Missouri Law Review

Volume 36
Issue 2 *Spring 1971*

Article 1

Spring 1971

Islamic Wakf, The

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THE ISLAMIC WAKF*

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I. INTRODUCTION

The institution of *wakf* rests upon the *shari'a,* the religious law of Islam.[1] Although it antedates the mediaeval English feoffment to uses, precursor of the trust, by at least four centuries, the *Islamic wakf* bears striking resemblances to the trust. The origins of the *shari'a* are to be found in the Koran, looked upon as the revealed word of Allah, and in the Hadith, traditions of the deeds and sayings of the Prophet Mohammed.[2] Some discussions of the peculiarities of the *shari'a* will be helpful to an understanding of the law of *wakf.* First, the *shari'a* is a personal, as distinguished from a territorial, law. It governs transactions because the parties are Muslims of a particular sect, not because they reside in, owe allegiance to or conduct their

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 A modified version of this paper will appear in Volume VI of the INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW. The author is indebted to Professors J. N. D. Anderson and N. J. Coulson of the School of Oriental and African Studies, University of London, for helpful suggestions incident to the preparation of this paper but he bears sole responsibility for its content.

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1. The institution may have existed in some form in Arabia before the time of the Prophet Mohammed (570-632 A.D.). *See* Majid, *Wakf as Family Settlement Among the Mohammedans.,* 9 J. COMP. LEG. 122, 125, 129 (1908). *But see* IV ENCYCLOPAEDIA OF ISLAM *Wakf* 1096, 1097 (1934); A. FYZEE, OUTLINES OF MUHAMMADAN LAW 265 (3d ed. 1964).

Wakf was probably suggested by the charitable foundations of late Roman law known as *piae causae. See* W. BUCKLAND, THE MAIN INSTITUTIONS OF ROMAN PRIVATE LAW 88-90 (1931); W. BUCKLAND & P. STEIN, TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 178-79, 256-57 (3d ed. 1963).

2. The *Muwatta,* a manual of the law of Medina containing seventeen hundred traditions, was compiled by the Iman Malik ibn Anas (715-795 A.D.). A later collection of traditions, the *Sahih* of the Iman Muslim ibn al-Hajjah (815-875 A.D.) was influential as was the *Sahih* of Mohammed ibn Ismail al-Bukhari (810-872 A.D.), a compilation of more than seven thousand traditions. The Koran and the Hadith were glossed by a number of schools of jurists. There are four great Sunnite schools of jurisprudence, which regard each other as orthodox: The Hanifite School, founded by the Imam Abu Hanifah al-nu-man ibn Thabit (699-767 A.D.), which was favored by the Abassid Caliphs of Baghdad (750-1258 A.D.) and the Ottoman Sultans, is still dominant in Central Asia, Pakistan, Afghanistan, Northern India and much of the former Turkish dominions. The Malikite School, founded by the Imam Malik ibn Anas (715-795 A.D.), which was influenced by the customs of Medina, has been important in the Sudan, North Africa west of Egypt and West Africa. The Shafite School, founded by the Imam Mohammed ibn-Idris al-Shafii (767-820 A.D.), a kinsman of the Prophet, is favored in Egypt, Syria, the Persian Gulf area, East Africa, Southern India and Southeast Asia. The

business in a territorial state.[3] Second, since the third century of Islam, at least until a hundred years ago, the sole authority for the *shari'a* has been the writings of venerated scholarly jurists. During the first two centuries the *kadis* (judges) presiding over courts administering the *shari'a* were free to go directly to the Koran and the precedents of the early authorities; since then a *kadi's* duty has been to seek only the dominant view of the leading jurists of his own school. There is, accordingly, in strict Muslim theory, no recognized place for custom, legislation or judicial precedents as sources of law.[4] The situation within any school of Islamic jurisprudence

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Hanbalite School, founded by the Imam Ahmed ibn Hanbal (745-792 A.D.), is prominent in Saudi Arabia, where conditions have changed relatively little since the time of the Prophet Mohammed. Other schools of jurisprudence exist which are not regarded as orthodox by Sunnite jurists. The Ibadite School, founded by Abdallah ibn Ibad (fl. 657 A.D.), which codifies a very early tradition, is followed in Oman, Tanzania, and Southern Algeria. Iran is the central stronghold of Shi'ite law, one variety of which, that of the Jafari School, founded by the Imam Jafar al-Sadiq (699-765 A.D.), the sixth Shi'ite Imam, is embraced by about half the population of Iraq and has had some following in Iran. *See* XVII ENCYCLOPAEDIA BRITANNICA *Mahammedan Law* 414-417 (11th ed. 1911); W. JENNINGS, THE DOMINION OF CEYLON: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION 257 (1952); Anderson, *Reforms in Family Law in Morocco*, 2 J.A.L. 146, 147 (1958); Anderson, *The Tunisian Law of Personal Status*, 7 INT. COMP. L. Q. 262, 264 (1958); Anderson, *Conflict of Laws in Northern Nigeria: A New Start*, 8 I.C.L.Q. 442 (1959); J. ANDERSON, ISLAMIC LAW IN THE MODERN WORLD 13 (1959); Anderson, *Waqfs in East Africa*, 3 J.A.L. 152, 154 (1959); Ramazoni, *The Shi'i System: Its Conflict and Interaction with Other Systems*, 53 AM. SOC. INT'L. LAW PROC. 53-59 (1959); Schacht, *Islamic Law in Contemporary States*, 8 AM. J. COMP. L. 133, 136 (1959); Anderson, *A Law of Personal Status for Iraq*, 9 INT'L. COMP. L.Q. 542, 544 (1960); Anderson, *Significance of Islamic Law in the World Today*, 9 AM. J. COMP. L. 187, 189 (1960); Anderson, *The Modernisation of Islamic Law in the Sudan*, S.L.J. 292 (1960); MAJID KHADDURI, ISLAMIC JURISPRUDENCE: SHAFI'I'S RISALA 10, 46, 47-48 (1961); Anderson, *The Future of Islamic Law in British Commonwealth Territories in Africa*, 27 LAW & CONTEMP. PROB. 617, 620 (1962); K. FARUKI, ISLAMIC JURISPRUDENCE 187-94 (1962); A. FYZEE, *supra* note 1, at 34; N. COULSON, HISTORY OF ISLAMIC LAW 86-102 (1964); J. ANDERSON, THE ADAPTATION OF MUSLIM LAW IN SUB-SAHARAN AFRICA: AFRICAN LAW: ADAPTATION AND DEVELOPMENT 149, 154 (1965); XII ENCYCLOPAEDIA BRITANNICA *Islamic Law* 679-81 (1967).

