevant provisions, undertakings and direct hedging instruments. Furthermore, it defines possible Sharīʿah substitutes for conventional derivatives-based hedging instruments, asset-based hedging applications, hedging in currency exchanges, in addition to the hedging instruments used to manage liquidity or protect against fluctuations on indices-based returns.

Perhaps the best outcome this unprecedented standard could achieve is clarifying the prevailing misunderstanding about the validity of Islamic banks and financial institutions practicing hedging. In fact, it is the duty of Islamic banks and financial institutions to manage their risks efficiently and effectively. Moreover, the standard presents hedging instruments and mechanisms that do not conflict with Sharīʿah rules or Sharīʿah objectives. It is thus by all accounts an important step towards the further development and success of Islamic finance. The Standard also helps conventional banks and corporates to safely convert and become Sharīʿah compliant by providing them with convenient yet permissible services and instruments by which to manage their risks and hedge against them in accordance with the rules and principles of the Sharīʿah.

Introductory Notes

A. The Significance of Hedging:

The Sharīʿah is well known for its affirmation of evolution, development and increased production. It considers work an obligation and calls for participation in all activities expected to yield profits. For this purpose the Sharīʿah provides a well balanced and just financial system. If it is properly followed and its requirements of legality are satisfactorily fulfilled, it constitutes a mechanism for a natural reduction of risks while at the same time sharing those risks.

Hedging is a means to mitigate risks, which makes it necessary to first analyze the investment risks in an attempt to identify their types and evaluate their magnitude. Secondly, it is essential to employ the appropriate mechanism that will reduce risks to the minimum level possible. This is the process that financial experts call "risk management".

In general, hedging is permitted provided that the risks one seeks to hedge against are not required by the nature of a transaction and that the risk management is conducted in conformity with the Sharīʿah methods and contracts. The aim should only be to mitigate risks that fall outside the nature of the transaction, not to eliminate them entirely or isolate them from their related assets in order to eventually convert them into financial products used for trading in risk.

In fact, the presence of relative risks in some transactions is indispensable for the legitimacy of these transactions, which is evidenced by two Islamic legal maxims: *al-ghunm bi-al-ghurm* (liability accompanies gain) and *al-kharāj bi al-ḍamān* (benefit goes with liability). These two rules, in fact, establish one of the fundamental principles of Sharīʿah in financial transactions, namely that one must accept the risk of loss in order to earn legitimate profits.

Although these risks are basically attached to all transactions, it is possible for these risks to be of varying degrees following the nature of the transaction or the contract in question. Of course, some risks shall be entirely excluded; otherwise, the related transaction would be invalid; for example, the risks associated with excessive uncertainty (*gharar jasīm*), major ambiguity (*jahālah fāḥishah*) or usury (*ribā*).

B. Standards Related to Hedging

AAOIFI issued two Sharīʿah standards related to hedging: No. (5) on "Guarantees" and No. (45) on "Capital and Investment Protection". Likewise, the Islamic Financial Services Board (IFSB) refers in its rules (especially par. 249 of the amended standard on "Capital Adequacy") to hedging by Sharīʿah-compliant methods. In essence, the nature of investment in Islamic banks involves risk-taking since this comes as a standard implementation of the principles of *al-ghunm bi-al-ghurm* (liability accompanies gain) and *al-kharāj bi al-ḍamān* (benefit goes with liability). The profit normally earned by Islamic banks makes up for these risks. However, despite the firmly embedded relationship between Sharīʿah-compliant investment and risk-taking (liability for total/partial loss or depreciation in asset value), this concomitance does not prohibit taking lawful measures and using permissible hedging instruments to mitigate risks.

C. The Need for Hedging Against Investment and Finance Risks

It is known that the transactions of Islamic banks may include deferring some amounts due from credit sales, deferred *murābaḥah*, *istiṣnāʿ*, leases with deferred installments, *muḍārabah* or *mushārakah*. Delinquency and default in debt payment may hamper the creditor's investment plans, prevent him from meeting his financial needs, or even cause him to lose some of his capital. Accordingly, some collateral contracts exist to protect the rights of creditors. These include contracts such as *kafālah*, *rahn* (pledge) and *ḥawālah*. (In *ḥawālah* the debtor transfers the debt he owes the creditor to a person who owes money to the debtor, or the creditor transfers his right to claim a debt to a third party.) *Kafālah* secures debts by expanding the liability to two persons instead of one. A pledge provides the creditor with an asset as a security for his rights prior to all other ordinary creditors when it is impossible for the debtor to make the necessary payments. *Ḥawālah* transfers the right of the creditor from the insolvent debtor to another solvent one. The referred creditor can seek his right from the party to whom his debt has been transferred.

D. The Difference between Protecting Capital through Hedging and Capital Guarantee

Protection of the capital refers to taking the necessary measures to reduce the possibility of its loss, but such measures may eventually fail. For example, theft and damage may cause losses to one's wealth despite all efforts to safeguard it. A guarantee, on the other hand, refers to the [guarantor] bearing losses instead of the guarantee seeker. It is associated with the effect of loss regardless of

its causes and regardless of the effectiveness of the means and methods taken by the guarantor or the guarantee seeker to prevent it.

Although the Sharīʿah expects the investment manager (the fund manager in *muḍārabah*, the managing partner in *mushārakah* or the investment agent in *wakālah* for investment) to use hedging and protect the invested funds, it relieves him from guaranteeing these funds except in cases of his misconduct, negligence or breach of the agreement. Hence, Islamic financial institutions use the term "protection" and not "guarantee" in trust-based transactions; namely, *mushārakah*, *muḍārabah* and *wakālah* for investment.

THE STANDARD

1. **The Scope of the Standard:** The Standard addresses hedging against the risks involved in the operations of the Islamic banking and financial institutions using legitimate means of protection that do not fall under the rubric of direct guarantee.

2. Hedging: Parameters, Mechanisms, Contracts and Requirements:

2.1 Hedging: Parameters of Lawful Instruments:

2.1.1 They shall involve risk distribution among partners proportional to their shares in the capital.

2.1.2 The purpose shall not be to make the investment manager a guarantor in cases other than misconduct, negligence or breach of the agreement.

2.1.3 The instrument used shall neither be an unlawful contract nor a pretext to violate the Sharīʿah rulings.

2.1.4 If the hedging instrument involves *murābaḥah* then it shall meet the following parameters:

2.1.4.1 The purchase/sale of commodities must be genuine, involving actual or constructive possession of the commodity. This is to avoid the fictitious sale of commodities.

2.1.4.2 The seller must have owned the asset and possessed it either actually or constructively so that the condition of being able to deliver the asset is fulfilled. The transaction shall not involve the sale of what one has not owned or possessed.

2.1.4.3 The bank (the buyer of the asset of *murābaḥah* who is seeking to sell) must be the party handling the sale itself or by delegating others, excluding the supplier, to sell on its behalf.

2.1.4.4 It must be ascertained that the buyer of the asset is neither its original supplier nor a party owning more than half of the asset. This is to avoid *bayʿ al-ʿīnah* (buy-back sale).

2.1.4.5 The bank is advised to follow the policy of not entering into transactions that would incur future liabilities in a currency other than the currency of the investment. This is in order to mitigate the risk of fluctuations in currency exchange rates.

2.1.5 If the transaction comprises several contracts, they must not be associated with one another in the same contract or interdependent or contingent on one another. This is in order to avoid all of them becoming void as a result of one of them becoming void, which would happen if it is done as forbidden by the Sharīʿah.

2.1.6 If the purchase undertaker (the promisor) defaults on his promise after the other party (the promisee) has made some contractual arrangements, the former party shall be liable for all actual costs and losses the latter has suffered. He shall also be liable to compensate him for the actual loss resulting from selling the asset to others for less than the cost, together with any actual fees incurred as a result of the promise.

2.1.7 Taking into consideration the contents of DFM's Standard No. 1 for Issuing, Acquiring and Trading Shares, which prohibits investment in companies that engage in activities that harm the environment, it is not permitted to use hedging means and instruments that cause harm to the environment.

2.2 Hedging: Lawful Instruments and Mechanisms

2.2.1 Personal guarantees: These may either be through combining liabilities as in the case of *kafālah*, letter of credit and documentary credit; or through the transfer of debt from one party to another (*ḥawālat al-dayn*) and the transfer of the right to demand debt payment such that one creditor replaces another according to the rules of Sharīʿah (*ḥawālat al-ḥaq*).

2.2.2 In-kind guarantees, such as a pledge (*rahn*) and holding the asset sold in cash sales until payment is effective.

2.2.3 Guarantees in the form of pledges of securities of debt and other rights, such as debt bonds, checks, promissory notes, freezing accounts, and merchandise documents.

2.2.4 Independent guarantees, such as a guarantee provided by a third party, Islamic *takāful* insurance against nonpayment of debt, and creation of an investment-risk reserve.

2.2.5 Contractual guarantees, such as stipulating early settlement of future debts and the dissolution of the contract in case of default/delay in the payment of installments.

2.2.6 Compound mechanisms of hedging (alternatives to conventional derivatives) such as the use of long-term *murābaḥah* with multiple *murābaḥah* deals and the use of bilateral promises with different subject matter.

2.3 Risk-Hedging: Special Contracts and Procedures

2.3.1 **Pledge**: Impairing disposal of a property owned by the debtor or another party as a security for the creditor's right, whereby the creditor can take his right entirely or partly thereof. It includes the pledge of physical assets, such as real estate and cash assets (various types of accounts) as well as the pledge of debts, benefits and financial assets. The right of the pledgee comes prior to the rights of other ordinary creditors, and he shall be given the right to pursue the debtor's pledged assets in the possession of others.

Cases of this pledge include:

2.3.1.1 Pledge of durable physical assets, such as real estate, cars, aircrafts, ships and durable equipment.

2.3.1.2 Pledge of assets and goods represented by financial instruments and supporting merchandise documents.

2.3.1.3 Pledge of securities, promissory notes and other debt instruments.

2.3.1.4 Pledge of cash balances by freezing accounts without denying the debtor his right to profits (profits can be agreed to be added to the original amounts as pledge).

2.3.2 **The preference rights recognized by the Sharīʿah** or Sharīʿah-compliant laws for certain permitted benefits, such as entitlements at the public treasury, the right to recover one's sold object when found in the property of the bankrupt, as well as the rights of the liquidator and the official receiver.

2.3.3 **Retaining the Sold Object**: Refraining from delivering it when the cash payment of the price is immediately required but not yet paid to the seller, until it is actually paid.

2.3.4 ***Kafālah***: refers to adding the liability of the guarantor(s) to the original liability of the debtor so that all liabilities become the same. It includes the right to recourse upon the request of the debtor or with or without his knowledge. It may be unrestricted up to the limit of the debt amount originally secured by the pledge, or restricted to the debt owed to the debtor by a third party. It may be hierarchal or non-hierarchal; if hierarchal, the creditor shall demand his debt from the

debtor first and then from the guarantor, but if non-hierarchal, the creditor can demand his debt from both, the principal and the guarantor, or either of them.

2.3.5 ***Ḥawalāt al-Ḥaq***: The transfer of the right to demand a debt from one creditor to another; it involves the replacement of one creditor by another. It also enables the creditor to obtain the payable entitlements due to the debtor on others, such as salaries and compensations; e.g., *takāful* compensation.

2.3.6 ***Ḥawalāt al-Dayn*:**[209] The transfer of a debt from the liability of one party to that of another, mostly to a more solvent one, so that the creditor may be able to collect his debt.

2.3.7 Entering into contracts after stipulating some of the hedging contractual options, such as:

2.3.7.1 ***Khiyār al-Sharṭ***: An option stipulated in the contract giving one party or both parties the right to terminate the contract within a certain period of time determined in the option.

2.3.7.2 ***Khiyār al-Naqd***: An option given to the seller, upon his stipulation, to terminate the contract if the buyer fails to pay the price during a fixed period determined in the option.

2.3.7.3 ***Khiyār* of a Sale with *ʿUrbūn***: The option given to the buyer, upon his stipulation, to reserve the right to cancel the contract within a certain period of time in return for making a down payment of the price. This down payment shall belong to the seller in case of termination and shall be deemed as part of the price if the contract is implemented.

2.4 Risk-Hedging: Conditions and Undertakings

2.4.1 **Stipulating that the total remaining debt installments shall become due following the failure to pay one or more due installments**. This must be implemented with full consideration of the number of installments set by the condition, and the debtor shall be notified of the procedure within an appropriate period of time. If no payment is made during this period, the installments shall become due. However, the creditor shall not receive more than the due debt amount. For example, if the debt resulted from *ijārah* (lease) financing and the failure to pay the due installments occurs before the completion of the *ijārah* period, the creditor shall be entitled only to the amount of debt corresponding to the period of *ijārah* actually utilized by the debtor. The rest, if any, shall be returned to the debtor.

2.4.2 **Stipulating the revocation of the agreement should the price or the rent not be paid within the scheduled time**: In this regard, it makes no difference whether the price is immediate

[209] Unlike laws that allow the sale of one's right to another (the sale of debt) unconditionally, Sharīʿah permits the sale of debt only if for equal value and with immediate payment of the two counter-values.

or deferred so long as it is unpaid within its due time. This kind of stipulation is called *khiyār al-naqd* (cash option). Pursuant to the dominant custom or the prevailing law, the seller may still cancel the contract even if such a condition is not stipulated in the agreement.

2.4.3 **Penalty Clause**: It is valid to stipulate a penalty clause in all financial contracts other than debt-based contracts. A penalty clause refers to an agreed-upon sum of money payable in recompense for the postponement of delivery beyond the scheduled time. It is permitted in *istiṣnāʿ*, supply contracts and labor-lease contracts. The sum must be fair and the postponement should not be the result of *force majeure*.

2.4.4 **The letter of guarantee**: A commitment issued by a bank upon the request of the client (the instructor) to pay a specific or a specifiable sum in cash upon the request of the beneficiary within a specific period of time. Despite the time limitation of this commitment, it may be extended before the expiry of the original period upon the consent of the client. If, however, the beneficiary's request to renew (extend) the letter of guarantee was declined (due to the refusal of the issuing bank or the client) the beneficiary shall have the right to demand payment of the guarantee amount from the issuing bank or the amount due thereof (i.e., to execute the letter of guarantee).

2.4.5 **Documentary credit**: A written commitment issued by a bank (issuer) to the seller's bank (beneficiary's bank) upon the request of the buyer (instructor) pursuant to his instructions. It may also be issued by the bank in its own capacity with the aim of securing the payment of money up to a certain limit and within a certain period of time provided the documents representing the merchandise are delivered as per instructions. In brief, it is a banking commitment to make a payment of money on the condition of conformity of documents with instructions.

2.5 **Direct Forms of Hedging**

2.5.1 **Establishing an investment-risk reserve**: This is possible through a partial deduction only from the investors' profits; that is, after allocating and deducting the amount due to the fund manager (whether it is a share in the profit or a fixed agency commission), so that the fund manager does not partake in any form of capital or profit guarantee. It is through this reserve that the loss of the invested capital may be reimbursed. If this reserve builds up significantly, it may cover any possible overall loss. AAOIFI's Accounting Standard No. 11 on Provisions and Reserves regulates this type of reserve.

2.5.2 **Third-Party Guarantee:** A third party may commit to bear the loss in a partnership, *muḍārabah* or agency for investment. The third-party guarantee is the guarantee provided by a party who is not the fund manager in either of the above-mentioned contracts to compensate the loss suffered by a partner or a fund provider. This guarantor, however, shall have no right of recourse to the fund manager for repayment. A resolution affirming this guarantee was issued by the International Islamic Fiqh Academy adding a further condition that there shall be no linkage between this guarantee and the contract of partnership or *muḍārabah*.

In other words, the beneficiary, based on this guarantee, has no right to raise any claims of guarantee against the fund manager in case the third-party guarantee turned ineffective. In fact, this sort of so-called guarantee is not a real guarantee per se; rather, it is a commitment to donate money whose sum would cover the loss if any. This analysis is actually necessitated by the fact that any invested money is not a debt and as such, it cannot be guaranteed under Sharīʿah rules.

2.5.3 **Transferring the burden of evidence to the trusted fund manager (*muḍārib*, managing partner or investment agent):** This may take place if the fund manager makes a claim that damage or loss of the invested assets occurred for reasons beyond his control while the fund provider rejects such a claim. This is based on the consideration that the fund manager is claiming something that is abnormal and against the prevailing commercial custom [and, as such, he may be made to bear the burden of evidence].

2.5.4 **The promise to purchase the assets of *muḍārabah*, partnership or agency in investment at fair value**: It is the promise to purchase the above assets at fair value, the net value or the market value so long as the assets remain unchanged from their initial state at the time of the promise.

2.5.5 **Guarantee in case of misconduct or negligence**: It refers to hedging through stipulating in the agreement that the fund manager shall be liable for any loss in the capital or the actual undistributed profits in cases of proven misconduct, negligence or breach of the agreement. This type of hedging provides that the trusted fund manager shall be the guarantor of the assets in his trust if they are destroyed, damaged or lost following the change of his possession of the assets from a trust-based possession to a liability-based possession. In this case the fund manager becomes a usurper for not returning the assets of *muḍārabah*, partnership or agency in investment at the time agreed upon in the contract. In this case, he becomes liable for the price or the value of these assets on the very day when his possession has changed from trust to usurpation.

Such provision in the contract of *muḍārabah*, partnership or agency in investment triggers the fund manager's liability for the capital invested.

If no loss to the capital results from the fund manager's misconduct, the fund manager will still be liable for returning the equivalent of the investment assets or their value, however high their value may reach, as long as the damage to the assets is attributable to the manager's misconduct, negligence or violation of the contract's conditions. The value of the assets, in this regard, shall include any growth in them, whether separate or inseparable from them, or from an appreciation in their market value. The rule remains applicable regardless of whether the increase to the capital is considered as belonging to the *muḍārabah* business as a whole or specifically to the fund provider.

2.6 ***Takāful*** **Insurance:** It is the agreement of a group of people exposed to certain risks to avert any harm resulting from these risks by payment of contributions based on undertakings to donate. The *takāful* fund is established from the collection of these contributions, and it shall enjoy a legal personality and an independent financial entity. The *takāful* fund assets are invested in Sharīʿah-compliant modes of investment, and the fund along with its proceeds will be utilized to cover the financial losses befalling the *takāful* participants.

2.7 **Conventional Hedging and Related Sharīʿah-compliant Alternatives:**

2.7.1 **Derivatives and related Sharīʿah-compliant alternatives:**

Conventional banks and Sharīʿah noncompliant businesses mostly use derivatives for their hedging.

AAOIFI has issued its Sharīʿah Standard No. 20 on derivatives titled "The Sale of Commodities in Organized Markets". Article (5) of this standard refers particularly to this issue. In fact, there are many conventional derivatives, the most important of which are futures, options and swaps.

2.7.1.1 **Futures and related Sharīʿah-compliant alternatives**:

Futures refers to those contracts in which the effects occur on a specific future date, usually ending with clearance of credit and debit balances among the parties involved, cash payments or inverse contracts. They rarely end with actual delivery of assets. According to the Sharīʿah, conventional futures are unlawful contracts to initiate or trade.

Sharīʿah alternatives to futures include the credit sale in which the sold object is delivered in advance while the price is postponed to a future date. The seller in such a sale may increase the deferred price above the spot price provided that the increase is not made after concluding the contract. *Salam* sales may function as another alternative to futures whereby the price is paid in advance and the delivery of the well described merchandise is postponed to an exact future date.

2.7.1.2 **Options and related Sharīʿah-compliant alternatives:**

These are contracts that give a contracting party—in exchange for payment of a certain sum of money that is not part of the price—the right but not the obligation to buy or sell a certain object, such as shares, goods, currencies, indexes and debts for a certain price within a specific timeframe. This right is sold by one contracting party to another so that the seller of the right becomes bound by the choice of the buyer. According to Sharīʿah, these options are impermissible to initiate or to trade.

Sharīʿah alternatives to conventional options include *bayʿ al-ʿurbūn*, which refers to the sale of some lawful items whereby the buyer makes a down payment of the price to reserve the right to cancel the sale within a certain period of time. If he does choose to cancel the sale, the down payment will belong to the seller. This right of the buyer can be transferred to others only once. They also include the sale contract with the option of stipulation (*khiyār al-shart*), which refers to a sale contract of lawful items in which the buyer or the seller or both parties stipulate for themselves the right to cancel the sale during a specified period of time. This option is non-negotiable.

Additionally, they include the binding promise to sell by the owner of some asset, and the binding promise to purchase by a potential buyer. This promise, however, has to be free of charge and is non-negotiable.

2.7.1.3 **Swaps and related Sharīʿah-compliant alternatives:**

Conventional swaps refer to the agreements made between two parties on the temporary exchange of a certain amount of certain financial or in-kind assets or interest rates. Swaps may involve a credit resale of the same asset back to the original seller (*īnah*) or to a third party but with no actual exchange of the asset. They may also involve an option, for a consideration, that gives the purchaser the right to conclude or cancel a contract.

Swaps transactions as conducted in commodity markets are impermissible.

Sharīʿah alternatives to swap transactions include the issuance of two promises by the two parties to a transaction; one promises to purchase a commodity on a *murābaḥah* basis in a certain currency, and the other promises to buy a commodity in a different currency. Also, one party may promise to buy some goods at cost plus a fixed profit margin, and the other promises to buy goods at cost plus a variable profit.

2.7.2 **Indices and related Sharīʿah-compliant alternatives**:

Indices refer to indicators calculated in a statistical manner using data on the prices of a selected group of stocks and goods traded in some organized, non-organized or mixed markets. The said prices are given weights based on the values of their trading volumes, and then their aggregate weighted value is divided by the total weights used. Various types of indices are derived using different statistical and calculation methods.

2.7.2.1 **Unlawful uses of indices for hedging:**

A. It is not permitted to use indices in trading through sales and purchases based on the change in their figures in the stock markets, even if such trading is for the sake of hedging against some risks. In other words, it is not permitted to pay or receive money for the mere change in some index figure in the market, without any actual exchange of any commodities or of the commodities represented by the index.

B. It is not permitted to conclude options contracts on indices or on the multiplier of indices' contracts.

C. It is not permitted to make contracts contingent upon that which does not admit contingency, such as a contract of sale conditional upon the value of a certain index.

D. It is not permitted to link the value of monetary debts at the time of the debt initiation to some price index so as to hedge against a possible change in the value of the debt currency.

2.7.2.2 **Lawful uses of indices for hedging:**

A. It is permitted to use indices to measure the change of some values in a certain market. It is also permitted to use these indices, being valid measuring tools, to measure and evaluate the performance of professional managers by comparing the profits they manage to achieve with certain indices. Indices may also be used to get an idea of the performance of a portfolio and evaluate its regular risks instead of observing the performance and risks of each stock independently. Furthermore, they can also be used to predict a market's future condition and

explore its probable changes. These kinds of uses of indices as future indicators in real transactions are permitted under the Sharīʿah.

B. It is permitted to use the indices as a basis for comparison (a benchmark) in investment funds and *ṣukūk*, and to accordingly determine the fund managers' incentive in a contract like investment agency or *muḍārabah*.

C. It is permitted to use financial indices, such as LIBOR or a price index of stocks or commodities, as a basis for determining the profit in a promise to conduct *murābaḥah* provided that the profit ultimately stated in the *murābaḥah* contract is determined and not affected by changes in these indices. It is impermissible, however, to rely on indices unrelated to finance, which would be classified as gambling.

D. It is permitted to use an index as a basis for determining the variable rent component representing the profit in lease contracts. (See Sharīʿah Standard No. (9) on Ijarah and Ijarah Muntahia Bittamleek, Article 5/2/3).

E. It is permitted to restrict the actions of the managing partner, the *muḍārib* or the investment agent by a certain index so that if the index reaches a certain rate, he will have to sell the investment assets at the market rate price or buy a certain amount of goods at the market rate price.

F. It is permissible to relate the execution of the binding promise to sell or buy an asset at a certain financial index rate of increase/decrease above or below the price of the asset at a given time, so that any increase in the index rate will be reflected in the price of the asset.

G. It is permitted to relate to some financial index the amount of charity payable to a charitable fund, on a self-commitment basis, in case of default in meeting any financial obligation by the self-committed donor.

2.7.2.3 **The Sharīʿah Parameters for an Islamic Index**:

A. The index should reflect the projected results of the Islamic investments at different maturities.

B. All Sharīʿah requirements, as well as technical requirements, should be fulfilled regarding the index components and the ways they are used.

C. There should be a Sharīʿah supervisory board to ensure compliance of the index components and the ways they are used with the Sharīʿah rules.

