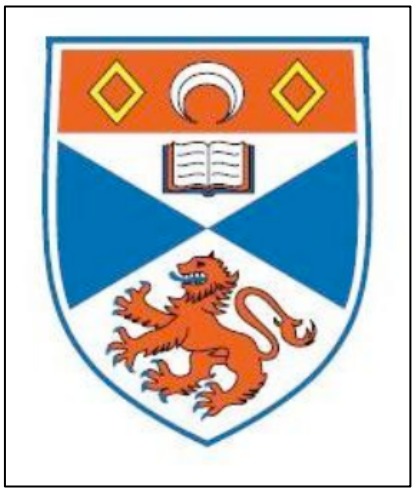

The development of the legal parameters of the waqf institution in contemporary Iran and its socioeconomic impact

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Abstract

This thesis argues that the laws of waqf in Iran lack modern relevance. Such laws have never been completely modernised, and the waqf system, no longer responsible for the delivery of public goods, still holds a vast array of properties and resources. Many of the ongoing socioeconomic and political disappointments of Iran, which, at the core, are the weakness of the country's private economic sector and its human capital deficiency, stand among the lasting consequences of the deficiency of resources which the institution of waqf has under its control.

Traditional Islamic law laid the ground for the economic infrastructure of the Middle Eastern countries until the late 19th century. Among the institutions that contributed to shaping the economy of the region are the Islamic law of inheritance, which inhibited capital accumulation; the absence in Islamic law of the concept of a corporation and the consequent weaknesses of civil society; and the waqf, which locked vast resources into unproductive organisations for the delivery of social services. It is often argued that many of these obstacles to economic development were largely overcome through radical reforms initiated in the 19th century. However, the modern civil law of Iran has kept traditional Islamic law at the core of laws of waqf, and the process of modernisation of its laws remains incomplete.

1. Candidate's declarations:

I, Kayhan Jafar-Shaghaghi, hereby certify that this thesis, which is approximately 76000 words in length, has been written by me, that it is the record of work carried out by me and that it has not been submitted in any previous application for a higher degree.

I was admitted as a research student in February 2006 and as a candidate for the degree of PhD in October 2007; the higher study for which this is a record was carried out in the University of St Andrews between 2006 and 2013.

I, Kayhan Jafar-Shaghaghi, received assistance in the writing of this thesis in respect to grammar and spelling, which was provided by M's Janet Rauscher.

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I hereby certify that the candidate has fulfilled the conditions of the Resolution and Regulations appropriate for the degree of History in the University of St Andrews and that the candidate is qualified to submit this thesis in application for that degree.

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The Persian or Arabic language names and terms used and translated in thesis have been transliterated into the English alphabet following the Iranian Studies Transliteration Scheme [1]reflected in the table below.

Please note that there are two words, Waqf and Mutawalli, used throughout this thesis which do not conform to this scheme. As the majority of the scholarly works on the topic use "Waqf" and "Mutewalli", these spellings were used to maintain consistency across studies of waqf.

Consonants

z	ض	b	ب
t	ط	p	پ
z	ظ	t	ت
‘	ع	s	ث
gh	غ	j	ج
f	ف	ch	چ
q	ق	h	ح
k	ک	kh	خ
g	گ	d	د
l	ل	z	ذ
m	م	r	ر
n	ن	z	ز
h	ه	zh	ژ
v	و	s	س
y	ی	sh	ش
‘	ء	s	ص

Vowels

short	long	diphthongs
a (as in *ashk*)	a or ā (as in *ensan* or *āb*)	-
e (as in *fekr*)	i (as in *melli*)	ey (as in Teymur)
o (as in *pol*)	u (as in Tus)	ow (as in *rowshan*)

[1] From the Institute for Iranian Studies, scheme available from http://iranianstudies.com/journal/transliteration

Chapter I: Introduction

This thesis studies the modernisation of the institution of waqf from its legal point of view in contemporary Iran. The study argues that modernisation of the waqf system was not sufficient enough to make a difference in the institution's performance. The dated legal parameters of waqf prevent this institution from exploiting its full potential. Historically, waqf appears to have emerged as a credible commitment device to give property owners economic security in return for social services. The laws of waqf that shape the backbone of the institution have two main characteristics in their traditional settings: first, they are as inflexible as possible in order to protect property; second, they emerged when there was not an understanding of a legal person or a corporation. These two characteristics may have suited such an institution during medieval times, when the pace of change was very slow, but they are not appropriate for the speed of change which created new demands on social services after the age of the Industrial Revolution. Given the immense scale of assets which waqf holds and the inherit inflexibility which is embedded at the core of its traditional laws, the modernisation of this institution should have been of paramount importance. This study demonstrates that the modernisation of the laws of waqf hardly exceeded the codification of the traditional laws into the civil law, which was nowhere near enough to make a difference.

The study of waqf laws during the 20th century fits within the broader discussion of the modernisation of Iran's legal system as such laws form one of the main pillars of the socioeconomic development of the country in that period. Because the system has not been able to naturally progress and evolve, waqf locks resources into organisations that are likely to become dysfunctional over time. These institutions do not pose economic disadvantages at the time of their emergence,

nor do they ever cause an absolute decline in economic activity; rather, they become handicaps by perpetuating themselves over a long period of time. The main problem with such a system is its immense scale, which has continually deprived Iran of much-needed assets for private economic sectors and the subsequent deficiency in human capital.

This study was initially inspired by the work of Timur Kuran. Professor Kuran has written a series of articles on Islamic institutions and the law. He considers Islamic law a major contributing factor to the underdevelopment of many Islamic countries. Kuran identifies four key features of Islamic law that he considers economically inefficient and to be preventing the emergence of private trade: the Islamic law of inheritance prevents the accumulation of wealth; the absence of the concept of a corporation reduces the size of partnerships and joint stock corporations; the ban on charging interest on lent money results in the lack of a paper-money-based economy; and the institution of waqf locks a vast amount of resources in order to deliver social services—but does so very inefficiently.[2]

Kuran primarily employs deductive reasoning as his methodology, with a set of hypothetical arguments. He argues that the "waqf system could have turned the Middle East into a region rich in 'social capital' the capacity to undertake initiatives requiring social organisations. Identifying why this potential was not realised is critical, then, to understanding the character of the Middle Eastern economy that eventually fell prey to 'European imperialism' and remains underdeveloped relative to the post-industrial world".[3] Kuran identifies Islamic law, given its sacred origins and its resistance to change, which made it imperious to reasoning, as the main obstacle to the development of the waqf system. He claims, that "the historical pattern might have been different had the

[2] Kuran (2010)

[3] Kuran (2001, p. 844)

regulations governing the waqf evolved into an enterprise enjoying corporate status. But no such transformation took place through indigenous means. Because of the very pecuniary motives that made waqf economically so significant, major reforms had to await the economic Westernisation drive that began in the 19th century."[4] As is the case in most of Kuran's studies, he finishes by bringing the good news that, in the case of the waqf system, "today in the early 21st century, the waqf institution is equipped with adaptation facilities it traditionally lacked. Most significantly, it now enjoys juristic personality. Traditionally, it was the manager who had been standing before the courts as an individual plaintiff or defendant. Another major reform is that a modern waqf is overseen by a board of mutawallis endowed with powers similar to those of a corporate board of trustees".[5]

Claims that Kuran makes with regard to the waqf system and its modernisation will be critically appraised throughout this thesis, in the case of Iran. However, what is important in his work is his focus on institutions, which have long been ignored by the economic historians of the Middle East. The importance of institutions is that if they do not function well, markets will not function well.[6] Building institutions that create incentive for people to invest and to increase productivity is a model that the World Bank has adopted since the mid-1990s under the rubric of good governance.

Development economics theories in general are divided into two main groups. Institutions like the UN focus on human development, which includes sustainable development, income equality, basic needs, etc. On the other hand, organisations like the World Bank place economic growth as their main indicator for economic development. There have been criticisms of almost every development

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[4] Ibid.

[5] Ibid.

[6]North (1990); Williamson (1985); Rodrik (1999); Acemoglu (2001, 2005, 2008)

theory. Political economists and sociologists, such as Andre Gunder Frank and Wallerstein, have criticised these policies on various grounds, including the fact that the U.S. was leading the policies.[7] On the other hand, some development economists (inducing Kuran) and sociologists argue for certain aspects of Western culture as pivotal to the success of these models. Characteristics such as rationality (based on Max Weber's theory[8]), universalism, organisational interdependency and individualism, among others, have been identified as prerequisites for the success of these models.[9] Hence, Islamic law has been viewed as an impediment to development, as it is in Kuran's writing.

Such stands against local cultural and religious beliefs are bound to provoke criticism. Within a postcolonial context, critics argue that economic growth and development have substituted for the civilising mission of the colonial era. Kuran has been subject to two primary criticisms. First and foremost is the lack of a significant amount of empirical evidence to support his central thesis. However, his hypothesis could be subjected to future empirical scrutiny or other possible explanations. The second set of criticisms are of his comparative studies, in which he compares the decline of institutions and the economy in the Middle East to economic success and prosperity in Europe.[10] His approach to comparative studies can be subjective and incoherent, and his analysis is mainly based on legal, institutional and cultural development, not giving the same weight to other factors, such as historical events or geographical conditions, which can contribute to the economic success of nations.[11]

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[7] Frank (1967); Wallerstein (1974)

[8] Weber (2001)

[9] Inkeles (1964); Bellah (1957) ; Mc Clelland (1964)

[10] Malik (2012)

[11] Frank (1998)

Recent studies of waqf have two common threads. All of those who have studied waqf from its socioeconomic point of view have drawn a similar picture and come to similar conclusions. Shatzimiler, Carrol, Hoexter and many more who have worked on certain specific topics of waqf, whether preserving family fortunes, protecting the endowment from the "free riders," or delivering social services, have used similar sources and come to similar conclusions. First is that the laws of waqf are dated and essentially were unable to evolve with a speed that might have maintained the institution in a healthy way. The core of the problem is that traditional Islamic law did not understand a corporation or a legal personality.[12] The lack of such a concept may not have been crucial in pre-industrial times, when the pace of social and technological changes was slow; however, it made waqf ill-prepared to meet the demand for modern public goods—things such as traffic control and the laying of tarmac on roads were completely beyond the capacity of its legal structure.[13] The second recurring theme is that these laws were radically modernised and changed in the early 20th century, and there is no longer an issue with waqf laws being dated.[14] Therefore, all of these studies support Kuran's hypothesis.

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[12] Legal personality allows one or more persons to act as a single entity (a composite person) for legal purposes. In many jurisdictions, legal personality allows such composites to be considered separately from their individual members or shareholders. They may sue and be sued, enter contracts, incur debt, and own property. Entities with legal personality may also be subject to certain legal obligations, such as the payment of taxes. An entity with legal personality may shield its shareholders from personal liability. It must be mentioned that the shortcomings of the traditional laws of waqf have only been studied within the Sunni schools of law; these could be different from those generated from the Shi'ite school. Whether or not the Shi'ite school of law presented the same degree of shortcomings is addressed in this thesis.

[13] For example, there is a huge number of wells and water conduits that were traditionally waqf in order to supply water to the public. However, these water conduits were not transformed into networks for providing cities' water supplies such that water would come to each and every residence.

[14] Hoexter (1998, pp. 474–95); Powers (1993, pp. 379–406); Carrol (2001, pp. 245–86); Shatzimiler (2001, pp. 44–74)

There are very few studies on waqf in Iran, and none of them are based on a socioeconomic point of view. Therefore, it is interesting to investigate whether Iran follows the same pattern as the rest of the Middle Eastern countries whose waqf systems have been studied. On the surface and historically, Iran's waqf shares a very similar story to those of other Middle Eastern countries. Twentieth-century Iran inherited a very dysfunctional waqf system. Iran in the 19th century was a country with a history of conflict, arid lands and limited resources.[15] At the beginning of the 20th century, aside from a rather efficient post and telegraph system, there were almost no industries or infrastructure to speak of, only a handful of schools and a country generally suffering from very poor healthcare.[16] Healthcare, public education and infrastructure can all be categorised as public goods, which, historically, have been the responsibility of the institution of waqfs to provide. Waqfs, therefore, while collectively having the largest share of properties and endowments in the country, nonetheless failed to deliver what constituted their main reason for existing.

Similar to other Middle Eastern countries, Iran underwent modernisation in the twentieth century, and its legal reformation was considered one of the main pillars of its development. The process of modernisation in Iran was generally well received, particularly because in some aspects the new legal system was ahead of the rest of the Middle East. This created the general belief that Iranian

[15] Abrahamian (1982, p. 28).