3. Majid Khadduri, *The Islamic System: Its Competition and Co-Existence with Western States*, 53 AM. SOC'Y INT'L LAW PROC. 49, 51 (1959); Anderson, *A Law of Personal Status for Iraq*, *supra* note 2, at 542-43; Anderson, *The Modernisation of Islamic Law in the Sudan*, *supra* note 2, at 294; Anderson, *The Future of Islamic Law in British Commonwealth Territories in Africa*, *supra* note 2, at 617, 621-24; W. DANIELS, THE COMMON LAW IN WEST AFRICA 92 (1964). In some countries the personal law of the *kadi* controls; in others, that of the litigants. A. FYZEE, *supra* note 1, at 321.

4. Schacht, *supra* note 2, at 133, 136-37, 146-47; Anderson, *Islamic Law in the Modern World*, *supra* note 2, at 11-13; Anderson, *A Law of Personal Status for Iraq*, *supra* note 2, at 545; Anderson, *Significance of Islamic Law in the World Today*, *supra* note 2, 188, 192; Anderson, *The Modernisation of Islamic Law in the Sudan*, *supra* note 2, at 292; Anderson, *The Future of Islamic Law in British Commonwealth Territories in Africa*, *supra* note 2, at 617-18; K. FARUKI, *supra* note 2, at 28-29, 76; Anderson, *The Adaptation of Muslim Law in Sub Saharan Africa*, *supra* note 2, at 149-51; XII ENCYCLOPAEDIA BRITANNICA, *supra* note 2, at 681; Bonderman, *Modernization and Changing Perceptions of Islamic Law*, 81 HARV. L. REV. 1169-93 (1968). The Malikite School does hold that what

thus resembles that created in the Roman Empire by the Law of Citations of 426 A.D., which required the courts to follow the views of five named jurists who had flourished in earlier centuries.[5] The Roman Empire always recognized, however, the possibility of change in the law by legislation. The *shari'a,* being deemed to be divinely ordained, does not, in theory, recognize the possibility of legislative change as distinguished from mere implementation by administrative regulations.

There is no mention of *wakf* in the Koran, but estimates that three quarters of the building and agricultural land in Turkey, half of that in Algeria and a third in Tunis were *wakf* at the dissolution of the Ottoman Empire indicate the importance of the institution in Islam.[6] The origin of the recognition of *wakf* in the *shari'a* is traced to a tradition reported in the Sahih of Mohammed ibn Ismail al-Bukhari (810-872 A.D.). According to this tradition Farouk Omar ibn-al-Khattab (caliph 634-644 A.D.) asked the Prophet Mohammed how he ought to dispose of his property in order that it might be pleasing to Allah. The Prophet is said to have replied, "Immobilize it in such a way that it cannot be sold or made the subject of gift or inheritance, and distribute the revenues among the poor."[7] The Ghayat el-Bayan, a collection of traditions published in 1369 A.D., reports that the Prophet gave a rather different reply to Omar's question: "Tie up the property and devote the usufruct to human beings, and it is not to be sold or made the subject of gift or inheritance; devote its produce to your children, your kindred, and the poor in the way of God."[8]

The validity of *wakfs* for such public charitable purposes as mosques, schools, hospitals, cemeteries, public baths and relief of poverty has never been questioned by Muslim jurists, but the underlying theory of the institution has not always been the same. The Imam Abu Hanifah thought that the creation of a *wakf,* like an English covenant to stand seized or self-declaration of trust, left ownership in the *wakif* (settlor) and merely devoted the usufruct to charitable purposes.[9] His disciple, the Imam Abu

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the courts have habitually recognized may prevail over what would otherwise be the more authoritative opinion of the jurist. Coulson, *Muslim Custom and Case-Law,* N.S. VI DIE WELT DES ISLAMS 13-24 (1959). This is closer to the French concept of *jurisprudence constante* than to the Anglo-American doctrine of *stare decisis.* F. LAWSON, A. ANTON & L. BROWN, AMOS AND WALTON'S INTRODUCTION TO FRENCH LAW 9-12 (2d ed. 1963).

5. XXIII ENCYCLOPAEDIA BRITANNICA *Roman Law* 570 (11th ed. 1911); H. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 472 (1961).

6. Jurist. WAQF, 4 MOSLEM WORLD 173 (1914); IV ENCYCLOPAEDIA OF ISLAM, *supra* note 1, at 1100; A. FYZEE, *supra* note 1, at 266. Charitable *wakf* bound 130,000 *feddans* (1 *feddan* equals 1.038 acres) in Egypt in 1339 A.D. IV ENCYCLOPAEDIA OF ISLAM *supra* note 1, at 1098. It has been estimated that 150,000 *feddans* in Egypt were subject to family *wakf* as late as 1957. D. WARRINER, LAND REFORM AND DEVELOPMENT IN THE MIDDLE EAST (2d ed. 1962) 192-93.

7. *Jurist, supra* note 6, at 174. Slightly different forms of reply are quoted in A. FYZEE, *supra* note 1, at 265, and A. QADRI, ISLAMIC JURISPRUDENCE IN THE MODERN WORLD 222 (1963).

8. *Jurist, supra* note 6, at 174-75.