D. The index has to be annually reviewed and a Sharīʿah-compliance report issued.

2.8 **Hedging in Extant Assets and Its Applications**

2.8.1 **Hedging in Currencies**

2.8.1.1 **Conventional hedging in currencies and the Sharīʿah alternatives:**

A. It is unlawful according to Sharīʿah rules on money exchange to sell or purchase a currency without immediate delivery of both counter-values.

Therefore, the only possible way to execute foreign exchange transactions under Sharīʿah rules is through spot payment of both counter-values.

B. Converting the debt currency into another currency before the debt maturity is unlawful for this involves money exchanged without spot payment of both values, since the debt is still an unsettled liability.

The Sharīʿah alternative is to extinguish the debts by actual payment or set-off. In case of partial discharge of a debt, the transaction is only permissible on this part and impermissible on the remaining unpaid or unset-off part.

C. It is not permitted for a bank to take interest-based loans in a certain currency, for example, euros, which it converts into US dollars for investment, and then it repays the loan in euros. Such interest-based loans are impermissible.

The Sharīʿah alternative is that the bank purchases merchandise on credit (deferred payment) with euros from A and then sells them for US dollars to B on the same maturity date as the first transaction, as detailed earlier.

D. If they have a future commitment to make payments in a specific currency (for example, in euros), or if they receive future payments in a foreign currency (for example, in US dollars), conventional banks tend to hedge their position through executing future money exchange, which is impermissible.

The Sharīʿah alternative is that the bank, after purchasing a commodity for a deferred price from a supplier in US dollars, can seek a promise from a *murābaḥah* customer to buy it in euros at an exchange rate agreed as promised. As such, the bank may receive euros, and not US dollars, on the payment due date, hedging thus against any increase in the euro price from the date of export to the date of price payment.

2.8.1.2 **Other forms of lawful hedging in currencies:**

A. In the case of having a grace period (which may reach six months) to pay a debt (a deferred price) in a currency that is different from the currency of the importer (the bank's client), the need arises to avoid the risk of currency exchange rate fluctuations. As an alternative, the bank after purchasing a commodity from a supplier for a deferred price in euros, payable after six months for instance, can proceed to sell the same in the local currency, UAE dirhams for instance, to its *murābaḥah* customer. Here the bank has to refer to the exchange rate quoted on the day of the *murābaḥah* sale. Since the bank fears the rise of the euro on the settlement date with its supplier, the bank may purchase a commodity at the price of the first sale (UAE dirhams) and then sell it by *murābaḥah* with payment in euros, payable on the same date that the euros must be paid to the supplier in the first transaction. By doing so, the bank will have hedged its position against an unfavorable change in the euro-dirham exchange rate from the first transaction.

B. Another form of lawful hedging is to seek to obtain a unilateral binding promise to exchange two currencies, US dollars for euros for example, as per the bank's need, at a certain exchange rate determined in the promise or within a certain period. Then, at the request of the beneficiary, the bank concludes the exchange contract with the one who made the promise through the exchange of offer and acceptance and effecting the exchange in the two currencies on the spot in the same contracting session. If they are not in the same location, then the actual exchange of currency shall take place as soon as possible, but not exceeding three days from the contracting date.

C. The bank may buy a certain commodity in US dollars from a certain party, possess the commodity physically or constructively, then sell it at a deferred price (for example, in euros) for the same term as the first sale and deliver it to its buyer, so that the latter can possess it physically or constructively. The bank may repeat this transaction whenever it has sums of certain currencies and needs another currency, so long as buying this currency at its payment due date exposes the bank to the risk of exchange rate appreciation.

D. Hedging by (exchange of deposits and loans): A bank may deposit the currency for which it has no investment opportunity, for example in yen, in a bank that desires to obtain this currency and has plans for some good investment opportunity. The latter bank, in return, may have the same problem with a certain currency and so it agrees with the former bank to do the same. Each of the two banks can invest the currency deposited by the other bank and consequently achieve some investment returns. When the deposit reaches its maturity date, each bank shall return the principal deposit to the other bank.

E. The bank may ask the client to conclude a *murābaḥah* deal in the same currency used by the bank to purchase the commodity on credit from its supplier. Alternatively, if the currencies are different, then the bank may increase the profit margin to cater for the possible appreciation in the currency payable by the bank to the supplier. As such, it is the client that actually bears the risk of exchange rate fluctuations, and the bank will not have to engage in any future currency exchange. Should the client refuse to conclude the *murābaḥah* deal in the same currency or to accept a higher profit margin, the bank in this case may now buy the currency payable later to the supplier and invest it until its payment due date.

F. The bank that has purchased a commodity on credit in a foreign currency to sell to its *murābaḥah* client in a local currency may agree with the client to take into account, while determining the *murābaḥah* profit, the possible change in the foreign currency rate and determine the profit margin in view of the two currencies' overall exchange rate average. In this case, the bank will not have to engage in any future currency exchange to protect its position.

2.8.1.3 **Liquidity hedging instruments:**

A. Using a *salam* sale to obtain the price in advance and deliver the goods in the future.

B. The sale of assets for an immediate price and then renting them against future rentals through *ijārah muntahiyah bi al-tamlīk* spanning a minimum of one year from its start.

C. Leasing assets on a forward-lease basis and claiming the rentals upfront.

D. Forming a portfolio whose tangible assets comprise no less than 10% of the total assets, the rest being *istiṣnāʿ* and *murābaḥah* debts, so that its units can be sold to obtain liquidity.

2.8.1.4 **Hedging mechanisms against fluctuations of an interest rate used as an index**: Hedging against interest rate fluctuations shall be in conformity with the Sharīʿah rulings; an agreement of profit exchange is concluded with two promises, one from the bank to its client and the other from the client to the bank as follows:

A. The bank issues a unilateral binding promise to enter into a *murābaḥah* transaction/ transactions with the client. In return, the client gives a promise to the bank to conclude the *murābaḥah* transaction/transactions with the bank. Here, the promised party shall have the option to enter into *murābaḥah* in the future and shall not be bound to do so lest the transaction involves binding bilateral promises. Since only one promise is executable during this transaction, it cannot be said that the promises are bilateral.

B. The profit margin in *murābaḥah* can be fixed, variable or linked to a certain index depending on the *murābaḥah* sum or the profit agreed to be paid on a certain future date. The targeted revenue shall be determined, whether it is fixed or variable.

C. The implementation of the promise can be made contingent upon a certain condition, so that if the condition is fulfilled the promise becomes executable.

D. The two parties must exchange an offer and acceptance when executing the *murābaḥah*, in which the contract shall state the price payable by the buyer.

E. The two parties shall agree that the debtor is free from having to fulfill his promise, pursuant to the terms of each transaction, and terminate the agreement unilaterally after the lapse of a certain period. Consequently, the two parties become free from any liabilities related to the agreement.

F. The party reneging on his promise shall compensate the promised party for any actual loss incurred.

G. If case the fixed rate of return is moving in an upward direction, the bank may make use of that by investing its assets for a short period at a variable-rate return that is agreed upon in the contract.

APPENDIX

3. **Definitions**

3.1. Risks:

3.1.1 Risk/hazards:

3.1.1.1 **Risk**: possible exposure to losses due to the occurrence of unexpected and unplanned incidents.

3.1.1.2 **Hazards**: exposure to possible incidents giving rise to losses that may or may not be measurable in advance.

3.1.1.3 **Calculable hazards**: exposure to possible incidents giving rise to losses that are measurable in advance and can be prepared for and covered.

3.1.1.4 **Incalculable hazards**: exposure to possible incidents without the ability to calculate their losses, or the failure to assess their losses, so that no measure can be taken to prepare for and cover them.

3.2 **Risk Management:**

A process aimed at confronting the negative effects of the incidents that would normally lead to losses by taking the necessary measures to avoid or mitigate these effects. This process involves the following:

3.2.1 **Risk analysis**, which includes the following:

3.2.1.1 Risk measurement.

3.2.1.2 Assessment of risks to identify their nature and the ways to mitigate or reduce their effects.

3.2.1.3 Developing risk management strategies with the aim of avoiding or mitigating the risk effects.

3.3 **Hedging**

Literally, it denotes preservation, maintenance and commitment. Technically, it refers to prevention of or protection from risks.

It is also a synonym of the term "capital and funding protection"; in other words, it means the protection of capital and funding by using the available means for protection from loss, deficiency and damage in order to eliminate these risks or mitigate or transfer them.

3.4 **Hedge fund**

A fund raised through contributions from high net-worth investors to make profit via speculation on shares, bonds and derivatives. The raised funds are used to facilitate speculation on different financial instruments in order to achieve high profit rates in high risk transactions.

3.5 **Currency risks or exchange rate risks**

3.5.1 These risks materialize when the currency of the investment in assets differs from the currency of the funds originally raised by the bank or the financial institution for investment.

3.5.2 When uncertainty exists as to the value of revenues, costs and receivables due on others or for others, upon their receipt or delivery in foreign currencies during the payment period.

3.5.3 As a result of the risks accompanying the transfer of a fixed-return instrument into a variable-return instrument or vice versa.

3.5.4 Return risks refer to the inability of the bank or the Islamic financial institution to distribute a competitive return to their depositors as a result of its failure to achieve the expected returns from the investment or its failure to achieve profits in partnerships and *muḍārabah*.

3.6 **Risk types related to their source**

The risks of extant objects (the assets, including debts, to which the capital is converted) are also called "investment risks" and they include the following:

3.6.1 Non-performing or under-performing assets.

3.6.2 Difficulty in liquidating assets when necessary.

3.6.3 Fluctuations in asset prices due to the degree of uncertainty regarding the possibility of liquidating them at a specific value.

4. **Risk types according to their nature:**

4.1 **Credit risks**, which refer to:

4.1.1 The probability of failure to pay a debt or to fulfill any financial commitment on time, including the delay in debt payment in case of (temporary) insolvency and the willful abstention from payment in case of procrastination.

4.2 **Market risks,** including the following risks:

4.2.1 Price fluctuations (downward in case of asset price decline and upward in case of inflation).

4.2.2 Exchange rate fluctuations affecting the instruments and the assets traded in the market (assets and currencies).

4.3 **Contract drafting risks:**

4.3.1 Arising from possible loopholes in contract drafting, which may lead to a partial loss of some rights of the Islamic bank or financial institution. They are sometimes associated with the characteristics of the contract as follows:

4.3.1.1 Information asymmetry between the bank and the client, as in the case of *muḍārabah* or investment agency.

4.3.1.2 The validity of the assets as securities to guarantee payment, as in the case of sales or lease contracts.

4.4 **Inflation risks:**

4.4.1 Resulting from a decline in the purchasing power of cash holdings.

4.4.2 Inflation risks appear upon the recovery of the invested capital in long-term or mid-term types of investment.

4.5 **The risks of moral hazards:**

These risks materialize when assets are invested on behalf of others in contracts involving information asymmetry between the bank and the client.

For example:

4.5.1 When the *muḍārib* or the investment agent risks the assets of the fund providers contrary to their expectations.

4.5.2 When those who must be trustworthy turn out to be untrustworthy. These risks become more probable in the contracts of *muḍārabah* and investment agency.

4.5.3 Ownership risks are legitimate and have to be borne, for Sharīʿah rules dictate that only owners have to bear the risks of their own properties. However, Sharīʿah validates using hedging instruments like *takāful*, diversification of investments and all other valid means.

4.6 **Operational risks**, which come as a result of:

4.6.1 Bad or weak management.

4.6.2 Failure to realize profits.

4.6.3 The risk of conflict with the Sharīʿah, which is the most serious risk of all, for it discourages clients from active participation and damages the institution's reputation.

4.6.4 Sharīʿah non-compliance risk. This refers to the risk resulting from disregarding the Sharīʿah rules or resolutions of the Sharīʿah committee, which may in turn lead to the invalidation of contracts and the disposal of the profit earned by channeling it to charity.

4.7 **Finance risks:**

They refer to the risks resulting from failure to adopt the appropriate methods to measure the risk involved in each financing instrument.

4.8 **Capital investment risks:**

They refer to the risks resulting from failure to follow proper strategies and apply the right measures for risk management, appropriate assessment and exiting from the investment when necessary.

4.9 **Credit-receiving risks:**

Refers to the risks of not laying down the proper foundations to identify the invested funds, their revenues, costs and profits in a manner commensurate with the responsibility of the institution's shareholders towards the investment account holders. This risk is also called "movable risks" due to the need to support the profits of investment accounts.

4.10 **Economic risks:**

Refers to the risks rising from change in overall economic conditions that usually affect foreign investment in any country, such as:

4.10.1 Exchange rate changes

4.10.2 Changes in governmental regulations.

4.10.3 Political instability.

Since these variables do not readily respond to the acts of investment managers, the mitigation of economic risks necessitates adoption of investment diversification policies in terms of geography, sectors, maturities, asset types and so forth.

4.11 **Legal risks**

Refers to the risks resulting from changes in laws such as banning what used to be lawful or imposing higher taxes on economic activities related to the investment.

5. **Date of the standard's issuance**

This standard was issued in 2017 and reviewed and revised in October 2018.

AAOIFI Sharīʿah Standard No. (45) Protection of Capital and Investments

This Standard aims at explaining the most important ways of protecting capital and investments in Islamic financial Institutions.[210] It also aims to explain what is permissible according to the Sharīʿah and what is not permissible as well as the Sharīʿah parameters for it.

Statement of the Standard

1. **Scope of the Standard**

This Standard covers the instruments and methods used to protect capital and investments from loss, decrease and destruction.

2. **Definition of Capital and Investment Protection and the Difference Between Protection and Guarantee**

Protection of capital and investments means using available methods to prevent loss, decrease or destruction. It is wider than a guarantee of invested capital, as a guarantee is an undertaking by a particular party to bear any loss, decrease or destruction of the capital. On the other hand, protection is the safeguarding of the capital, and it encompasses both direct and indirect guarantees.

3. **Sharīʿah Ruling**

3/1 Protecting capital by permissible means is desirable in Sharīʿah as it serves the Shariah's higher objective of preserving wealth.

3/2 It is compulsory for an investment manager, whether he is a *muḍārib*, an investment agent or a managing partner, in his fiduciary capacity, to exercise due diligence to protect the funds from loss, decrease or destruction. If he fails to do so using usual means of protection, he is liable (for loss), taking into consideration items 4/1 and 7/1.

3/3 It is permissible to use Shariah-compliant instruments and processes to protect investment from risks that it may be exposed to, whether they are risks relating to a loss of capital, depreciation in value, inflation, or the fluctuation of exchange rates, etc.

[210] The word (Institution/Institutions) is used here to refer to Islamic financial institutions including Islamic Banks.

3/4 The investment manager acts in a fiduciary capacity with regard to the funds. He is not liable for loss of capital except in case of his misconduct, negligence or breach of contractual terms and conditions.

3/5 The efforts exerted by the investment manager to grow the capital must be suitable for the nature of the relevant investment. It is also incumbent on him to take professional measures that normally provide suitable protection for the funds. Otherwise, he will be deemed negligent.

3/6 It is not permissible to stipulate in an investment agreement that the investment manager is unconditionally liable for any loss of capital in cases other than willful misconduct, negligence and breach of contractual terms and conditions.

3/7 If a loss occurs caused by the *muḍārib*'s misconduct, negligence or breach of contract, the capital provider may hold the *muḍārib* liable for the loss of capital but not the loss of profit. However, if it is determined through actual or constructive liquidation that the investment accrued profit which was added to the capital and then suffered a loss due to the *muḍārib*'s misconduct, negligence or breach of contract, the *muḍārib* is liable to indemnify for loss of that profit as it has become a part of the capital. If destruction of the whole or a part of the capital is caused by the *muḍārib*'s misconduct, negligence or breach of contract, the *muḍārib* is liable for the value of the capital.

4. **Sharīʿah Compliant Means for Protecting Capital**

4/1 Instruments and processes used to protect capital and investments must fulfill the following conditions:

4/1/1 The investment partners should bear the risks and losses according to their respective shares in the capital.

4/1/2 The objective should not be to hold the investment manager liable in cases other than willful misconduct, negligence or breach of contract.

4/1/3 The means adopted for capital protection must not be a Sharīʿah non-compliant contract and should not be a pretext to achieve an objective violating Sharīʿah.

4/2 Some permissible methods of protecting capital include:

4/2/1 *Takāful* (Islamic insurance) for the investment to protect the capital or cover the risks of willful misconduct, negligence, breach of contract, procrastination, death or bankruptcy.

Takāful coverage may be obtained either by the investors themselves or through the investment manager on their behalf.

4/2/2 Obtaining *takāful* cover for the leased assets underlying the *ṣukūk* or other instruments against the risk of destruction and for major maintenance.

4/2/3 An undertaking provided by *takāful* institutions to guarantee exports and investments.

4/2/4 A voluntary undertaking by a third party acting in the public interest, such as the state, or relevant public interest authorities, such as a guardian, executor or father, to indemnify against a loss of capital without any right of recourse to the investment manager, such as a government pledge in respect of an investment project. In order for this undertaking to be valid, the third party should be administratively independent of the investment manager and there should be no direct or indirect ownership relationship of more than a half between the investment manager and the third party.

4/2/5 An undertaking by a third party to indemnify against a loss of capital resulting from the investment manager's misconduct or negligence without receiving consideration for providing such a guarantee. However, the guarantor has the right of recourse to the investment manager.

4/2/6 Creating reserves to protect the capital through deductions from the investors' share of profits but not from the investment manager's share of profits due to him in his capacity as the *muḍārib*.

4/2/7 Diversifying the investment assets to achieve an appropriate return and minimize risks. This may include:

a) Combining real assets, such as real estate and commodities with financial assets (such as stocks and *ṣukūk*) or combining assets denominated in two different currencies.

b) Dividing the capital into two parts by deploying the capital in *murābaḥah* and *mushārakah* contracts, respectively. The first part is used in *murābaḥah* contracts with parties that have strong credit ratings in a way that the combination of the principal amount and the profit of *murābaḥah* protect the initial capital and the second part is invested in *mushārakah* contracts.

c) Dividing the capital into two parts by deploying the capital in *ijārah* and *mushārakah* contracts respectively. The first part is used in *ijārah* contracts with parties that have strong credit ratings in a way that the combination of the principal amount and the rental amount protect the initial capital and the second part is invested in *mushārakah* contracts.

d) Dividing the capital into two parts and deploying them in *murābaḥah* and *ʿurbūn* contracts respectively. The first part is used in *murābaḥah* contracts with parties that have strong credit

ratings in a way that the combination of the principal amount and the profit of *murābaḥah* protect the initial capital. The second part is used in *ʿurbūn* contracts to purchase assets. If the value of the assets rises, the purchase contracts are completed and the assets are sold for a profit. If the value of the assets declines, the purchase contracts are not completed and the loss is limited to the amount of the *ʿurbūn*, while the capital is protected by the *murābaḥah* contracts. It is compulsory in this method to observe the Sharīʿah rules relating to *ʿurbūn*. This includes the requirement to reserve the assets sold under the *ʿurbūn* contract from the time of contract conclusion until the settlement date and the impermissibility of trading in *ʿurbūn* contracts. [See Sharīʿah Standard No. (53) on *ʿUrbūn*].

4/2/8 Taking security and guarantees in *murābaḥah, salam* or *istiṣnāʿ* contracts to ensure that debts are paid.

4/2/9 A sale with an option to terminate due to non-payment (*khiyār al-naqd*).

4/3 It is permissible to use other permissible instruments and processes with the consent of the investor to protect the capital from risks, whether those risks are related to the destruction of the original investment capital, depreciation in value, inflation or the fluctuation of exchange rates, etc.

4/4 If the investor has required the investment manager to adopt certain Sharīʿah-compliant ways to protect the capital, the manager is obligated to do so. If he does not do so, he is liable for any resulting loss of capital, in accordance with item 4/4.

5. **Sharīʿah Non-Compliant Means for Protecting Capital**

It is not permissible to protect the capital by Sharīʿah non-compliant means or means that result in violations of the Sharīʿah, such as:

5/1 Stipulating that the investment manager is liable for loss of capital.

5/2 An undertaking by a third party to indemnify for loss of capital in the cases other than misconduct or negligence of the investment manager with a right (of the third party) to have recourse to the investment manager.

5/3 A commitment by or obligating the investment manager to purchase the investment assets at their nominal price or at a price that was initially agreed upon.

5/4 An undertaking by a third party to guarantee the capital for a fee. This is a form of conventional insurance.

5/5 Protecting the capital by use of conventional hedging contracts such as futures, options and swaps.

6. **Date of Issuance of the Standard**

This Standard was issued on 24 Dhul-Qa‘dah 1431 A.H., corresponding to 30 November 2010.

The Sharīʿah Board adopted this Standard in its meeting No. (28) held in the Kingdom of Bahrain during the period of 22-24 Dhul-Qa‘dah 1431A.H., corresponding to 28-30 November 2010.

The Forth Area of Discussion:

Waqf Experiences in Kuwait

and

the Sharīʿah Ruling on Waqf Management Expenses and the Parameters of Remuneration

by

Prof. Dr. ʿIṣām Khalaf Al-ʿAnizī

The Experience of the General Secretariat of Awqaf in Kuwait

In the decisions and recommendations of the Fourth Forum on Waqf Issues, the following was stated regarding the parameters for disbursement of charitable endowments and the rules for prioritizing disbursements:

> Fourthly: Regarding the issue of retaining amounts of the revenue in the interest of the waqf:
>
> 1- The revenue of the waqf is owned by the beneficiaries. That is after deduction of the operating, management and maintenance expenses, which must be controlled to remain within the (commonly accepted) limits of expenses for similar projects.
> 2- An amount shall be deducted from the waqf revenue that is necessary to preserve the waqf, ensure its continuity and maintain its ability to generate revenue.
> 3- A provision shall be created to retain part of the revenue prior to its disbursal to its rightful beneficiaries for the purpose of substitution and renovation in the future.
> 4- In case a surplus remains after disbursal to the beneficiaries:
>
> a. The party managing the waqf has the right to allocate part of such surplus for the development of the waqf asset in order to increase its revenue; or,
> b. To disburse such surplus at the discretion of the party legally authorized to oversee the waqf in each country.

In light of that, the experience of the General Secretariat of Awqaf in Kuwait with regards to waqf expenditures is as follows:

1- The Government of Kuwait allocates an annual budget to the General Secretariat of Awqaf from which the employees' salaries, social allowances and administrative expenses are paid.
2- The equivalent of 12% of the waqf revenue shall be deducted as operating expenses to be disbursed to the staff of the Secretariat as remuneration for supervision of the waqf and for the operating expenses.
3- Besides the above-mentioned ratio, maintenance and repair expenses are deducted from the waqf revenue when needed.
4- Based on the ruling of the Sharīʿah Committee of the General Secretariat of Awqaf, the General Secretariat is not allowed to take on debt as the liability of the waqf.
5- The General Secretariat has a department for the investment and development of waqf assets. Therefore, the direct cost of investment is borne by the waqf.

And we end by supplicating: All praise is for Allah, Lord of the worlds, and peace and blessing be upon our Prophet Mohammad, and on his family and all his companions.

(رَبَّنَا لاَ تُؤَاخِذْنَا إِن نَّسِينَا أَوْ أَخْطَأْنَا رَبَّنَا وَلاَ تَحْمِلْ عَلَيْنَا إِصْرًا كَمَا حَمَلْتَهُ عَلَى الَّذِينَ مِن قَبْلِنَا رَبَّنَا وَلاَ تُحَمِّلْنَا مَا لاَ طَاقَةَ لَنَا بِهِ وَاعْفُ عَنَّا وَاغْفِرْ لَنَا وَارْحَمْنَآ أَنتَ مَوْلاَنَا فَانصُرْنَا عَلَى الْقَوْمِ الْكَافِرِينَ).

Our Lord, do not impose blame upon us if we have forgotten or erred. Our Lord, and lay not upon us a burden like that which You laid upon those before us. Our Lord, and burden us not with that which we have no ability to bear. And pardon us; and forgive us; and have mercy upon us. You are our protector, so give us victory over the disbelieving people. [2:286]

A Case Study of Sharīʿah Supervision from the Experience of the General Secretariat of Awqaf

Sharīʿah Supervision in the General Secretariat of Awqaf in the State of Kuwait[211]

The General Secretariat of Awqaf is considered one of the few institutions that practices waqf and offers it to the public according to the standards of modern civilisation. Therefore, we will use the General Secretariat of Awqaf in the State of Kuwait as a model to study the reality of Sharīʿah supervision of waqf institutions. There are many reasons for selecting the General Secretariat of Awqaf, including:

1- As mentioned, the General Secretariat of Awqaf is considered one of the authorities that plays a prominent role in serving waqf. What applies to it also applies to many institutions that administer *awqāf*. Moreover, it is considered a reference for waqf institution practices in the Muslim world. This is because the State of Kuwait, represented by the General Secretariat of Awqaf, has been chosen to serve as the coordinator of the efforts of Muslim countries in the field of waqf throughout the entire Islamic world. A decision to that effect was taken at the conference of the ministers of *awqāf* of Islamic countries that was held in the Indonesian capital, Jakarta, in October 1997.