[16] Ibid.

civil law was largely secular.[17] The laws of waqf in Iran have also been codified and have undergone few additional changes during the last century. There is little written in Iran about the laws of waqf. This lack of written scholarship might reflect that waqf is no longer a relevant institution with respect to delivering public goods, and that, because of waqf's deep connections with Iranian clergymen, any writings on waqf run the risk of provoking this highly powerful and influential group.[18]

The process of modernisation of Iran's legal system

The main body of this thesis is dedicated to examining the laws of waqf in contemporary Iran. These are the laws which were initially codified into civil law in 1919 and which have remained more or less the same ever since. Three important events impacted the laws of waqf: in 1953, 1976 and 1985.[19] The codification of the laws in 1919 took place under the supervision of a few Islamic jurists. Based on these jurists' views, the most relevant fatwas of the Shi'ite jurists throughout history were selected and subsequently codified into civil law. The important point here is that the verdicts could have derived from jurists who issued fatwas as far back as the 13th century and to the

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[17] Scacht (1961, pp. 99–129); Anderson (1971, pp. 1–21; Abrahamian (1982, p. 140). Iran undertook huge modernisation plans, the most notable of which was started by Reza Shah; his main focus was modernising the country—in particular, the army, government bureaucracy and courts. Davar, the Swiss-educated jurist, was assigned the arduous task of completely reorganising the Ministry of Justice. He replaced the traditionally trained judges with modern educated lawyers; introduced modified versions of the French Civil Code and the Italian Penal Code, despite the fact that some of their statutes contradicted Qu'ranic canons; and codified Sharia regulations concerning such personal matters as marriage, divorce and children's guardianship. For example, Anderson points to the family act of 1967 in Iran, which enabled an Iranian women to file for a divorce as a way of praising Iran's legal transformation relative to rest of the Middle Eastern countries he examines.

[18] Najmabadi (1987, p. 206). For example, the first public anti-Shah's speech of Ayatollah Khomeini in 1964 was related to a few waqf properties linked to a mosque, which were nationalised as a result of the White Revolution and subsequently were sold to peasants farmers.

[19] Safar (2006, pp. 113–17)

20th century. In other words, the time when the fatwa was issued was not important, only the verdict was considered.

In 1953, as an attempt to modernise the waqf system, a law was introduced in which waqf could potentially update its administration. Finally, in 1976, waqf was given corporate status. This process, on the surface, seems to be a coherent development of the laws of waqf. However, as this thesis will demonstrate, the laws that were codified were merely versions of the traditional laws of waqf—which had their shortcomings. They were not clear, often contradictory and case-based. Furthermore, when the waqf was given corporate status, its legal structure, which was rooted in the traditional laws based on an unincorporated model, needed to change and be updated. However, that process never took place. The legal structure of modern waqf laws, which was built on concepts alien to a legal personality, needed to be updated but remained unchanged. Hence, the contemporary laws of waqf kept the Islamic traditional law in their backbone, and the incompleteness of the modernisation of the laws kept them incoherent and often contradictory.

The development of these laws during the 20th century has been critically appraised in this thesis using the theory of legal rationalisation by Max Weber. The following explains the terms and methodology in which this theory has been deployed.

Defining rationality

In the interest of proving the hypothesis, much emphasis has been placed on the idea of economic rationality. The argument to large extent depends on comparing the traditional verdicts of jurists with what ultimately appeared in modern laws. In general, the idea has been that modern laws are modern by virtue of being rational; this is a concept that this study challenges. The concept of

"rationality" is derived from Weber's extensive work on the sociology of the law, which was published after his death in volumes of his writing on economy and society.

An interesting point is that Weber himself was not very clear about what he meant by rationality, as he used it in different contexts. To better understand his sociology of law, a brief discussion of his typology of legal decision-making, and an explication of its relationship to economic development, is necessary. Weber's specific emphasis on the rationality of the legal system emerged from his broad examination of law, which emphasised four central themes: coercion, legitimacy, normativeness and rationality.[20] For Weber, the rationality of the legal system is about the degree to which the system is "capable of formulating, promulgating and applying universal rules."[21] Furthermore, "rationality" signifies the use of "explicit, abstract, intellectually calculable rules and procedures instead of sentiment, tradition, and rule of thumb."[22]

Weber used the term "formal legal rationality" in four different ways. First, to indicate the idea of being "governed by rules or principles"; second, in reference to the "systematic" nature of the legal order; third, as indicating that the method of legal analysis is focused on "the logical interpretation

[20] Trubek (1972, p. 725)

[21] Ibid.

[22] Wrong (1970, p. 26)

of meaning"; and finally, as indicating that techniques of dispute resolution are "control led by the intellect".[23]

When forms of rationalisation are discussed, it is crucial to remember that these are oriented toward "values," and that, for Weber, values are determined by sources external to the process of rationalisation. Therefore, the posited values influence the direction of the process of rationalisation. Weber himself may not have realised the importance of this assumption in discussing legal change. The majority of Weber's work emphasises objective rationality. Accordingly, he attempts to answer three questions: Which institutions in society are being rationalised? What intermediate goals are being rationalised and in which direction are they being rationalised (i.e., the law can be rationalised to ensure the inequality or equality of the members of a society)? What are the different forms that rationalisation may take? Weber emphasises legal development as a process of increasing rationalisation. The importance of values in this process can be viewed as a counter-attack on the political and intellectual implications of Marx's work.[24]

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[23] Kronman (1983, p. 70) acknowledges that the use of various meanings of the concept of legal rationality creates the impression that the term "legal rationalisation" is not well thought-out and introduces ambiguities into basic types of legal thought. Nevertheless, Kronman argues that a closer examination shows that the four meanings are interrelated and, taken as a whole, constitute the necessary conditions for the formation of a rational legal system. A useful distinction is that between subjective and objective manifestations of rationality. Subjective rationality refers to the mental processes of actors, while objective rationality focuses on institutionalised norms. Weber's discussion of subjective rationality in his classification of types of social action derives from his contention that values and ideals, as well as economic forces, determine social structure. The importance of values becomes apparent in his typology of social action: (1) value-rational action, based on a belief in value for its own sake with respect to some ethical, aesthetic, religious or other form of behaviour, independent of chances of success; (2) means/ends action, which aims at rationally balancing costs vis-à-vis alternative means to an end and the relative importance of possible ends; (3) traditional action reflective of customs; and (4) effectual action, based on emotional feelings.

[24] Hunt (1978, p. 123)

In short, the types of rationality noted by Weber can be broken down into the following four categories based on their main characteristics. What has been said about rationality can be summarised in the table below. Furthermore, it is also expected that, as legal systems are rationalised, they move away from formal and substantive irrationality.

Forms of Legal Rules and Procedures	
Irrational	Rational
1. Formal irrationality (magic, oracles)	Formal rationality 1. Logical consistency and a completeness of rules (systematisation); 2. Legal formalism (a tidiness of rules)
2. Substantive irrationality (case-by-case decisions, unpredictable; determined based on outside criteria)	2. Legal formalism (a tidiness of rules)
3. Limitations of rationality (unsolvable problems, “dialectical dilemmas”)	Instrumental rationality 1. The rules for making rules; 2. Autonomous legal rationalisation (generalisation); 3. Adaptive rationalisation (substantive rationality)

Based on the types of rationality outlined above, an Islamic judge or the jurists who have issued fatwas on waqf-related issues—and who are the main focus of this thesis—fall into the category of substantive irrationality.[25]

Formal rationality involves the application of explicit, universal rules. Weber argued that rules are not derived from a source external to the formal substantive legal rationalisation system; they are intrinsically legal. Here, he neglects both the legislative function of rule-making, a political process, and the executive function of rule enforcement—he carries the idea of legal autonomy too far. To the extent that legal analyses emphasise the development of closed systems of rationality, it follows that political, economic and legal systems have entirely separate spheres of logic. The reality of the overlap of logic and rationality in the three systems does not support this view.

With a complete and internally consistent body of rules, decision-making becomes highly predictable. Vague or contradictory rules can be dismissed in favour of a consistent, logical system of legal rules. Weber actually distinguished two sub-types of formally rational law: legal formalism and logically formal-rational law.[26] Weber's discussion is limited to the second sub-type, the logically formal-rational law, which he identified with European or continental law. The distinguishing feature of a formal-rational system is that the creators of the rules are bound by the rules they have created.[27] He described the ideal role of the judge in a strictly formal-rational system:

> The judge is more or less an automaton of paragraphs: the legal documents, together with the costs and fees, are put in at the top, with the expectation that a judgment will emerge at

[25] Ibid.

[26] Bendix (1960)

[27] Weber (1945); Allen & Cain (1980)

the bottom, together with more or less sound arguments—apparatus whose functioning, accordingly, is by and large calculable or predictable.

On the other hand, substantively rational decision-making relies on systematic general rules that are not strictly legal. The rules may come from religion, ethics, political ideology or economics. A theocratic legal system that uses religious writings as the basis of its legal code and decision-making is an instance of substantive rational law. Having an insanity defence intervene in cases involving legally defined crimes (e.g., murder), or using community standards in order to define pornographic materials, are also instances of substantive rational law.

Framework of analysis

Waqf is one those very few institutions that can trace its heritage over a millennium. Its legal structure also has evolved throughout this long stretch of time, and, as was mentioned earlier, the modern laws of waqf are merely the codification of the traditional laws that have been selected from the verdicts of the most prominent Shi'ite jurists in the past seven centuries or so. The verdicts may have derived from cases that now seem dated, unfamiliar or strange, and there seems to be no order in which the jurists have dealt with the issues. For example, a jurist recorded a question about whether objects made out of gold and silver can be converted into waqf, followed by the minimum age and sex for a founder of a waqf.

The next chapter in this thesis provides a thorough background on the main legal, socioeconomic and historical reasons behind establishing a waqf. Once the motives been studied, why and how the laws, which are case-based, have come about makes more sense. For the remaining chapter of the thesis, the first task for analysing the material used for this study was to put it into an order. The laws of waqf have been broken down to the most basic ones, and, as the chapters progress, they become more and more complicated in order to showcase a waqf from its legal point of view as best

as possible. At every stage of this process, the laws have been critically appraised to highlight the consequences of sticking with the traditional laws and the advances that have been made throughout the modernisation of the laws of waqf. Those contributing factors to the performance of the waqf system and those laws that have been deemed incoherent or contradictory have been highlighted.

Discussion of sources

Most of the studies on waqf in recent years have been conducted on the waqfs of places that used to be part of the Ottoman Empire. Because of this area's world-famous archives, especially those concerning waqfs, researchers have had access not only to the deeds and documents specific to the endowments being studied but also to the court cases in which those endowments have appeared. Therefore, it has been possible to draw a clear picture concerning the establishment of endowments in these countries, inclusive of the administrative and numerous other challenges that often landed them in court and eventually generated verdicts by jurists (the primary sources which have been used in this study).

Conducting a direct comparative study between Iran and any of those places is almost impossible, due to a lack of such archival information in Iran. However, the jurists in Iran did keep records of their verdicts on disputes and challenges related to waqfs. In most cases, the exact waqf and the specific details pertaining to it remain unknown; nonetheless, some invaluable information can be extracted from these cases based on their characters and respective verdicts. Interestingly, the cases that jurists registered in their own records share many similarities with the official records found in the Ottoman archives.

For example, Shatzmiller notes the following case:

In two fatwas written in the 14th and 15th centuries in Fez in Morocco, individuals used building materials left over from the building of a mosque for private use; one used rocks, the other sold an old pillar that belonged to the waqf. The first claimed that the rocks had been left lying in a field; he used them to build a wall of a castle. He justified this in several ways: first, he claimed that he had received a fatwa allowing him to do so, then that the rocks had been excavated when the foundations were dug out, and that because the palace belonged to the state's treasury, the makhzen, he was justified in using the leftover material.

The jurist rejected his claim, saying that the rocks belonged to the waqf and could not be used for anything else, regardless of whether or not the government was involved. In the second instance, a man had removed a pillar from a ruined mosque and had installed it in the Friday communal mosque, The Jami', to replace an existing pillar. The discarded pillar was then sold to a private contractor, who built an arch and two elevations on it. The jurist said that the pillar could not be diverted to private use; therefore, the guilty parties should return the property. The old pillar was returned and everything built on it was destroyed. The related expenses were to be paid by the man who removed it from the mosque.[28]

Helli, a very prominent jurist from the same time period in Iran, wrote about this case: “If a wooden column in a mosque breaks, one may not sell that column to finance a new one. Moreover, the broken column shall be transplanted to somewhere else in that mosque.”[29]

The existence of many similar examples suggests that, although the material for comparative research is not identical, the nature of the problems is essentially the same; therefore, comparisons can be utilised in order to determine whether different jurists issue different verdicts on the same

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[28] Shatsmiller (2001, pp. 44–74)

[29] Shirazi (1998, p. 306)

issues. By studying the verdicts of jurists instead of court cases, the exact endowment of a given waqf, its founder, when it was established, and what happened to it afterward generally remains unknown. However, the problem that was presented to a jurist and his verdict provides much valuable information, which can help us to reconstruct the respective cases. Moreover, studying a jurist's verdict opens previously undiscovered avenues of research. Unlike court cases, which are rich in detail but limited in scope, the verdicts related to a specific jurist on the subject of waqfs are usually no longer than one chapter in a book covering hundreds of different topics. In other words, by examining the cases and verdicts that were recorded by jurists, more legal ground can be covered than would be treated the case if one only considered court cases. On the other hand, the court cases measure the effectiveness of the verdicts. If a verdict was reasonable, then it would have had an impact on the respective endowment, something that one cannot determine solely by reading a jurist's books.

This study relies heavily on primary sources, all of which were translated from Persian or Arabic into English. Finding the sources and identifying the correct ones for this study was a process that began by studying Iran's modern laws related to waqfs. The search began with reading various journals and books that considered waqf, from which the idea behind this thesis (the role of waqf in socioeconomic development) was born. However, it soon became apparent that there was very little, if anything, written specifically on the waqf in contemporary Iran in English. The research included three trips to Iran in the summer of 2007 and two trips to Iran during 2008.