9. A. QADRI, *supra* note 7, at 228; A. FYZEE, *supra* note 1, at 268-69; Majid, *supra* note 1, at 123.

Yusuf, who was Grand Kadi under Haroun-al-Raschid (Caliph of Baghdad 786-809 A.D.), decided that the creation of a *wakf* involved a conveyance of ownership to Allah in perpetuity, with usufruct to successive human beneficiaries.[10] This became the accepted view of the Hanifite and Shafite schools of jurisprudence, but it would seem that the Hanbalite and Shi'ite schools hold that ownership of the corpus is in the beneficiaries.[11] The prevailing view is that, like a gift, the creation of a *wakf* must be immediate and unconditional; it cannot be subject to a condition precedent; and that it must be perpetual and irrevocable.[12]

II. Methods of Creation of Wakfs

An owner of property may declare it *wakf* if he has capacity to make a gift of it. No prescribed formula is required; any words manifesting the intention to create a *wakf* are sufficient.[13] The Imam Abu Hanifah held that the approval of the *kadi* is necessary for the creation of a *wakf* and this was required in the Ottoman Empire, including Egypt.[14] Grand Kadi Abu Yusuf decided that approval of the *kadi* is unnecessary and judicial approval is not required in India and Algeria.[15] Grand Kadi Abu Yusuf did not consider appointment of a *mutawalli*[16] or delivery of possession essential to the validity of a *wakf*. His younger contemporary, the Imam Mohammed ash-Shaybani (d. 804 A.D.) considered the transaction incomplete without the appointment of a *mutawalli* and, unless the *wakif*[17] designated himself as *mutawalli*, delivery of possession to the *mutawalli*. Some Muslim countries require appointment and delivery for creation of a *wakf;* others do not.[18] The Muslim jurists did not require a writing but land title registration legislation now makes a registered instrument setting out the terms of the *wakf* (known in India as a *wakfnama*) necessary for creation of a

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10. A. Qadri, *supra* note 7, at 229; A. Fyzee, *supra* note 1, at 269; Majid, *supra* note 1, at 123.

11. A. Fyzee, *supra* note 1, at 269n. Some Shafite jurists also thought that title to the corpus was in the beneficiaries. IV Encyclopaedia of Islam, *supra* note 1, at 1097.

12. A. Qadri, *supra* note 7, at 223, 226, 229, 230, 231; A. Fyzee, *supra* note 1, at 269, 271, 276-78, 280; Majid, *supra* note 1, at 126; *cf.* IV Encyclopaedia of Islam, *supra* note 1, at 1097. The Imam Malik (715-795 A.D.) taught that a *wakf* could be created for a limited period. A. Qadri, *supra* note 7, at 229. Under Malikite law the settlor of such a temporary *wakf* retains ownership of the property.

13. Majid, *supra* note 1, at 123; Jurist, *supra* note 6, at 183; A. Fyzee, *supra* note 1, at 273.

14. Jurist, *supra* note 6, at 176, 177-178; A. Qadri, *supra* note 7, at 228. Creation of a *wakf* by a formal proceeding before a *kadi* is described in Dajani v. Mustafa el Khaldi, [1946] A.C. 383 (P.C. on appeal from Palestine.)

15. Jurist, *supra* note 6, at 177-78; Majid, *supra* note 1, at 138.

16. Mutawalli: one who manages the *wakf* property; a trustee without ownership. *See* The Mutawalli, below.

17. *Wakif*: one who creates the *wakf;* a settlor.

18. A. Qadri, *supra* note 7, at 229, 230; A. Fyzee, *supra* note 1, at 273-74; N. Coulson, *supra* note 2, at 51.

wakf of land in most Muslim countries.[19] A *wakf* created during the *wakif's* "death-sickness" (last illness) or by will is subject to the rights of inheritance of the *wakif's* heirs.[20] The creation of a *wakf* which makes the *wakif* insolvent is a fraud on his existing creditors but the creation of a *wakf* is not a fraud on future creditors even if designed to defeat them. Some authorities say that this is because a *wakf* is deemed a conveyance to Allah for a full and adequate consideration by way of promise of reward in Heaven and Allah is never guilty of fraud.[21]

III. The Wakf Property

The existence of property owned by the *wakif* is essential to the creation of a *wakf*. All of the Muslim jurists appear to have agreed that land, weapons, camels, horses, cattle and tangible chattels used in connection with land, including agricultural implements and copies of the Koran used in a mosque, could be made *wakf*. Grand Kadi Abu Yusuf thought that other movables could not be made *wakf* but his younger contemporary, the Imam Mohammed ash-Shaybani said that anything which could be bartered or traded could be made *wakf*. The latter view has tended to prevail in the Hanifite School as to coin and non-consumable tangible chattels but there is modern Hanifite authority against the eligibility of mere claims for money, whether or not secured by mortgage or reduced to judgment, consumable chattels and investment securities, such as corporate stock. The Malikite authorities impose no restriction on *wakfs* of movables. There is evidence that, as early as 1355 A.D. not only mosques, cemeteries, gardens and farms were *wakf* but whole villages, tenement houses, and such business establishments as shops, warehouses, stables, baths, mills, bakeries, oil and sugar presses, soap works and paper factories. The Ottoman Sultan even made a railroad *wakf*. Grand Kadi Abu Yusuf held that an undivided share in land could be made *wakf* for purposes other than a mosque or cemetery. The Imam Mohammed ash-Shaybani disagreed but, on this point, the view of the Grand Kadi has prevailed in the Hanifite School and the same approach has been taken by other schools. There is general agreement that the *wakf* property must be definitely specified and identified at the

19. Majid, *supra* note 1, at 138; A. Fyzee, *supra* note 1, at 274. *See* Dajani v. Mustafa el Khaldi, [1946] A.C. 383 (P.C. on appeal from Palestine). Curiously, during the centuries when the English courts of common law would receive deeds in evidence but not the oral testimony of witnesses the Muslim courts would hear the oral testimony of witnesses but would not accept written documents as evidence. Coulson, *Muslim Custom and Case-Law, supra* note 4. The English courts of common law did not accept testimony by witnesses, either in open court or by deposition, until the sixteenth century. Anonymous, R.S.Y.B. 20 Edw. 3, Mich., pl. 3 (II 168-70) (1346). Other authorities are cited in Fratcher, *Uses of Uses,* 34 Mo.L.Rev. 39, 47 (1969).