2- The State of Kuwait [has demonstrated] concern for the development and protection of waqf, especially in the supervisory aspect, whether legal, Sharīʿah, financial or administrative. This is evident from the decrees issued in this regard. Additionally, it has established many supervisory bodies to monitor waqf affairs. For example: the Accounting Department, the Board of the Nation, the Sharīʿah Committee and other bodies.

3- The huge amount of waqf funds [supervised by] the General Secretariat of Awqaf has contributed to the diversification and expansion of the activities it carries out. Such activities include those that the owners of wealth have pledged their assets for as well as investment activities for the development of waqf funds. This makes the General Secretariat of Awqaf a model to be studied.

[211] I gathered the material for this field study of the reality of the General Secretariat of Awqaf by meeting with the members of the Sharīʿah Committee in the General Secretariat of Awqaf, with the staff in the Sharīʿah Supervisory Department in the Secretariat, and with the external bodies assigned duties by the Secretariat, as well as from the rules and regulations of the General Secretariat of Awqaf.

4- There are clear and specific regulations regarding investment, disbursement and other activities practiced by the General Secretariat of Awqaf.

5- I received the cooperation of brethren in the General Secretariat of Awqaf, which enabled me to access and obtain many official documents from the General Secretariat of Awqaf.

First: Sharīʿah Supervision in the General Secretariat of Awqaf via Its Approved Rules and Regulations

1- **Formation of the Sharīʿah Committee:** The General Secretariat of Awqaf has a Sharīʿah Committee that was formed by the decree of the Awqaf Affairs Council in its 23rd meeting, held on the 21st of Ramadan, 1420H, corresponding to December 29, 1999. The Sharīʿah Committee consists of five members specialised in Sharīʿah appointed for two-year renewable terms.

2- **The Committee's scope of work:** The tasks of the Committee have been determined as follows:

   a. It specialises in providing the Sharīʿah ruling regarding all issues that the General Secretariat of Awqaf deals with in its capacity as the body in charge of monitoring waqf activities and disposals. This is whether the activities [in question] or [other] queries are presented by the Awqaf Affairs Council, the Secretary General or one of his deputies or by waqf funds or projects or working units within the Secretariat. The Committee can also provide rulings on any other topics it considers [relevant].

   b. The Committee shall verify the Sharīʿah permissibility of the activities undertaken by the Secretariat and by the waqf funds and projects.

   c. The law of the Sharīʿah supervisory on waqf-related activities states that there are certain activities that shall only be initiated by the Sharīʿah Committee:

      i. Looking into matters having a Sharīʿah nature and providing the rulings for them.

      ii. Looking into the reports submitted by the Sharīʿah audit officer and providing opinions about them.

3. **Sharīʿah supervisory**: the regulations state that the Sharīʿah Committee has wide authority in Sharīʿah supervision. The supervision practiced by the Committee has the following aims:

a. Ensuring that the work complies with Sharīʿah rules and principles.
b. Stating the Sharīʿah ruling for the arising issues and matters in light of the Islamic rules and principles. In order to achieve these goals, the Sharīʿah Committee has the right to:

i. **Prior Supervision:**

The Committee has the right to exercise prior supervision in the following cases:

- Draft laws related to waqf prepared by the Secretariat, or when an opinion about them is requested.
- The regulations related to waqf or any decisions pertaining to it containing general rules that the Secretariat intends to issue.
- Ownership transfers of waqf properties.
- Any disposal or action resulting in the annulment of a right of a waqf, or any disposal or action leading to the waqf assuming liabilities that go against rules and regulations previously issued by the Committee.
- Contracts related to waqf that the Secretariat intends to conclude, with the exception of the standard contracts previously approved by the Committee.
- The rules that set the priorities in spending from the waqf in accordance with the conditions stipulated by the waqf founders.

ii. **Post-supervision**

The Committee's oversight shall be subsequent in cases other than those mentioned in the preceding paragraph.

Instruments of Sharīʿah Supervisory

1- The Committee has the right to request one or more of its members, the Sharīʿah audit officer or one of his assistants to review the documents related to the properties and activities of a waqf. The Committee also has the right to request copies of such documents. In particular, the Committee has the right to view and request copies of:

a. Action plans and programmes.
b. Estimated budgets, final accounts and audit reports.

c. The minutes of meetings of the Council of Awqaf Affairs, the boards of directors of waqf funds and projects and committees operating in the Secretariat.
d. Financial reports prepared by the investment department.
e. Projects, activities and actions that the waqf funds and projects are planning to conduct.
f. Publications, films, sound recordings and others.

2- The Committee has the right to assign one or more of its members or to instruct the Sharīʿah audit officer or one of his assistants to visit departments, offices and work units in the Secretariat, as well as waqf funds, projects and committees, in order to ensure compliance with Sharīʿah rules and regulations. The Committee shall prepare a report of such visits.
3- The Committee has the right to invite whomever it wants of officials and staff members of the Secretariat or of the waqf funds, projects and committees in order to obtain information that would assist the Committee in carrying out its duties and to explore their views and opinions on the subjects the Committee is looking into.
4- Based on the proposal of the Committee, the Secretariat shall appoint one or more Sharīʿah auditors according to the needs of the job. Such Sharīʿah auditor shall assume the following tasks:
    a. To review the documents related to the waqf tasks identified by the Committee in order to examine them and report the findings to the Committee.
    b. To visit working units in the Secretariat and in the waqf funds, projects and committees in accord with a programme approved by the Sharīʿah Committee. A report shall be submitted to the Committee with the results of these visits.
    c. To liaise between the Committee and the Secretariat in matters related to Sharīʿah supervision practiced by the Committee.
    d. Spreading awareness of Sharīʿah among the employees of the Secretariat and of the waqf funds, projects and committees.

Meetings of the Committee

1- The Committee meetings shall be chaired by a member appointed by the Council of Awqaf Affairs from among the members of the Council. He shall be entitled to vote, and his vote

shall be the decider in case the other votes are equal. In his absence, the eldest member shall act as chairman.

2- The Secretary General shall appoint a rapporteur, and an assistant if needed, to receive and maintain all documents of the Committee and to organise its meetings. The rapporteur of the Committee shall prepare the minutes of its meetings, which shall include the names of the attendees, the subjects discussed, and the decisions reached with regards to each subject.
3- A register shall be created within the Committee in which the rapporteur shall record all referred subjects as well as those subjects the Committee decides to consider during its meetings.
4- The rapporteur of the Committee, in agreement with the chairman, shall prepare the agenda for each meeting.
5- The Committee shall meet at least six times a year, or whenever deemed necessary, at the request of its chairman, or two of its members, or the Secretary General.
6- An invitation to attend the Committee meeting shall be extended, giving enough time before the date of the meeting. The invitation shall be accompanied with notes and documents related to the topics the Committee will look into.
7- For a meeting to be considered valid, three of the Committee's Sharīʿah members are required to attend.
8- The minutes of the Committee's meetings shall be approved by the chairperson, the rapporteur of the Committee and all attending members after being endorsed at the following meeting. A copy thereof shall be sent to the Secretary General.
9- The Secretary General shall distribute copies of the endorsed minutes of the Committee's meetings to the chairman and members of [the Council of] Awqaf Affairs.

Issuance of Decisions

1- The Committee has the right to submit to the Council of Awqaf Affairs its opinions on the ways to implement the *ijtihād*-based rulings it considers will realize the waqf interests.
2- The Committee shall make its recommendations based on the majority opinion of the attending members.

3- Abstention is considered rejection of the issue at hand.
4- The Committee shall prepare a report on each subject referred to it within a period not exceeding two months from the date of referral. The report of the Committee must include a statement of the Sharīʿah ruling it believes applies. Each report shall be signed by the members involved in the consideration of the matter.
5- The rulings issued by the Committee are mandatory. It is incumbent upon the Secretariat and the waqf funds and projects to abide by such rulings. The Secretary General may request the Committee to reconsider any of its announcements by a letter stating the reasons. In such case, the Committee may re-examine the matter or reconfirm the issued ruling.

The Reality of Sharīʿah Supervision in the General Secretariat of Awqaf

Based on the previously mentioned rules and regulations that govern the work of the General Secretariat of Awqaf, we would like to mention the General Secretariat's actual application of these rules and regulation:

1- The Sharīʿah Committee meets on an almost weekly basis to discuss the issues submitted to it before they are executed by the General Secretariat of Awqaf. The Committee issues a ruling with regards to the discussed subject. The ruling is sent to the Secretary General of the Secretariat, who then issues it as a directive from him to the relevant unit.
2- The Sharīʿah Committee assumes the role of prior supervision, meaning that all matters the Secretariat wishes to perform are presented to the Sharīʿah Committee.
3- The Committee has a rapporteur who—in coordination with the chairman of the Committee—prepares the agenda, takes the minutes of the meetings and follows up to get the Sharīʿah Committee's endorsement of them.
4- The Sharīʿah Committee issues an annual report on all projects and requests submitted to the Committee attached with the Committee rulings. Such report does not include the violations committed by the Secretariat.
5- The Secretary General submits the report of the Sharīʿah Committee to the Council of Awqaf Affairs to be viewed.

6- The Sharīʿah Committee does not select its own members or outsiders to conduct Sharīʿah audit and review tasks. Rather, the Sharīʿah audit and review team is formed by a ministerial decision, which may select members from the Sharīʿah Committee or from outside it.
7- Despite the existence of regulations and parameters for the disbursement of waqf revenue, the Sharīʿah Committee cannot ensure that such disbursement has been done in the proper manner. For example, an amount has been approved to be disbursed to a particular entity and the amount has been given. However, it is unknown afterwards whether or not that entity has disbursed the amount according to the Committee's decision. The majority of the violations that are discovered come to light through the personal knowledge of a member of the Sharīʿah Committee or of someone outside it.
8- The majority of the Sharīʿah Committee meetings are for the purpose of discussing the disbursement of waqf revenue to various parties in addition to assessing the extent to which the disbursement parameters are applied to those parties.
9- There is no department specialised in Sharīʿah supervision in the General Secretariat of Awqaf. Still, there is a division within the legal department that has two employees to follow up with regards to Sharīʿah issues. The full control of this division is with the legal department.
10- The General Secretariat of Awqaf does not have Sharīʿah supervisors who are qualified to conduct a Sharīʿah audit of the General Secretariat's work. Therefore, a ministerial decree was issued assigning certain persons to assume the task of external Sharīʿah audit of the work of the General Secretariat of Awqaf. The team has also been assigned by the Secretary General to establish a department for Sharīʿah supervision. The team's mandate includes supervising the sector of the Secretary General; however, the team is under the supervisory and audit department which is under the Secretary General as well.

This team has made a great effort. It started with the investment sector and has accomplished the following:

1- It has reviewed the procedures manuals of the financial and real estate investment sector. It was found that the investment procedures manual was issued without the approval of the Sharīʿah Committee. It was later forwarded to the Committee and approved.

2- It was found that the investments were not followed up on regarding their Sharīʿah status. The investment sector has invested in some companies that were Sharīʿah compliant [at the time]; however, the conditions of such companies may change, leading to their [later] exclusion from the list of Sharīʿah-compliant companies, but the Secretariat maintains its investments in them.
3- Some companies that are Sharīʿah compliant might have impermissible income. Thus, there is a need for follow-up in order for the Secretariat to dispose of such impermissible income.

The team followed up regarding those issues and presented a brief recommendation as to whether or not the investment should continue and whether or not the investment income has impermissible elements.

This initiative of the General Secretariat of Awqaf was not destined to continue. It ended when the team was transferred from the supervisory and audit department to the planning department. The team then declined to continue after having spent two-and-a-half years in its work. Afterwards, a ministerial decision was issued assigning the task of Sharīʿah auditing and supervision to the Sharīʿah Committee. Three members of the Committee were selected to carry out this task. The audit period takes two months, two days a week, during which they scrutinize all the work of the General Secretariat of Awqaf.

A comparison of the Sharīʿah supervision between the way it is described in the rules and regulations and the way it is actually applied; also, the most important proposals for its further development

In fact, the Sharīʿah supervision is well formulated in the rules and regulations. The regulations have given the Sharīʿah Committee wide powers, and its decisions have been made binding upon the General Secretariat of Awqaf. However, we have some comments on these rules and regulations as follows:

1- Even though the existence of the Sharīʿah Committee has been dictated by a decree of the Amir, the selection of the Sharīʿah members is done by the Awqaf Affairs Council. As mentioned before, the Sharīʿah Committee has the right to review the minutes of meetings

of the Awqaf Affairs Council and thereby has the right to object to the Council's decision if such decisions involve any Sharīʿah violations. This is because the decisions of the Sharīʿah Committee—as per the rules and regulations—are binding on the General Secretariat of Awqaf. Therefore, the Sharīʿah Committee should be formed by the same body that forms the Awqaf Affairs Council for two reasons:

a. In order for the Sharīʿah Committee to enjoy full independence and not be affected by the Awqaf Affairs Council, since it has supervisory power over it. How can it monitor the Awqaf Affairs Council when the Council is the body that appoints it?
b. The Sharīʿah Committee should be given full and sufficient support as it has the same power as the Awqaf Affairs Council.

2- According to the rules and regulations, the Awqaf Affairs Council selects the chairman of the Sharīʿah Committee. Article 9 of the rules of procedure of the Sharīʿah Committee states:

"Committee meetings shall be chaired by a member appointed by the Council of Awqaf Affairs from among the members of the Council. He shall be entitled to vote, and his vote shall be the decider in case the other votes are equal. In his absence, the eldest member shall act as chairman."

Still, the website of the General Secretariat of Awqaf (www.awqaf.org) states regarding the Awqaf Affairs Council:

> The Council shall form from its members and others the following permanent committees which exercise the responsibilities listed for each of them. As per Article 12 of the rules of procedure of the Awqaf Affairs Council:
> **The Sharīʿah Committee:** is specialised in issuing the Sharīʿah opinion on the work of the Secretariat.

Additionally, as stated in the same website, the members of the Awqaf Affairs Council include the following:

a. The Minister of Awqaf and Islamic Affairs (Chairman)
b. Secretary General of the General Secretariat of Awqaf (Member)
c. Deputy of the Ministry of Awqaf and Islamic Affairs (Member)
d. General Manager of the Social Security Association (Member)
e. General Manager of Zakat House (Member)

f. A representative of the Ministry of Finance whose rank shall not be less than a deputy assistant minister chosen by the respective minister (Member)
g. A representative of the General Authority for Investment (Member)
h. Three members with experience and competence who shall be appointed for a renewable period of three years by a decision of the Council of Ministers upon nomination by the Minister of Awqaf and Islamic Affairs.

We have several comments on this matter, including:

1. With respect to those who occupy these positions, whether current or former, it is not right for the Sharīʿah Committee to be headed by a member of the Awqaf Affairs Council. This is because this committee is a Sharīʿah Committee. There might not be among the members of the Awqaf Affairs Council anyone who is specialised in Sharīʿah issues and matters—as is evident from the decree on the formation of the Awqaf Affairs Council—let alone qualified to head the Sharīʿah Committee. This leads to [undermining] the validity of the meetings of the Committee, which requires the presence of three of its Sharīʿah members. This means that non-Sharīʿah specialists are entitled to participate in the Committee.
2. The Sharīʿah Committee has the right to monitor and audit the work of the Awqaf Affairs Council. Therefore, there is a conflict of interest in the responsibility of the Chairman of the Sharīʿah Committee. How can he be the one who issues decisions and the one who monitors them?
3. The inclusion of the Sharīʿah Committee under the Awqaf Affairs Council, as the latter is the one who forms it, affects the independence of the Sharīʿah Committee as a separate entity with the right to control and audit.
4. We have said: the rules and regulations that govern the work of the Sharīʿah Committee give it the right to monitor and audit the work of the General Secretariat of Awqaf. However, the General Secretariat of Awqaf lacks the presence of a special department for Sharīʿah audit. The volume of funds administered by the General Secretariat of Awqaf is considered large compared to some Islamic financial institutions in which the Sharīʿah supervisory boards require the management to have Sharīʿah officers to review the work of the institution from Sharīʿah perspectives and submit reports of their work to the Sharīʿah supervisory and fatwa body. This is despite the fact that the responsibility of Islamic financial institutions is limited to investing and growing the funds. If we add to this

activity the disbursement of waqf revenue, ensuring that the recipients are in line with the stipulations of the waqf founders and the General Secretariat's overall policies on disbursements, such tasks require a full administrative system to follow up on these issues. It is not enough for the Sharīʿah Committee to carry out the Sharīʿah supervision and auditing for two months only. Rather, the supervision should be permanent and continuous in order for the Secretariat to avoid mistakes and Sharīʿah violations. Nothing makes the need for such a system more evident than the magnitude of violations discovered by the Accounting Office. Those violations included the disbursement of sums of money in areas other than those allocated for disbursal as well as the Secretariat's lack of commitment to contractual terms with other parties. I shall review some of these issues as they are related to the Sharīʿah aspect, especially Sharīʿah supervision, in order to emphasize the importance of having a department for Sharīʿah supervision in the General Secretariat of Awqaf. The report of the Accounting Office regarding the work of the General Secretariat of Awqaf includes the following:

a. There are issues with regards to the agreement concluded between the General Secretariat of Awqaf and the Ministry of Awqaf and Islamic Affairs regarding the expenses of mosques. The Ministry of Awqaf did not comply in sending quarterly reports according to the agreement between the two parties. The Ministry has also disbursed some amounts without complying with the signed agreement.[212]
b. Adequate control measures have not been put in place to ensure proper disbursements of the grant amounts and financial support that the Secretariat provides to some entities.[213]
c. The Secretariat does not comply with some provisions of the regulations for parameters of waqf fund investment.
d. There are no approved internal guidelines to govern the work and procedures of joint waqf supervision and to specify the powers and responsibilities of the managers.

[212] The General Secretariat of Awqaf responded that these issues were included by the Office in its previous reports and that its observations were considered and implemented. In addition, the General Secretariat has not spared any effort in urging the Ministry to implement the agreement as is, and the Ministry was contacted in this regards many times.

[213] The Secretariat mentioned in its response that detailed reports were obtained from some parties and the Secretariat is waiting for the rest. It should be taken into account that further disbursements of any following payments have been halted until the reports on previous payments have been delivered and audited.

These comments and others, although the General Secretariat of Awqaf might have responses to them, indicate the importance of having an independent department for Sharīʿah supervision to follow up with waqf affairs on a daily basis. If the Accounting Office, as an external party, managed to find these observations, what would happen if there was a Sharīʿah audit authority to supervise and monitor the work of the General Secretariat of Awqaf on a daily basis?! The need to establish such a department would be confirmed through its impact in reducing these comments, which would enhance the confidence of the waqf founders in this Secretariat, offer them peace of mind about their endowments, and prevent those who wish to harm the Secretariat from tarnishing its image.

5. Sharīʿah audit has become a science with its own rules and parameters. In fact, it has become a science that is taught, and the student who passes the course is granted a certificate. This is done, for example, at the Accounting and Auditing Organization for Islamic Financial Institutions, based in the Kingdom of Bahrain, which benefited from the task of the external auditor and added what is related to Sharīʿah supervision. The presence of a Sharīʿah supervisory department in the General Secretariat of Awqaf is important. It is even more important that there be qualified Sharīʿah auditors for such a great task.

Mentioning these remarks does not diminish the importance of the role played by the General Secretariat of Awqaf. It is rather an attempt to fill the gaps and further develop its work. As mentioned earlier, the General Secretariat of Awqaf is considered a reference for the rest of waqf institutions.

Waqf Expenses

Waqf expenses refer to the liabilities that must be discharged and deducted from the waqf revenue before the beneficiaries receive their entitlements. After tracing the opinions of Islamic jurists (may Allah have mercy on them), I found that there are four [types] liabilities which they stipulated should be considered as waqf expenses and which need to be deducted from the revenue.

First: Waqf Maintenance Expenses

A waqf will either generate revenue or not. If the waqf generates revenue, the majority of scholars, including the Ḥanafīs, Mālikīs and Shāfiʿīs, opined that maintenance expenses shall be paid first from the revenue of the waqf whether the waqf founder stipulated it or not. This is because the maintenance of the waqf is in its best interest as maintenance leads to preserving the waqf and ensuring its continuity.[214] In fact, the Mālikīs stated that even if the waqf founder stipulated that the beneficiaries be given from the waqf revenue without repairing what is worn out, such condition would be void.[215]

As for the Ḥanbalīs, they agree with the majority opinion regarding the importance and necessity of maintaining the waqf. However, they differentiated between two cases:

1- Waqf of living creatures such as a horse: If it is provided with a specified outlay, it shall be used to cover its expenses. However, if it is not provided with a specified outlay, its expenses shall be covered from its revenue because its survival depends on spending on it. Further, if it is unable to generate revenue due to weakness, then its expenses shall be covered by the beneficiary because it is [in a sense] his property. If the beneficiary is absent or unable to cover the expenses, the waqf shall be sold and its value shall be spent on acquiring another similar asset that shall in turn become waqf. This [option] is required by necessity.

   If the beneficiaries are not specific persons, such as the poor and the like, then its expenses shall be covered from the public treasury. If doing so is not possible, the waqf should be sold and its value be spent on another asset as indicated earlier.

[214] Al-Ḥaddād, Abū Bakr, *Al-Jawharah al-Nayyirah: Sharḥ li Mukhtaṣar al-Imām al-Qadūrī,* 4:108; ʿUlaysh, *Minaḥ al-Jalīl,* 8:100; Al-Sharbīnī, *Mughnī al-Muḥtāj*, 2:393.
[215] ʿUlaysh, *Minaḥ al-Jalīl,* 8:100.

2- If the waqf is real estate and needs maintenance, such maintenance is not mandatory unless the waqf founder stipulated it. However, if the waqf founder stipulated it, then maintenance shall be prioritized over the employees if doing so will not disrupt the interests of the waqf. If it does, the two shall be combined as much as possible to avoid disruption of the waqf or its interests.[216]

What the jurists meant by maintenance is the basic maintenance which, if ignored, would lead to the destruction of the waqf or the disruption of its benefits. Imam Sharbīnī says:

> The maintenance of the waqf is prioritized over the rights of the beneficiaries due to its benefit in conserving the waqf. The revenue of the waqf that is pledged for the unspecified benefit of the mosque or for its maintenance shall be spent on its structure, its proper plastering, stairs, mats used to provide shade, brooms used for sweeping, or shovels used to remove dirt….If the waqf is pledged for the interests of the mosque, the spending of the revenue shall be on the matters mentioned above and not on engraving and decoration. In fact, if the waqf is designated for these two [purposes], it is not valid.[217]

If the waqf does not generate revenue; for example, if it is designated for the housing of particular persons, then the expenses of maintenance shall be borne by the beneficiary (the one utilizing the waqf). This is according to the legal maxim "Benefit goes with liability" (الخراج بالضمان). If the beneficiary refuses to cover the maintenance expenses or is poor, he shall be evicted from the waqf property and the ruler shall rent it out. The rental shall be taken upfront to be used in fixing the property. Afterward, the lessee shall utilize it for the agreed duration. Subsequently, the waqf property shall be returned to the beneficiary.[218]

Second: The Remuneration of the Waqf Manager (*Nāẓir*)

Among the expenses that shall be borne by the waqf is the fee of the waqf manager (the *nāẓir*). This is because the *nāẓir* is entitled to a fee in exchange for the management of the waqf and its affairs such as its maintenance, construction, cultivation, protecting its interests, collecting its yield—whether rent, crops or fruit—striving to make it grow, and disbursing its revenue for purposes such as repairs, maintenance and the rightful beneficiaries.[219] As compensation for all

[216] Al-Buhūtī, *Sharḥ Muntahā al-Irādāt*, 2:417.
[217] Al-Sharbīnī, *Mughnī al-Muḥtāj*, 2:393.
[218] Al-Ḥaddād, *Al-Jawharah al-Nayyirah*, 4:108; ʿUlaysh, *Minaḥ al-Jalīl,* 8:100; Al-Sharbīnī, *Mughnī al-Muḥtāj*, 2:393; Al-Mardāwī, *Al-Inṣāf fī Maʿrifat al-Rājiḥ min al-Khilāf,* 2:1179; Al-Buhūtī, *Sharḥ Muntahā al-Irādāt*, 2:417.
[219] Al-Buhūtī, *Kashshāf al-Qināʿ*, 4:268.

these jobs, the *nāẓir* is entitled to a fee. In fact, the *nāẓir* is given priority over other beneficiaries because not paying him would cause harm that might lead to the ruin of the waqf.[220] This fee is divided into two scenarios:

1- The fee is stipulated; i.e., the waqf founder stipulates a fee for the *nāẓir*, [which he shall receive] even if it is higher than the fair fee[221] paid for similar jobs. This is due to the emphasis of the stipulated condition. The Ḥanafīs have stated that the manager is entitled to what the waqf founder specified. If, however, the specified amount is less than the fair value usually paid for similar jobs and the manager petitions a judge, the judge has the right to increase it to the fair fee paid for similar jobs.[222] This is because the objective of the stipulated fee is that it suffice him. Thus, if the stipulated fee is not enough and the manager does not perform his duties without it, the fee can be increased.[223]

2- The fee is not stipulated: The Ḥanafīs and Ḥanbalīs are of the opinion that if the waqf founder did not stipulate a certain remuneration, the *nāẓir* is entitled to the fair fee for similar jobs if the manager in question is one who [only] accepts working for fee. If not, the manager would be considered a volunteer.[224]

The Ḥanafīs indicated that the fair fee is one-tenth of the revenue of the waqf on the grounds that this used to be considered the fair fee for similar jobs. Therefore, if one-tenth of the waqf revenue exceeds the fair fee for similar jobs, the difference should be returned.[225]

The Shāfiʿīs contended that if the waqf founder did not specify a fee for the *nāẓir*, then he will not get one. However, the *nāẓir* has the right to bring the issue to a judge to decide a fee. This is similar to the case of a guardian who volunteered to look after the money of a child and then raises the issue to a judge to fix a fee for him.[226]

As for the Mālikīs, I believe that they share the opinion of the majority that if the waqf founder stipulated a fee to *nāẓir* it shall be fulfilled. I say that because I have not found a clear text from them that says so.