In the earliest journey, my first point of contact was the Waqfs Organisation (Edareye-Owqaf), where I learnt about their journal (Waqf, Mirath-e- Javidan). I also made contact with historians, including the late Drs Iraj Afshar and Ayneh Vand from Tarbiat Moddares University, to ask their

views and expertise on the subject. Subsequently, books published on waqf, dissertations written on the subject, and all sixty issues of the journal, were purchased and shipped to St Andrews.

During subsequent journeys to Iran, the sole focus was finding sources which dealt specifically with the laws of waqf. Meetings were arranged with Dr. Ayatollah Mohaqeq-e- Damad and Dr. Nasir Katouzian, both of whom are among the most respected legal theorists in Iran. The former is a senior professor of law at the University of Shahid Beheshti in Tehran and an ayatollah, the most senior rank in the Shi'ite school of law. The latter is an author of the most acclaimed series of books on the doctrine of laws in Iran and among the most prominent lawyers in Iran. The first set of primary sources was suggested by these two professors. In addition to these meetings, various issues of waqf had already been learnt through reading the journal of Waqf Mirath-e- Javidan, while meetings had been arranged with some of the authors who had contributed to the journal.

The sources are the published verdicts of various jurists. Most are in Persian, although some are in Arabic (most of them were, in fact, originally in Arabic, but many were later translated into Persian). The traditional sources begin with early Shi'ite scholars from the 14th century, namely Mohammad Jamaluddin al-Makki al-Amili (Shahid-e-Avval), who produced the very influential work Lom'e, and continue to the 20th century, with Ayatollah Khomeini's Tahrir al-Vasileh. The important point to mention here is that, According to Article 167 of the Iranian Constitution, judges must make use of "Islamic sources and fatwas" in matters concerning which the Iranian law books are silent. Waqf by its nature is an Islamic institution and is anchored heavily in Sharia. Hence, in modern legal system of Iran Judges use the Islamic sources and fatwas on a regular basis to tackle the cases that are brought forward to them. These sources and fatwas date from the early days of Islam to contemporary times. Furthermore, the fatwas, if they are supporting the case, can be used regardless of the original time in which they were issued. In other words, a judge can cite a fatwa

that supports his case but was initially issued in the 13th century and another fatwa from the 20th century; both fatwas have equal weight in the eyes of the law. The major challenge when referring to those sources is that they can be unclear and contradictory, or appear to be strange according to modern understanding. Therefore, judges try to interpret the ways in which their cases would fit into one of those cases that have appeared in the sources.

These sources were also purchased in Iran and shipped to St Andrews. In order to secure access to a few rare sources, trips to the libraries of the Majlis and Tehran University were made. At all times, Iran's primary reference books on contemporary waqf laws were consulted, such as those used as manuals by lawyers and judges in Iran; these were published by Dr. Emami and Dr. Katouzian. These were the sources used to establish which verdicts of the Ulama would be codified into Iran's contemporary Civil Law.

The second set of primary (and secondary) sources consisted of issues of the journal Waqf Mirath-e Javidan. This journal has been in publication in Iran since 1993 and deals exclusively with waqf in Iran. The main focus of the journal is the cultural side of waqfs, which is quite a vast subject. However, regular articles on legal issues and even statistics have been published, and these have been used throughout this study.

The third component of the primary sources is indicative of the extensive range of waqf manuscripts (waqf deeds) that have been identified and collected in Iran. Special thanks are due to Mr. Sahebdivani,[30] the mutawalli for one of the largest waqfs in Iran, for providing in-depth information about many of Iran's endowments, as well as providing some of the manuscripts of the

[30] This invaluable source came as a surprise to me. I met another Iranian student at St Andrews, who was pursuing a PhD in physics. When I explained my thesis topic, she informed me that her family has a few waqf complexes in Iran that are among the largest in the country. I am so grateful to her and the fact that she brought all of their waqf deeds to me from Shiraz.

related waqf deeds dating back to the 18th century. In addition to these deeds, several other manuscripts were used in my case studies. Needless to say, all of these manuscripts are in Persian and were translated into English. Last, but not least, most of the relevant secondary sources are in English and focus on the socioeconomic aspect of waqfs, which have also been taken into account.

Chapter structure

Chapter 2: Motives behind establishing a waqf

The aim of this chapter is to familiarise the reader with the socioeconomic and political reasons that motivated people to convert their assets into waqfs throughout history. In order to understand and analyse the laws of waqf, it is vital to understand their relation to Islamic law as a whole. Waqfs are often perceived as pure acts of patronage and charity. However, in reality many factors have contributed to the founding of waqfs. Many laws, such as the Islamic law of succession and Islamic laws regulating private property financing, have provided motivation for the establishment of waqfs. In other words, by converting a property into a waqf, one could potentially circumvent the law of inheritance, gain more security over one's private property, possibly use the waqf as a tool for financing projects, and so forth. Furthermore, many socioeconomic factors have had a direct influence on decisions to convert assets into waqfs. Establishing a waqf could be a way of showing one's piety, gaining credibility and status, or supporting a political cause. The aim of this chapter is to explore the historical development of the waqf and the primary reasons for establishing waqfs. This background is necessary for understanding why many of the laws of waqf were established as well as the extent of their effectiveness.

Chapter 3: The founding of a waqf

This chapter considers the main players with respect to waqfs based on traditional Islamic law as well as which aspects have been codified into Iran's modern civil law. This chapter lays the groundwork for the ensuing chapters. Who can establish a waqf, who can benefit from a waqf and what may or may not be converted into a waqf are the main subjects of discussion in this chapter. The answers to these questions not only shed light on certain issues and shortcomings related to the system, they also lay the ground for the next chapters, which deal with the players, their interactions, and the problems that ensue. This chapter shows the natural progression of waqfs in terms of reaching new beneficiaries and providing new goods.

Chapter 4: Legal effects

The aim of this chapter is to show the legal transactions that take place between the main players associated with waqfs and the relationship between endowments and the state. The initial goal is to identify what happens to the ownership of waqf properties. In order for a piece of property to be protected by the state, ownership needs to be clearly established; more importantly, transfers of ownership must be formally recorded. The debate begins with the act of establishing a waqf, at which point the founder allegedly loses his rights over his property, in spite of the fact that no new owner for the property has been selected. The second phase of the discussions revolves around the transaction of founding a waqf, and whether or not such a transaction can be considered a contract. Any verdict concerning the ownership of a waqf property is dependent on how this question is answered. In short, the jurists thus far have not provided a consensus verdict regarding the ownership of waqf properties. This might be considered one of the primary reasons for the many problems which waqf properties face. These may all be related to the absence of a legal personality in traditional Islamic law and, as the study shows, granting waqf a corporate status was not enough to make all of its legal parameters relevant.

Chapter 5: Administration

This chapter primarily examines the administration of waqfs, as well as some of the other economic activities of waqfs, such as selling, renting, dividing, etc. By introducing another player involved in waqfs, the mutawalli or administrator of a waqf, this chapter considers the legal framework within which a waqf must be administered. Ambiguities surrounding the ownership of waqf properties, their lack of corporate status, and many waqf-related concepts, such as the perpetuity, irrevocability and inalienability of waqfs, prevent mutawallis from deploying new means of technology and managerial innovations, as well as from using their own judgement in order to best exploit endowments. Much work was needed by the legislators to improve the laws of waqf concerning mutawallis. However, as this study shows, many of the new concepts that were borrowed from laws related to modern corporations and incorporated into the laws related to waqfs were not sufficiently woven into the fabric of the codified laws to make a difference. Furthermore, this study considers many of the problems with which waqfs have had to grapple, such as economic entities, and the impact this has had on neighbouring properties. Finally, a few case studies support the arguments, and the chapter chronicles the most recent developments in waqf laws in Iran, such as the resurrection of terminated waqfs, and their broader socioeconomic impact.

Chapter II: The motives behind establishing a waqf

This chapter considers three main questions. First, what have been the primary roles of the waqf as an institution within Islamic economies over the years? In most cases, the waqf has been studied from a charitable and patronage perspective. However, the waqf has played a much larger economic role in Islamic countries such as Iran than has generally been imagined. Second, what have been the immediate and long-term motivations behind establishing waqfs? The accumulation of properties converted into waqfs over the centuries is immense. There must, therefore, have been recurring patterns, the understanding of which is instrumental to a proper understanding of waqf laws. These will be examined in the following chapters. Finally, what are the main shortcomings and challenges with which waqfs must grapple? Altogether, this chapter should shed some light on the relative effectiveness of this institution in fulfilling its duties over the long term.

Before discussing the economic roles of waqfs beyond charitable acts and acts of patronage, some of the fundamentals of the Islamic economy must be addressed. There are four main aspects of an Islamic economy upon which all of the Islamic schools of law agree and which even modern Islamic economists might advocate. These four pillars are: the Islamic tax, Zakat, the law of inheritance, and a ban on charging interest upon lending money (which results in a lack of any financial institutions or corporations). These are the main elements characterising an Islamic economy. These four pillars create a peculiar economic environment, far from ideal for anyone attempting to operate in it.

On the one hand, the lack of financing means that development projects are unable to flourish or even begin in ordinary ways. Islamic taxation does not seem fair and creates inequality between different classes of society. One is left with very limited testimonial power, and the protection of one's wealth through the formation of a corporation often has not been possible. The institution of

the waqf has been utilised as a way of overcoming these obstacles. The waqf is an institution that, on the surface, is charitable; more importantly, it is heavily rooted in Sharia, which gives it a great deal of stability.[31]

The contributing factors that have resulted in the growth and, subsequently, the immense scale of the waqf as an institution in Iran are numerous. However, they can be narrowed down to a few of primary importance. These elements not only change based on historical context, they also influence the decisions of jurists in creating waqfs' legal parameters, the focus of the next chapters. Among the main reasons why people convert their assets into waqfs, the protection of private property ranks highest. In addition to the legal shortcomings of Islamic law, which does not accord much significance to such rights, the harsh historical events in Iran related to its many foreign occupations and consecutive dynastic changes have added to the ever-growing problem of protecting private property. These factors have contributed to the growing popularity of, and advocation for, waqfs—a mechanism whereby the confiscation of property becomes more difficult and costly as well as an efficient system for sheltering wealth and escaping taxation.

The law of inheritance can also be circumvented effectively by converting one's assets into a waqf. The waqf empowers one with all of the testimonial wishes of which Islamic law deprives one (according to a strict interpretation of Islamic law, one has no testimonial rights beyond one third of his assets). By establishing a waqf, such restrictions can be circumvented, thus creating new possibilities.

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[31] The origin of waqfs as they currently exist is the subject of dispute. Some advocates of waqfs trace them back to the early days of Islam and claim that they received the seal of approval from the Prophet himself. On the other hand, much contemporary research shows that they began around 100–150 years after the birth of Islam, as a result of significant changes in the Islamic community at the time. For more on this subject, see Appendix II.

Islamic law prevents the lending of money; this stipulation has created an economic environment without financial institutions. A waqf creates a mechanism that facilities the financing of development projects as well as the maintenance and operation of establishment. The activities of those waqfs that provide public goods rendered from revenue generated by other waqf establishments.[32] Moreover, the establishment of a waqf can be undertaken as an act of piety or with a political motivation in mind. In either case, the founder benefits by gaining social status, as in most cases his or her name stays on the waqf indefinitely.

The waqf appears to be an ingenious system, one that potentially could overcome the many legal obstacles that have resulted from the rigidities of traditional Islamic law. However, the waqf in reality has more or less been a short-term remedy rather than a long-term solution. Most research on waqfs has shown the many challenges with which institutions, and the jurists who were in charge of the legal aspects of them, have had to grapple, many of which might never become rationalised. There are still many shortcomings in the system, such as ambiguities over the ownership of waqf property and the lack of the concept of a corporation. In reality, most founders of waqfs have only gained a temporary solution regarding the future of their assets. In the long run, however, they become alienated from their endowed assets.