20. Majid, *supra* note 1, at 124; Jurist, *supra* note 6, at 179; A. Qadri *supra* note 7, at 227.

21. Majid, *supra* note 1, at 124-25; Jurist, *supra* note 6, at 183; A. Qadri, *supra* note 7, at 227; A. Fyzee, *supra* note 1, at 288.

time of creation; e.g., a declaration of *wakf* of "one of my horses to be selected hereafter" would not presently create a *wakf*.[22]

IV. The Mutawalli

Wakf property is managed by a *mutawalli* (known in Egypt as a *nazir*), whose position resembles those of the civil law curator and the Anglo-American guardian or committee of property of minors and mental incompetents in that he has fiduciary powers and duties but does not have ownership of the property which he administers. If the *wakif* failed to designate a *mutawalli*, the Imams Abu Hanifah (699-767 A.D.) and Mohammed ash-Shaybani thought that the *wakf* failed. Grand Kadi Abu Yusuf held that the *wakf* was effective and the *wakif* the *mutawalli*. The Shi'ite jurists also considered the *wakf* valid but thought that the beneficiaries became the *mutawallis*. Under Malikite law the *wakif* may not be the *mutawalli*. The terms of the *wakf* may and usually do designate the first *mutawalli* and prescribe rules for succession to the office. The office may be entailed by way of primogeniture on the male descendants of the *wakif* or each successive *mutawalli* may be empowered to select his own successor, either without restriction, or from a designated class, such as the male descendants of the *wakif*. The beneficiaries for the time being, whether the congregation of a mosque or individuals entitled to shares in the income, may be empowered to fill vacancies. If the terms of the *wakf* do not prescribe a scheme of succession, the *wakif* or his executor may designate his successor. If the office is vacant for want of an eligible incumbent designated by the terms, the *wakif* or the latter's executor, the *kadi* may appoint a *mutawalli*. The *kadi* may remove a *mutawalli* for maladministration or insolvency and appoint another. In appointing a *mutawalli* the *kadi* normally prefers the descendants of the *wakif*. The survivors of several joint *mutawallis* succeed to the powers of the original group. If the *wakif* is the first *mutawalli*, he may resign and designate his successor, but other *mutawallis* may not do this unless the terms of the *wakf* authorize their doing so. Women may serve as *mutawallis* and, in modern times, government departments do so. A *mutawalli* may employ agents and servants to perform ministerial acts not involving the exercise of discretion. The terms of the *wakf* may fix the compensation of the *mutawalli*, which he may pay to himself from the income of the *wakf* property. If the terms do not fix his compensation, the *kadi* may do so in an amount not exceeding a tenth of the income.[23]

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22. Majid, *supra* note 1, at 126-27; Jurist, *supra* note 6, at 182-83; IV Encyclopaedia of Islam, *supra* note 1, at 1099, 1102; A. Qadri, *supra* note 7, at 223, 230-34; A. Fyzee, *supra* note 1, at 280-82; Anderson, *Recent Developments in Shari'a Law IX—The Waqf System*, 42 Muslim World 257, 262-63 (1952).

23. Jurist, *supra* note 6, at 183-84; IV Encyclopaedia of Islam, *supra* note 1, at 1097; A. Qadri, *supra* note 7, at 238-39, 240; A. Fyzee, *supra* note 1, at 271, 273-74, 303-309. For forms of *wakfnamas* (instrument creating and setting out the terms of a *wakf*) prescribing various schemes of succession to the *mutawallishiip*, see S. Gopal, Conveyancing Precedents and Forms 359, 361 (2d ed. 1961); Riziki

V. Powers of the Mutawalli and the Kadi

The *mutawalli* has authority and a duty to take charge of the *wakf* property, protect it from injury, keep it in repair, pay any taxes to which it is subject, and collect the rent and profits. He may expend income for these purposes and has a duty to apply the balance to the specified or implied objects of the *wakf*. Obligations properly incurred in the administration of a *wakf* are normally collectible from the *wakf* income, not, as in the case of a trustee, from the individual property of the *mutawalli*. The *mutawalli* has implied power to lease houses and agricultural lands for terms of three years or less. Power to grant leases for longer terms may be conferred by the terms of the *wakf* or by decree of the *kadi*. Malikite law permits the creation of *wakfs* for limited periods. As, under the rules of the other schools of Islamic jurisprudence, every *wakf* must be perpetual, the *wakif* cannot reserve to himself or confer on the *mutawalli* power to terminate the *wakf*, by sale of the *wakf* property or otherwise, and the *kadi* has no power to decree termination. The *wakif* may, however, reserve or confer upon the *mutawalli* by terms of the *wakf* power to sell the *wakf* property for purposes of reinvestment of the proceeds of sale, and the *kadi* may authorize sale or exchange for reinvestment. The property acquired by exchange or reinvestment of the proceeds of sale of *wakf* property is subject to the *wakf*. Although the *mutawalli* is not supposed to profit from the administration of the *wakf* other than by the receipt of his authorized compensation, he is not subject to the strict rules which forbid self-dealing by trustees. For example, a *mutawalli* may lease a *wakf* house to himself so long as he pays a fair rent for it. The fact that the *mutawalli*, unlike a trustee, does not own the *wakf* property, which belongs to Allah or to the beneficiaries, has several consequences. An unauthorized sale or lease, even to a *bona fide* purchaser for value, is wholly void. Moreover, a disseisor of *wakf* land is accountable for the profits which accrue during his wrongful occupation. The *kadi* may entertain suits for the construction of the terms of *wakfs*.[24]

Binti Abdulla v. Sharifa Binti Mohamed Bin Hemed [1963] 2 W.L.R. 475, 477 (P.C. 1962). The nature of the office of *mutawalli* is discussed by Ameer Ali, P.C. in Vidya Varuthi Thirtha v. Balusami Ayyar, L.R. 48 I.A. 302, 312-14 (P.C. 1921). It would seem that, in Pakistan, a *mutawalli* may designate his own successor if the terms of the *wakf* make no other provision. A. Gledhill, Pakistan: The Development of Its Laws and Constitution 290 (2d ed. 1967).