Al-Ṣāwī said:

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[220] Ibn ʿĀbidīn, *Al-Ḥāshiyah,* 13:464.
[221] Ibid., 13:659; Al-Sharbīnī, *Mughnī al-Muḥtāj*, 2:394; Al-Buhūtī, *Kashshāf al-Qināʿ*, 4:271.
[222] Ibid.
[223] Ibid., 13:467.
[224] Ibid., 13:658-9; Al-Buhūtī, *Kashshāf al-Qināʿ*, 4:271.
[225] Ibid., 13:658-9.
[226] Al-Sharbīnī, *Mughnī al-Muḥtāj*, 2:394.

> The judge has the right to specify a fee for the *nāẓir* from the revenue of the waqf based on perceived interest, contrary to the opinion of Ibn ʿAttāb that it is not permissible for him to take anything from the revenue of the waqf. [He says it should be taken] from the public treasury instead, unless the waqf founder stipulated a fee.[227]

Further, Ibn ʿArafah said:

> The management of the waqf shall be for the person appointed by the waqf founder. If he did not specify one, the judge shall select someone and grant him from the rental of the waqf whatever fee he deems suitable.[228]

Ibn ʿArafah said on the authority of Ibn Fattūḥ:

> The judge has the right to fix a specified monthly fee for the person whom he appointed to look after the waqf. The judge shall exercise his judgment to determine the amount based on the work [the *nāẓir*] does. This is how it was practiced by the Imams.[229]

Third: Borrowing for the Benefit of the Waqf

If the waqf does not generate revenue, or the revenue is not enough to cover its needs, does *nāẓir* have the right to arrange a debt for the waqf? Examples would include buying the needs of the waqf on installments or borrowing money for construction and repaying the debt later from the revenue before disbursing the shares of the beneficiaries.

Muslim jurists agree that if the waqf does not need to go into debt then it is not permissible for the *nāẓir* to borrow. The jurists also share the view that if the *nāẓir* is forced by necessity to borrow to preserve the waqf, it is permissible subject to the approval of the judge. Additionally, the jurists also agreed that if the waqf founder gave the *nāẓir* permission to borrow when needed, then it is considered permissible for him to do so.

Nevertheless, the jurists differed on other issues:

The Ḥanafīs stated that the basic rule is the impermissibility of borrowing for the waqf if it is not done by the order of the waqf founder. This is because the waqf has no legal capacity for liability, which is what debt is. Similarly, the beneficiaries cannot be liable for the debt, especially if the

[227] Al-Ṣāwī, *Ḥāshiyat al-Ṣāwī ʿalā al-Sharḥ al-Ṣaghīr*, 4:119-120.
[228] ʿUlaysh, *Minaḥ al-Jalīl*, 8:98.
[229] Al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, 7:658.

waqf is for the benefit of the poor because they are many and it is unimaginable that payment could be gotten from them. Additionally, the debt cannot be considered a liability of the manager because if he did [take it on those terms], the debt would be his liability and could not be recovered from the revenue of the waqf. Nonetheless, the Ḥanafīs left the original ruling (the impermissibility of borrowing), despite its accord with analogy (*qiyās*), due to necessity (*ḍarūrah*). They allowed borrowing with two conditions:

1- A judge's permission.
2- When leasing the waqf subject matter and spending from its rental is not possible.[230]

Therefore, the Ḥanafīs stated that paying back the debt taken for the sake of a house pledged as waqf is prioritized over paying the beneficiaries. This is because the debt is a liability upon the waqf that has been borrowed in order to maintain it. Thus, if the waqf generates money, even if a little every year, it shall be utilized to settle the debt to free the waqf. After that it shall be leased at the market rate.[231]

As for the Mālikīs and Ḥanbalīs, they do not require getting the permission of a judge or the approval of the waqf founder for it to be permissible to borrow for the waqf. This is because the *nāẓir* is entrusted and enjoys absolute disposition of the waqf; thus, permission and trustee status have been established for him from the beginning.[232]

However, the Shāfiʿīs considered it impermissible for the *nāẓir* to do so. Therefore, they ruled that the *nāẓir* is not allowed to borrow without the approval of the waqf founder or the permission of the ruler. However, it is permissible for the ruler to grant a loan to the *nāẓir* from the public treasury, or he may permit the *nāẓir* to borrow or to spend his own money for repairs on the condition that the waqf will repay. In case the *nāẓir* does so without the permission of the ruler or the approval of the waqf founder, it is not allowed, and whatever he spent shall not be returned because he has committed a violation.[233]

[230] Ibn ʿĀbidīn, *Al-Ḥāshiyah,* 43[*sic*]:666-8.
[231] Ibid., 13:459.
[232] Al-Ḥaṭṭāb, *Mawāhib al-Jalīl*, 7:458; Al-Buhūtī, *Kashshāf al-Qināʿ*, 4:267.
[233] Al-Nawawī, *Rawḍat al-Ṭālibīn*, 5:361; Al-Sharbīnī, *Mughnī al-Muḥtāj* with *Ḥāshiyat al-Shabrāmilī*, 5:397.

Fourth: The Zakat of Waqf

Is zakat considered among the expenses of waqf; i.e., is it an obligation on the waqf to be paid before the distribution of the revenue to the beneficiaries? This issue is divided into two parts:

1- Zakat on the Waqf Asset

This issue is based on the difference of opinion regarding the ownership of the waqf asset. The most authentic view in the Hanafi and Shāfiʿī Schools is that there is no zakat on the waqf asset because of the lack of ownership. This is because the ownership transfers to Allah S.W.T and is thus delinked from being particular to any human. The beneficiary only receives its benefits, either directly or through others by means of lending or leasing.[234]

The Mālikīs, however, considered the waqf to be under the ownership of the waqf founder; thus, zakat of the waqf is the responsibility of the waqf founder. Al-Ṣāwī said:

> If anyone made a waqf [of cash] to be borrowed by the needy and replaced with the same amount, the waqf founder must pay its zakat because it is under his ownership. Therefore zakat is payable on it every year even if [the *niṣāb* is only completed] by adding it to the rest of his wealth. If it stays with the borrower for many years, then zakat is payable for one year after it has been recovered.[235]

The Ḥanbalīs held that the ownership of the waqf is transferred to the beneficiaries unless it is a mosque or the like. Thus they made the beneficiaries responsible for paying the zakat. Al-Buhūtī stated:

> If the waqf asset is livestock such as free-grazing camels, cows and sheep, and a year has passed [on its ownership, zakat is due upon it]. Likewise, if waqf has been made of trees and a year has lapsed, zakat is due on the fruit, to be paid by the beneficiaries. [The School is of] one opinion [on this matter].[236]

2- Zakat on the Waqf Revenue

The waqf can either be pledged for specific parties or for a general category. If the waqf is pledged for certain individuals, the jurists have agreed that if any of them earns from the waqf an amount

[234] Al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 2:9; Al-Sharbīnī, *Mughnī al-Muḥtāj*, 2:389.
[235] Al-Ṣāwī, *Ḥāshiyat al-Ṣāwī ʿalā al-Sharḥ al-Ṣaghīr*, 1:229.
[236] Al-Buhūtī, *Kashshāf al-Qināʿ*, 4:255.

equal to the eligibility threshold (*niṣāb*), zakat is required from them for the amount received. This is because that amount is fully owned by them since they are free to use it at their discretion.[237]

However, if the waqf was pledged for a general category like the poor, the scholars have differed:

1- The Ḥanafīs and Mālikīs: it is incumbent upon the waqf manager (*nāẓir*) to pay zakat from the proceeds and then disburse the rest to the beneficiaries. The evidence is the generality of Allah's statement:

وَآتُوا حَقَّهُ يَوْمَ حَصَادِهِ

"…and give its due [zakat] on the day of its harvest" (6: 141).

Therefore, one-tenth of what the land produces is required to be paid as zakat. This means that ownership of the land or the lack thereof are of the same status according to the Ḥanafīs.

2- According to the Ḥanbalīs and the confirmed view of the Shāfiʿīs: zakat is not required on the revenue of the waqf if the beneficiaries are not specified; for example, the poor. This is because the waqf for the poor and needy is not specified for one of them.[238]

According to the previously mentioned position of the Ḥanafīs and Mālikīs, zakat is considered to be a liability that needs to be paid from the revenue of the waqf before disbursing it to its eligible owners.

[237] Al-Kāsānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 2:56; ʿUlaysh, *Minaḥ al-Jalīl,* 4:77.
[238] Ibn Qudāmah, *Al-Mughnī*, 5:639; Al-Nawawī, *Al-Majmūʿ, Sharḥ al-Muhadh·dhab*, 5:292, 457.

The Fifth Area of Discussion:

Waqf Experiences in Malaysia, The Sharīʿah Ruling on Substitution in Waqf, The Ruling on Waqf Management Expenses, The Parameters of Charging Fees, and Cash Waqf

by

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All praises be to Allah. We praise Him, seek His aid and ask His forgiveness. May the peace and blessings of Allah be upon Muhammad, his family, his companions and all of those who follow his guidance till the Day of Judgement.

This short research was written to honour the invitation of the brothers at Bank Rakyat. It is a brief research on some of the important topics related to the application of contemporary waqf with some minor references to the application in Malaysia. Due to the fractal nature of the topics requested of us, we will [only] address the questions that we were specifically asked to answer. However, before engaging in answering the questions, we will make a quick presentation on the way waqf is managed in Malaysia.

FIRST THEME: A BRIEF OVERVIEW OF WAQF MANAGEMENT IN MALAYSIA

The Federation of Malaysia consists of eleven states and three federal regions. The Malaysian Federal Constitution provides that the power to enact laws differs according to the aspects of the law that needs to be enacted. Based on the second list of the ninth table of the Federal Constitution, the authority to administer Islamic affairs and enact laws pertaining to it fall under the jurisdiction of the states. The Sultans of the states are the heads of this administration.

The Constitution states:

List 11: State List:

1. Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, **Islamic law and personal and family law of persons professing the religion of Islam,** including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; **Wakafs** and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public place of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organization and procedure of Syariah courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any

> of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law; the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom….

To manage these matters, the state government of each state has established an Islamic Religious Council. Matters relating to waqf are among the functions of these Councils, and legal judgments pertaining to waqf are under the jurisdiction of the state judiciaries. As for the enactment of waqf laws, there are two directions for these councils:

1) Legislation related to the management of Islamic affairs, including waqf legislation, is included in the Administration of Islamic Law. This law is considered to be the main law that manages all matters relating to Islam and Muslims in the states. As for the rules related specifically to waqf, whether legal or administrative, they are issued in the form of independent regulations and guidelines.

2) Besides the main law, there are special acts on waqf that contain all the regulations related to waqf. These separate acts are found in the states of Selangor, Terengganu, Perak, Negeri Sembilan and Malacca.[239]

It is important to note here that the federal government has made continuous efforts to unify the application of waqf at the federal level through a body formed under the prime minister called the Department of Zakat, Waqf and Hajj (JAUHAR). However, this department has no legal influence on the administration of waqf; therefore, its role remains merely advisory. This legal independence [of the states] has led to various provisions and legislation about waqf, including the Sharīʿah rulings on waqf.

According to the laws of the administration of Islamic affairs in the states, the Islamic Religious Councils (IRCs) have become the sole authority on waqf. The IRCs specialise in managing the *awqāf* and everything related to their affairs. That includes the management and investment of their funds and the disbursement of their revenue in accordance with the stipulations of the waqf founders in ways that achieve the Sharīʿah objectives of waqf. The laws of the states dictate that the Council [of that state] has the right to appoint any person or entity to manage the assets of the waqf on its behalf. Nevertheless, the Council shall remain the sole custodian of the assets of the

[239] Aznan Hasan, Azman Muhammad Noor, Shahnan Sulaiman, *Dirāsah ʿan Waqf Ṣanādīq al-Istithmār wa Āliyāt Taṭbīqihi fī Malaysia.* Study financed by JAKIM, 2017.

waqf and may at any time dismiss that person or entity as it deems fit for the interest of the waqf and its assets.

SECOND THEME: ISSUES IN WAQF SUBSTITUTION

The First Topic: The Concept of Waqf Substitution: Literally and Terminologically

In Arabic, *istibdāl* is an infinitive form derived from the roots *baddala* and *abdala*. All their linguistic meanings revolve around putting one thing in place of another. It is mentioned in *Lisān al-ʿArab*:

> **وأبدلت الشيء بغيره، وبدَّله الله من الخوف أمنا، وتبديل الشيء: تغييره وإن لم تأت ببدل، واستبدل الشيء بغيره وتبدَّله به إذا أخذه مكانه. والأصل في الإبدال جعل شيء مكان شيء آخر.**
>
> I replaced (*abdaltu*) something with something else. Allah replaced (*baddala*) his state of fear with safety. *Tabdīl* of something means changing it, even without substitution. *Istabdala* and *tabaddala* both mean to replace something with something else. The essence of *ibdāl* is putting one thing in place of another.[240]

The concept of *istibdāl* (substitution) in waqf, according to Islamic jurists, is not far from the literal meaning, although classic scholars did not mention a specific definition for it. Rather, they usually began directly discussing its forms and issues related to it, apparently because it was clear to them. However, contemporary scholars are interested in determining a definition for it; for example: "changing the waqf subject matter by removing it from the waqf and placing another subject matter in its stead, such that the rules of the waqf subject matter apply to it, regardless of whether it is similar to or different from the original".[241]

The Second Topic: The Sharīʿah Ruling of Waqf Substitution:

Islamic jurists' discussions of the ruling on waqf substitution vary according to the different ways the matter is viewed. These include the type of waqf, whether substitution is stipulated by the waqf founder, and the reason for the substitution. We will address some of these issues briefly.

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[240] Ibn Manẓūr, *Lisān al-ʿArab*, 11:48.

[241] ʿAbdul-Qādir ʿAbdullāh Al-Ḥawājirī, *Istibdāl al-Waqf wa Bayʿuh*, master's thesis, Islamic University of Gaza, 2015, p. 64.

1- **Substitution in Waqf of Real Estate:** In their rulings on the substitution of waqf property, scholars differentiate between mosques and other types of property.

a. Replacing a Mosque: Muslim jurists differed in their rulings on replacing a mosque into three opinions:

The first opinion: It is permissible if there is a benefit (*maṣlaḥah*). This is even if the mosque is still usable; for example: if the mosque becomes too crowded for the number of people using it and it is not possible to expand it in the same place. This view is narrated from Imam Aḥmad[242] and favoured by Ibn Taymiyyah.

Ibn Qudāmah said:

> If a waqf is ruined and its benefits cease, it can be sold. For example, a house that has collapsed; or land that has become infertile and cannot be restored; or a mosque in a village whose inhabitants have moved away so that there is no one left to pray there; or a mosque that is not spacious enough for the worshippers and cannot be expanded; or a mosque of various sections that cannot be rebuilt except by selling some of the sections; it is allowed to sell part of it to rebuild the other parts. If none of it can be used, all of it should be sold.[243]

The second opinion: It is permissible if the mosque is nonfunctional and dilapidated. This is the opinion of some Shāfiʿīs[244] and the approved view in the Ḥanbalī School.[245] **The proponents of permissibility cited several items of evidence including:**

Narrations: The *ḥadīth* of ʿĀʾishah (may Allah be pleased with her), in which the Prophet (peace be upon him) said:

«لولا أن قومك حديثو عهد بجاهلية لهدمت الكعبة ولبنيتها على قواعد إبراهيم».

"O ʿĀʾishah, if your people were not so recently [immersed in] ignorance, I would have dismantled the Kaʿbah and rebuilt it on the foundations of Ibrāhīm."[246]

In a variant narration:

[242] See: *al-Inṣāf* with *al-Sharḥ al-Kabīr*, 16:521.
[243] Ibn Qudāmah, *al-Mughnī*, 6:28.
[244] Al-Nawawī, *Rawḍat al-Ṭālibīn*, 8:357.
[245] Ibn Qudāmah, *al-Mughnī*, 8:222.
[246] *Ṣaḥīḥ al-Bukhārī* and *Ṣaḥīḥ Muslim*.

«لنقضت الكعبة فجعلت لها بابين بابا يدخل الناس منه وبابا يخرجون».

"…I would have dismantled the Kaʿbah and placed two doors in it, one by which people could enter and the other by which they could leave."

The angle of reasoning is that the Kaʿbah is the best waqf on the face of the Earth. The Prophet (peace and blessings of Allah be upon him) was determined to dismantle it and change it back to the way Ibrahim (peace be upon him) had built it and to place two doors in it. This is evidence for replacing the building with another building. The only thing that prevented him from doing so was fear of the harm of possibly shaking the belief of the new Muslims among the Quraysh who had only recently accepted Islam after the conquest of Makkah. The substitution of one building with another is one type of substitution. It can be derived that substitution is permissible in its entirety.

From the tradition of the Companions: What ʿUmar and ʿUthmān (may Allah be pleased with them) did in expanding the Prophet's mosque. Shaykh al-Islam Ibn Taymiyyah said:

> It is confirmed that ʿUmar and ʿUthmān changed the building of the Prophet's mosque. As for ʿUmar, he built it with similar materials such as cob and [date-palm] trunks. ʿUthmān on the other hand used better materials such as teak. In any case, the Rightly-guided Caliphs replaced the cob and trunks that had been part of the original waqf with other materials. This is one of the most famous stories, and no one questioned it. There is no difference between the substitution of one building for another building and the substitution of one lot for another lot in case of need.[247]

In addition, there is what ʿUmar (may Allah be pleased with him) did when he relocated the mosque of Kufah and substituted it with another mosque while transforming its previous location into a market for date sellers.[248] Ibn Qudāmah said: "This was witnessed by the Companions and no dissent was voiced; therefore, it is consensus."[249]

The third opinion: It is absolutely forbidden even if the mosque is destroyed, its benefits are disrupted, and there are no people around to use it for prayers anymore while its land and

[247] Ibn Taymiyyah, *Majmūʿ al-Fatāwā*, 32:142.
[248] Al-Ṭabarānī, *al-Muʿjam al-Kabīr*, 9:192, no. 8949. Al-Haythamī stated that Al-Ṭabarānī collected it. Qāsim did not hear from his grandfather, but the narrators were relied upon by the collectors of authentic narrations (Al-Haythamī, *Majmaʿ al-Zawāʾid*, 6:275).
[249] Ibn Qudāmah, *al-Mughnī*, 6:29.

courtyard are still valid for prayers. This is the view of the Ḥanafīs,[250] Mālikīs[251] and the majority view of the Shāfiʿīs,[252] in addition to one narration of Imam Aḥmad.[253]

It was narrated in *al-Majmūʿ*:

> If a mosque was pledged as waqf and the place was destroyed and no longer prayed in, it shall not be returned to [human] ownership and it is not allowed to dispose of it. This is because when ownership is transferred to become the right of Allah, the ownership is not transferred back due to disruption. This is similar to freeing a slave who then becomes old. If a palm tree is pledged as waqf and then it dried out, or an animal is pledged as waqf and then it becomes old, or tree trunks are pledged for a mosque and they then splinter; there are two views: one is that it is impermissible to sell them for the same reason mentioned for the case of the mosque. The other is that it is permissible because no further benefits can be expected from them; therefore, selling them has higher priority, unlike the mosque. This is because the mosque can still be used for prayer even if it was destroyed. The place can be rebuilt and used for prayer.[254]

Those supporting this view cited many items of evidence, including:

Transmitted Evidence: The *ḥadīth* of Ibn ʿUmar, may Allah be pleased with them both, that says:

> **أصاب عمر بخيبر أرضاً فأتى النبي صلى الله عليه وسلم فقال: أصبت أرضا لم أصب مالا قط أنفس منه، فكيف تأمرني به؟ قال: «إن شئت حبّست أصلها و تصدقت بها». فتصدق عمر: أنه لا يباع أصلها، ولا يوهب ولا يورث في الفقراء والقربى والرقاب وفي سبيل الله والضيف وابن السبيل، لا جناح على من وليها أن يأكل منها بالمعروف، أو يطعم صديقا غير متمول فيه.**
>
> ʿUmar acquired a piece of land in Khaybar. He came to the Prophet (peace be upon him) seeking his advice about it, saying it was the most valuable property he had ever owned. The Prophet (peace be upon him) told him, "If you like, you may hold back the property and give its produce as charity." ʿUmar made a charitable donation of it, declaring that the property must not be sold or given as a gift or inherited. [He devoted its produce] to the poor, [his] relatives, to the emancipation of slaves, in the way of Allah, and for guests and wayfarers. And [he added that] there is no blame on the one who administers it to consume from it according to what is customary or to feed a friend without appropriating it as [his own] property."[255]

[250] *Rawḍat al-Quḍāh*, 2:792; *Al-Jawharah al-Nayyirah*, 2:25.
[251] *Al-Ishrāf*, 2:81.
[252] Al-Nawawī, *Rawḍat al-Ṭālibīn*, 5:357.
[253] Ibn Qudāmah, *al-Mughnī*, 8:222.
[254] Al-Nawawī, *al-Majmūʿ*, 15:360.
[255] *Ṣaḥīḥ al-Bukhārī* and *Ṣaḥīḥ Muslim*

The inference: That the Prophet (peace and blessings of Allah be upon him) prohibited selling it shows that it is not correct to transfer the ownership of waqf in any form.

Rational Evidence: The essence of waqf requires perpetuity, which is incompatible with sale. It, therefore, shall be either a waqf or a sale.

b. **Substitution of a Property That is Not a Mosque:** Muslim scholars divided on the issue of the substitution of a property that is not a mosque into two views:[256]

The first view: it is forbidden: This is the view of the Shāfiʿīs and Mālikīs. In support of it they cited the evidence previously cited supporting the impermissibility of substitution in mosques.

However, the Mālikīs excluded one case: if the mosque is surrounded by other *awqāf* and the mosque needs expansion. In such case, it is permissible to sell the land bordering the mosque and using the proceeds to buy another waqf. In the book *As-hal al-Madārik,* it is mentioned:

> Khalīl said regarding exceptions to the waqf that cannot be sold: No [waqf] property [can be sold] even if it is dilapidated or demolished even without it being damaged, unless to expand a mosque even with [legal] coercion and [a judge's] order to use the proceeds for another [property.