The Islamic economy and its fundamental characteristics

The law of inheritance

There are few economic rules in the Qur'an, which is not meant to function as a manual for economic management. One exception concerns the rules related to inheritance, which are the most

[32] A waqf can be established to serve the ultimate purpose (i.e., a hospital) or the activities of the same hospital can be supported from a variety of other waqfs . For example, the cost of heating and the maintenance of the same hospital may come from the generated revenues of a farm that has also been converted into a waqf in order to support the activities of that hospital.

detailed and most explicit. Two-thirds of any estate is reserved, according to complex rules, for an extended list of relatives, including offspring, parents, siblings and even more distant relatives. The number of legal heirs can be large compared to those mandated by a wide array of other inheritance practices. The inheritance left to an individual's discretion is limited to one-third of her or his estate.[33]

This system has a visible distributional effect and limits the concentration of wealth in any given individual. At the same time, it hinders the preservation of successful enterprises, or other properties, across generations. One could maintain a property undivided by forming a proprietary partnership or by having a single heir buy out the rest. Nevertheless, the system's net effect has been to fragment property, especially financial wealth. Moreover, "the explicitness of the Qur'anic commandments made it unlikely that wealth holders concerned about fragmentation would challenge them".[34]

The concept of corporation

A striking aspect of classical Islamic law is the absence of corporate structures, collective enterprises possessing legal rights distinct from those of the individuals who finance or serve it. A corporation creates its own internal rules, possesses property, makes contracts, and files legal claims. Its members, as individuals, do not owe its debts. Its decisions do not require the approval of each of its members. It can live on after its founders die or retire. Given the absence of corporate structures, Islamic law only recognises individuals. Partners can sue one another, of course, as

[33] Kuran (2004, p. 72)

[34] Ibid., p. 74

parties to a contract, but a partnership has no legal standing as a distinct entity. A third party can thus sue one or more partners, but never the partnership itself.[35]

Timur Khan argues that "the prevailing inheritance system will matter, then, to contractual practices".[36] The greater the number of potential heirs, the greater the threat of early termination; partners recognise that if many people have claims on their partnership's assets, the resolution will be complicated, thus imposing high costs on all involved parties. They also recognise that the larger the partnership, the greater the likelihood of a premature death within their ranks, and, hence, the more likely it is that the mission will terminate early. If heirs are likely to be numerous, then incentives will exist to limit partnership size as a means of minimising the risk of early termination. In mandating the division of estates among a potentially very long list of relatives, the Islamic inheritance system has thus created a basis for keeping partnerships small.[37]

More important in the long run are a host of dynamic consequences. The prevalence of small partnerships has hindered Iran from meeting the challenges of organisational development. In the absence of expanding partnership size, no need arose to develop standardised accounting techniques, to create hierarchical management practices, or to address the problems of multi-polar communication. In other words, it was unnecessary to search for increasingly sophisticated organisational forms. Admirably adapted to the initial environment in which it achieved its classical form, Islamic contract law stagnated over the subsequent millennium.

The prohibition of interest

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[35] Ibid., p 76

[36] Ibid., p. 86

[37] Ibid., p. 89

Of all of the injunctions cited, the most celebrated is the prohibition on interest. The hostility to interest is based on the belief that the Qur'an bans all interest, regardless of its rate or form. In fact, what the Qur'an bans is Reba, the pre-Islamic Arabian practice of doubling the debt of a borrower who is unable to make restitution on schedule, inclusive of both the principal and the accumulated interest. Reba tended to push defaulters into enslavement, so it was an acute source of social friction. From the earliest days of Islam to the present, various interpreters of the Qur'an have held, accordingly, that the purpose of the ban on Reba was simply to block socially harmful financial practices. They have suggested that the ban was intended, like the bankruptcy laws of a modern state, to make creditors deal charitably with debtors who are unable to make timely payment.[38]

The rationale for prohibition differs according to whether the loan is a consumption loan or a business loan, although the principle of fairness is central to both cases. If interest is charged on a consumption loan, the lender makes money without exerting any effort and without giving the borrower something in return. If interest is charged on a business loan, the lender's return is fixed while that of the borrower is variable (a bank deposit is treated as a special kind of business loan, whereby the depositor is the lender and the bank the borrower).[39]

Transactions involving speculation caused by avoidable ignorance are considered objectionable, again on the grounds that they may result in unearned gain for one party and undeserved loss for the other. Thus, the sale of a pregnant camel is prohibited because her value depends on the sex of the offspring, which, until known, may generate speculation. Likewise, an orange tree in blossom may not be sold, because neither the quantity nor the quality of its yield can, at this stage, be predicted. It

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[38]Robinson (1974, p. 71)

[39] Ibid., p. 112

is also considered illegal to trade a piece of cloth that has not been examined carefully by both parties, lest one or the other have misperceptions regarding the cloth's properties.[40]

The prohibition of interest, deceptively straightforward from an abstract point of view, poses a fundamental practical problem that many writers do not acknowledge. For example, assuming inflation, is the borrower of a consumption loan obligated to compensate the lender for changes in purchasing power? Some of the writers who address the issue refrain from taking a position; those who do are divided, with some saying that fairness requires the indexation of loans and others that it bars indexation. Those who favour indexation note that whether the relevant price level should be based on the lender's consumption basket or that of the borrower is unresolved.[41]

Profit and loss sharing, the favoured alternative to interest in the case of a business loan, presents another problem, one that has received little attention. Suppose an elderly person takes his savings to the only Islamic bank in his neighbourhood, which offers him a profit-and-loss-sharing deal, whereby it receives 99% of any profits and, correspondingly, incurs 99% of any losses. Is this deal fair from an Islamic standpoint? If the answer is “no” or “not necessarily,” what constitutes the line of demarcation? One writer who takes up the issue states that the shares are to be determined by custom, as if a practice becomes fair by virtue of being customary.[42] Another writer, using a mathematical model, contends that the shares are to be determined through the interaction of supply and demand for contracts—as if an equilibrium allocation could never be off-centre. Lastly, Murat Cizaka, a Turkish professor of economics, argues that a major factor underlying the Islamic world's economic backwardness has been the inadequacy of credit opportunities for entrepreneurs. The

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[40] Ibid., p. 234

[41] Kuran (1989, p. 173)

[42] Ibid., p. 169

development of the Islamic world will thus require, he argues, the establishment of vast numbers of venture capital firms, which will provide funds to promising companies in return for some of their shares.[43]

The Islamic tax (Zakat)

A waqf creates a suitable way for escaping taxation. Islamic tax is a very large and complicated matter, over which there is much disagreement and dispute between different schools of law and jurists. In this section, the main characteristics of such taxation in modern Islamic economies are highlighted.[44]

A much-proclaimed obligation is the redistribution scheme known as Zakat, which entails taxing specified wealth holders and income earners at rates varying between 2.5 and 20% and using the proceeds to aid disadvantaged members of society, such as the poor, the handicapped, the unemployed, the dependents of prisoners, orphans, and travellers in difficulty. The coverage of Zakat is controversial. Some writers consider it to be limited to those categories of wealth and income for which rates were specified during the early years of Islam. Others consider it to include categories that until recently were unknown, such as factories and motorised vehicles. No consensus exists, however, among reformist writers regarding the limits of coverage and the applicable rates.

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[43] Kuran (2004, p. 82)

[44] Kuran (1989). In the massive contemporary literature that has come to be known as "Islamic economics", the claim is repeatedly made that an Islamic economic system would achieve a greater degree of economic justice than existing capitalist and socialist systems. An Islamic system, it is said, would be free, on the one hand, of the exploitation and severe inequalities characteristic of capitalism, and, on the other, of the class struggles and intolerable restrictions that are the hallmarks of socialism. Inconsistencies, ambiguities and disagreements exist, however, in all of the great bodies of literature concerned with creating a just world, diverse writings rooted in Judaism, Christianity, Marxist socialism, and Third World nationalism among them. Islamic economics, however, did not emerge from a drive to correct economic imbalances, injustices or inequalities. Nonetheless, the ideals of fairness and equality are at the core of Islamic economic thoughts and writings.

Regardless of how they perceive Zakat, all Islamic economists believe that it is a very powerful instrument for bringing an economy in line with the principle of equality.[45]

The purpose of Zakat, as shown here, is to promote equality by redistributing wealth from the "haves" to the "have-nots". It is by no means self-evident, however, that Zakat achieves this purpose. Because it entails taxing only some categories of income and wealth, and at various rates, its distributional impact depends on a society's composition. Its narrow version places the burden of taxation entirely on categories of income and wealth that were known during the early years of Islam—notably agriculture, mining and precious metals. With greater economic justice in industrialisation, and the explosion of the service sector, these sources of income and wealth have dwindled in importance, even in the least-developed countries. Additionally, most poor households in today's world are concentrated in agriculture, while most wealthy households exist outside agriculture.[46]

It is not clear, therefore, that Zakat would promote equality; indeed, it might well promote inequality. This conjecture is supported by a study of one of the narrow Zakat schemes currently in existence. Yet, what about the broader schemes that have been proposed? It is certainly possible that they would play an equalising role, although this remains to be demonstrated. The impact of any particular scheme will depend on the characteristics of the economy to which it is applied. A scheme that serves as a strong equaliser in a contemporary economy dominated by industry and agriculture could lose its potency as services—for which rates have not been specified—gain in importance. [47]

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[45] Ibid., p. 158

[46] World Development Report 2006

[47] Kuran (1989, p. 189)

Only a proportional tax at a fixed rate along the pattern of Zakat is to be levied on the accumulated wealth of capable taxpayers without any distinction. Yet another Islamic economist sees merit in both positions: “Proportional taxation becomes Islamic if income and wealth are already distributed according to Islamic economic egalitarian criteria . . . However, in the existence of the misdistribution of income and wealth . . . a progressive system of taxation should be invoked.”[48]

Underlying this particular controversy is the fact that the principle of equality is subject to many different interpretations. Indeed, writers who agree that "moderate" inequality is acceptable often disagree over the limits of moderation. It is worth noting that such disagreement is anything but new to Islam; even the early caliphs saw the limits differently.[49]

Regarding the disbursement of Zakat funds, writers disagree as to whether funds collected in one year can be spent during another. Related to this, a few reasons can be mentioned why, until now, the equalising effect of Zakat has been disappointing (in those countries where it has been applied). First, Zakat revenue is limited everywhere by low rates, vast loopholes and widespread evasion. Second, the costs of administering the system, inclusive of losses due to official corruption, have been high. Finally, large shares of the raised revenue finance causes other than poverty reduction,

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[48] Ibid., p. 184

[49] Ibid., p. 174

religious education and pilgrimages to Mecca among them.[50]

Islamic tax is ambiguous; it may not be fair, and its usage is limited. It is, therefore, not a reliable source of funding for public goods. The waqf, on the other hand, is more concrete. True, the founder has to follow a strict protocol as to how everything is established and so forth; nonetheless, a waqf can be spent on a vast variety of public goods and provide numerous services (at least, this was the case during the preindustrial age), which gives it a significant advantage over Islamic tax. The next section considers the main socioeconomic, historical and legal reasons behind the establishment of waqfs. The vast scale of the institution suggests that it has taken a long time for it to become widespread. Recent research in this area provides us with a wealth of knowledge regarding the main reasons why people convert their assets into waqf.[51]

Motives for founding a waqf

We have established that the legalities underlying waqfs were formally ratified by sharia law. The main point made in the first section of this chapter is that the waqf is heavily anchored in the socio-economic demands of society. In this section, the most important reasons as to why one might wish to establish a waqf will be considered. It should be noted, however, that such reasons have varied from time to time and from place to place.

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[50] Ibid., p. 175; Behdad (1994, p. 800). As Behdad points out, nowhere are the divisions within Islamic economics more clear than in Iran, where advocates of Islamisation have differed greatly on such matters as private property, profits, wages, labour laws, trade and development strategy. At one extreme, leaders of the Mojahedin Khalq Iran have advocated vast redistribution in order to achieve a classless society—one that would depart from Western visions of socialism only in its rejection of atheism. At the other extreme, an Islamic research centre in Qom has promoted the view that all property acquired through legitimate means should enjoy the full protection of the law. One of the centre's publications, "Introduction to Islamic Economics," holds that social conflicts and inequalities are unavoidable.

[51] Shatzmiller (2001); Carroll (2001)

There has been a general belief that the founder of an endowment for a pious purpose will receive a reward in the next life. This wish can be observed in almost any testamentary endowment. For example, one founder expresses the desire to see "the face of God the almighty and the abundance of his momentous reward." Most often, the waqf formula is followed by selected citations from the Qur'an: for instance, "we will not waste the wage of him who does the good work," meaning that the family waqf is founded on the presumed charity and piety of its founder. A specific waqf might be established for "the poor among my children and my children's children", or "for the poor and the Imam Hossein", or "for the poor relatives of the founder, and his parents". It might be even more specific, designating only one side of the family. Alternatively, it might be for the benefit of the founder's children and a designated mosque or school, or, in a less specific manner, for the benefit of his children and the poor or sick in general.

A family endowment might be established for a variety of reasons. For example, it could be created as an act of piety, as a legal fiction to prevent revocation of a sale, to secure property whose ownership is disputed, or to avoid confiscation. It can also be a sign of affection toward a dying husband, wife, or other individual. Whatever the motivation, and regardless of the true wishes of the founder, the endowment ultimately serves the purpose of keeping the property intact. Stated another way, it is established in order to ensure the entitlement of beneficiaries for the duration of the object's existence, and in order to regulate the transfer of usufructuary[52] rights from one generation to the next. The waqf institution provides the founder with the power to make decisions about the

[52] This term comes from Roman law. Usufruct is the right of temporary possession and enjoyment of something that belongs to somebody else, so far as that can be done without causing damage or changing its substance. For example, a slave in classical Rome could not own anything. Things he acquired as the result of his labour he merely held usus (et) fructus, under "use (and) enjoyment" — it was his master who actually owned them. The term remains in use in modern legal practice in the US and elsewhere to mean somebody who "enjoys the fruits" of something, usually land. These days a usufructuary can be a trustee who enjoys the produce or income from property he holds in trust for somebody else. Many Native American groups hold land on a usufruct basis, with rights to enjoy the renewable natural resources of the land for hunting and fishing.

future of his assets, something denied him by the law of inheritance. Moreover, by creating a family waqf, the founder can be more selective regarding which of his descendants will inherit his assets. Thus, for example, a waqf may have been established for the founder's sons and their lineal descendants, yet it is not uncommon to encounter clauses stating that if the line of males comes to an end the daughters and their descendants, frequently specified as waqfnamehes, shall take charge of the waqf.