24. Majid, *supra* note 1, at 128, 136; Jurist, *supra* note 6, at 184; IV Encyclopaedia of Islam, *supra* note 1, at 1097; A. Qadri, *supra* note 7, at 230, 239-40; A. Fyzee, *supra* note 1, at 276-79, 304, 323; J. Schacht, An Introduction to Islamic Law 160 (1964). Although an *inter vivos wakf* is irrevocable, a will creating a testamentary *wakf* is revocable by the testator because a will is not operative until the death of the testator. The form of *wakfnama* (instrument creating a wakf and setting out its terms) given in S. Gopal, *supra* note 23, at 361, purports to empower the *mutawalli* to invest in securities permitted by The Indian Trust Act and in first mortgages on urban residential property. In view of the restrictions upon the types of property which may be made *wakf* imposed by traditional Hanifite law, these powers would seem to be of questionable validity in the absence of

VI. Wakf Beneficiaries

All schools of Islamic jurisprudence recognize the validity of *wakfs* for the exclusive benefit of public charity. Islamic law recognizes as public charitable purposes (1) the relief of poverty; (2) the advancement of education; (3) the promotion of health; (4) governmental or municipal purposes; (5) other purposes the accomplishment of which is deemed beneficial to the community; (6) the advancement of religion. Provisions for the maintenance of schools and colleges and payment of teachers in such institutions are examples of advancement of education. Provisions for maintenance of hospitals would promote health. Provisions for the construction and maintenance of roads and bridges are examples of governmental purposes. The maintenance of wells, fountains, aqueducts, caravanserais and cemeteries is deemed beneficial to the community. The maintenance of mosques and assistance to the poor to perform the pilgrimage to Mecca advance religion. The advancement of a religion other than that of Islam is not a proper purpose. As non-Muslims may create *wakfs* only for purposes which are permitted by both the *shari'a* and their own personal law, they may not create *wakfs* for mosques, synagogues or Christian churches and monasteries. If the particular charitable purpose specified by the terms of the *wakf* ceases to exist or fails to exhaust the income of the *wakf* property, the *kadi* may frame a scheme *cy pres* designating substitute or additional charitable purposes.[25]

The *shari'a* prescribed rigid rules of succession to property at death under which the surviving spouse, children, parents and, in some situations, grandparents, grandchildren, brothers and sisters took, by way of forced share or legitime, fixed fractions of the decedent's estate which could neither be increased nor diminished by will without the consent of the other heirs. Moreover, whether or not there were heirs entitled to forced shares under the *shari'a*, a decedent could not dispose of more than a third of his estate by will or by a gift made during death sickness without the consent of his heirs.[26] This scheme had serious disadvantages in some cases. It

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the Indian *wakf* validation legislation currently in force, which removes the traditional restrictions.

25. Majid, *supra* note 1, at 125; Jurist, *supra* note 6, at 177; IV Encyclopaedia of Islam, *supra* note 1, at 1096; S. Gopal, *supra* note 23, at 360; A. Qadri, *supra* note 7, at 235, 237; A. Fyzee, *supra* note 1, at 273, 283-84.

26. Koran ch. 4 (Sale transl. 1734); Jurist 179 (1914); J. Anderson, Islamic Law in the Modern World, *supra* note 2, at 62-76; A. Qadri, *supra* note 7, at 184-96; N. Coulson, *supra* note 2, at 16-17, 22; A. Fyzee, *supra* note 1, at 353, 380-459; J. Schacht, An Introduction to Islamic Law, *supra* note 24, at 170-72; Liebesny, *Stability and Change in Islamic Law*, 21 Middle East J. 16, 23 (1967); Anderson, *Modern Trends in Islam: Legal Reform and Modernisation in the Middle East*, 20 *Int. & Comp.* L. Q. 1 at 10 (1971). There was freedom of testation as to the whole estate if there were no heirs at all but this would rarely occur. The tendency to use the *wakf* as a device to avoid the forced heirship system of *shari'a* law is mentioned in Thomas, *Note on the Origin of Uses and Trusts—*Waqfs, 3 S.W.L.J. 162, 163 (1949).

tended toward the division of land into tracts so small as to be economically unworkable. The share of a widow could vary from a quarter to as little as one thirty-second of the estate. The share of a daughter was half that of a son and, if there were no son, an only daughter had to share even a small estate with the decedent's parents, brothers and sisters. The legal share of a wife or child might be miserably inadequate for her support. Yet, although the decedent could devise a third of his estate to charity or to strangers, he could not by his will increase the share of a wife or child by a single piaster without the consent of his other heirs. The *shari'a* scheme of succession, which often deprived even a moderately wealthy man of the power to make decent provision by will for the support of his wife and disabled children, created a demand for some other device to achieve such purposes. The device commonly chosen was the *wakf*.

The Imam Abu Hanifah did not consider support of relatives a permissible purpose for a *wakf* except, of course, to the limited extent that allowing compensation to a series of *mutawallis* who were relatives of the *wakif* served this purpose incidentally. Grand Kadi Abu Yusuf decided, however, that so long as the *wakf* was created before the *wakif's* death sickness, he could make all or any part of his property *wakf* for "me so long as I live and after me for my children and children's children and descendants as long as my posterity exists, and on their extinction, for the poor—it is lawful." The decision reflected the Muslim view that making provision for one's family is a pious or charitable purpose, as is a donation for public charity. This became the prevailing view in the Hanifite School. The other Islamic schools of jurisprudence also took the position that *wakfs* for the benefits of the *wakif's* descendants are valid so long as the ultimate remainder is to public charity. The Ottoman Porte encouraged the creation of private (family) *wakfs* in order to prevent excessive fragmentation of land holdings. Despite disagreement by his younger contemporary, the Imam Mohammed ash-Shaybani, the Hanifite School also followed the Grand Kadi's view that the *wakif* might make himself a beneficiary. This position was also taken by most Hanbalite and Ibadite jurists. The Imam Mohammed ibn-Idris al Shafi'i made his house and its contents *wakf* for his descendants but taught that the *wakif* could not make himself a *wakf* beneficiary. Although such stratagems are discountenanced by some of their authorities, the Shafites sometimes avoid this restriction, either by describing the *wakif* by the title of an office or the name of a class (e.g., "the imam of the Mosque at Machpelah;" "the eldest son of my father") or by a conveyance to a straw party who creates the *wakf* for the conveyor and his descendants. Some schools are more strict in excluding the *wakif* from any interest. The Malikite School, for example, does not even allow the *wakif* to designate himself as a *mutawalli*. The Grand Kadi Abu Yusuf and the Imam Mohammed ash-Shaybani, both of whom were Hanifites, differed on the question of whether the ultimate remainder to public charity must be express. The Grand Kadi and some leading Shafite jurists thought that a