The commentator said:

> It has already been mentioned that it is not permitted to sell a waqf even if it becomes dilapidated except in this case. That is, if a mosque becomes too small for the number of worshippers or there is a need to expand it. If there is beside it another waqf, or any other property, it is permissible to sell the waqf in order to expand the mosque. If the manager of the waqf or the property owner refused to sell it, the common view is that they shall be forced to sell it. They should then buy another property similar to the first with the proceeds and turn that into a waqf. Similar cases to expanding a mosque are expanding a road or graveyards of Muslims…

Al-Mawāq quoted Saḥnūn:

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[256] Ibn ʿĀbidīn, *al-Ḥāshiyah*, 3:371; Al-Mawāq, *Al-Tāj wa al-Iklīl li Mukhtaṣar Khalīl*, 7:661; Al-Qarāfī, *Al-Dhakhīrah*, 6:346; Al-Shīrāzī, *al-Muhadh-dhab*, 2:11; Ibn Qudāmah, *al-Mughnī*, 6:29; Abū Zahrah, *Muḥāḍarāt fī al-Waqf*, pp. 183-197; Al-Kubaysī, *Ahkām al-Waqf*, 2:9-59; Al-Zarqā, *Ahkām al-Waqf*, p. 171.

> Our companions did not allow the selling of waqf at all unless it is near a mosque that needs to be expanded by adding the waqf to it. In this case, they permit selling it and buying another place to be waqf using the proceeds. Some waqf houses near the mosque of the Prophet were incorporated into it. It is narrated from Mālik that this is only permissible in mosques where Jumuʿah prayers are held and not in other mosques. This is because the necessity is not as pressing as it is in the former.[257]

The second view is permissibility: This is the view of Ḥanafīs. They are the ones who offered the most details about this issue. They allow the substitution if it is stipulated by the waqf founder. They also allow it without his stipulation if the benefits from the waqf have been completely disrupted. The Ḥanafīs are followed by the Ḥanbalīs, who permit substitutions based on necessity without further qualification, whether for fixed property or for movables. It is also permissible based on benefit (*maṣlaḥah*) according to one of the views transmitted from Imam Aḥmad, which was chosen by Ibn Taymiyyah as the weightiest, and he argued for it strenuously. This is a general rule [with some exceptions].

2. The Substitution of Moveable Properties: For example, books if they have been damaged, animals if they have grown old, palm trees, etc. Some jurists reported that there is a consensus regarding the permissibility of selling waqf animals if they are no longer usable for the purpose they were pledged for, such as horses if pledged for jihad for the sake of Allah. This consensus was reported by many scholars.

Ibn Qudāmah said: "I agree with the first view due to the consensus [of scholars] regarding the permissibility of selling a horse that is pledged for jihad if it is old and not useable for battle."[258] Qāḍī al-Jabal said: "The leading scholars permitted [it]; in fact, there is consensus that it is permissible to sell waqf animals if they are no longer usable for the purpose they were pledged for."[259]

Scholars differed regarding movable properties other than horses, having two views:

[257] Al-Kashnāwī, *As-hal al-Madārik Sharḥ Irshād al-Sālik*, 3:104-105.
[258] Ibn Qudāmah, *al-Mughnī*, 8:223.
[259] *Al-Munāqalah bi al-Awqāf*, p. 48.

The first view is full permissibility. This is the view of the majority of Ḥanafīs,[260] Mālikīs,[261] Shāfiʿīs[262] and Ḥanbalīs.[263]

Proponents of permissibility base their view on that fact that if moveable waqf properties are no longer useable for the purpose they were pledged for, it is clear impairment that cannot be rectified. It is not expected that they will return to their original state; thus it is more appropriate to sell them.

The second view is impermissibility: This is the view of Ibn al-Mājishūn from the Mālikīs[264] and some of the Shāfiʿīs.[265]

Proponents of impermissibility base their view on the *ḥadīth* of ʿUmar ibn al-Khaṭṭāb (may Allah be pleased with him) that is the key evidence on waqf "…on the condition that it not be sold or given as a present or bequeathed".

3. The Sharīʿah Ruling of Substitution Based on the Stipulation of the Waqf Founder or without It

Initially, it should be known that those who allow substitution without the stipulation of the waqf founder approve it, a fortiori, when it is stipulated by the waqf founder. Those are the Ḥanafīs and Ḥanbalīs. However, those who completely disapprove of substitution whether moveable or immoveable—the Shāfiʿīs—or immovable properties only—the Mālikīs—have a different view if the substitution is stipulated by the waqf founder. The Mālikīs disallow the waqf founder stipulating that in the first place. However, if it happened that he did stipulate and his stipulation was confirmed, the substitution is then permissible in order to follow his stipulation.[266]

[260] Ibn al-Humām, *Fatḥ al-Qadīr*, 6:237.
[261] Mālik ibn Anas, *al-Mudawwanat al-Kubrā*, 6:99.
[262] Al-Nawawī, *Rawḍat al-Ṭālibīn*, 5:375.
[263] Ibn Qudāmah, *al-Mughnī*, 8:223.
[264] Ibn ʿAbd al-Barr, *al-Kāfī fī Fiqh Ahl al-Madīnah*, 2:1010.
[265] Al-Nawawī, *Rawḍat al-Ṭālibīn*, 8:385.
[266] See: Ibn ʿĀbidīn, *al-Ḥāshiyah*, 4:384; Muḥammad ibn al-Ḥaṭṭāb al-Mālikī, *Aḥkām al-Waqf*, (prepared by ʿAbd al-Qādir al-Bājī, Dār Ibn Ḥazm, 2009) p. 264.

This is in case the waqf founder stipulated and authorised the substitution. However, what is the ruling if it was not stipulated or if he stipulated that his waqf shall not be sold or substituted?[267] Is it permissible for the judge to violate his condition and rule for its substitution in certain cases?

Those who discussed this issue in detail are the Ḥanafīs due to their being the most expansive school in allowing substitution, permitting it absolutely when the waqf founder stipulates it. Regarding this issue, they have two views:

a. The judge does not have the authority or right to change the condition of the waqf founder. This view was chosen by Imam Hilāl al-Ḥanafī, the companion of Abū Yūsuf and Zafar.[268]
b. The judge has the right to violate this condition and the authority to order substitution. They included this as one of the seven issues in which they held it permissible to go against the condition of the waqf founder.[269]

4. Substitution Due to a Total or Partial Disruption of the Benefit

The waqf property, whether moveable or not, may be subject to disturbances that may disrupt its benefits totally or partially. What is the ruling for replacing it in this case?

First: Total Disruption of the Benefit

1- **If it is a fixed asset and it is not possible to maintain it by selling part of it or leasing it, then if the fixed asset is:**
   a. **a mosque:** The view of the majority that it is not permissible even if it was destroyed and its building was demolished. This is according to the Ḥanafīs, Mālikīs and Shāfiʿīs; however, it is allowed by the Ḥanbalīs, as mentioned earlier.
   b. **not a mosque:** It is permissible according to the Ḥanbalīs and Ḥanafīs.[270] However, according to the Mālikīs, the basic rule is that it is not permissible to sell the waqf property and replace it even if it is destroyed. They explained that one of the

[267] The view of the permitting substitution based on necessity and benefit (*maṣlaḥah*) a backdoor for judges and unjust rulers to meddle with Muslims' Awqaf; this provoked many Waqefs (donors) to stipulate in their statements of Waqf not to sell or substitute it at all. This is in order to close the door for those people. In addition to maintaining their Awqaf from their greed and injustice.
[268] In his book: *Aḥkām al-Waqf*, p. 94.
[269] See: Ibn ʿĀbidīn, *al-Ḥāshiyah*, 4:387; Ibn Nujaym, *Al-Ashbāh wa al-Naẓāʾir*, p. 163.
[270] See: Ibn ʿĀbidīn, *al-Ḥāshiyah*, 4:286; Ibn Nujaym, *Al-Baḥr al-Rāʾiq*, 5:240.

beneficiaries or someone else will be found to fix it even if after a while. They only made an exception for one case: if the waqf property is far away from a city. In this case only, there is one opinion among the Mālikīs that it is permissible that it be substituted.[271] As for the Shāfiʿīs, they prohibit the substitution of the waqf property even if it is destroyed and its benefits are totally disrupted because it is hoped that someone will come and fix it even after a while. Additionally, it is feared that opening the door for substitution is likely to cause the ruin of *awqāf* by fraudulent trickery.[272]

Second: Total Disruption of the Benefits of a Moveable Asset

Substitution is permissible according to the majority, comprising the Ḥanafīs, Ḥanbalīs and Mālikīs and one opinion of the Shāfiʿīs. Al-Shīrāzī said:

> If someone pledged as waqf a palm tree that died from lack of water, or an animal that got old, or pledged tree trunks for a mosque and they broke, there are two views. The first is that it is not permissible to sell them, as per what we mentioned regarding a mosque. The second is that it is permissible because no future benefit is expected from them; therefore, it is more appropriate to sell them than leaving them as is.[273]

The reason that prompted those who disallow selling among the Mālikīs and Shāfiʿīs to be lenient regarding movables is that not allowing replacement of movables would lead to their destruction and, thus, the end of the waqf, which is not expected to occur in the case of immovable properties. Permitting the substitution of movables would ensure the continuity and perpetuity of waqf. This is the reason for differentiating between the two.[274]

If the Benefit is Partially Disrupted

The first view: it is obvious that anyone who disapproves of substitution of waqf assets in cases of total disruption of their benefits would do the same if some benefits remain. Thus, the majority of Ḥanafīs, Mālikīs, Shāfiʿīs and the confirmed view of the Ḥanbalīs is that substitution is prohibited

[271] See: Al-Qarāfī, *Al-Dhakhīrah*, 6:330; Ibn ʿArafah, *Al-Mukhtaṣar al-Fiqhī*, 8:497.
[272] See: Zakariyyā al-Ansārī, *Fatḥ al-Wahhāb Sharḥ al-Ṭullāb*, 1:309.
[273] Al-Shīrāzī, *al-Muhadh-dhab*, 2:331.
[274] See: Abū Zahrah, *Muḥāḍarāt fī al-Waqf*, p. 185; Al-Kubaysī, *Aḥkām al-Waqf*, 2:33 & 39; Al-Mawāq, *Al-Tāj wa al-Iklīl li Mukhtaṣar Khalīl*, 7:630.

in this case. Al-Ḥawājiry chose this as the weightiest view because it blocks lawful means that lead to unlawful ends (*sadd al-dharīʿah*).[275]

The second view: it is permissible when doing so realizes a preponderant interest. This is the less weighty view in the Ḥanafī and Ḥanbalī Schools. It was the choice of Abū Yūsuf of the Ḥanafīs in addition to Ibn Taymiyyah and many scholars, as will be illustrated in the issue of the substitution of a waqf that is more beneficial.

5. Substitution in Order to Shift to a More Beneficial, Useful or Profitable Waqf[276]

This issue is different than the previous one since the benefit is not disrupted, neither fully nor partially. Therefore, what is the Sharīʿah ruling of shifting to a more beneficial and useful waqf?

The majority view is that it is forbidden. As long as the waqf is still operational and generating revenue, it is not permissible to substitute it according to the four major schools. The Mālikīs and Shāfiʿīs maintain the basic ruling of their schools not to permit substitution—with some differentiation between detailed cases in each school, some of which was previously mentioned. This is also the preponderant view of the Ḥanafīs and Ḥanbalīs.[277]

The second view is permissibility. This is the view of Abū Yūsuf of the Ḥanafīs, Ibn Taymiyyah and Ibn Qāḍī al-Jabal of the Ḥanbalīs, Abū Thawr, and Qāḍī Abū ʿUbayd ibn Ḥarbawayh from the Shāfiʿīs.[278]

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[275] Al-Ḥawājirī, *Istibdāl al-Waqf wa Bayʿuh*, 94-96.

[276] For further details, see: *Majmūʿ fī al-Munāqalah wa al-Istibdāl bi al-Awqāf*, which contains three essays by Ḥanbalī scholars, viz.: Ibn Qāḍī al-Jabal, Qāḍī Yūsuf Al-Mardāwī and Ibn Ruzayq al-Ḥanbalī; ed. by Muḥammad Sulaymān Al-Ashqar (Muʾassasat al-Risālah); cf. Al-Kubaysī, *Aḥkām al-Waqf*, 2:21; ʿAbd al-Raḥmān ibn Nāfiʿ al-Salamī, "Istibdāl al-Waqf alladhī lam tuʿaṭṭal manāfiʿuhu bi Waqqf Khayr minhu fī al-Fiqh al-Islāmī", *Majallat al-Iqtiṣād al-Islāmī bi Jāmiʿah ʿAbd al-ʿAzīz bi Jeddah*, vol. 24, no. 1, 2011.

[277] See: Ibn ʿĀbidīn, *al-Ḥāshiyah*, 4:388. He said, "If a person wants a substitute with a greater yield and better location, it is permissible according to Abū Yūsuf." Ibn Nujaym said in *Al-Baḥr al-Rāʾiq*, 5:223: "Abū Yūsuf permitted substitution in waqf without any condition if the yield of the earth is weak, but we do not give fatwa according to this opinion for we have seen countless examples of corruption in the substitution [process]. Unjust judges have used it as a subterfuge to void most of the *awqāf* of the Muslims and to do the things they have done." Regarding the most correct view in the Ḥanbalī School, Al-Mardāwī said in *Al-Inṣāf* (7:101), "Know that the benefits of a waqf will either be disrupted or not. If its benefits are not disrupted, it is not permitted to sell it or exchange it under any condition. [Imam Aḥmad] explicitly stated that in the narration of ʿAlī ibn Saʿīd. He said, 'It shall not be substituted or sold unless it is in a state in which no benefit can be derived from it.' Abū Ṭālib said, 'It shall not be changed from its state or sold unless it cannot be benefited from at all. That is the position of the scholars of the School.'"

[278] He wrote a book on the matter called *al-Munāqalah bi al-Awqāf* in which he supported the view of Ibn Taymiyyah, and it has been printed and is in circulation.

Ibn Taymiyyah said:

> As for what has been pledged as waqf for its revenue, if it was substituted with something better—such as: a person pledges a house, a shop or an orchard that generates a small revenue and he substituted it with something more useful for the waqf—it is permitted by Abū Thawr and other scholars. They include Qāḍī Abū ʿUbayd ibn Ḥarbawayh, the judge of Egypt—a follower of the Shāfiʿī School—and he issued his judgment by it. It is the analogic extrapolation of Imam Aḥmad's view that it is permissible to change the location of a mosque from one place to another if there is benefit. In fact, if it is permissible to substitute a mosque with something else due to the benefit—for example, a mosque becoming a marketplace, it would be more appropriate to allow substitution of one revenue source for another. This is also the analogic extrapolation of his view that it is permissible to replace a sacrificial animal with a better one. He also stated that if a mosque built on the ground is raised up to place irrigation pipelines beneath it and the neighbours approve it, it is permissible. However, there are amongst the companions of Aḥmad those who forbade replacing the mosque, the sacrifice and the waqf land. This is the view of the Shāfiʿīs and others. Nonetheless, [Imam Aḥmad's] statements, narrations about the views and practice of the Ṣaḥābah, and *qiyās* (legal analogy) require the permissibility of substitution due to the benefit. Allah knows best.[279]

6. Substitution for the Purpose of Changing the Beneficiary of the Waqf Property

This means changing the waqf from its original form; for example, when the *nāẓir* or waqf administration changes the waqf from a house to an orchard or changes a school into a mosque. The basic rule is that it is not permissible to change the waqf from its original status if there is no benefit for the waqf or the beneficiaries. It is also not allowed to be changed for the benefit of the *nāẓir* or the waqf administration.

Ibn Mufliḥ said:

> If he changed it for his own benefit, he shall be obliged to return it back to its original state and shall be liable for its lost revenue. The authorities shall force him to do so. If he refuses, he shall be punished by imprisonment, caning or the like. An indebted person can be punished with the like, so what about a person who refuses to do an obligation after having inflicted injustice?[280]

However, what if it is done for the benefit of the waqf? Al-Ḥaṭṭāb stated:

[279] Ibn Taymiyyah, *Majmūʿ al-Fatāwā*, 31:253.
[280] Ibn Mufliḥ, *Al-Furūʿ*, 4:581.

> An example is what I did for the Shaykh's school located in QanÏarah. I changed the ablution area into a house and relocated it near the well because the channel that used to bring it water dried up.[281]

The jurists have three differing opinions on the ruling:

The first opinion: The *nāẓir* has the right to change the form of the waqf if it benefits the beneficiaries. This is the view of some Ḥanafīs,[282] the Mālikīs[283] and the Ḥanbalīs.[284] It is also the choice of Ibn Taymiyyah.[285] He said: "The majority of scholars permitted changing the form of the waqf if there is a benefit; for example, changing homes into shops."[286]

The second opinion: The *nāẓir* does not have the right to change the form of the waqf unless the waqf founder stipulated that it can be done if there is a benefit in doing so. This is the view of the Shāfiʿīs.[287]

The third view: The *nāẓir* does not have the right to change the form of the waqf except with two conditions:

1. The change is subtle, such that it does not change the name of the waqf asset.
2. That the change does not take away anything from the waqf property but rather shifts its components from one side to the other. This is the view of the Shāfiʿī scholars Ibn Ṣalāḥ and Al-Subkī.[288]

We are of the same opinion as the first view, that it is permissible to change the aspect. That is because it follows the purpose of the waqf founder, that purpose being maximization of the revenue rather than the particular object named [in the trust deed]. Allah knows best.

The Fourth Topic: The Forms of Replacing Waqf and Their Respective Rulings

[281] Al-Ḥaṭṭāb *Mawāhib al-Jalīl*, 6:36.
[282] Ibn al-Humām, *Fatḥ al-Ḳadīr*, 6:241.
[283] Al-Ḥaṭṭāb *Mawāhib al-Jalīl*, 6:36.
[284] Ibn Mufliḥ, *Al-Furūʿ*, 4:623; Al-Ḥajjāwī, *Al-Iqnāʿ*, 3:83.
[285] Ibn Taymiyyah, *Majmūʿ al-Fatāwā*, 31:260.
[286] Ibid., 31:261.
[287] Al-Nawawī, *Rawḍat al-Ṭālibīn*, 5:361.
[288] Al-Sharbīnī, *Mughnī al-Muḥtāj*, 2:393; *Fatāwā Ibn Ṣalāḥ*, 1:367-8.

The forms of substitution are many. The most prominent and systematic categorisation is by variety and type as per what Al-Ḥawājirī did in his study.[289] The meaning of variety here is either movable or immovable. Each variety is then subdivided into types. He divided the forms of substitution into three according to similarities and differences between the original and the substitute. The ruling of each form is deduced from the basic view that substitution is permissible, according to those who allow it with parameters.

1. The substitution is of the same variety and type; for example, a mosque for a mosque, or a car for a car. All those who permit substitution in movable and immovable property consider this form of substitution to be permissible. It is also permitted by those who permit substitution in movable property only, when the conditions they stipulate for it are fulfilled.
2. The substitution is of the same general category but of different type; for example, replacement of land with a house, or of a house with land in the category of real estate; likewise, the replacement of a car with furniture, or copies of the Qurʾān with other books in the category of movable property.

Those who permit substitution in real estate with the conditions they stipulate for its permissibility—i.e., the Ḥanafīs for other than mosques, and the Ḥanbalīs without restriction—disagree about this form. There are two views: permissible and impermissible. Ibn Qudāmah said:

> The manifest meaning of Al-Khiraqī's statement is that when waqf property is sold anything can be purchased with the proceeds and returned to its beneficiaries, whether it is of the same type or not. That is because the point is that it be of benefit, not of a specific type.[290]

Al-Ḥawājirī has chosen permissibility here without distinguishing between a mosque and other types of immovable assets. The authors disagree, opining that it is forbidden to include substitution of a mosque by another immovable asset in the permissible forms of substitution. This is because the intention of the waqf founder is that it be used for worship in particular. Replacing that with another immovable asset, no matter how useful, would be considered a fundamental change to the intention of the original founder. This is not permissible when it is possible to raise another mosque in place of the first. However, replacing assets other than mosques by any form of substitution due to necessity (*ḍarūrah*), need (*ḥājah*) or benefit (*maṣlaḥah*) is permissible.

[289] For further details, see: Al-Ḥawājirī, *Istibdāl al-Waqf wa Bayʿuh*, 60-78.
[290] Ibn Qudāmah, *Al-Mughnī*, 6:29.

1- **Difference in variety:** i.e. between immovable assets and movables such as substituting a piece of land with cars or vice versa. There are two cases in this scenario:
   a. The original sold asset is movable, such as cars, while the purchased asset is an immovable asset such as a piece of real estate. Al-Ḥawājirī in his study opined that it is permissible. This is because it is agreed that immovable assets are more sustainable and perpetual than movable assets. Therefore, it achieves the objective of perpetuity and sustainability in waqf benefits in a clearer way than the movables.
   b. The original sold asset is an immovable while the purchased asset is a movable, such as replacing a house with cars or electrical devices. Al-Ḥawājirī opined that it is impermissible for the same reason as the previous case but from the opposite angle.

The Fifth Topic: A Brief Observation on Jurists' Statements on Substitution

The issue of substitution in the applications of waqf has been a very sensitive topic in the past and the present. Jurists are quite polarized in their views between those who support and defend it with many conditions and those who forbid it except in very narrow cases. There is no doubt that their views were influenced by the reality in which they lived. Their views are therefore in line—to a certain extent—with those circumstances. Those who witnessed abuse tried to avoid it by either prohibiting it or allowing it with extreme caution and for certain cases only. Many further restrictions were added to regulate the matter and keep waqf properties out of reach of greedy hands.

In fact, the arguments of proponents of impermissibility of substitution are based on two matters:

1- Their understanding of the nature of waqf is that it is to be kept in perpetuity. This means that the waqf shall be sustained whatever its condition because substitution is contrary to the perpetuity of waqf. Their evidence is the *ḥadīth* of ʿUmar that it shall "not be sold or given as a present or bequeathed". In response, proponents of permissibility say that substitution does not contradict the purpose of waqf, which is retaining the asset and donating its benefit; rather, it affirms it. There is no meaning to keeping the waqf subject matter if benefit cannot be derived from it or its revenue. Substitution goes in line with what the waqf founder intended from the waqf. Therefore, it must be permissible if need or interest requires it. Ibn Taymiyyah defended the ruling of the permissibility of substitution, saying:

> As for the view that it is not permissible to remove or substitute unless benefiting from it is not possible, it is rejected. Its [Ḥanbalī] proponents have not presented any proof, neither from Sharīʿah nor from the [Ḥanbalī] School. There is nothing from the Lawgiver or the founder of the School to support this negation they argue for. Rather, the Sharīʿah evidence and the statements of the founder of the School indicate the opposite.[291]

Regarding the substitution of waqf in order to move into a waqf with higher benefit, he says:

> If it is permissible, according to his apparent view, for the mosque—which is pledged as waqf so people can benefit from its corpus, and that corpus is sanctified in Sharīʿah—to be replaced with another due to benefit—because the substitute is more suitable and more beneficial, even if the benefit from the mosque is not totally disrupted—and for the first property to become free from waqf …. To allow substitution with what is better and more suitable when waqf has been made of something to be exploited for use is more appropriate. This is definitely permitted by Aḥmad for *awqāf* that are pledged for their utility. There are two views reported from him regarding the sale of a mosque due to need. It is permissible to release the mosque from being waqf and substitute it with another mosque to be pledged as a waqf if there is a benefit. If the benefit from the first mosque is not disrupted: the waqf property shall be utilised and another better mosque shall be pledged as waqf in its place. If the benefit from the first mosque is not disrupted, it would be more adequate. Selling the waqf pledged for its utility is prioritised over the selling of the mosque, and so is its substitution. This is because the corpus of the mosque is sanctified in Sharīʿah, and it is intended that benefit be derived from its physical structure. Therefore, it is not allowed for it to be leased or for an exchange contract to be conducted for its usufruct. This is contrary to the waqf pledged for its utility, which is permissible to be leased and for an exchange contract to be conducted for its usufruct. Also, in the latter it is not intended that the beneficiary would take the benefit of the waqf by himself compared to the case of the mosque. Additionally, it does not have a Sharīʿah sanctity due to the right of Almighty Allah as in the case of the mosque.[292]

2- The fear of those who disallow substitution stemmed from the abuse they noticed from rulers, judges and managers who used substitution as a mechanism to convert waqf properties into their personal property. As a result the waqf would be lost and all or part of its revenue would be plundered in the name of substitution. This is clear from the discussions of jurists. Therefore, even the jurists who supported its permissibility stipulated many conditions in order to preserve the waqf properties from the injustice of the greedy. We find that they sometimes recommended new conditions as deemed necessary for their eras for the

[291] Ibn Taymiyyah, *Majmūʿ al-Fatāwā*, 31:220.
[292] Ibid. 31:229.

sake of preserving them. The author of *al-Baḥr al-Rāʾiq*, after preferring the view that substitution of waqf property is permissible, stated:

> Another condition must be added in our time: that substitution must be with immovable property and not with money. That is because we have seen the *nāẓirs* consuming [the price] and rarely buying a substitute. We did not see any of the judges looking into it despite the frequent substitution in our time.[293]

The view that we incline toward in this matter is that it is permissible for the waqf to be substituted if there is a benefit or necessity in doing so. This is because the purpose of waqf is the benefit produced by the waqf to the beneficiaries, which must be maintained as much as possible. The intention of substitution is to preserve this benefit and ensure that the waqf assets produce the best fruits for the beneficiaries based on the stipulation of the waqf founder or as determined by the body responsible for *awqāf*. Most contemporary scholars have favoured the overall permissibility of substitution. This is the view that is suitable for the developments of this era and the issues that waqf faces in this regard. Shaykh Abū Zuhrah said, after discussing the matter and mentioning the views in an expansive way, "The fatwa from the old times is the permissibility of substitution in this case—i.e. the substitution of one revenue-generating waqf with another that generates more revenue—similar to the previous case."[294] Dr. Muhammad Zuhaily, after quoting the view of Ibn Taymiyyah and those who agree with him regarding the permissibility of substitution based on necessity and benefit, said: "This is the view followed in all Muslim countries. It is obligatory to practice caution and preparation against exploitation, fraud and manipulation."[295]

When we say it is permissible to substitute in these cases, it is necessary to establish firm policy and good governance in order to achieve the intended purpose of substitution and to prevent the occurrence of misconduct and abuse of power.