Indeed, based on this, it has been suggested that, although, historically, female lineage has often not been treated equally, Muslim communities have been less patriarchal than previously thought. There are many examples in which family waqfs were used to supplement the rights of female descendants. Despite the fact that, in most cases, agnatic descendants still received a greater share, the shares could become more equal over time, with the arrival of grandchildren. For example, there have been waqfs for which the related revenues were to be divided equally among the founder's male and female children and grandchildren. In a more specific way, we can divide the reasons behind establishing a waqf into a few categories.

The protection of private property

Among members of the wealthy classes, there have been those who stood to gain from certain provisions that enhance the attractiveness of founding a waqf. Accordingly, the specifics of the waqf system probably emerged as a compromise between the personal incentives of these officials and their incentives as servants of the state.

The search for well-specified and strictly enforced property rights is a major theme in every society, past and present. The mere recognition of private property rights offers no solution, of course, as long as the state can revoke that recognition unilaterally. What is needed is some institution to

compel the state to relinquish that power by constraining its own future actions. In pre-modern Iran, the waqf served as a credible commitment device. The sacredness of the waqf has given it considerable protection against confiscation, as rulers were averse to developing a reputation of impiety. The credibility of their commitment to respect the inviolability of the waqf strengthened insofar as rulers pursued a hands-off policy toward waqf-owned properties. It was also reinforced as the main beneficiaries of the resulting security strengthened the Islamic legitimacy of waqfs through the spread of hadiths. Finally, the establishment of a pattern respecting the inviolability of the waqf made it all the more difficult for rulers to confiscate waqf assets without appearing impious. The waqf, then, served as a device that enhanced material security. It also served as a vehicle for supplying public goods in a decentralised manner. From the standpoint of a waqf founder, these two functions are obviously in conflict.

It seems that what limited the wealth-sheltering function of waqfs is the demand for social services. The ruling class, which stood to lose tax revenue, generally allowed the process, giving the waqf Islamic legitimacy on the provision that the founders were required to supply socially desirable services. Rulers had a stake in this requirement, for it relieved them of responsibilities believed to have been fulfilled under the rulership of the Prophet. Their implicit contracts with the founders of waqfs fostered growth and prosperity, thereby earning them legitimacy in the eyes of their subjects and solidifying their political power. To qualify these contracts as "implicit" is to note that no convention was held to restore conflicting social interests and establish a broadly acceptable trade-off. The institution did not have to be developed from scratch because various ancient peoples—Persians, Egyptians, Turks, Jews, Byzantines, Romans and others—had developed similar structures. Just as Islam itself did not emerge in a historical vacuum, so, too, did the first founders of Islamic trusts, and the jurists who shaped the relevant regulations, almost certainly draw inspiration from models already present around them. Yet the waqf is sufficiently different from

each of its pre-Islamic forerunners, so much so that it might be considered a distinctly Islamic institution. Although non-Islamic influences were obviously important early on, the waqf subsequently took on a life of its own. Not only did the waqf turn into a defining aspect of Islamic civilisation, it went on to become a source of cross-civilisation emulation.[53]

There is no limit on the size of a waqf created by individuals. There are many examples where individuals have even designated their entire properties as family waqfs.[54] A religious scholar might, for example, designate his immovable property, inclusive of orchards, farms, bathhouses and shops, as a waqf. More frequently, however, a founder will designate a piece of property, or a fraction of it, as a family waqf; these might be residential properties, such as a room (bayt), house (dar) or compound (rab), or non-residential properties, such as shops or a fraction thereof. Family endowments vary in size, as well: they might consist of a store, a bathhouse, agricultural properties such as orchards, or, in some cases, entire villages.[55] Finally, it is not uncommon for a founder to designate just a part of a property as a family waqf: for instance, half of a house, one quarter of a jointly held compound, half of a nonspecific share of several shops, or two-thirds of a well-known strip of land. It is likely that, over the course of time, considerable segments of the urban and rural landscape have been converted from private into waqf property.

The most secure method of ensuring the perpetuity of a waqf (and its assets) is to include a religious institution such as a mosque or a school; in Iran, it is not uncommon to designate a waqf in honour of the Imam Hossein as its ultimate beneficiary. Furthermore, a founder can establish certain personal affiliations with these institutions. For example, in one case the founder of a testamentary waqf stipulated that in the event that his descendants' line came to an end, the waqf's revenues

[53] Kuran (2001, p. 850).

[54] For example , awqaf of Malik and Sepahsalar in Iran.

[55] Riahi (1998, pp. 140-48).

would revert to the imam of a mosque, who would use these revenues to renovate or restore the mosque and to help his students learn Qur'an. Other founders have designated specific individuals to become the ultimate beneficiaries of their waqfs—the muezzin of a mosque or religious functionaries who say prayers over the graves of family members (people may hire individuals to say prayers over the graves of family members).

The law of inheritance

Of all the economic rules in the Qur'an, those relating to inheritance are the most detailed. The law of inheritance restricts the individual's testamentary power to one-third of his or her estate, as the Qur'an specifically allocates two-thirds to sons and daughters, spouses, parents and grandparents, brothers and sisters, grandchildren, and even possibly distant relatives. Based on Shi'ite interpretation, the testator is free to make bequests to relatives already entitled to a proportional share of the reserved two-thirds. However, the entire estate of a person who dies intestate is divided among all his legal heirs.[56]

The act of founding a waqf empowers an individual to circumvent the law of inheritance. The Islamic law of inheritance specifically focuses on the extended family, something the institution of waqf can easily circumvent. For example, earlier generations of beneficiaries can specifically exclude other generations. Moreover, the founder can designate his descendants as the first class of beneficiaries.[57] This can entail the complete exclusion of many of the Qura'nic heirs, such as the parents, grandparents, and siblings of the founder, none of whom belong to the immediate family (encompassing the spouse and unmarried children).[58]

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[56] Kuran (2001, p. 888).

[57] Powers (1993, p. 386).

[58] Baer (1962, p. 164).

The Islamic law of inheritance forces Qura'nic heirs to take their allocated shares. In this case, the agnatic heirs are subject to the rules of priorities and exclusion. The waqf is a very effective means of granting its founder a greater degree of flexibility vis-à-vis the law of inheritance. Unlike the law of inheritance, the waqf system enables the founder to pass his assets from one generation or series to the next successively. Conversely, under the law of inheritance, the founder's assets would be apportioned among beneficiaries of different degrees of relationship to him. Finally, by bypassing the law of inheritance, the founder can concentrate entitlement on immediate family members. The transmission of entitlement from the first series to descendants proceeds by branches. For example, when the doctrine of representation applies, immediate family can be protected from extended family in which sharia law has adapted. For instance, according to sharia law, an orphaned grandson or even a great-grandson is entitled to receive a share of what his ascendants would have taken if he had been alive at the time of the grandparent's death. The waqf system makes it possible to circumvent the law of inheritance where challenging it would be an impossible task, inasmuch as it is one of the only clear commandments stated in the Qur'an. Therefore, by converting his property into a waqf, the founder is able to secure his property from being fragmented; he can also prevent its division among his heirs.[59]

Piety

It is often said that Muslim piety contributed to the pervasiveness of the waqf system. Although piety has by no means been the most important factor, neither has it been insignificant. As in the medieval West, in the medieval Islamic world the rich commonly set aside a portion of their wealth for God so as to secure a place for their souls in heaven. Wealthy Muslims, out of a desire to perform good works, financed many mosques and Qur'anic schools. The concept of good works, as

[59] Ibid.

in Christendom, included endowments for the benefit of the poor and the weak.[60]

In the pre-modern Islamic world, as in other pre-modern societies, piety served as a key indicator of truthfulness. People who did not fulfil the requirements of their religion—in the case of Muslims, those who did not attend Friday prayers—were considered unreliable witnesses in court. Precisely because establishing a waqf was considered a pious act, it served to cultivate a favourable reputation. Forming a waqf served as a vehicle for achieving status and authority. To preserve their prestige, modern philanthropists often attach their names to structures built through their donations. The founders of waqfs often named their enterprises after themselves in the hope of immortalising the obtained status.

Politics

Governments have sometimes used the waqf system to pursue selected constituencies. Like gift-giving in general, waqf formation could also be driven by a desire to spread an ideology. A donation to a modern university may serve to win converts to a political agenda, as when a donor funds an ideologically charged programme. So it is that the founders of educational waqfs frequently required the appointed teachers to be loyal to them personally and resistant to ostensibly subversive ideas. The ultimate objective of these founders was to gain the political loyalty of students and, through them, control over public opinion.[61]

There are many cases that illustrate the vast investment by Iranians in religious sites (in Iraq in particular) throughout history. Most of the mosques, libraries, school and halls of residences in the cities of Najaf, Karbala and Kazemein have been established and maintained via waqfs in Iran over

[60] Lambton (1997, p. 308).

[61] Lambton (1981, pp. 307-08).

the centuries. The Qajar kings, for instance, established many waqfs in support of pilgrims to the holy cities in Iraq, in order to ensure that the ulama should preach to the pilgrims in a manner favourable to them.[62] In the city of Najaf, for instance, it was an Iranian merchant who introduced electricity to the city for the first time, although his initial aim was to illuminate the shrine of the Imam Ali at night.[63]

Financing

The motives discussed thus far—piety, status and politics—do not exhaust the relevant factors. Another very important reason behind establishing a waqf is financing. This motive is so important that Hodgson considers waqf to be the primary vehicle for financing in Islam.[64] For some founders, perhaps most of them, other than sultans and members of their respective households, the main motive was to shelter wealth. What fuelled this fourth motive was that the Islamic world never developed effective safeguards against opportunistic taxation or expropriation. Kings varied tax rates and forms when it suited their purposes. Where they could do so with impunity, part of the reason is that the Qur'an, the fundamental source of Islamic law, contains few specifics regarding taxation. As with any rational ruler, sultans preferred taxation to confiscation, in order to maximise their subjects' incentives to pay taxes, yet in fiscal emergencies they readily yielded to the temptation to confiscate. [65]

This is because they could not borrow directly from their subjects, at least not enough to meet their needs, a consequence of the fact that their repayment promises lacked reliability. The upshot is that

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[62] Litvak (2000, pp. 41-66).

[63] Qomi Ansari (1994, pp. 76-86).

[64] Hodgson (1974. p. 124).

[65] Kuran (1995), Kuran (1997, p. 64).

rulers regularly confiscated private property, often by invoking the Islamic principle that all property belongs to God. The consequent weakness of private property rights made the sacred institution of the waqf a convenient vehicle for defending wealth against official predation. The expropriation of waqf properties did occur, especially following conquests or the replacement of one dynasty by another. However, when such expropriation occurred, it usually generated serious resistance. A closely related pecuniary motive for establishing a waqf was “asset laundering”. State officials who took over properties belonging to the government or to other individuals would transform them into waqfs as a means of legitimising their confiscations.[66] For example, as McChesney shows, one of the major sources of revenue for Shah Abbas in developing his capital city of Isfahan was waqfs. Likewise, there are at least 40 remaining waqfnamehs directly linked to the maintenance of Naqsh-e-Jahan Square.[67]

As Lambton states, small landowners and peasant proprietors who transformed their property into waqfs sometimes did so in order to obtain protection. For example, by converting their properties into a waqf for a shrine, they placed themselves under the protection of the shaykh of the respective order. "Political" motives for the constitution of waqfs, especially in the case of rulers and their ministers, also, no doubt, played a part. Those who established charitable foundations and constituted waqfs for them might have expected to gain public respect, which, in turn, would bring followers and influence. Furthermore, in return for contributions to the upkeep and subsistence of ulama through charitable foundations, rulers might expect their help and support in times of need. Such support was vital for them because of the respect with which the common people held the ulama. At the same time, the ulama, for their part, had a vested jrimi’ al-khayrrit.[68] An estimate shows that in late-19th-century Iran, the generated revenues from waqfs amounted to roughly

[66] Crecelius (1986, p. 187).

[67] McChesney (1988, pp. 103-34).

[68] Lambton (1981, p. 320).

4,000,000 tamans, approximately half the revenues of the state. Furthermore, the clergy drew a substantial income as the mutawallis of those waqfs and enjoyed considerable discretionary power as to expenditures.[69] Without a doubt, one of the reasons why the clergy class played such a huge role in the politics of 20th-century Iran was their independent financial sources, of which waqfs have been among the largest contributors.

Precisely because of the frequent use of this motive, when a state attempted to take over a waqf, it usually justified the act on the ground that the waqf was illegitimate. Accordingly, its officials tried to convince the populace that the expropriated properties belonged to the state, or simply that the waqf founder had never been the legitimate owner. However, there was no guarantee, of course, that a state's public relations drive would succeed, which is why the waqf often served as an effective asset-laundering device. Still another pecuniary motive for establishing a waqf was to circumvent the Islamic inheritance system.[70]

Potential problems and disputes

On the surface, the waqf system seems to be the best and the most practical solution for overcoming the barriers associated with Islamic law. On the one hand, it seems that the waqf system prevents the fragmentation of property and strengthens stability and family tradition. On the other hand, in practice this mechanism can contribute to substantial family fragmentation. There are some principal reasons for this. First is the obvious exclusion of some of the Qura'nic beneficiaries. The second reason is that, by converting a property into a waqf the founder not only loses ownership rights to the property but also, more importantly, ownership does not necessarily transfer to the beneficiaries (given the severance of the juridical connection between the property, founder and

[69] Litvak (2000).