declaration of *wakf* for the benefit of the descendants of the *wakif* was valid, because it implied the necessary ultimate remainder to the poor; but there are differences of opinion on this point in both schools.[27]

VII. Modern Changes in the Law of Wakf

Any device which restrains the alienation of land has adverse social and economic effects because it tends to concentrate ownership in a small part of the population and keep it out of the hands of those persons who have the means, motive and ability to develop and use it to maximum advantage. The Islamic *wakf*, in view of the power of the *kadi* to authorize sale for reinvestment, does not effect a complete restraint on alienation but it seriously discourages it. The concentration of a high proportion of the wealth of a country in the control of fiduciary managers discourages industrial and commercial development because it is unavailable for use as risk capital. Unless expressly conferred by the terms of the *wakf* or by the *kadi*, a *mutawalli*, like a trustee, lacks authority to make improvements to the *wakf* property, such as electrification, and the erection of new buildings. Muslim law, like the English law of waste, contemplates preservation of property in its original state, without deterioration or improvement. Moreover, when no one has full ownership of property, the incentive to improve it is materially reduced. Because the *mutawallis* do not have, and cannot be given by the *kadi*, power to mortgage or sell *wakf* property for the purpose, they are commonly unable to finance improvements, such as better drainage and irrigation systems for agricultural lands and the installation of plumbing and air conditioning in residential properties. It is sometimes impossible to pay for even normal repairs from income alone. The widespread use of the *wakf* device has, in consequence, operated as a serious deterrent to economic growth and social improvement in Islam.

Wakf is peculiarly inappropriate for family settlements. The Hanifite rules, that would permit an urban financier to settle date groves, camels, old swords and trunks of gold coin (none of which he has) on his family, but deny him power to settle the stocks, bonds, bank accounts and mortgages which he does own, make no sense in a modern economy. Because a *wakf* must be perpetual, a *wakif* can neither authorize principal invasion to meet the urgent needs of his elderly parents, widow and minor and disabled children nor direct that the *wakf* cease and the corpus pass outright to able-

27. Jurist, *supra* note 6, at 174-81; Majid, *supra* note 1, at 127-31; IV Encyclopaedia of Islam, *supra* note 1, at 1096, 1100; Anderson, *Recent Developments in Shari'a Law IX—The Waqf System*, *supra* note 22, at 257; Anderson, *Waqfs in East Africa*, *supra* note 2, at 153-55; A. Qadri, *supra* note 7, at 235-36; J. Anderson, Islamic Law in Africa: Problems of Today and Tomorrow, Changing Law in Developing Countries 176-77 (J. Anderson ed. 1963); N. Coulson, *supra* note 2, at 169; A. Fyzee, *supra* note 1, at 289-303; Anderson, *A Recent Decision of the Judicial Committee of the Privy Council*, in Arabic and Islamic Studies in Honor of Hamilton A. R. Gibb 53, 54, 59 (Makdisi ed. 1965); Liebesny, *supra* note 26, at 23-25.

bodied descendants when these needs cease to exist. In consequence, *wakf* gives inadequate protection to those who need it and far too much to those who do not. It produces a large class of able-bodied people who are idle pensioners because they have neither property to manage nor need to work. It is not surprising that for more than a century efforts have been made to break the stranglehold of *wakf* on the economy and society of Islamdom.

Wakfs may be classified into three groups: (1) public—the purposes of which are exclusively public charity; (2) semi-private—where part of the income in each year is to be paid to members of the *wakif's* family and part devoted to public charity, and (3) private—where the whole income is to be paid to the *wakif's* family until it becomes extinct, with only the ultimate remainder to public charity. In the former Indian Empire (including what is now Pakistan) and in British colonies in Africa and Asia with substantial Muslim populations, the *shari'a* was normally applied by a unified court system with English judges assisted by native assessors. Ultimate appeal was to the Judicial Committee of the Privy Council in London, most of whose members are present and former English judges.[28] The English judges have a tradition of implacable hostility to family perpetuities which goes back more than six centuries.[29] The Fatawa-Alamgiri, compiled in

28. Anderson, *Significance of Islamic Law in the World Today, supra* note 2, at 189; Liebesny, *supra* note 26, at 32. In British Somaliland the *shari'a* was administered by Muslim *kadis*. Anderson, *The Future of Islamic Law in British Commonwealth Territories in Africa, supra* note 2, at 625-26.

29. In the fourteenth century the English judges thwarted attempts to create family perpetuities through the use of restraints on alienation of estates in fee simple by holding the restraints void. Anonymous, Liber Assisarum 33 Edw. 3, pl. 11 (1359). *Accord*: Mayn v. Cros Y.B. 14 Hen. 4, Mich., pl. 6 (1412); Anonymous, Y.B. 21 Hen. 6, Hil., pl. 21 (1443); Anonymous; Y.B. 8 Hen. 7, Hil., pl. 3 (1493); Anonymous, Y.B. 10 Hen. 7, Mich., pl. 28 (1494); Anonymous, Y.B. 13 Hen. 7, Pasch., pl. 9 (1498); Vernon's Case, 4 Co. Rep. 1a, 3b, 76 Eng. Rep. 845, 854 (1572); Shailard v. Baker, Cro. Eliz. 744, 78 Eng. Rep. 977 (1600). The Roman law was to the same effect. JUSTINIAN, DIGEST 30.114.14 (533 A.D.).