The Sixth Topic: The Application of Waqf Substitution in Malaysia

The application of substitution in Malaysia has gone through two phases. Since the prevailing *fiqh* school in Malaysia is the Shāfiʿī School, the application used to be absolute prohibition of

[293] Ibn Nujaym, *Al-Baḥr al-Rāʾiq*, 5:241.
[294] Abū Zahrah, *Muḥāḍarāt fī al-Waqf*, p. 196.
[295] Al-Zuḥaylī, *Al-Istithmār al-Muʿāṣir li al-Waqf*, p. 13.

substitution. This led to either the loss of the waqf or the inability to utilise it properly. Therefore, in a meeting of the National Fatwa Council, the scholars discussed this issue and released a decree dated 13 April 1982 that waqf substitution is permissible. This can be done through selling it and buying another waqf that is more useful for the beneficiaries. The resolution declared that the basis for this ruling of permissibility is the Ḥanafī view. Similarly, the Council at its forty-first meeting, on November 4, 1996, confirmed the permissibility of substitution and urged its practice due to the benefits it brings to the beneficiaries, especially since abandoned properties and mosques might cause a problem for the authorities.

Furthermore, states such as Johor, Malacca, Negeri Sembilan and Selangor have also issued rules and regulations approving substitution for any waqf property that does not generate benefit for the beneficiaries or when the waqf real estate does not achieve the main objective of the waqf.

In terms of application, substitution is done in many forms such as selling part of the waqf property in order to develop the remainder of the property; selling a group of waqf properties that have the same purpose and buying another property in their stead that would achieve the same purpose; selling one waqf property and buying another with the same purpose; and selling multiple waqf properties having different waqf purposes and buying a new waqf property that generates higher revenue in their stead. That same revenue is then disbursed to all the *awqāf* that were sold in proportion to the value of the sold properties.

In practice, the substitution process goes through two phases. First, the Investment and Development Committee of the Council considers the possibility of applying substitution to the particular waqf property. The Committee then submits a proposal to the State Fatwa Council to issue the ruling of permissibility or prohibition. It should be noted here that the Fatwa Councils in the states are the only source of acceptance or rejection of the substitution.

There is an observation that should be mentioned on this point. It seems that the fatwas on substitution in Malaysia do not limit the permissibility to certain types of substitution. Nor do they set the conditions and rules for it either. The fatwas and regulations provide for absolute permissibility while mentioning the many benefits of substitution. It seems that the determination of parameters and regulations of substitution is left up to the state Fatwa Councils and that it varies from one substitution to another. The religious department under the Prime Minister's office has attempted to breach the gap by issuing a research explaining the guidelines for substitution.

THIRD THEME: ISSUES CONCERNING THE FEE OF THE *NĀẒIR* (WAQF MANAGER)

The First Topic: Types of Waqf Management, the Extent of the Public *Nāẓir*'s Authority over the Private *Nāẓir*, and the Conditions of Waqf Management

There are different categorisations of waqf management depending on many considerations. However, the most common and relevant categorisations that have a direct impact on the issues of the fee are those based on two considerations: public and private waqf management, and primary and secondary waqf management.

It is agreed upon[296] that the public *nāẓir* here is the ruler by virtue of his general mandate over the entire citizenry and public interest. The mandate of the judge is derived from the mandate of the ruler since he acts on his behalf. Granting a public mandate to the Ministry of Awqaf and similar official waqf departments is considered a way of transferring the power of the judge to these ministries. This is required due to the changes of time and the developments of this era. It is also considered a part of *siyāsah sharʿiyyah* (Sharīʿah-guided public policy) that is decided by the ruler based on public interest.[297]

The private *nāẓir*: is the manager who is appointed by the waqf founder, or the judge, or the beneficiary who is entitled to the waqf revenue. The latter is based on the view that [the beneficiary] has authority over the waqf if the waqf founder did not appoint a manager.

The primary *nāẓir*: it is agreed that the primary *nāẓir* is the waqf founder if he appointed himself as a manager, or if he set up a waqf but did not appoint a manager, according to some scholars. Additionally, the judge is considered to be a primary *nāẓir* if the founder did not appoint one and the beneficiaries are not particular persons or are particular persons but not of fixed number. That is by scholarly consensus. Further, according to the Mālikīs and Ḥanbalīs, the beneficiary is considered a primary *nāẓir* if the founder did not appoint one and the beneficiaries are particular,

[296] Regarding the ruler being the public manager or whoever he appoints such as a judge, see: Al-Anṣārī, *Asnā al-Maṭālib* (Shāfiʿī), 2:471; Al-Buhūtī, *Sharḥ Muntahā al-Irādāt*, 2:254 (Ḥanbalī); *Fatāwā al-Subkī*, 2:133; Al-Kubaysī, *Aḥkām al-Awqāf*, 2:145 (Iraqi Wizārat al-Awqāf, 1977).

[297] See: ʿIṣām Al-ʿAnazī, "Wilāyat al-Dawlah fī al-Raqābah ʿalā al-Awqāf", research presented at the Fifth Conference on Fiqhi Waqf Issues, held in Istanbul, 13-15/2/2011, p. 5; cf. Kamāl Manṣūrī, "Wilāyat al-Dawlah fī al-Raqābah ʿalā al-Awqāf wa al-Raqābah al-Sharʿīyyah fī al-Muʾassasāt al-Waqfiyyah", research presented at the same conference, pp. 4 and 7.

of limited number and [one of them] is qualified to act as a manager. However, the Ḥanafīs and Shāfiʿīs are of the opinion that the beneficiary is not eligible to be a primary manager in this case; rather, it is given to the judge.[298]

The secondary *nāẓir*: is anyone other than the above. This is because the secondary *nāẓir* obtains his mandate by being appointed by one of the primary *nāẓir*s.

The Second Topic: The Limits of the Mandate of the Public *Nāẓir* over the Private *Nāẓir*

The public *nāẓir* is in this case the Ministry of Awqaf or the like such as the state governments, as mentioned above. Is the public *nāẓir* entitled to supervise the private *nāẓir*? What are the areas of supervision and their limits if it has such a right?

In essence, the general rule that is agreed upon by the scholars is that the private mandate has priority over the public mandate. Therefore, the public *nāẓir* has no mandate if there is a private *nāẓir*.[299] As a result, the Ministry of Awqaf and the judiciary have no right to intervene in the direct executive work of the private *nāẓir* nor do they have the right to share the management of the waqf. However, they have the right of general supervision. In this regards, Al-Buhūtī says:

> The ruler does not have the mandate to manage if a private *nāẓir* exists. [Ibn Mufliḥ] said in *al-Furūʿ*: "He would turn [away from it] when [the private *nāẓir*] is present. The ruler would decide about issues arising in the absence [of the private *nāẓir*] because it entails implementation of the waqf founder's instructions to manage it and ensures the continuity of its benefits." Based on that, if the absent *nāẓir* appointed one person and the ruler appointed another [as a *nāẓir*], the one who was appointed first would be chosen. However, the ruler has the mandate of general supervision; therefore, he can challenge him—i.e. the private *nāẓir*—if the latter did something that he is not supposed to do. The ruler can do so based on his general authority. He also has the right to appoint a trustee along with the private *nāẓir* if the latter is negligent or suspected [of wrongdoing]. This is done to ensure that the objective of the waqf is achieved.[300]

Contemporary scholars[301] have limited [the mandate of the authorities] to the following areas:

1- Sharīʿah, administrative and accounting supervision.

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[298] See Al-Dasūqī, *Ḥāshiyat al-Dasūqī*, 4:88; Ibn Qudāmah, *Al-Mughnī*, 6:39; Al-Ṭarāblusī, *Al-Isʿāf fī Aḥkām al-Awqāf*, p. 50; Al-Sharbīnī, *Mughnī al-Muḥtāj*, 3:552; Al-Kubaysī, *Aḥkām al-Waqf*, 2:127.

[299] For more information regarding this legal maxim and its application see: Al-Zarkashī, *Al-Manthūr fī al-Qawāʿid al-Fiqhiyyah*, 3:345; *Al-Ashbāh wa al-Naẓāʾir*, p. 154.

[300] Al-Buhūtī, *Kashshāf al-Qināʿ*, 4:273.

[301] Al-Shubayr, "Mashmūlāt Ujrat al-Nāẓir al-Muʿāṣirah", research presented at the First Conference on Waqf Fiqh Issues, held in Kuwait from 11-13/10/2003. Published by al-Amānah al-ʿĀmmah li al-Awqāf, Kuwait in 2004.

2- Holding *nāẓir*s accountable for their negligence.
3- Providing binding advice regarding serious decisions such as borrowing on behalf of the waqf, replacing the waqf or leasing the waqf for a long-term.

Dr. Shubayr opines that the judiciary system is not qualified to carry out Sharīʿah and managerial supervision due to the lack of expertise and specialisation. He proposes the establishment of an independent supervisory body staffed with qualified Sharīʿah specialists, managers, economists and accountants to oversee the waqf properties and the private *nāẓir*s. This view is also supported by Dr. Monzer Kahf, who stressed that ministries and government bodies including the judiciary are not qualified to manage investment waqf. He further stated that assigning them to manage waqf investment is one of the reasons for its weakness and its lack of growth. He suggested that the role of the ministries of *awqāf* be limited to supervision and control only and not to management and disposition, and that the role of the judiciary system be limited to deciding on disputes related to waqf affairs.[302]

Conditions of [eligibility of] a *nāẓir*:

The most notable conditions of [eligibility of] a *nāẓir* according to the jurists[303] are the following:

1- **Being a Muslim:** Because being a *nāẓir* is a kind of authority and a non-Muslim does not have authority over a Muslim.
2- **Adulthood:** Because waqf needs care and maintenance whereas one who has not attained puberty needs someone to protect and take care of him.
3- **Sanity:** Because the insane and the feebleminded do not have legal capacity of disposal; therefore they do not qualify.
4- **Justice:** It means good conduct in the contemporary parlance.

[302] Kahf, M. *Idārat al-Awqāf al-Istithmāriyyah*, a paper available on the internet, pp. 35 & 40. He goes even further regarding the judiciary, stating that it does not have the mandate to appoint the *nāẓir*. He explains that the reason classical jurists granted the judiciary this mandate is that there were no supervisory bodies that could be assigned to do so. Thus, the only available option was the judiciary as it represented an independent authority than could be sought in this regard. Therefore, he opines that the role of the judiciary system should be limited to deciding disputes. The mandate to appoint the *nāẓir* in addition to control and supervision should be based on new mechanisms that guarantee integrity, efficiency and quality. He proposed a model for that in his book.

[303] Al-Zuḥaylī, "Mashmūlāt Ujrat al-Nāẓir al-Muʿāṣirah", p. 322; Al-Shubayr, "Mashmūlāt Ujrat al-Nāẓir al-Muʿāṣirah", p. 351; cf. Qārūt, N.Ḥ. (n.d.), *Waẓāʾif Nāẓir al-Waqf fī al-Fiqh al-Islāmī*, 13-4; Al-Kubaysī, *Aḥkām al-Awqāf*, 2:161-81.

5- **Competency:** The ability to carry out the duties of waqf management and its requirements that have been assigned to him.

The Third Topic: Determining the Waqf Management Fee and When It Is Due. What is the source of the fee if the waqf does not generate revenue? Can the *nāẓir* stipulate a certain amount as his fee? What is the ruling if the fee is made as a percentage of the revenue?

1- Where does the *nāẓir* earn his fee from?

There is no dispute among the scholars that, if the waqf founder has stipulated a financial compensation for the *nāẓir* in exchange for his work, he is entitled to it regardless of whether it is considered a fee or a share of the waqf revenue.[304] However, if the waqf founder did not name a *nāẓir*, or if he did not stipulate a revenue for him for his efforts, the judge shall be the one to appoint a *nāẓir*. If the appointed *nāẓir* does not offer to work as a volunteer, then there is no dispute among the scholars that he deserves a reward for his efforts. However, the scholars differ regarding the party that the *nāẓir* shall receive his fee from. The majority of the scholars opine that it should be derived from the waqf revenue and profit. However, some Mālikī scholars prefer the view that his fee should be paid from the public treasury.[305] This view is different than the view of the majority of the Mālikī School.

Some contemporary scholars, most notably Shaykh Muḥammad Abū Zahra, hold that if the waqf is a family waqf and limited to specific beneficiaries, then the fee should be paid from the waqf revenue. However, if the waqf is for public interest such as for the benefit of the poor and needy, then the fee should be paid by the public treasury. This is because these waqf properties perform some of the duties of the state and discharge some of its responsibilities. They also help the state in establishing a sound and pious social system.[306]

[304] Ibn Nujaym, *Al-Baḥr al-Rāʾiq*, 5:264; Al-Dasūqī, *Ḥāshiyat al-Dasūqī*, 4:88; Al-Sharbīnī, *Mughnī al-Muḥtāj*, 2:380, 394; Al-Buhūtī, *Sharḥ Muntahā al-Irādāt*, 2:295; 503.

[305] Al-Dasūqī, *Ḥāshiyat al-Dasūqī*, 4:88; Al-Ṣāwī, *Ḥāshiyat Al-Ṣāwī maʿa al-Sharḥ al-Ṣaghīr li Al-Dardīr*, 4:120.

[306] Abū Zahrah, *Muḥāḍarāt fī al-Waqf*, (Maʿhad al-Dirāsāt al-ʿArabiyyah al-ʿĀlamiyyah, 1959), p. 390

2- Who has the mandate to determine the fee of the *nāẓir*? What is the benchmark used to determine it? How is it determined?

The parties that have the mandate to determine the fee of the *nāẓir* can be either of the following:

a. **The waqf founder**: the waqf founder is the one who has the original mandate and has the right to determine how much he wishes the *nāẓir*'s fee to be. The jurists agree that it is permissible[307] for the founder to stipulate a fee at par with the going market wage (*ajr al-mithl*) or higher. However, if the founder stipulated a fee less than the market wage and the *nāẓir* agreed to it, it is permissible and the *nāẓir* is considered a volunteer. But if the *nāẓir* did not agree, then he has the right to raise the issue before the judge and request a raise. The judge has the authority to determine the amount of the fee and raise it to a value not exceeding the market wage. The *nāẓir* does not have the right to unilaterally increase his fee.

b. **The judge:** The judge has the original[308] mandate if the waqf founder did not appoint a *nāẓir* and it was done by the judge himself. It can also be the case if the waqf founder appointed a *nāẓir* but did not determine his fee. In this case, unlike the case of the waqf founder, the judge does not have the right to determine the fee to be more than the market wage. The benchmark for determining the fair fee is the customary practice for the same situation, time and place. Further, professional experience can be utilized to determine the fair fee.

3- When will the *nāẓir* be entitled to receive the fee?[309]

The view of the majority is that the entitlement of the *nāẓir* to the fee starts when he starts working. Still, the time he is paid the fee is after the waqf revenue has been received and before it is distributed to the beneficiaries. This is because waqf expenses, including the fee of the *nāẓir* and

[307] Al-Kubaysī, *Aḥkām al-Waqf*, 2:216.

[308] The judge becoming the *nāẓir* or appointing the *nāẓir* is subject to dispute when the waqf is designated for the benefit of a limited number of specified recipients. The Mālikīs and Ḥanbalīs were of the opinion that in this case the management of the waqf is for the beneficiaries not the judge. The Ḥanafīs and Shāfiʿīs, however, were of the opinion that the management is for the judge or his appointee. See: Al-Shubayr, "Mashmūlāt Ujrat al-Nāẓir al-Muʿāṣirah", p. 351. Regarding the judge's authority to set the fee, see: Al-Kubaysī, *Aḥkām al-Waqf*, 2:221.

[309] See: Al-Zuḥaylī, *Al-Istithmār al-Muʿāṣir li al-Waqf*, p. 5; cf. ʿUmar, "Al-Takhṭīṭ wa al-Muwāzanāt fī Idārah al-Ṣanādīq al-Waqfiyyah", p. 22; Al-Kubaysī, *Aḥkām al-Awqāf*, 2:235-7.

the dues of those looking after its affairs, are prioritised over the beneficiaries. The beneficiaries receive their stipulated shares from the net income after the deduction of all waqf expenses including the fee of the *nāẓir*.

4- Who pays the *nāẓir*'s fee if the waqf does not generate revenue?

In this matter, we are faced with two scenarios. The first is for countries whose laws and legislations allow spending on the waqf in certain circumstances. The second is for countries that do not allow it. We will discuss the two scenarios in detail below.

Scenario 1: Countries whose laws and legislations allow spending on waqf

In this scenario, the ruling differs based on the *nāẓir*: if the *nāẓir* is a public manager such as the Ministry of Awqaf or an official government department, or if the *nāẓir* is private.

If the *nāẓir* is public (i.e., governmental), in the form of the Ministry of Awqaf or an official government department, then the government should pay the salaries of the employees who are directly involved in managing the waqf from the waqf revenue they manage, if the revenue is enough to cover their fees. This is limited to the case where they directly manage the waqf and protect its interests, not merely performing supervision or control.[310] However, if the waqf revenue is not enough to cover their fees, then they should be paid from the public treasury. This is the case for waqf properties pledged for the public interest which are managed by the state such as mosques, hospitals, orphanages and *awqāf* set up for the benefit of the poor. This is according to the view of some Mālikīs and Ḥanbalīs, including Imam Ibn Taymiyyah,[311] who stipulated that the fee of the *nāẓir* should be paid from the public treasury. This view has been chosen as the weightiest by contemporary scholars such as Shaykh Abū Zuhrah—as previously mentioned—in addition to Dr. ʿAjīl Al-Nashmī.[312] This is based on its general supervisory nature and its responsibility in

[310] In this case, the governmental waqf administration and its employees have no right to take the remuneration for their activities from the proceeds of the waqf. See: Manṣūrī, "Wilāyat al-Dawlah fī al-Raqābah ʿalā al-Awqāf wa al-Raqābah al-Sharʿīyyah fī al-Muʾassasāt al-Waqfiyyah", p. 8.

[311] Ḥanbalīs say: If something that does not generate revenue is donated as waqf, then the expenses of the waqf including the *nāẓir*'s fee should be paid by the specified beneficiary if he is able to afford it. If the beneficiary cannot afford it, then the waqf property should be either leased out or sold. The proceeds from the sale should be spent on another waqf that is generating revenue. See: Al-Buhūtī, *Kashshāf al-Qināʿ*, 4:266; Al-Mardāwī, *Al-Inṣāf*, 7:44; Ibn Taymiyyah, *Majmūʿ al-Fatāwā*, 31:235. Ibn Taymiyyah says: "If the waqf donor stipulates expenditure for him [he shall have it]; otherwise, it will come from the state treasury like for the other *awqāf* that are designated for general purposes such as mosques."

[312] See Al-Nashmī, "Mashmūlāt Ujrat al-Nāẓir al-Muʿāṣirah", pp. 314-5.

maintaining the public interest by protecting and maintaining the waqf properties. Additionally, it is considered a pure donation for a Sharīʿah-compliant public interest. The jurists approved that and also the cases where the spending on the waqf comes from the public treasury.[313]

As for a case where the private *nāẓir* is managing a waqf that generates no revenue or that has stopped generating revenue: if the waqf managed by the private *nāẓir* is for the public interest and not a private family waqf such as a school for the poor or an orphanage, then it can be attached to the previous scenario where the public treasury should spend on the waqf and its expenses including the waqf manager's fee. However, in cases where the waqf is a private family waqf, the general view of the jurists is that if no fee was stipulated for the *nāẓir* or it is less than the market wage, then the *nāẓir* has the right to bring the case before the judge to bring his fee up to the market wage. The jurists also agreed that if the waqf revenue is not enough to cover the fee in this case, the judge should grant him the difference from the surplus of the revenue of public *awqāf* for other purposes.[314] It is even more fitting that the issue be elevated to the judge for a waqf that generates no revenue and for him to grant the *nāẓir* his fee from the surplus of other waqf revenues.

Scenario 2: Countries whose laws do not allow spending on waqf

In some countries, the laws do not allow [the central government] to spend on *awqāf*; for example, Malaysia. This is because all waqf assets are under the management of Islamic Religious Councils, which serve under the respective state governments. In this case, the waqf may be revenue-generating but the revenue has yet to materialise such as the waqf of an orchard whose trees have not yet been harvested. Or it could be a cash waqf whose funds are invested in waqf funds that have yet to realise profit, or the waqf generates no revenue at all. The following are the respective details:

[313] The Mālikīs and Shāfiʿīs stated that if a waqf made for public interests such as mosques does not generate revenue to cover its expenses such as the *nāẓir*'s fee, then it should be covered from the public treasury. See: Al-Qarāfī, *Al-Dhakhīrah*, 6:342; Ibn Shās, *ʿAqd al-Jawāhir al-Thamīnah fī Madhhab ʿĀlim al-Madīnah*, 3:973; Al-Shīrāzī, *Al-Muhadhdhab*, 2:331. Al-Shīrāzī resolved regarding the question of the ownership of the waqf that it belongs to Allah, which is the view of the majority. Thus, the waqf expenses, including the *nāẓir*'s fee, should be paid from the public treasury.

[314] See Ibn Bayyih, "Mashmūlāt Ujrat al-Nāẓir al-Muʿāṣirah", p. 287. There is also a view among jurists that the expenses of the waqf, including the *nāẓir*'s fee, should be paid from the wealth of the beneficiaries if they are specified and the waqf does not generate revenue. If the beneficiaries refuse to pay, they should be forced to. See: Ibn al-Humām, *Fatḥ al-Qadīr*, 6:223; Ibn Qudāmah, *Al-Mughnī*, 6:40; Al-Zuḥaylī, "Mashmūlāt Ujrat al-Nāẓir al-Muʿāṣirah", p. 340.

First: Revenue-generating waqf properties whose revenue has not yet materialised or which have stopped generating revenue for a while.

In this case, since there is no central government spending on the waqf and there is a need for the immediate settlement of waqf expenses (such as the fees of lawyers, management companies, and *nāẓir*s), how would those expenses be settled while the waqf is still under development and is yet to generate revenue?

To settle such expenses, two alternatives can be adopted:

The First Method: taking on debt on behalf of the waqf

Taking on debt on behalf of the waqf can be achieved when the *nāẓir* buys or spends for the benefit of the waqf—as in the case of waqf funds—while he does not currently have any revenue from the waqf. In this case, the *nāẓir* shall repay the debt from the future revenue of the waqf.[315] Since the waqf has its own legal liability, the jurists[316] agreed that it is permissible to borrow for the waqf if need be.[317] The necessity in this abovementioned case is clear. This is because waqf funds cannot be created nor can their funds be invested and thereby generate revenues—which is the primary objective of the waqf—without paying upfront fees and expenses to the parties that organize and manage the investment. It is incumbent upon the *nāẓir*, when the waqf project has been completed and the revenue realized, to pay back all debts the waqf owes from the generated revenue. The book *Asnā al-Matālib* states:

> The expenses of the waqf and costs of its development and maintenance in the way stipulated by the waqf founder are payable either from the founder's own money or from the money of the waqf. However, if that is not possible, it should be paid from the revenue or benefits of the waqf.[318]

It should be noted that the repayment of debts is prioritized over distributing the revenue among the beneficiaries.[319]

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[315] See: *Fatāwā Qāḍī Khān*, 3:298.