[70] Powers (1993, pp. 176-89).

beneficiaries).[71] The third reason reflects the fact that the revenues of the waqf property are collected by the mutawalli, in the form of rent or harvested crops, and are then divided between the beneficiaries. This seasonal enjoyment would be reduced over subsequent generations as the number of beneficiaries grew (as is likely). This might eventually result in beneficiaries abandoning the waqf, as there might not be much reason for them to stick with it.[72]

The fact that the founder appointed in most scenarios is the most capable son or male agnatic descendant means it can only be a short-term solution for the future of the family. However, this comes at the expense of family fragmentation. Because the inheritance law does not deprive the beneficiaries of ownership rights, in practice the property can be jointly shared as "musha," at least for one generation. In the long run, however, the structural pressures and inconsistencies between the distribution of ownership rights and the contributions of the different family members to the joint labour force will lead to the disintegration of the extended family.[73]

Property rights are indisputable and pivotal points for family cohesion, both in urban and in rural settlements. In most cases, in patrilineal societies, with regard to founders, we would expect agnates to take precedence over cognates. The cognates would thus become disadvantaged, both in the order of beneficiaries and in the transmission of entitlement to descendants. The right of transmission would be reserved for male agnatic descendants. Cognates could receive a share only if there were no agnates left.[74] Ironically, although the waqf system is firmly anchored in sharia law,

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[71] For example, the beneficiaries can only reside at the property if the founder has specifically expressed such a desire in the waqfnameh.

[72] Baer (1964, p. 58).

[73] Bonine (1987, pp. 182-96).

[74] Power (1993, p. 385).

this institution can (as noted) circumvent another part of sharia law: the Islamic law of inheritance. In this case, the victory of tradition over sharia is evident.[75]

As a rule, females in both the patrilineal and matrilineal lines of descent enjoy the income of the waqf, but they do not transmit their rights to their descendants. The main reason for this is fear of the family property becoming fragmented as a result of exogenous marriage. Restrictions on female marriages can perhaps be partially linked to the fragmentation of property, as well. However, with all the limitations that have been imposed on them, females were often granted the right to reside on waqf property and to maintenance until death or marriage.

The Islamic law of inheritance does not allow for a system wherein the state can be maintained from the outside. The waqf is a non-institutionalised customary manifestation of such a doctrine. The vital and interesting point here is the fact that sharia norms are regularly invoked in waqfs. The requirement for transferring the right of usage of the property to the next generation is that family degrees be mitigated. Moreover, such compromise may also become subjected to a stipulation for transmission between different branches within the family. The waqf system empowers the founder to ignore the Islamic law of inheritance to a great degree. For example, the fractional shares according to sharia, a fundamental part of the Islamic law of inheritance, can be bypassed when the same property is converted into a waqf. The founder gains a considerable degree of control over the future of his asset. He can decide how he wants his property to be divided between members of the next generation or to keep it intact. Furthermore, depending on local tradition, it seems that in many cases the particular instructions in sharia regarding the inheritance of female descendants have been circumvented. In granting males twice the share of that for females, a property converted into a

[75] The tradition stated here varies vastly from country to country, and even from region to region within a country, as local tradition plays an important role in this case.

waqf gives its founder the power to exclude any heirs and to divide his assets according to his or her wishes.

In the twentieth century, as a result of modern reforms, the norm has been pushed such that entitlements are often divided on a per capita basis, rather than by gender or family degree. The waqf system has been used extensively in order to circumvent the Islamic law of inheritance so as to exclude certain heirs who are entitled to a share according the Qur'an. In some Middle Eastern countries, modern legislators have restricted founders' freedom by coordinating the law of waqf with that of inheritance and even with wills. Therefore, the latitude for establishing a waqf in favour of a stranger or even a member of the family, for instance, has been limited to only one third of the property, the same as the quantitative limitation on Muslim wills. However, in the case of Iran no specific legal restriction has been imposed, as we shall see in subsequent chapters. Every dedication beyond that limit enforces this practice, such that descendants, parents and the spouses of founders receive entitlements proportional to their share as per the compulsory inheritance rule, as stated in the Islamic law of inheritance. With a few changes, this is the case in most schools of law and in many countries in the Islamic world.[76]

The same patterns have been observed in family waqfs established by non-Muslims, whether Christian or Jewish, in sharia courts; they seem to have been inspired by the same motivations as Muslims.[77] Furthermore, founders' requirements are stated in very similar or even identical terms, although, in these cases, the stipulations are not a matter of Islamic law but rather of social practice. It is likely that the beneficiaries of the first series after the founder are named by the founder himself. However, the possibility that the rest of the components, such as transmission and mode of

[76] Kozlowski (1985, pp. 40, 53-60).

[77] Shaham (1991, pp. 460-72).

entitlement, reflect the social philosophy of the judges and those who formulated the waqfs rather than the founder himself.[78]

Disputes

In a study of 101 disputes relating to family waqfs, in more than 75 cases both the founder and the beneficiary were mentioned. Seventy-five per cent of them were established by parents, both fathers and mothers, on behalf of their children, and, to a lesser degree, on behalf of their grandchildren. Fathers have the higher degree of shares compared to mothers, at a ratio of six to one. The remaining 25% of the waqfs were established on behalf of someone other than the founder's children or lineal descendants.[79] The institution is regularly employed by males in support of other males. For example, as Powers argues, the ratio of endowments established by fathers in favour of sons relative to daughters is three to one. On the other hand, should a mother establish a waqf, it is likely that she will be more even-handed.[80]

Twelve per cent of established waqfs have been in favour of minor children. This shows that it has been common for parents to establish a family waqf soon after their children get married and are ready to produce their own offspring. This practice demonstrates the intention of the proprietors to create de facto arrangements for the ultimate devolution of their property while still in the early years of their lives. This phenomenon forces founders to devise special provisions for the inclusion of unborn children in the waqf. Furthermore, in cases of multiple wives it can become even more complicated. For example, some husbands have favoured the children of one wife over those of

[78] Powers (1993, p. 396).

[79] Ibid.

[80] Werner (1999, p. 123).

another. At the same time, there have been cases where founders with multiple wives have treated the sons of co-wives equally.

In the case of testamentary waqfs, the endowment is only formally established once the founder is dead (such cases are still disputed in the Shi'a tradition). The advantage of this is that the founder keeps control over the property for the duration of his life. However, the founder can only convert one third of his assets into a waqf; this is the cap imposed on him by the Islamic law of inheritance. Furthermore, there is a second set of restrictions with which the founder must contend, whereby he may not be allowed to include his own children among the waqf's beneficiaries (otherwise, he would have violated the Islamic law of inheritance). Therefore, the founder faces a number of challenges. On one hand, the founder wants to maintain control over his property, at least throughout his lifetime. Furthermore, he would like to select one or several of his children to be the main beneficiaries. On the other hand, the prohibition on bequests imposed by the Islamic law of inheritance does not include grandchildren whose father is still alive. One way of solving the problem is to appoint a grandchild, or even, in some cases, an unborn grandchild, as the beneficiary. This solution works because the minor grandchild is subjected to the guardianship of his father, who effectively acts as the beneficiary of the waqf. Additionally, this provides the founder with the opportunity to honour the offspring of one branch of the family over another.

In cases where a certain family line becomes extinct, the revenues of that waqf can be channelled toward different beneficiaries. In most cases, the revenues revert to the public. It is common for the founder to include in the waqfnameh clauses specifying how the related revenues are to be spent under such conditions. For example, he might request that they are channelled toward "poor Muslims", or "the poor of a specific district of a town or mosque," or "the sick or more specifically to the lepers". Furthermore, it is not uncommon to find waqfnamehs in which the founder has given

specific directions that, in the event that the family line becomes extinct, the revenues should be used to support students, ransom captives or free slaves.

Concluding remarks

Traditional Islamic law had several shortcomings with respect to economic growth and prosperity. It does not honour private property as much as it should.[81] It prohibits financing by demonising money lending, deprives one of testimonial powers, and does not recognise corporations. Moreover, Islamic tax, Zakat, is not conclusive enough to provide the necessary public goods for society. From a century or so after the birth of Islam, the institution of the waqf in its current form came to play an important role in filling these gaps. It managed to root itself heavily in sharia, in spite of not being mentioned in the Qur'an, and took dubious forms and functions even during the days of the Prophet himself.

Socio-economic and historical factors have contributed to an ever-increasing demand for establishing waqfs. Waqfs, at least in the short-run, provide a quick solution for protecting wealth against confiscation, fragmentation and outright taxation. Moreover, the institution has been more efficient in the provision of public goods where Islamic tax has been ill-prepared to take on the task.

Many historical factors have contributed to the ever-growing scale of endowments in Iran. Securing private property perhaps ranks among the most prominent reasons. However, many other factors, such as piety, politics and financing, have also played important roles as driving forces behind the growth of this institution.

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[81] Abrahamian (1994, p. 44). According to Motahari, private property is a divine gift. This is very different from the concept of private property, which, according to post-Enlightenment views on the topic, constitutes one of an individual's natural rights.

In the long-run, however, the legal structure of the waqf has proved to be far from perfect or even efficient or sufficiently flexible to accommodate various demands in more complicated economic climates. The focus of the next chapters will be to investigate and ascertain which laws of waqfs have made the institution unsuitable for the post-industrial age and, more importantly, to consider where the institution currently stands.

Chapter III: Founding a Waqf

The laws of waqf constitute a collection of fatwas from different jurists over the course of history. These laws share important elements, among which is the lack of a legal personality and concept of corporation. The current task is to explore how and why the laws of waqf in Iran remain inefficient; they not only prevent existing waqfs from exploiting their full potential, in light of the magnitude of their influence, they also cause economic stagnation. Every waqf comprises a founder, beneficiaries and an object. The modern laws of waqf have huge shortcomings in dealing with each of these players. The unincorporated nature of the laws does not allow for multiple individuals or third-party corporations to establish a waqf. Therefore, the endowments remain small in scale and do not benefit from the synergy that comes from resource pooling and the efficiency of economies of scale associated with larger organisations. Additionally, the traditional problems with the founder, who can potentially use waqf as a method of escaping his creditors or sheltering wealth, persist. Furthermore, the object or assets of the waqf define the waqf, and if for any reason the object or assets terminate, the endowments cease to exist.[82] To put it simply, the waqf and its assets are one and the same from a traditional legal perspective. Thus, terminating the assets has historically been used as a method to terminate a waqf in cases of dispute. This prevents the endowment from moving its location and from changing or upgrading its assets according to new needs and demands of the time. Finally, the unincorporated nature of the establishment of a waqf requires a waqf to be valid only if at any given time the beneficiaries and the object are present. Hence, beneficiaries such as terminally ill patients may not become qualified as beneficiaries.

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[82] This could be deliberate or a result of natural causes. In either case, if a building is a waqf and the building collapses, the waqf is terminated. In cases in which the waqf truly had a corporate status, should the building collapse the waqf remains the same and has the option to rebuild the building or purchase another one, etc.

In order to prove this point, the laws of waqf have been dissected (by collecting various cases and the codified versions of their respective civil laws). In this chapter, the main players in every waqf will be introduced. The task is to determine who is eligible to establish a waqf, or to be appointed as a beneficiary of a waqf, and what objects have the potential to be converted into waqfs. The aim is to show that many of the contemporary legal parameters relating to these players in modern Iranian civil law have been borrowed from premodern legal discourse. Furthermore, the socioeconomic grounds behind the creation of some of these legal parameters during the premodern era, and their subsequent and broader impact on the economy, will be examined. Moreover, this chapter lays the groundwork for the more in-depth and detailed arguments found in subsequent chapters, which deal with the operation of the waqf as a unit, its economic contribution, and its future as an institution. As we will see, most conditions for each player involved in a waqf derive from the various cases that jurists have addressed throughout history. With few exceptions, the laws found in modern Iranian civil law are merely codifications of one or more selected fatwas from cases issued by past and present jurists vis-à-vis the body of civil law. There are a few points that can be made in reviewing these laws. First, they are primarily economic in nature and, perhaps due to the lack of a specific bureaucracy, ended up on the desks of the clergymen who issued legal fatwas on them. Second, these laws follow the rationale of the premodern era; they might have been relevant during the preindustrial age but do not correspond sufficiently to the needs of modern times and the rapid speed of change during the 20th century.

A waqf comprises three sets of players. These players must always be present in order for the principle of perpetuity to remain intact. These players are the founder, beneficiary(ies) and the object of the waqf. This chapter is divided into three sections, each of which deals with one of the

three categories of players. The first section concerns the founder. Research demonstrates the extent to which the primary reason for establishing a waqf—including the sheltering of wealth or a desire to escape creditors—is still possible within the modern legal framework, although there have been attempts by legislators to minimise loopholes. However, the primary remaining problem is that the founder of a waqf needs to be an individual. There is no provision in the law for a group of people or a corporation to establish a waqf. This situation is the result of the unincorporated nature of the waqf laws.