In the fifteenth century they thwarted attempts to create family perpetuities through the use of perpetual entails expressly authorized by statute. The Statute of Westminster II, *De Donis Conditionalibus*, 13 Edw. 1, stat. 1, c. 1 (1285), had been construed to impose a perpetual restraint on alienation in Bastard v. Somer, Y.B. 4 Edw. 3, Trin., pl. 4 (1330), but the fifteenth century judges ruled that any tenant in tail could convert the entail into a freely alienable estate in fee simple absolute. Taltarum's Case, Y. B. 12 Edw. 4, Mich., pl. 25 (1472). *Accord*: Capel's Case, 1 Co. Rep. 61b, 76 Eng. Rep. 134 (1593); North v. Way, 1 Vern. 13, 23 Eng. Rep. 270 (1681). Restraints on such conversion were held void. Sonday's Case, 9 Co. Rep. 127b, 77 Eng. Rep. 915 (1611); Portington's Case, 10 Co. Rep. 35b, 77 Eng. Rep. 976 (1613).

In the sixteenth century the English judges thwarted attempts to create family perpetuities through the use of a perpetual series of life estates by holding that those limited to the unborn descendants of unborn persons were void. Haddon's Case, cited in Perrot's case, Moore 368 at 372, 72 Eng. Rep. 634 at 637 (1594); Whitby v. Mitchell, L.R. 44 Ch. Div. 85 (1890); In re Nash [1910] 1 Ch. 1. The Roman law restricting successive fideicommissary substitutions was similar. In re Estate of Hierius, Novel 159 (555 A.D.); Strickland v. Strickland, [1908] A.C. 551 (P.C.). *See* Thomas, *Perpetuities and Fideicommissary Substitutions*, V REVUE INTERNATIONAL DES DROITS DE L'ANTIQUE 3e SERIE 571-90 (1958).

In the seventeenth and eighteenth centuries they thwarted attempts to create

India in 1656 under the Mogul Emperor Aurangzeb, had asserted the validity of private *wakfs*[30] but, in view of the judicial tradition in which the Lords of the Council stand, it is not surprising that in the nineteenth century the Judicial Committee decided that a private *wakf* of the third type described above was void under the law of India[31] and that in the twentieth century it held a similar private *wakf* void under the law of *Kenya*.[32] Legislation designed to validate private *wakfs* was enacted in India, Aden, Kenya and Zanzibar,[33] but it received a cold reception from the Judicial Committee which held that a *wakf* was wholly void if it gave any beneficial interest to descendants of adopted children of the *wakif* or gave his blood descendants more of the income than required for their maintenance and support.[34] This would permit semi-private but not private *wakfs*.[35] In thwarting English attempts to create family perpetuities the courts did not

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family perpetuities through the use of future interests limited to unborn persons by holding void any such interest which might become possessory at a time beyond lives in being plus twenty-one years and any periods of gestation involved in the limitation. Howard v. Duke of Norfolk, 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1681); Reeve v. Long, 1 Salk. 227, 91 Eng. Rep. 202 (1694); Loyd v. Carew, Prec. Ch. 72, 24 Eng. Rep. 35 (1697); Marks v. Marks, 10 Mod. 419, 88 Eng. Rep. 789 (1718). This is the Common Law Rule Against Perpetuities as applied to the type of future interest known in Anglo-American law as an executory interest. *See* Clere's Case, 6 Co. Rep. 17b, 77 Eng. Rep. 279 (1599); Davies v. Speed, 2 Salk. 675, 91 Eng. Rep. 574 (1692). Its application to the type of future interest known as a remainder is slightly different. *See* Beverly v. Beverly, 2 Vern. 131, 23 Eng. Rep. 692 (1690); L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 1232 (2d ed. 1956).

30. Majid, *supra* note 1, at 131.

31. Abul Fata Mahomed Ishak v. Russomoy Dhur Chowdhry, L.R. 22 I.A. 76 (P.C. 1894). *See* Petheram, *The Mahomedan Law of Wakf*, 13 L.Q.R. 383-86 (1897); Majid, *supra* note 1, at 134-36; J. ANDERSON, ISLAMIC LAW IN AFRICA *supra* note 27, at 176; A. QADRI, *supra* note 7, at 236 n.; N. COULSON, *supra* note 2, at 168-171; A. FYZEE, *supra* note 1, at 290-94; Liebesny, *supra* note 26, at 32.

32. Fatuma Binti Mohamed Bin Salim Bakhshuwen v. Mohamed Bin Salim Bakhshuwen, [1952] A.C. 1 (P.C. 1951). *See* Anderson, *Waqfs in East Africa*, *supra* note 2, at 157-59; J. ANDERSON, ISLAMIC LAW IN AFRICA, *supra* note 27, at 177; N. COULSON, *supra* note 2, at 168-171; J. ANDERSON, THE ADAPTATION OF MUSLIM LAW IN SUB-SAHARAN AFRICA, *supra* note 2.

33. J. ANDERSON, ISLAMIC LAW IN AFRICA, *supra* note 27, at 177; N. COULSON, *supra* note 2, at 168-71; A. FYZEE, *supra* note 1, at 296-303; J. ANDERSON, THE ADAPTATION OF MUSLIM LAW IN SUB-SAHARAN AFRICA, *supra* note 2, at 158-59, 163. Indian legislation of 1923 requires *mutawallis* to file inventories and account annually to the district court. A. GLEDHILL, *supra* note 23, at 199. Ceylonese legislation of 1931 reformed the law of succession and made *wakfs* revocable. W. JENNINGS, *supra* note 2, at 254-55. The *wakf* is not used in West Africa, which permits the creation of true trusts under English and native customary law. Anderson, *The Future of Islamic Law in British Commonwealth Territories in Africa*, *supra* note 2, at 624; W. DANIELS, THE COMMON LAW IN WEST AFRICA, *supra* note 3, at 313-14.