[316] See: Al-Dasūqī, *Ḥāshiyat al-Dasūqī*, 4:89; Al-Buhūtī, M.Y. (n.d.), *Kashshāf al-Qināʿ*, 6:40; Ibn ʿĀbidīn, *al-Ḥāshiyah*, 3:416; Al-Ramlī, *Nihāyat al-Muḥtāj*, 5:397.

[317] Jurists disagree on whether or not the private *nāẓir* needs the permission of the judge in order to take on debt on behalf of the waqf. This disagreement, however, does not apply to waqf in Malaysia because the *nāẓir* is a public *nāẓir* and therefore does not need the permission of the judge. Still, the borrowing must be in the best interest of the waqf.

[317] Al-Anṣārī, *Asnā al-Maṭālib*, 2:473.

[318] Al-Anṣārī, *Asnā al-Maṭālib*, 2:473.

[319] Al-Tuwayjirī, *Mawsūʿat al-Fiqh al-Islāmī*, 3:694.

The Second Method: the stipulation of the waqf founder

We mentioned earlier that the jurists decided that the expenses of the waqf are to be paid according to the stipulation of the waqf founder. Therefore, the following can be inserted as stipulations in the waqf deed:

All expenses and payments of the waqf shall be covered from the waqf property. After the completion of the project and after starting to generate revenue, such revenue shall be channelled to fully recover the whole amount that was taken from the waqf as expenses and payments before starting to distribute the revenue to the beneficiaries.

Example:

A waqf fund is established with a sum of RM100 million. This fund requires cash expenses starting from its initiation until the revenue is generated. Such expenses are expected to amount to RM one million. According to the stipulation of the waqf founder, the expenses (RM one million) are paid from the principal waqf amount (RM100 million). Therefore, we are left with RM 99 million. When the revenue and profit start to be generated, such revenue is not distributed to the beneficiaries. Rather, it should be channelled to recover the sums paid from the principal waqf amount until it is fully recovered as when it was initiated (RM 100 million). Afterwards, the revenue shall be distributable to the beneficiaries.

Second: A non-revenue generating waqf

Many forms of cash waqf can be included under this category, such as lending the cash waqf money to the poor as benevolent loans (*qarḍ ḥasan*) or building hospitals for the poor using the cash waqf money. In such cases, the waqf does not generate revenue, neither at the initiation stage nor later on. On the other hand, these forms of waqf require the payment of expenses and fees such as for the *nāẓir*, the management company, lawyers and other expenses that are expected for the benefit of the waqf or prevent harm to its interests. Thus, is it permissible for these expenses to be charged from the waqf property itself?

Going back to the main books, we find many texts that permit charging the expenses to the waqf property itself to cover the expenses and payments of the waqf for the purpose of protecting and maintaining it. An example is what is mentioned in the book *Kashshāf al-Qināʿ*:

> The *nāẓir* has the right to have the waqf deed copied and to check on its status. The copying fee is payable from the waqf property as per the common practice."[320]

Additionally, it is mentioned in the book *al-Baḥr al-Rāʾiq*:

> The *nāẓir* has the mandate to spend an amount of money from the waqf property in order to have the fatwas and minutes of trials related to the waqf written up.[321]

This declaration of the permissibility of taking from the waqf property covers all procedures or regulations that would bring benefit to the waqf or prevent harm from afflicting it.[322]

5- The Sharīʿah ruling on the *nāẓir's* stipulation of a certain amount as a fee

Many scholars have affirmed that many or most waqf issues are decided by *ijtihād* and the consideration of public interest.[323] It is known that the consideration of public interest and *ijtihād* about it differ according to circumstances, time, place and customary practice. The fee of the *nāẓir* is payable in exchange for service according to the view of the majority. As such, it is the right of the *nāẓir* to stipulate whatever he deems suitable as a fee. If such stipulation was put to the waqf founder and he accepted it and stipulated it for him [in the waqf deed], then there is no issue, as mentioned above, even if the fee is more than the going market wage. However, if the judge is the one who determined the fee of the *nāẓir*, then the *nāẓir* shall not be entitled to a fee more than the fair market wage. This is because, as discussed above, the judge does not have the mandate to stipulate more.

6- The Sharīʿah ruling on stipulating a share of the profit to the *nāẓir* when waqf funds are invested

[320] Al-Buhūtī, *Kashshāf al-Qināʿ*, 4:277.
[321] Ibn Nujaym, *Al-Baḥr al-Rāʾiq*, 5:259.
[322] This is the view of some contemporary scholars such as Dr. Abdul Sattār Abū Ghuddah in his research "Al-Aḥkām al-Fiqhiyyah li al-Waqf," in the book *Dirāsāt al-Maʿāyīr al-Sharʿiyyah*, 3:2270.
[323] Among classical scholars, this issue was mentioned by Imam Al-ʿIzz ibn ʿAbd al-Salām in his book *Qawāʿid al-Aḥkām fī Maṣāliḥ al-Anām*, 1:22. Among the contemporary scholars, it was mentioned by Shaykh Muṣṭafā al-Zarqā in his book *Aḥkām al-Waqf* (Dār ʿAmmār, 2nd ed. 1998), p. 19, in which he said: "The detailed waqf rulings found in *fiqh* books are all based on *qiyās* (analogy) and *ijtihād* as there is scope for opinion regarding them. However, the scholars of the Ummah have agreed that waqf must be motivated by the intention of drawing closer to Allah and seeking His pleasure."

The general rule is that the fee of the *nāẓir* shall be, regardless of whether the waqf funds are invested or not, a predetermined monthly or yearly amount or a percentage of the revenue. That would be determined according to the customary practice and best interest (*maṣlaḥah*).[324] Dr. Muḥammad Al-Zuḥaylī mentioned that some Muslim countries have decided to fix the *nāẓir*'s fee at 8%. He said: "It is up to the ruler and his perception of best interest (*maṣlaḥah*), which varies from one country to another."[325] In case of investment waqf, incentives and bonuses that are paid for increasing the waqf revenue and efficiency are among the expenses that should be taken from its revenue.[326] Such fee should be payable to the *nāẓir* if he is the one managing the investment activities; otherwise, to the party appointed by the *nāẓir* to manage the investment such as investment fund managers entrusted to manage the waqf fund by the waqf's board of directors, who are considered the *nāẓir*s.

Dr. Monzer Kahf opined that one of the most important obstacles to developing and increasing the revenue of waqf properties managed by the ministries of *awqāf* and the like is the absence of motivation to seek profit due to them being government employees earning regular salaries. The increase of revenue or lack thereof will not benefit them in any way. One of the most important ways to remedy this is by linking managers' bonuses to a percentage of the profit.[327]

7- If the *nāẓir* was appointed for more than one waqf, can he earn a fee from each one of them even if the total sum exceeds the fair value? Or should he be limited to earning from one of them?

In principle, there is no problem with the *nāẓir* managing more than one waqf if he is able perform his duties as required without negligence or impairment. His fee can be considered similar to the case of an *ajīr mushtarak* (a contractor offering services to more than one customer). Jurists call

[324] Ibn Bayyih, "Mashmūlāt Ujrat al-Nāẓir al-Muʿāṣirah", p. 284; Al-Shubayr, "Mashmūlāt Ujrat al-Nāẓir al-Muʿāṣirah", p. 356; Al-Kubaysī, *Aḥkām al-Awqāf,* 2:213. He says: "The fee of the *nāẓir* is not bound by a limit because it differs based on time and place. It also differs according to the situation of the *nāẓir* and the consideration of the situation itself. It can be a certain amount of money: such as twenty or thirty, or it can be set as a ratio: one-tenth or one-eighth of the revenue. Further, it can be payable monthly or yearly. All of that is subject to the conditions of the waqf founder or the common practice.

[325] Al-Zuḥaylī, "Mashmūlāt Ujrat al-Nāẓir al-Muʿāṣirah", p. 325.

[326] Regarding bonuses and incentives being included in waqf expenses payable from the revenue, which is a contemporary issue, see: Ibn Bayyih, "Mashmūlāt Ujrat al-Nāẓir al-Muʿāṣirah", Al-Zuḥaylī, "Mashmūlāt Ujrat al-Nāẓir al-Muʿāṣirah", and Shubayr, "Mashmūlāt Ujrat al-Nāẓir al-Muʿāṣirah".

[327] Kahf, *Idārat al-Awqāf al-Istithmāriyyah*, pp. 32-33.

such a person "*ajīr ʿamal*".[328] Dr. Muḥammad Al-Zuḥaylī clarified that the *nāẓir* overseeing multiple *awqāf* is eligible to earn the fair fee for each waqf independently.[329]

8- If the *nāẓir* oversees multiple waqf properties, some of which do not generate revenue, is it permissible to charge the waqf that generates abundant revenue more than the fair fee to compensate for the lack of earning from the waqf that generates no revenue? What is the ruling on combining multiple waqf properties into one waqf fund and charging them a collective fee?

If the *nāẓir* was appointed by the founder of a revenue-generating waqf, and he gave him permission to charge a premium to compensate for the lack of a fee from another waqf that generates no revenue, there is no issue in doing so. This is because the waqf founder has the mandate to grant the *nāẓir* more than the fair value as explained earlier. However, if the *nāẓir* was appointed by the judge, or he couldn't get the permission from the waqf founder—due to his death, for example—then the *nāẓir* is not entitled to charge any extra amount from any waqf without the approval of the judge. In this case, the judge can then rule to grant him an extra fee payable from the surplus of other public waqf properties that are pledged for public interest.[330] Still, Shaykh Ibn Bayyih preferred that this extra amount be paid from the public treasury.[331]

- The ruling on combining multiple waqf properties into one waqf fund and charging them a collective fee

Doing so in family waqf is not permissible. This issue is applicable only to waqf properties created for the benefit of the poor or students or the like. The general rule is that the independence of waqf properties should be maintained as per the stipulation made by the waqf founder. However, when there is a weightier public interest, it is permissible to combine waqf properties that are created for the benefit of a certain category into one waqf in which all waqf properties are treated as one. An example is the waqf properties that are made for the benefit of mosques. In fact, there are prior juristic cases that supported the permissibility of merging multiple waqf categories into one in

[328] Ibn Bayyih has explained this in his research "Mashmūlāt Ujrat al-Nāẓir al-Muʿāṣirah," p. 290.
[329] Al-Zuḥaylī, "Mashmūlāt Ujrat al-Nāẓir al-Muʿāṣirah", p. 325.
[330] Ibid., p. 340.
[331] Ibn Bayyih, "Mashmūlāt Ujrat al-Nāẓir al-Muʿāṣirah", p. 295.

cases of public interest.[332] Dr. Monzer Kahf mentioned that there are examples in the practices of government waqf departments of investing the [funds of] *awqāf* whose founders' stipulations are unknown or which do not have waqf deeds. In such cases, the waqf departments combine their properties into one.[333]

A contemporary researcher looked into this issue in detail and categorised it into three cases as follows:

1) The waqf founder is the sole provider for the beneficiary: as when someone creates a waqf of a house and a shop for the benefit of a mosque.
2) There are multiple waqf founders for the benefit of one entity: For example: when Muḥammad offers his home as a waqf for the benefit of a school while ʿAlī offers his shop as a waqf for the benefit of the same school. The researcher said: in these two cases, it is permissible to combine them into one fund based on the interest of the waqf as determined by the *nāẓir*; such as selling the shop and utilising its value in the house, for example.
3) There are multiple waqf founders and multiple waqf purposes: As when Khālid offers his house as a waqf for the benefit of a mosque while Sāliḥ offers his car as a waqf for the benefit of a hospital. The researcher clarified that there is a difference in opinion among scholars based on their differences regarding the permissibility of changing the waqf in the interest [of the waqf]. There are two opinions; however, he preferred the opinion that it is permissible when there is a benefit governed by Sharīʿah parameters designed to protect the waqf from tampering and manipulation. The researcher cited the Companions' expansion of al-Masjid al-Ḥarām and the Prophet's Mosque and inclusion of the houses around them that had been turned into waqf, making them part of the mosque.[334]

   Based on the view that it is permissible, the fee should be charged from the collective waqf fund rather than from each waqf in the fund separately. Therefore, if the fee stipulated in exchange to waqf management and its expenses is, say, 7% of waqf revenue—which is the commonly used ratio at the moment—then this ratio should be calculated from the lump sum of the waqf fund. It is known that this is reasonable and possible to be adopted in accounting.

[332] Al-Qarādāghī, *Istithmār al-Waqf wa Ṭuruquhu al-Qadīmah wa al-Jadīdah*, p. 17, a paper available on the internet.
[333] Kahf, *Idārat al-Awqāf al-Istithmāriyyah*, p. 7.
[334] Al-ʿAnazī, A.R., *Aḥkām Taʿāḍud al-Aḥkām wa Taṭbīqātuh al-Muʿāṣirah—Dirāsah Fiqhiyyah*, master's thesis published by al-Amānah al-ʿĀmmah li al-Awqāf, Kuwait.

9- The Sharīʿah ruling on spending from the waqf fund on marketing and building a centre for the waqf in order to attract other waqf funds

Spending on the waqf from its revenue for any purpose that it is necessary to preserve, maintain and grow the waqf if the waqf generates revenue is permissible according to the majority of scholars[335] provided that the waqf founder did not specify another funding source for waqf expenditures. Classical[336] and contemporary scholars discussed what can be included in the necessary expenses. This is governed by the condition that such expense should be of benefit to the waqf in terms of preserving it and making it grow. Many contemporary scholars and researchers listed many modern categories that can be included in the areas that can be spent on from the waqf revenue. These include, most notably: building centres for waqf management and equipping them with all their requirements such as furniture and instruments; also marketing and advertising expenses to promote the waqf and attract funds to it.[337] Dr. Al-Zuḥaylī mentioned that the Sharīʿah Committee of the General Secretariat of Awqaf in Kuwait decided that it is permissible to build a centre for waqf management from the waqf revenue.[338]

Dr. Monzer Kahf chose the view that if the waqf founder explicitly allowed spending part of the waqf revenue on marketing or on building a centre, then it is permissible. It is also permissible if it can be considered part of a general condition of the waqf founder such as the stipulation to spend on spreading knowledge and on invitation to Allah. This is because calling people to establish a waqf can be considered part of that.[339]

FOURTH THEME: WAQF OF CASH AND FINANCIAL SECURITIES

[335] See: Ibn Nujaym, *Al-Baḥr al-Rāʾiq*, 5:235; Al-Zarqānī, *Sharḥ Al-Zarqānī ʿalā Mukhtaṣar Khalīl*, 7:159; Al-Shīrāzī, *Al-Muhadhdhab*, 2:331; Al-Mardāwī, *Al-Inṣāf*, 7:70.

[336] To view the issues and cases that jurists talked about regarding spending from the revenue whereby some mentioned that a part of the revenue should be set aside to cover it, see: Ibn Nujaym, *Al-Nahr al-Fāʾiq*, *Sharḥ Kanz al-Daqāʾiq*, 3:322; Ibn Qudāmah, *Al-Mughnī*, 6:40.

[337] To view the details of these contemporary categories see: Ibn Bayyih, "Mashmūlāt Ujrat al-Nāẓir al-Muʿāṣirah"; Shubayr, "Mashmūlāt Ujrat al-Nāẓir al-Muʿāṣirah"; Al-Zuḥaylī, "Mashmūlāt Ujrat al-Nāẓir al-Muʿāṣirah"; Al-Nashmī, "Mashmūlāt Ujrat al-Nāẓir al-Muʿāṣirah"; Al-Zuḥaylī, *Al-Istithmār al-Muʿāṣir li al-Waqf*, p. 20; Abū Ghuddah & Shaḥātah, *Al-Aḥkām al-Fiqhiyyah wa al-Usus al-Muḥāsibiyyah li al-Waqf* (2nd ed., Wizārat al-Awqāf, Kuwait, 2014), pp. 118-9.

[338] Al-Zuḥaylī, "Mashmūlāt Ujrat al-Nāẓir al-Muʿāṣirah", p. 335.

[339] Kahf, *Idārat al-Awqāf al-Istithmāriyyah*, p. 26.

The First Topic: The Concept of Cash Waqf, Its Sharīʿah Ruling and Its Contemporary Importance

1- The concept of cash waqf.

"*Nuqūd*" is the plural of "*naqd*", which has many meanings in the Arabic language. When mentioned by jurists, *naqd* means gold and silver coins or similar things that people customarily accept in place of them and treat as money.[340] It must be noted that the concept of cash that mankind has been using for thousands of years essentially refers to gold and silver. Coins minted from copper or iron that were used in addition to them were valued in terms of one of them and were used in people's simple, low-value daily transactions. The most prominent characteristics of gold and silver when used as cash are not only a store of value and a medium of exchange but also having an intrinsic value due to being precious metals.

However, this concept of cash was almost completely abolished when mankind entered the era of fiat money. Gold and silver are no longer media of exchange, nor are they used for valuing goods and services. Instead, fiat money, whose value is derived from political, economic and psychological factors of the issuing country, has become the predominant kind of money that is used in exchange transactions between countries and individuals. The most important differences between gold and silver used as cash and fiat money are the following two differences:

1) Gold and silver have intrinsic value in themselves as precious metals while fiat money does not.
2) Dealing with fiat money has been accompanied with something new that did not occur when using gold and silver. Although fiat money is in essence a store of value and a medium of exchange that is used to evaluate goods and services, replacing the usage of gold and silver, it has become a commodity that is itself the subject of massive trading and speculation. Foreign exchange and currency trading use currencies as a commodity, the trade of which yields billions in returns on the global level. This was unknown and non-existent during the era when gold and silver were used as money. Consideration of this emergent difference in [the nature of] money has an important impact on the ruling on cash waqf that should not be ignored.

[340] Qalʿajī & Qunaybī, *Muʿjam Lughat al-Fuqahāʾ*, (Dār al-Nafāʾis, 1988), p. 486.

As for the **definition of cash waqf**, it was discussed by the classical scholars. Abū Saʿūd Al-Afandī wrote a short article supporting the view that cash waqf is permissible. It can be defined as "the retention of cash while dedicating its benefit by either lending it or investing it and benefiting from the resulting revenue".

2- The Sharīʿah ruling on cash waqf

In the past, scholars and leaders of the different *fiqh* schools differed in their ruling on cash waqf.[341] The view of the majority of the Ḥanafīs,[342] Shāfiʿīs and Ḥanbalīs was that cash waqf is impermissible. However, the view of the Mālikīs and the second view of the Shāfiʿīs and Ḥanbalīs, which was adopted by Ibn Taimyyah, was that it is permissible to create cash waqf in a way that does not consume its capital such as lending it or utilising it in trade and spending the profits on the beneficiaries. Neither of the two groups has clear evidence for permissibility or prohibition. This issue is considered a matter of *ijtihād*, rational arguments and benefit (*maṣlaḥah*). Those who consider it impermissible based their argument on two reasons:

1) Waqf is created for a subject matter to be benefited from while maintaining the asset itself. Such subject matter shall not be exhausted through consumption. They said: Cash is considered among the subject matters that are diminished and consumed. Ibn Qudāmah said:

> In summary, anything that is not possible to benefit from while maintaining its corpus, such as dinars, dirhams, food, drink, candles and the like, is not permissible to be used to create waqf according the majority of jurists and scholars, except for something narrated from Mālik and Al-Awzāʿī.[343]

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[341] See: *Al-Fatāwā al-Hindiyyah*, 2:362; Al-Zarqānī, *Sharḥ Al-Zarqānī ʿalā Mukhtaṣar Khalīl*, 7:138; Al-Anṣārī, *Asnā al-Maṭālib*, 2:458; Ibn Qudāmah, *Al-Mughnī*, 6:34; Ibn Taymiyyah, *Majmūʿ al-Fatāwā*, 31:235; Al-ʿAmmār, "Waqf al-Nuqūd wa al-Awrāq al-Māliyyah", a paper presented at the Second Conference on Waqf Fiqh Issues, p. 76; Maḥmūd Abū Layl, "Waqf al-Nuqūd fī al-Fiqh al-Islāmī", *Majallat al-Sharīʿah wa al-Qānūn*, University of the United Arab Emirates, no. 12, Feb. 1999.

[342] This is the view of their classical scholars. The view of the contemporary Ḥanafīs is that cash waqf is permissible, which was the view of Zafar, a student of Abū Ḥanīfah among the classical scholars. Ibn ʿĀbidīn, a leading latter-day Ḥanafī scholar, said: "The common practice of our times in the [formerly] Roman lands and others has become the waqf of dirhams and dinars. It can be attached to the view of Muḥammad, who permitted the creation of waqf from any movable used in transactions, and this is the view adopted in [Ḥanafī] fatwas. Thus, this permissibility does not need to be specified [to dirhams and dinars] as per the view of Imam Zafar in the narration of Al-Anṣārī from him. Allah knows best. The author of *Al-Baḥr* gave a fatwa that it is permissible and he did not mention any disagreement." Ibn ʿĀbidīn, *al-Ḥāshiyah*, 4:363.

[343] Ibn Qudāmah, *Al-Mughnī*, 6:34.

They also based their view on a rule they coined: Money becomes particularized in an exchange contract.[344] Among the applications of this rule is that if a cash waqf was created from an assigned 1,000 dirhams, then it would be considered those particular dirhams. If they were converted to other coins in any investment or commercial transaction, they would be considered consumed, and the asset would be gone. This conflicts with the concept of waqf, which is to retain an asset that is benefited from while preserving it.[345]

2) The creation of waqf requires perpetuity.[346] According to them, cash waqf goes against this requirement.

The evidence of those who say it is permissible

Those who say it is permissible to create cash waqf based their argument on the permissibility of renting coins for use as jewellery or for use as a measure of weight.[347] According to them, this makes cash among the subject matters that can be benefited from while preserving its asset. They considered that the requirement of perpetuity is met in cash waqf in activities that preserve its asset [amount] while benefiting from it such as lending it or benefitting from its profit and revenue by investing it and spending the generated revenue on the assigned beneficiary.

They rebutted the argument of impermissibility

1) They rejected the maxim that "money becomes particularized in an exchange contract".[348] Rather, money of equivalent value takes the place of the particular money that was agreed upon in the contract. In other words, the equivalent value takes the place of the amount that

[344] See: Ibn Rajab, *Al-Qawāʿid fī al-Fiqh al-Islāmī*, (Dār al-Kutub al-ʿIlmiyyah, Beirut, n.d.), p. 383.

[345] Ibn Taymiyyah replies to this argument saying: "It is know that the loan (*qarḍ*) is consumed and the original [coins] are gone and that they are replaced by their equivalent. Having the replacement take its place is in the best interest of the waqf even if necessity was not the reason for the waqf to do so." Ibn Taymiyyah, *Majmūʿ al-Fatāwā*, 31:234.

[346] This is the view of the majority. The Mālikīs are of the opinion that this is not considered a condition; they permitted temporary waqf.

[347] These were two familiar types of transactions using coins in the past. 1) **Renting them as jewelry**: to those who wear it for beautification for a period of time and then return it. 2) **Renting them as a measure of weight**: since dirhams and dinars were of accurate and precise weights, they were used to weigh light things and may have been [occasionally] rented for this purpose. Obviously, these two purposes no longer exist; in fact, gold and silver are no longer even used as money. If the logic of the permissibility of cash waqf is built on this basis and we continue to inflexibly cling to this view of classical scholars, it would make the contemporary view that allows cash waqf untenable.

[348] Ibn ʿĀbidīn refuted this rule in his book. He said: "Coins do not become particularized even if they are identified in particular. Even if they cannot be used while retaining the particular coins, their substitutes take their place because they are not particularized. Thus, it is as if they remain; and there is no doubt that they are movable property." Ibn ʿĀbidīn, *al-Ḥāshiyah*, 4:364. The International Islamic Fiqh Academy, in citing the bases for its ruling that waqf of cash is permissible, rejected the validity of this maxim, as Ibn ʿĀbidīn and other jurists had previously done.

the borrower took. Likewise, in *muḍārabah* and other investment activities the equivalent value takes the place [of the original money] in all forms of exchange contracts concluded.