The second and third sections of this chapter consider the beneficiaries and object of a waqf. In both cases, civil law has merely added to what already existed in juridical form. The codification of such laws rationalises some of the potential ambiguities that existed in waqfs' traditional laws. However, designation of a waqf's main responsibility regarding beneficiaries remains with the founder. The founder essentially enjoys a great degree of latitude in choosing his waqf's beneficiaries for many generations to come. The majority of cases involve disputes between later generations of beneficiaries and concern the division of the proceeds among them. Moreover, as we shall see, some of the main wishes underlying the establishment of a waqf, such as preserving family fortunes, can result in disparities between family members—and thus disputes. Finally, those objects that can be converted into waqfs will be explored. This section sheds light on the fact that, in most cases, an object must comply with traditional codes. However, one of the least transparent functions of a waqf demonstrates the important role it has traditionally played in financing the economy. In recent years, there have been attempts to highlight this aspect of waqfs in order to obtain legal permission to allow cash to be converted into waqfs. As will be discussed in detail, this policy could potentially rejuvenate many stagnated waqfs by allowing them to sell dysfunctional assets and invest them in profitable ventures.

The founder

The first and most important figure with respect to every waqf is its founder: the individual who establishes the waqf. The reasons behind the establishment of the waqf, previously mentioned, greatly inform his decision. Moreover, the waqf will most likely be named after him. The question is, then: who can establish a waqf, and under what conditions? What qualifications must this person have, and what restrictions might be imposed on him by law?

According to Iranian civil law, the founder must be an adult, in good health, sane of mind, the actual owner of the designated property, and have a decent reputation. In order to understand the extent to which the laws have changed in accordance with the demands of the current age, the conditions and places in which they originally appeared must be studied. In examining the historical record, it becomes evident that the eligibility of the founder has been based on three major factors. The first and most important consideration is that the law has been as inclusive as possible. This is due to the initial reasons behind establishing a waqf. The historical record shows that every time there has been an invasion of a country, a change in dynasty, an increase of taxes by the rulers, etc., the number of waqfs has increased.[83] Therefore, the logical way in which to help landowners protect their properties from outright confiscation has been to create a process in which establishing a waqf is inclusive and simple enough that they can be founded simply and quickly. However, it has not gone unnoticed that, in creating a very easy mechanism for establishing a waqf, the system has been prone to abuse. This creates the grounds for the second juridical concern, which has been how to block loopholes and protect the institution from abuse. Finally, jurists have tended to follow certain principles, particularly the principle of perpetuity—without exception, the waqf must be kept in perpetuity. In the next chapter we will look at this principle in greater detail.

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[83] For example, Lampton (1997, pp. 298–318) demonstrates that vast amounts of land and properties were converted into waqfs just after the Mongol invasion of Iran in the 13th century. The same story can be seen repeatedly until the Islamic Revolution of 1979.

With respect to the founder, the laws are very inclusive. The records show that a founder might be from either gender and might establish a waqf regardless of his or her religion. In other words, non-Muslim founders were also welcome.[84] The second set of considerations concerns those aimed at preventing the system from potential abuse; these effectively make the laws more complicated. The cases are divided into what appear to be the more common categories that jurists have had to consider. The first category includes those cases in which the true intention of the founder in establishing a waqf has not been to provide a public good but rather to circumvent the law of inheritance. As mentioned above, in this respect the waqf is a powerful tool, one that empowers the founder regarding the future of his or her property. The founder could assign only one or a few of his children as beneficiaries to a waqf, decide that the proceeds should be divided equally among his male and female children, or even appoint a stranger to become the sole beneficiary of the waqf, and so forth. However, the founder's decision could aggravate a family member. In some cases the founder has died soon after establishing a waqf, and family members omitted from the waqf have made claims. For example, children might claim that their father was unaware of what he was doing at the time of the waqf's establishment. He might have been too sick to realise the consequences of his actions, or perhaps had fallen prey to an opportunist who convinced him to establish a waqf and deny some of his heirs their inheritance. The response from the jurists—and there is almost no disagreement among the Ulama—has been that if a person establishes a waqf during his final illness (Marad al-Mawt) the act is subject to the restrictions regarding bequests (Vassiat); that is, the value

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[84] Khomeini (2007, p. 71), Minasian (1998, p. 153–56)
In general, being a Muslim is not required; in principle, waqfs founded by non-Muslims are valid. This is an issue upon which both the Imami Shia and the Sunni jurists agree. Khomeini argues that non-Muslims (he uses the word infidels) may establish waqfs for the refurbishment and restoration of their churches, synagogues and Zoroastrian temples.
There has been no record to show that founding a waqf has been exclusive to men. However, according to some views, a married woman would need her husband's authorization if the value of the waqf exceeds one third of her property, as in the case of gifts. There is much historical evidence that women could establish, and have established, numerous waqfs in Iran throughout history.

of the endowed property may not exceed one third of the estate (such as constitutes his testimonial power). Consequently, his wishes should be treated in the same way as one would treat a will. Thus, many refer to this way of founding a waqf as a testimonial endowment.[85] The rationale behind this tradition is to minimise the claims from a founder's heirs that can be generated after learning that they will no longer be receiving their anticipated inheritance.

There is also a second set of claims related to health. In these claims, which pertain to both the founder and to his or her heir, it is argued that the founder was either insane or, at least, was not acting with complete sanity at the time that the waqf was established. The founder might have regretted his decision (once the waqf is established, the action is irrevocable) and sought to revoke his decision to convert his property into a waqf. Similarly, the relatives of the founder may have protested his decision to convert his assets into a waqf on the grounds that he was not sane at the time of his decision. The verdicts in such cases have been that an insane person may not establish a waqf.[86] It is possible that the popularity of such claims has led to fatwas specifically targeting those with bipolar disorder (those who may act normally at times and insanely at other times). These cases have been brought forward by the relatives of the founder and by the founder himself, who might have regretted his decision to convert his assets into a waqf. The verdicts suggest that, in such cases, if the waqf was established during the period when the founder was sane, then the decision to found a waqf is deemed valid; otherwise, it is considered that the waqf was not properly ratified.[87] Such verdicts naturally pave the way for abuse of the system. One can convert his or her property into a waqf and enjoy certain benefits (tax reductions and the like), then, after a while, claim that he was not sane at the time, ask that the endowment be terminated, and subsequently sell the property.

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[85] Helli (1985, p. 465); Helli (1989, p. 443)

[86] Helli (1985, p. 447). Allameh Helli argues that a "madman" is not eligible to establish a waqf.

[87] Ibid.

This verdict also contradicts one of the main principles of waqf: perpetuity. One can still use waqfs for all of the purposes indicated above. Modern Iranian civil law states that the founder must have the right background (Ahliyyat). In other words, the founder must be trustworthy. The trustworthiness of a person is not something that can be measured in a standardised way. Therefore, although in some respects—as with respect to adulthood and ownership—the law has become more rational compared to traditional law, in others it remains out-dated. The reason for stipulating trustworthiness in the law, as Katouzian elaborates, is because "theoretically, one can still establish a waqf and appoint his immediate family to be the beneficiaries". Katouzian argues that if the understanding from reading the Waqfnameh is that the founder is either sheltering some wealth or, even more importantly, escaping from his creditors, one can legally establish a waqf and appoint an immediate family member as beneficiary. Because the founder thus loses his or her rights to his property, his creditors cannot make any claim on his or her wealth. As Katouzian elaborates, "trustworthiness is used to ensure that one is not going to take advantage of this legal loophole".[88]

The third series of cases are related to waqfs wherein the founder may be intending to shelter his or her wealth, or to avoid paying taxes. One very popular type of case throughout history that has been used for exactly that purpose is a waqf established in the name of a minor child. By founding such a waqf, the actual owner of the property has been able to claim that he or she no longer has ownership of the property and, therefore, should be exempt from paying taxes on that property; at the same time, he or she continues to enjoy benefits from the property, at least until the child reaches maturity. There are many cases in which jurists have tried to prevent such actions. The arguments come down to the following question: what is the appropriate minimum age for one to become a

[88] Katouzian (2007, pp. 546–48). Furthermore, Article 56 of civil law expresses that if the founder has debts, he or she can only establish a waqf after obtaining permission from his or her creditors to do so. Katouzian summarizes that, according to civil law, the conditions for a founder are as follows: the founder has to have the general capacity to act and contract (Ahliyyat al-Ada) and he or she must be an adult, sound of mind, capable of handling financial affairs (Rashid), a free person, and not under interdiction for prodigality or bankruptcy.

founder? Although there is no set minimum age upon which all jurists have agreed, it seems that the age of ten is what the majority have selected.[89] This is the main reason why adulthood is mentioned in civil law—to avoid such abuses of the system.

Converting someone else's property into a waqf

The final set of cases after a waqf has been established are those in which the founder was not the actual owner of the property. Such situations might have been deliberate or genuine mistakes. The common fatwa among the Imami jurists has been that if this occurs and later the actual owner of the property does not protest against such action, the waqf is valid.[90] On the other hand, some, like Ayatollah Yazdi, disagree with this ruling. He argues that, because the wishes of the owner were not fulfilled at the moment of the waqf's establishment, the waqf cannot be ratified.[91] The interesting aspect here is that the true wishes of the founder seem to be a more important issue for Yazdi than the problem of a possible violation of someone's private property. In either event, Iranian civil law has attempted to avoid such cases by enforcing the law that the owner should be the actual proprietor of the property.[92] Again, one might assume that modern laws have rationalised the

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[89] Helli (1989, pp. 444–46). The verdict from the majority of the Ulama is that a child can establish a waqf. However, a set minimum age is not agreed upon; the age of ten is where disagreements seem to begin among jurists. Mohaqeq Helli and Allameh Helli both argue against a ten-year-old child being allowed to establish a waqf; Sheikh Mohammad Hassan Najafi, on the other hand, argues that a ten-year-old child is old enough (in most relevant studies, adulthood has been mentioned as one of the primary conditions for the founder of a waqf. However, the age that was considered to signal adulthood according to those fatwas is often not mentioned or is neglected).

[90] Helli (1989, p. 444); Karaki (1989, p. 181)

[91] Yazdi (2002, p. 189)

[92] (Katouzian 2005, pp. 542–43). Article 64 of civil law states that one can convert anything from one's own wealth into a waqf, including property that is in temporary use by someone else. Therefore, if one has rented out one's property, that property can be converted into a waqf even while it is rented out. In such cases, the tenants of the property must give the rent to the mutawalli, and the rent money is spent on the waqf's mission.

situation, but, as Katouzian argues, there is still a chance that one can effectively establish a waqf without having actual ownership of the property or the permission of the owner. [93]

One very crucial point is that, in both the traditional and the modern version of the laws, the founder is always a single person. There is no mention as to whether more than one individual can establish a waqf as a joint venture, nor is there any discussion of or evidence that an institution with a legal personality can establish a waqf. This is proof that the waqf is an unincorporated institution. Modern Iranian civil law claims that a waqf now has corporate status, which is contradictory in terms of who may qualify to be a founder. There has never been mention of a corporation as a founder, nor even of a waqf founded in partnership. Most importantly, this fact demonstrates that a waqf cannot be effective on a large economic scale. When the pooling of resources is not allowed, such endowments can only be established and operate on a small scale, which limits the scope of their operation and, more importantly, prevents them from achieving an economy of scale. A very recent example that is worth highlighting here is the case of the Islamic Azad University, which, after the disputed presidential elections of 2009 in Iran, was set to be converted into a waqf; this attempt was denied on legal and political grounds. Concerning the legality of this matter, the Islamic Azad University was not the property of one individual; therefore, as an institution, it could not convert itself into a waqf.[94] This case may come very close to the traditional method of sheltering wealth and protecting investments from confiscations (as the Islamic Azad University is heavily connected to Rafsanjani, who was allegedly supporting Musavi during those elections).

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[93] Ibid. However, according to Iranian civil law, one cannot convert those parts of his or her belongings that are in permanent usage by someone else. Article 64 of civil law states that one can convert anything from one's own wealth, and it may be in temporary usage by someone else. Therefore, if one has rented out one's property, that property can be converted into a waqf, even while it is actually rented out. In such case, the tenants of the property had to give the mutawalli the rent, and the rent money has to be spent on the waqf's mission

[94] bbc.co.uk/persian/iran/2010/09/100929_107_iran89_larijani_azad_university.shtml. (2010/9/30 at 11:32.32).

However, this case shows that the institution of waqf is not suitable to the demands of this day and age. The case of the Islamic Azad University might have been controversial in nature but nonetheless shows that, even in ordinary circumstances, large-scale corporate-type enterprises can no longer be converted into waqf, which limits the usability and scale of this institution.

The beneficiaries

The second part of this chapter deals with the second set of players in a waqf: the beneficiaries. In short, the founder customarily begins by designating the first generation of beneficiaries, usually one or more children, and indicating whether males and females are to be treated equally. Next, the founder indicates what will happen to the revenue belonging to a beneficiary of the first-generation beneficiary upon his or her death. If that beneficiary leaves behind a child, his or her share reverts to that child; if the beneficiary dies without a child, his or her share reverts to the surviving beneficiaries of the first generation or their descendants. Thus, the entitlement of extinct branches reverts to the surviving branches of the lineal descent group. Referring to the second generation of beneficiaries, the founder generally indicates that the revenue is "for their descendants and their descendants' descendants". Historically, such phrasing has been understood by jurists as signifying that the entitlement now applies to anyone who qualifies as either a descendant (Aqabeh) of the founder or a descendant of a descendant; thus two (or more) generations of lineal descendants may qualify as beneficiaries simultaneously. Such an endowment is characterised as being Maqub ("for a descent group"). Depending on the verdict of different jurists, the founder may or may not appoint himself to be included among the waqf's beneficiaries. The founder exercises a high degree of freedom regarding whom to select and whom to omit from benefitting from his or her waqf. In general, the founder might be motivated by one or more of the three sets of intentions in identifying the beneficiaries of his or her established waqf. The first intention might be to circumvent the

Islamic law of inheritance. In this case, the founder can be selective as to which of his children should take over the endowment. The second set of intentions (deriving, perhaps, from the founder's common knowledge) entails being as detailed as possible concerning the beneficiaries, particularly with respect to future generations. Finally, the founder could be deliberately vague regarding his or her intention to enjoy the benefits of establishing a waqf without it actually providing any services—in other words, making it very difficult, if not impossible, for anyone to qualify as a beneficiary.