34. Riziki Binti Abdulla v. Sharifa Binti Mohamed Bin Hemed [1963] 2 W.L.R. 475 (P.C. on appeal from Kenya, 1962). *See* Anderson, *A Recent Decision of the Privy Council*, *supra* note 27, at 53-63.

35. It may be noted that a recent Indian form book contains forms of *wakfnama* for public and semi-private but not private wakfs. S. GOPAL, *supra* note 23, at 358-62.

invalidate the entire transactions; only the restraints on alienation and the remote future interests were void. English law, however, has no objection to property interests which are limited in duration. Because Islamic law requires *wakfs* to be perpetual, the invalidity of a future interest under a *wakf* makes the entire *wakf* void.

Wakf land, comprising about a third of the area of Greece, was expropriated after the revolution of 1829.[36] All *wakf* property in the Soviet Union was expropriated after the revolution of 1917.[37] In Algeria public *wakf* property was expropriated in 1830 and private *wakf* property made alienable in 1873.[38] Turkish legislation of 1926 prevented the creation of *wakfs* by substituting the Swiss Civil Code for the *shari'a,* provided for the liquidation of existing *wakfs,* and regulated them pending liquidation.[39] Egyptian legislation of 1943 and 1946 reformed the law of succession, permited devises by will to heirs, limited the duration of private *wakfs* to sixty years or two generations of beneficiaries beyond the *wakif,* permitted public *wakfs,* other than for mosques, to be limited in duration, and made *wakfs* for purposes other than mosques and cemeteries revocable by the *wakif.* Egyptian legislation of 1952 and 1955 prohibited the creation of private *wakfs,* provided for the progressive liquidation of existing private *wakfs* and transferred jurisdiction over *wakfs* from the *kadis* to the civil courts.[40] In 1959 Iraq reformed the law of succession, permitted devises by will to heirs, and prohibited the creation of private *wakfs.*[41] Legislation enacted in Lebanon in 1947 limited the duration of private *wakfs* created thereafter to two generations and empowered the *wakif* to revoke or amend.[42] The Code of Personal Status adopted in Morocco in 1958 reformed the law of succession.[43] Sudanese legislation of 1945 is like the Egyp-

36. XII ENCYCLOPAEDIA BRITANNICA 434 (11th ed. 1911).
37. IV ENCYCLOPAEDIA OF ISLAM, *supra* note 1, at 1102.
38. *Id.* at 1100.
39. Anderson, *Recent Developments in Shari'a Law IX—The Waqf System, supra* note 22, at 257; Liebesny, *supra* note 26, at 26-27.
40. Anderson, *Recent Developments in Shari'a Law IX—The Waqf System, supra* note 22, at 259-76; Safran, *The Abolition of the Shar'i Courts in Egypt,* 48 MOSLEM WORLD 20 (1958); J. ANDERSON, ISLAMIC LAW IN THE MODERN WORLD, *supra* note 2, at 29-32, 77; Anderson, *The Modernisation of Islamic Law in the Sudan, supra* note 2, at 306-309; D. WARRINER, *supra* note 6, at 67, 192-93; A. QADRI, *supra* note 7, at 247. For earlier Egyptian developments see Goadby, *Wakf in Egypt,* 10 J. COMP. LEG. (Ser. 3) 319-20 (1928); IV ENCYCLOPAEDIA OF ISLAM, *supra* note 1, at 1102.
41. Anderson, *A Law of Personal Status for Iraq, supra* note 2, at 546, 558-60; D. WARRINER, *supra* note 6, at 67; J. ANDERSON, ISLAMIC LAW IN AFRICA, *supra* note 27, at 172.
42. Anderson, *Recent Developments in Shari'a Law IX—The Waqf System, supra* note 22, at 295, 264-65; J. ANDERSON, ISLAMIC LAW IN THE MODERN WORLD, *supra* note 2, at 35; A. QADRI, *supra* note 7, at 247-48; I. Khairallah & C. Chaiban, LEBANON LAW DIGEST; in MARTINDALE-HUBBELL LAW DIRECTORY at 3135 (100th ed. 1968). This restriction on successive series of beneficiaries resembles both the rule of Roman law restricting successive fideicommissary substitutions and the rule adopted in England in 1359 restricting successive life estates, *supra* note 29.
43. Anderson, *Reforms in Family Law in Morocco, supra* note 2, at 147; J. ANDERSON, ISLAMIC LAW IN THE MODERN WORLD, *supra* note 2, at 33, 147.

tian legislation of 1943 and 1946.[44] Syrian legislation of 1949 and 1953 prohibited the creation of private and semi-private *wakfs,* provided for the liquidation of those in existence and reformed the law of succession.[45] The Tunisian Law of Personal Status of 1957 reformed the law of succession and transferred jurisdiction over *wakfs* from the *kadis* to the civil courts.[46]

Although the chief theoretical difference between the Islamic *wakf* and the English trust is the locus of title to the property involved, the practical difference between them is that the trust is a flexible device, adaptable to new needs and conditions, whereas the *wakf* is inflexible and inadaptable to modern needs, public and private. It is evident that the *wakf,* once a great and widespread institution, is declining and will soon be obsolete. The reason is apparent.

44. J. ANDERSON, ISLAMIC LAW IN THE MODERN WORLD, *supra* note 2, at 77-78; Anderson, *The Modernisation of Islamic Law in the Sudan, supra* note 2, at 294-310.

45. Anderson, *Recent Developments in Shari'a Law IX—The Waqf System, supra* note 22, at 259; J. ANDERSON, ISLAMIC LAW IN THE MODERN WORLD, *supra* note 2, at 33; D. WARRINER, *supra* note 6, at 67; A. QADRI, *supra* note 7, at 248. Property of existing semi-private *wakfs* was to be divided between public charity and the family of the *wakif.*

46. Anderson, *The Tunisian Law of Personal Status, supra* note 2, at 266; J. ANDERSON, ISLAMIC LAW IN THE MODERN WORLD, *supra* note 2, at 34.