2) They rejected the view that perpetuity is a condition for waqf creation. In fact, the perpetuity of any asset lies in retaining it. The perpetuity of waqf assets is only conceivable in lands. As for other types of real estate and movable assets—which the majority consider permissible to use in creating waqf—their perpetuity is inconceivable. Thus, using this condition as a basis to disallow cash waqf is not correct.[349]

The above is the summary of the disagreement among the classical scholars and their arguments for permissibility and prohibition. However, the contemporary view is that cash waqf is permissible. This is the view of almost all of the contemporary scholars, the ruling of the OIC Fiqh Academy,[350] the ruling of the Seminar on Waqf Fiqhi Issues[351] and the Sharīʿah standard of the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI).[352]

Allowing cash waqf for lending or for investing to distribute the revenue promotes waqf and makes it more widespread. It expands its resource base and opens the door for all segments of the society even the poor [to participate] in the models of collective waqf and waqf shares—as shall be discussed later. Further, it enables waqf to keep pace with the spirit of the modern age and to achieve clear public interest.

This is also the view of the National Fatwa Council in Malaysia, which affirmed the permissibility of cash waqf. One of its fatwas stated: "The creation of cash waqf is permissible in Islam," as resolved in its meeting number 77 on 10-12 April 2007. The same ruling can be found in most of the Religious Councils in Malaysia. Cash waqf has been applied in many states in Malaysia.

One researcher opines that there is a new factor that further supports the permissibility of the contemporary cash waqf. This factor is what we previously mentioned that on top of being a means

[349] Especially since the modern *fiqh* tendency is to consider temporary waqf permissible. This is the ruling of many major fiqh academies. Dr. Monzer Kahf says: "Ever changing economic and social conditions create unlimited needs. The new forms of waqf vary according to the needs that need to be met. Modern societies have found many public needs to be served. Some are perpetual in nature while others are not, either because of the nature of the need itself or because the waqf founder has no desire to perpetuate it. Further, there are types of waqf that are depleted with the consumption of the waqf fund while there are others where the money goes back to the waqf founder at the maturity period of the waqf." See: Kahf, *Al-Waqf al-Islāmī, Taṭuwurruhu, Idāratuhu, wa Tanmiyyatuh*, a paper available on the internet, p. 175.

[350] Resolution No. 140 (6/15), issued at its fifteenth session in Muscat in 1425H.

[351] Whereby it was decided regarding cash waqf that it is permissible. See p. 401 of the proceedings of the forum held in Kuwait from 8-10 May, 2005 and published by al-Amānah al-ʿĀmmah li al-Awqāf, Kuwait in 2006.

[352] AAOIFI, *Shari'ah Standards*, p. 826.

of valuating products and services, a means of exchange and a store of value, it is at the same time a commodity in and of itself. There is demand for it and its price is subject to speculation. Thus, it has become among the movable commodities intended for sale and purchase and benefiting from its price. This makes it part of the category of movable assets that the majority of scholars consider permissible to be made into waqf. [He goes on to say that] the differences between movable commodities and cash that are mentioned by contemporary economists are among the factors that support the permissibility of cash waqf. This is because such differences, in essence, indicate that cash is not consumable through use as per the basis of those who say it is impermissible to be made into waqf.[353] In fact, such an argument is not valid because accepting it would lead us to accept the contemporary practice, which treats cash as a commodity that is permissible to sell or even rent, and to speculate on its price. Such transactions have contributed to the economic collapse of many countries.

3- The importance of cash waqf in the contemporary era[354]

The importance of cash waqf in the contemporary era is illustrated by the following:

a) Comparison of cash waqf and real estate waqf reveal that cash waqf is free of many of the problems of real estate waqf, such as:
   I. The high cost of real estate, which means not everyone is able to make waqf of it, unlike cash waqf which can be pledged as waqf even in small values.
   II. The high costs of building and maintaining properties.
   III. The limitations of property investment methods.
   IV. The difficulties in financing real estate waqf when needed.
   V. The difficulties in replacing the property by sale or substitution according to the view of the majority.
b) The possibility of the inception of more successful waqf institutions.
c) The revitalization of the role of waqf in development, which is readily apparent in opening the door of cash waqf.

[353] See Maḥmūd Abū Layl, "Waqf al-Nuqūd fī al-Fiqh al-Islāmī", op. cit., p. 37.
[354] ʿAbdullāh Muṣliḥ al-Thamālī, "Waqf al-Nuqūd, Ḥukmuhu, Tārīkhuhu, Aghrāḍuhu, Ahmiyyatuhu al-Muʿāṣirah, wa Istithmāruh", research published on the internet, pp. 21-28.

d) The possibility of establishing a waqf institution specializing in benevolent loans (*qarḍ ḥasan*).

Important issue: The Sharīʿah ruling on real estate and assets that are invested in through cash waqf

Clearly, the capital of cash waqf is not intended to be depleted. Rather, the cash waqf capital should be invested and developed while spending its revenue and profits on the beneficiaries. In the context of different means of investment, as shall be mentioned later on, new assets will be acquired such as properties, movable assets and others. What is the Sharīʿah ruling on these assets that are bought and owned by cash waqf? Would they have the same ruling as the cash waqf that is used to acquire them and therefore be considered as waqf that should not be sold or have their ownership transferred? Or will they not be considered as waqf?

The resolution of the OIC Fiqh Academy about that was clear in not considering the assets owned by the cash waqf as waqf themselves; the waqf is limited to the money used to create the cash waqf. Anything that is invested in using this money would not take the same Sharīʿah ruling. As such, it is permissible to sell [the investment] and transfer its ownership according to the best interest of the waqf. The text of the resolution is as follows:

> **د) إذا استُثمر المال النقدي الموقوف في شراء أسهمٍ أو صكوك أو غيرها، فإن تلك الأسهم والصكوك لا تكون وقفًا بعينها مكان النقد، ما لم ينص الواقف على ذلك، ويجوز بيعها للاستثمار الأكثر فائدة لمصلحة الوقف، ويكون أصل المبلغ النقدي هو الموقوف المحبَّس....**
>
> d) If the cash waqf was invested to acquire stocks, *ṣukūk* or others, such stocks and *ṣukūk* are not themselves considered waqf unless stipulated by the waqf founder. It is permissible to sell them for the purpose of achieving the most beneficial investment for the waqf. The waqf amount is the principal cash amount used to create the waqf….[355]

In our opinion, this view widens the horizons for waqf and enhances its development prospects in a major way. It also makes cash waqf management and investment more flexible, which would aid in achieving the objectives of the waqf and attaining its best interest.

The application of cash waqf in Malaysia

[355] Resolution No. 140 (6/15), issued at its fifteenth session in Muscat in 1425H.

As previously mentioned, the ruling that cash waqf is permissible has been issued by the National Fatwa Council. However, in the different states, the permissibility of cash waqf stems from either the provisions of the law or from legally binding fatwas. In terms of application, most states limit their application of cash waqf to using the money collected for the purpose of buying new real estate to become a waqf, or to financing an existing waqf property which does not have enough money to develop it.

Apparently, this application makes the collected cash as a means to only buy new waqf assets or to develop existing waqf assets. In fact, the application of cash waqf in this way is different from the meaning of cash waqf that has been discussed by jurists in their books. It is also different from what is mentioned in Resolution No. 140 of the Fiqh Academy.

In many cases, cash waqf is created in the form of waqf shares as follows:[356]

1- Being the *nāẓir*, the Islamic Religious Council would issue the waqf shares.
2- Willing shareholders buy the shares at a value of ten Malaysian ringgits per share, for example. Afterwards, those shareholders would offer the shares as waqf to the Council to manage and invest them with the objective of utilizing the proceeds of these waqf shares in improving public wellbeing. In some cases, the share issuance prospectus may mention the areas the waqf revenue will be spent on.
3- The shareholders have no right to receive any form of profit. However, each shareholder receives a certificate of his share of the cash waqf.
4- The Council will utilize the proceeds to buy new waqf property or to develop and restore existing waqf property.

Nevertheless, some new practices have taken a different approach; for example, the waqf established between Maybank Islamic and the State of Perak. This cash waqf was designed in the form of an investment fund. It was announced upfront that the proceeds of the subscription would become the waqf asset. The fund is invested in specified portfolios, some in real estate and others in the form of financial securities such as *ṣukūk*, stocks, money market instruments and the like. Currently, these are the applications of cash waqf available in Malaysia.

The Second Topic: The Waqf of Financial Securities

[356] Adīlānī, *Al-Waqf al-Naqdī wa Istithmāruhu fī Malaysia*, p. 202, with alterations and additions.

The discussion regarding the Sharīʿah ruling on waqf of financial securities is based on the discussion of the jurists regarding joint ownership. According to scholars, joint ownership (*mushāʿ*) is the share of ownership of something that is indivisible;[357] for example, when two persons jointly own one house whereby each one owns an unspecified and undesignated half. The jurists differed in their ruling on the waqf of jointly owned property. The view of the majority is that it is permissible.[358]

First: The definition of financial securities[359]

The meaning of financial securities here are: stocks, *ṣukūk* and bonds:

Stocks: are representation of a joint ownership share in a company's assets and investments.

***Ṣukūk*:** are financial certificates of equal value that represent equal shares in joint ownership of properties, usufructs, services or assets in a certain project or in a particular investment activity.

Bonds: are financial instruments of equal value that represent a loan for which the issuer is liable that matures on a certain date. The bond holder is entitled to interest in return.

Second: The Sharīʿah ruling on waqf of financial securities

The most prominent *fiqh* academies as well as the conferences and symposia have issued rulings and fatwas allowing the creation of waqf from stocks and *ṣukūk* while prohibiting the creation of waqf from bonds. An example is the Islamic Fiqh Academy of the Organisation of Islamic Cooperation, which resolved:

> يجوز وقف أسهم الشركات المباح تملكها شرعاً، والصكوك، والحقوق المعنوية، والمنافع، والوحدات الاستثمارية، لأنها أموال معتبرة شرعاً.
>
> It is permissible to create a waqf of shares of Sharīʿah-compliant companies. It is also permissible to create waqf of *ṣukūk*, intangible assets, usufructs and investment units because those are all considered as *māl mutaqawwim* (assets that are legal and possess value in the view of Sharīʿah).[360]

The resolution of the Second Seminar on Waqf Fiqh Issues was as follows:

> "يجوز وقف النقود والأسهم والصكوك، ولا يجوز وقف السندات لاحتوائها على القرض ذي الفائدة المحرمة".

[357] Qalʿajī & Qunaybī, *Muʿjam Lughat al-Fuqahāʾ*, p. 430.

[358] Ibn Nujaym, *Al-Baḥr al-Rāʾiq*, 5:218; Al-Ḥaṭṭāb *Mawāhib al-Jalīl*, 6:19; Al-Anṣārī, *Asnā al-Maṭālib*, 2:457; Ibn Qudāmah, *Al-Mughnī*, 6:36.

[359] See *Proceedings of the Second Seminar on Waqf Fiqh Issues*, p. 401.

[360] Resolution No. 181 (7/19), issued at its nineteenth session held in Sharjah, the United Arab Emirates 26-30 April, 2009.

"It is permissible to create waqf of cash, stocks and *ṣukūk*. However, waqf of bonds is not permissible because they comprise a loan with forbidden interest."[361]

Third: What is the Sharīʿah ruling on selling the financial securities that are made as waqf if their value declined and [using the proceeds to] buy more profitable financial securities instead?

If the waqf is created from cash while the sale and purchase of the financial securities was done to achieve the highest profit, then there is no issue in doing so, as indicated earlier. However, if the financial securities themselves were pledged as waqf, it might be possible to sell them subject to certain conditions:

1) **If it was stipulated by the waqf founder:**

If the waqf founder permitted the *nāẓir* to transfer the cash waqf from one investment portfolio to another, then it is permissible. This condition would be considered one of the valid conditions of the waqf founder.

2) **Based on the view that waqf substitution is permitted to secure benefit (*maṣlaḥah*):**

If the founder did not stipulate [permission to sell the securities], this issue can be solved by following the view that waqf substitution is permitted to secure benefit (*maṣlaḥah*) and in order to achieve better revenue, as previously stated. We favoured this opinion subject to the relevant parameters.

The Third Topic: Modern and Contemporary Forms of Cash and Financial Securities Waqf

The contemporary forms and applications of cash waqf vary according to the nature of waqf whether temporary or perpetual. We will discuss the two forms along with details of their forms and applications below.

First: perpetual cash waqf

[361] See *Proceedings of the Second Seminar on Waqf Fiqh Issues*, p. 401.

This is the default meaning of cash waqf if not otherwise mentioned. The areas of investing and developing it are limitless. Many contemporary scholars and Islamic economists mentioned modern channels in which cash waqf can be invested. They include:

- **Waqf funds**

This is by creating a waqf fund for a certain purpose with a capital of, say 100 million. The capital is divided into categories of 10, 20 or 50. Consequently, financial securities of the same value are issued as *ṣukūk*, stocks or waqf certificates and sold in a public offering through a financial institution to willing Muslims in order to collect the required capital. In this case, the waqf is considered as a collective waqf in the form of the collected cash. Afterwards, the fund would be invested appropriately and the revenue would be spent on the purpose the waqf was created for. We find that the idea of waqf fund has its *fiqhī* basis under the rubric of collective waqf in addition to secondary authority over waqf and the permissibility of cash waqf.[362]

Waqf funds have been created in Malaysia as in the case of the waqf between Maybank Islamic and the State of Perak.

Investing through investment deposits

This is through saving and investment funds in Islamic banks and in Sharīʿah-compliant areas such as *murābaḥah, salam, istiṣnāʿ, muḍārabah, mushārakah, mushārakah* that ends in transfer of ownership, diminishing *mushārakah, istiṣnāʿ* in the agricultural field in particular and others. The returns would be spent on the area the waqf is created for. This is what the Religious Councils in the Malaysian states have been doing in general.[363]

Among the forms of this waqf and the ways of attaining its cash in Malaysia is the direct cash waqf. This is created when the waqf founder deposits the cash to be turned into waqf in an investment account of a certain religious institution or a private waqf institution at a bank. The money would be invested for the benefit of the respective institution and according to the way it deems suitable in its capacity as the *nāẓir*. The revenues are then spent on charitable purposes.[364]

- **The periodic creation of waqf out of the revenue of a non-waqf asset[365]**

[362] ʿUmar, "Al-Takhṭīṭ wa al-Muwāzanāt fī Idārah al-Ṣanādīq al-Waqfiyyah", pp. 4-5.
[363] See: Ibid. pp. 220 & 234.
[364] Ibid., p. 201.
[365] Kahf, *Ṣuwar Mustajaddah min al-Waqf*, p. 50.

An example of this is when a person creates a waqf from the rental payments of a certain building without that building itself being pledged as waqf. Another [example] is creating a waqf from the profit of a certain stock without the stock itself being a waqf. One of the most prominent examples of this in Malaysia is what Johor Corporation does. Johor Corporation pays 25% of its yearly profit from stocks to *awqāf* to be spent on charitable purposes.[366]

- **Investing cash waqf to be used for speculation in stocks.**

Dr. Muḥammad Al-Zuḥaylī mentioned that the General Secretariat of Awqaf in Sharjah, UAE entered in Mudarabah of waqf of stocks and that it has achieved a lot of profits. The investments amounted to 250 million dirhams while the generated return is about 10% annually.[367]

- **Cash waqf for the purpose of offering benevolent loans (*qarḍ ḥasan*)**

This is an old and renewed model; classical scholars who allowed cash waqf mentioned it. Financing and its availability are among the most important aspects of development and combating unemployment in modern times. They also help the needy to achieve necessities such as marriage and education. As such, the establishment of waqf institutions for the purpose of offering benevolent loans (*qarḍ ḥasan*) has become one of the most important requirements for the application of waqf in modern times.

- **Creating a waqf of a whole investment institution including all its assets, usufruct and cash**

The Sharīʿah classification of this issue is that it is considered a type of mixed waqf whether perpetual or temporary, family or public, or anything in between.

Second: Temporary cash waqf:

It is subscription to financial securities having a certain maturity date or using benevolent loan (*qarḍ ḥasan*) as a mechanism to collect cash temporarily and then pay it back to the waqf donors at the determined maturity.[368] Among its models is the following:

[366] Ibid., and Bello, *Al-Waqf al-Naqdī wa Istithmāruhu fī Malaysia*, p. 208.
[367] Al-Zuḥaylī, *Al-Istithmār al-Muʿāṣir li al-Waqf*, a paper available on the internet, p. 16. He transmitted this information from *Majallat Manār al-Islām*, Abu Dhabi, No. 357, Vol. 30, Ramadan 1425H/October 2004 CE.
[368] Hishām Sālim Ḥamzah, "Al-Haykalah al-Māliyyah li Waqf al-Nuqūd", *Majallat Jāmiʿat al-Malik ʿAbd al-ʿAzīz, al-Iqtiṣād al-Islāmī*, vol. 30, no. 3, p. 133.

- Temporary cash waqf fund: whereby the fund would collect the cash waqf on a temporary basis from the lending waqf donors and issue benevolent loan (*qarḍ ḥasan*) certificates. The collected cash would then be offered as benevolent loans (*qarḍ ḥasan*) for a predetermined duration to the poor who own small businesses and need financing. Finally, the borrower would pay back the loan to the waqf institution, which in turn would return it back to the waqf founders.[369]

As for the application in Malaysia, despite the existing Sharīʿah rulings and views that allow temporary waqf, the ruling on temporary waqf varies from state to state in Malaysia. Based on the approved view of the Shāfiʿī School, most states do not permit temporary waqf. The exceptions are the states of Terengganu, Sarawak, Johor and the Federal Territory. In Selangor the State Fatwa Council issued a ruling on the permissibility of temporary waqf, but because this ruling was not legally announced, it has no legal status. In terms of application, to the best of our knowledge, we have not found any application for a temporary waqf in Malaysia.

CONCLUSION

It is no secret for those who explore the types of waqf that many of its rulings are based on *ijtihād* and considerations of public interest (*maṣlaḥah*). Thus, we must continue the efforts to find the optimal way for the contemporary application of waqf in order to find the best governance principles that can be applied in contemporary waqf applications. These views are just an attempt to look for these principles. Our final supplication is: all praise is for Allah, Lord of the worlds.

[369] Ibid.

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Findings and Recommendations

17 Muḥarram 1438 A.H corresponding to 30th October 2017

Under the auspices of Bank Rakyat Malaysia

Kuala Lumpur – Malaysia

Section one: Cash Waqf

The participants concluded by confirming Resolution No. 140 (6/15) of the Islamic Fiqh Academy of the Organization of the Islamic Conference, issued at its fifteenth session, which states:

> Cash waqf:
>
> 1. Cash waqf is permissible because the purpose of the waqf, which is to retain the asset and give out its benefit for a charitable cause, can be realized by it. That is because money does not become particularized by specification; any money can substitute for any other money.
> 2. Cash waqf can be used for loan or investment, either directly or by the participation of a number of the donors in one fund, or through the issuance of cash waqf shares to encourage waqf [donation] and to achieve collective cooperation in it.
> 3. If the cash waqf is invested in something, such as buying real estate or having something manufactured, those assets are not considered waqf in place of the cash; rather, it is permissible to sell them for continued investment. It is the original amount of cash that is the waqf.

The Sharīʿah standard issued by the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) states:

> Cash waqf is allowed, but it should be used in a manner that does not consume it such as a permissible loan or safe investment such as *muḍārabah* (silent partnership). The waqf's share of the profit shall be distributed to the beneficiaries.

The participants opine that the areas of use of the cash waqf are numerous:

1. Cash waqf can be invested in various Sharīʿah-compliant investments.
2. Sharīʿah dictates should be complied with to protect the capital of the cash waqf (in accordance with Sharīʿah Standard No. 45 issued by AAOIFI regarding Capital Protection and Standard No. 3 of the Dubai Financial Market on Hedging against Investment and Financing Risks.
3. It is permissible to create waqf funds from the cash waqf for charitable and developmental loans while remaining vigilant about recovery of the capital by taking adequate guarantees and the like.
4. The Forum recommends the creation of accounting and supervisory standards for the follow-up and tracking of cash waqf, its investments and loans.

5. Sharīʿah-compliant hedging measures should be adopted against the risks of exchange rate fluctuation; for example, the Master Agreement of the International Islamic Financial Market (IIFM).
6. The Forum discussed the issue of guaranteeing the capital of the cash waqf by the entrepreneur in *muḍārabah* or the managing partner or the investment agent and recommended the completion of research on this subject. Among the topics that deserve to be explored are:

a) Distribution of profits from the total profits before deducting expenses in *mushārakah* and *muḍārabah* contracts.
b) A stipulated or voluntary guarantee by the entrepreneur in *muḍārabah* or the managing partner or the investment agent for waqf institutions as well as for institutions that care for orphans, widows and minors, social insurance funds and the like.
c) The undertaking by the entrepreneur of a *muḍārabah* or the managing partner or the investment agent to pay as a waqf the amount of the loss for which he is not asked about. He would by doing so become one of the donors of waqf in accord with the stipulations [of the other donors] or by the conditions he stipulates. Is it permissible to make such a pledge in a charitable waqf only or in both charitable waqf and family waqf?

Section Two: The Manager's Remuneration and the Administrative Expenses

First: The Manager's Remuneration

1. The manager (*nāẓir*) refers to any person who manages the waqf, develops its resources, preserves its assets and spends its proceeds on the beneficiaries in accordance with the stipulations of the waqf donor. The *nāẓir* bears the responsibility of waqf management whether the entity who does so is an individual, a group, an organization, a ministry or the like.
2. Parameters of the manager's remuneration: the basic principle is that the manager's remuneration is to be as stipulated by the waqf donor. It can be a specific amount or a proportion of the proceeds, but the following should be taken into account:

a) If the waqf manager is appointed by the donor and his remuneration is determined by the donor, his stipulation should be implemented even if the remuneration is higher than the standard remuneration. If the total proceeds are less than the stipulated manager's salary, maintenance costs and other necessary expenses should be given priority over the manager's salary. The remainder of the proceeds should be paid to the manager while the remainder of the salary becomes a debt on the waqf.
b) If the remuneration is less than the standard remuneration, the matter can be referred to the judge by the manager, provided there is a surplus in the waqf proceeds.
c) If the waqf manager is appointed by the judge, the remuneration should not be higher than the standard remuneration.
d) If the waqf donor did not fix any remuneration for the manager, the manager should be paid the standard wage in accord with the nature of the work, his qualifications and experience, and the economic circumstances of that time and place, unless the manager offers his work as a volunteer.
e) If the donor appoints himself or a relative as the manager of the waqf and stipulates a remuneration higher than the standard remuneration, he only has a right to the standard remuneration if there is surplus in the waqf proceeds after payment of the maintenance expenses. This is because it entails partiality, invites accusation, and may invalidate the waqf.
f) If the waqf is run by a government agency such as a council or a ministry, the state or the supervising authority should bear the administrative costs, including the wages of the workers. This is applicable to the charitable waqf only. This has been successfully practiced in some Islamic countries.
g) If the cash waqf fund is created with a specific amount of money; e.g., a million, but the administrative and other expenses for the establishment of the fund are a hundred thousand, it is permissible to stipulate in the waqf deed and its prospectus that the distribution of the waqf proceeds to the beneficiaries will begin only after recovery of the administrative expenses incurred in establishing the fund.

Second: the administrative expenses of the waqf are the expenses necessary for the preservation of the waqf, maintenance of the waqf assets and protection of the waqf's rights. The most important include:

1. Maintenance and repair expenses;
2. The manager's remuneration;
3. The normal administrative expenses;
4. Current waqf debt.

The administrative expenses should be subject to Sharīʿah, accounting and administrative supervision in accordance with the country's customs. In all cases, the administrative expenses should not exceed 12% of the total return of the waqf, taking guidance from the case of those employed to collect zakat.

Section Three: Waqf Substitution

Fiqh scholars opine that in principle it is impermissible to sell the waqf or give it away or replace it with another asset. However, some special cases are exempted as follows:

1. Waqf substitution in the cases of necessity or for public interest;
2. When the waqf stops yielding benefits or it is difficult to make use of the benefits;
3. When the waqf changes to something forbidden to permanently possess; for example, the waqf consists of shares that were permissible but their status changes to Sharīʿah non-compliant.

When substituting a waqf, the following must be observed:

a) The waqf substitute should not be less in value and profit than the original waqf based on the evaluation of experts.
b) Any partiality or cause for accusation or suspicion should be avoided.
c) The waqf substitute should be purchased right away except what is dictated by circumstances.
d) The substituted waqf should not be released except after the actual delivery of the waqf substitute.

e) The waqf substitution should be done upon the decision of a Sharīʿah judge or the fatwa of a recognized Sharīʿah committee.

One of the topics worth researching on the issue of waqf substitution is the combination of nonfunctional *awqāf* (endowments) into a single waqf.

At the end of the seminar, the participants strongly recommended the establishment of higher Sharīʿah councils in Islamic countries to supervise waqf affairs from Sharīʿah, accounting and governance aspects.

May the peace and blessings of Allah be upon our Prophet Muhammad, his household, and companions.

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