In traditional or classical doctrines, there is no distinction between the beneficiaries of the different types of waqf.[95] However, in connection with attempts within 20th-century Iran to codify the law, legislators have sought to divide cases into those dealing with private waqfs and those dealing with public waqfs. This has constituted progress toward facilitating an understanding of the laws and their rationalisations to a greater degree. The main issue surrounding the laws related to waqfs' beneficiaries is that the civil law does not necessarily provide a framework for who may or may not

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[95] Jaberi (1991, p. 182); Khomeini (2007, p. 70); Majmu' Qavanin Owqafi (2004, p. 86) . Waqfs are generally categorised into Aam (public waqfs) and Khas (private waqfs). Public waqfs are those for which the public is the actual beneficiary, such as for mosques and libraries. A public waqf either has a very specific mission or it does not. For example, it could be a waqf that finances the activities of a specific mosque, or a waqf that is designated for the restoration of any mosque. Moreover, a public waqf could set as a beneficiary the poor or orphans in general instead of being exclusive to the poor of a particular region or the orphans of a particular orphanage. A private waqf, on the other hand, has a very specific beneficiary or beneficiaries; for example, someone's child or children. Both public and private waqfs could have very specific usage and beneficiaries. For example it could be the poor that are the beneficiaries of a public waqf; on the other hand, in a private waqf the beneficiaries might be restricted to the male children of a particular individual. Sometimes, all of the beneficiaries of either type of waqf benefit equally; on the other hand, sometimes one or more of the beneficiaries has greater shares than the rest. For instance, in a public waqf, the order in which the beneficiaries are presented is an indicator of their hierarchy in terms of shares being received. The same applies to private waqfs. With a public waqf, sometimes a particular guild has priority over another. For instance, certain Ulama could have priority over other members of the Ulama as the designated beneficiaries of a waqf. In private waqfs, generally one or a few of the founder's children have greater shares than the rest of the heirs. Furthermore, there is a third case in which the beneficiaries of a waqf could be the children of the founder along with certain designated Ulama (or "a certain number of Ulama"). Again, in this case, they might all have equal shares or not, depending on the wishes of the founder.

be appointed as a beneficiary, nor under what circumstances this may take place. What the civil law does, effectively, is elaborate on extant popular cases involving past jurists. Therefore, this section follows these popular cases, as well as those for which the civil law is relevant. These cases have also laid the ground for legal transactions among waqfs' main players and the ownership of endowments.

The beneficiary(ies), or Moqufon Elaih, can be divided between those pertaining to private waqfs (waqf-e Khas/ ahli), which are generally established in favour of one's relatives and/or descendants, and those pertaining to public waqfs (waqf-e-Aam/Kheyri), for which the beneficiaries are people selected from the public.

The first question involving many cases concerns whether or not the founder can appoint himself as the beneficiary of his waqf. This may seem a rational thing to do from the founder's point of view. He could potentially set aside part of the endowment-generated revenue to finance himself following retirement (in event of an emergency), whereby the waqf constitutes a contingency plan. However, the popular verdict among the Imami jurists has been against such action. On the other hand, some have argued that if, for example, the founder appoints members of the Ulama and/or the poor to be beneficiaries of a waqf, and later in his life he is poor or becomes a member of the Ulama, he should be permitted to take recourse to the waqf.[96] Based on Article 72 of the Iranian civil law, the founder may not appoint himself to be among the beneficiaries of an established waqf. Furthermore, the founder may not appoint himself to be among the beneficiaries either during his

[96] Khomeini (2007, p. 67).

lifetime or following his death.[97] Although the founder may not include himself as a direct beneficiary, there are nonetheless ways around this; for example, by appointing one of his minor children as the main beneficiary of a waqf, the founder will have the right to receive the proceeds of the waqf as the child's guardian, thus effectively turning himself into a beneficiary.

It should be noted that these are cases that compel a founder to specify the beneficiaries and ensure that they are identifiable. In many cases, either deliberately or due to a variety of reasons—such as the passage of time or the loss of the Waqfnameh—the beneficiaries may no longer be identifiable. Furthermore, another trick whereby a founder is able to show on paper that he or she has a waqf but in reality does lose any of the generated revenue is to appoint beneficiaries who are not easily identifiable. The second case is that in which the beneficiary is identifiable but is unable to acquire the object that has been converted into a waqf.

Acquiring a waqf, as mentioned earlier, is a vital condition for the beneficiaries. In other words, beneficiaries must be capable of acquiring the property. There are, however, some exceptions to this rule. For example, with respect to the list of beneficiary conditions presented earlier, Allameh Helli adds that one cannot appoint angels, genies or the devil as beneficiaries. His argument is not based on condemning superstition but on the notion that they (angels, genies and the devil) do not have possessional power.[98] Ayatollah Yazdi further adds that one cannot appoint someone with a bad reputation (i.e., someone who drinks alcohol or someone who, upon receiving the benefits from the

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[97] Qanun-e Madani, Majmu'e-ye Qavanin-e Owqafi (2005, p. 135). To set oneself among the beneficiaries after one's death usually means that the founder is able to establish a waqf whereby, following his or her death, the proceeds go to someone who will pray for his or her soul. This is what Iranian law does not allow. However, the family members of the same person could establish the same waqf for the same purpose on his or her behalf.

[98] Helli (1985, p. 447)

waqf, will waste them on drink, etc.).[99] Based on Article 71 of civil law, one cannot appoint an unidentifiable person or persons as the beneficiaries of a waqf. However, with respect to a public waqf, as Katouzian argues, in order for the waqf to be properly ratified, although the beneficiary may not be precisely identifiable, it is sufficient that the public is able to identify the stated beneficiary(ies) on the Waqfnameh.[100]

Beneficiaries of a private waqf

The beneficiaries of a private waqf usually are members of a family. During the time of producing the Waqfnameh, the founder can be specific or non-specific about the members of his family who will effectively become beneficiaries. In other words, beneficiaries of the first type can constitute one or more individuals ("Fulan ibn Fulan", "my children", or "my male offspring"). He can favour one or a few of them over the rest of the family members. The founder can also discriminate between his male and female children. Usually, several subsequent classes of beneficiaries are mentioned. A very common clause is to designate first one's sons and unmarried daughters, then one's agnatic grandsons and unmarried agnatic granddaughters, then one's agnatic great-grandsons and unmarried agnatic great-granddaughters, and so on. In such cases, no class becomes entitled until the previous one is entirely extinct. It is also quite common for the founder to stipulate that half of the proceeds go to the poor and the other half to his children.[101]

Before reviewing specific cases and conditions relating to beneficiaries, it is necessary to discuss and bring to the fore the ever-present reasons behind establishing a waqf and to consider their

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[99] Yazdi (2002, pp. 208–14)

[100] Yazdi (2002, p. 519); Qanun-e Madani, Majmu'e-ye Qavanin va Moqararat-e Owqafi (2005, p. 135).

[101] Carroll (2001, pp. 246–86)

influence on the formation of waqf laws. As has been previously discussed, sheltering wealth and protecting private property from confiscation or fragmentation have been among the key reasons for setting up a waqf. Consequently, founders have often been disinterested in establishing a waqf for the purpose of providing a public good. In fact, in many cases founders have effectively looked for ways to bend the law in order to use waqfs to shield their property from taxation, confiscation, fragmentation, etc., without having to give up anything in return. The first general rules concerning beneficiaries tackle these issues. The first of two tricks that founders can use is to appoint a beneficiary who is not sufficiently specific. In other words, although it seems that the waqf is providing certain services, in reality no one can claim the benefits because no one fits the description of the designated beneficiaries. The second case is when a founder appoints a beneficiary but there is no way for the designated beneficiary to take possession of the waqf. The third condition is that the beneficiaries must not be condemned or doomed by Sharia. The final condition is that the founder cannot appoint those who are going to be executed or who are infidels (in this case, those who do not have Muslim relatives).[102] The reason for this condition is different from those pertaining to the previous conditions, which are aimed at preventing the waqf from becoming merely an institution for sheltering wealth without providing any services; rather, it relates to the desire to maintain the waqf principle of perpetuity intact.

The second set of cases is related largely to the need to settle disputes related to family waqfs.[103] It is true that by converting a property into a waqf, the founder is able to circumvent the law of inheritance which otherwise would deny him the right to choose a particular path for and successor to his property. However, due to a variety of reasons—the main one being the non-corporate nature of waqfs—within a few generations after the founder's death, disputes have often arisen among the

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[102] Helli (1989, p. 455)

[103] Layish (1997, pp. 352–88)

beneficiaries. More importantly, the biggest problem has been that, as it is likely that the number of beneficiaries will increase as time passes, each beneficiary's designated shares of revenue from the waqf will drop. This could continue to the point that families eventually decide to abandon the family waqf, with the properties either becoming abandoned or, in most cases, subject to corruption.

Those cases dealing with the beneficiaries of a waqf can be divided into two categories: those that deal with private waqfs and those that deal with public waqfs. The first set of cases that we will review concern disputes among family members or between family members and a third party who was also appointed by the founder as a beneficiary. The second set of cases includes those in which individuals are disqualified from becoming beneficiaries, and, as a result, the perpetuity of the waqf becomes endangered.

First are those cases that deal with family disputes related to the division of the proceeds, either among the founder's children or when the proceeds are divided among the children of the founder and a third party. The majority of such cases are caused by ambiguities in the Waqfnameh. There are many cases in which the Waqfnameh goes missing after one or several generations following the foundation of a waqf, either accidentally or deliberately. Furthermore, there are many cases in which the Waqfnameh can no longer be read because it has deteriorated over time, or for a variety of other reasons. The verdicts of jurists in such cases have varied, both individually and across schools of law.

The popular verdict among the Imami Ulama is that once the founder appoints his children, each of them will receive an equal share of the waqf's revenues, unless otherwise stipulated by the founder.[104]Article 73 of Iranian civil law empowers the founder to appoint his children and also

[104] Helli 1981, p. 448); Najafi (1997, p. 31); Tusi (1996, p. 230)

encourages the founder to avoid discrimination between the sexes when appointing beneficiaries.[105] In the end, and regardless of which school of law we are speaking of, the founder is empowered to a certain extent to make a decision as to who should be the beneficiaries and what their respective shares should be. However, there is no unified verdict for cases in which there is no Waqfnameh, when family disputes are thus likely.

Disputes can be more complicated when there is a third party (outside of immediate family members) who has also been designated a beneficiary. A very common method for establishing a family waqf is to include a religious institution among the beneficiaries. By doing so, the founder has a greater chance of protecting his or her endowment; not only is it in the interest of the respective institution to protect the endowment, it also conveys a degree of sacredness to the waqf. In any event, the resulting cases and verdicts could not be more varied. Traditionally, the jurists would refer to the style in which the Waqfnameh was written, based on which they would decide how the proceeds should be divided among the beneficiaries. The rule of thumb was that beneficiaries should receive more or fewer benefits based on the order in which they appear on the Waqfnameh.

An example of this is when a founder appoints his children and the poor as beneficiaries of his waqf. Allameh Helli argues that when a founder selects more than one group of people as beneficiaries, he has created two classes (Tabaqeh) of beneficiaries—in this case the first being his children and the second being the poor.[106] In other words, the children have priority over the poor in receiving their share. Nonetheless, he adds, "the grandchildren will be exempt from receiving the

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[105] Qanun-e Madani, Majmu'e-ye Qavanin va Moqararat-e Owqafi (2005, p. 136)

[106] Social and historical practices have played a significant role in the reading of Waqfnameh. Generally, the order of the classes is determined by the order in which the beneficiaries are mentioned in the waqf's deed.

benefits."[107] Over time, cases like this have been the subject of much dispute, and we can find many fatwas issued on them. For example, Ayatollah Khomeini disagrees with Allameh Helli and argues that, in such cases, the revenues of the waqf must be divided equally between the children, grandchildren and the poor.[108] According to his view, not only is there no class distinction between the beneficiaries of the waqf, the grandchildren are treated as equal to the rest of the beneficiaries, even if they are not mentioned. Whether or not the grandchildren of the founder are to be treated as beneficiaries has been the subject of much discussion. The main views are split between those who argue against grandchildren's right to automatically become beneficiaries after their parents, as Allameh Helli argues, and those who argue for them, such as Ayatollah Khomeini and Ayatollah Yazdi, claiming that once the founder appoints his children as beneficiaries, the grandchildren will automatically become beneficiaries following the death of their parents (i.e., the founder's children).[109]

The case whereby grandchildren are included among the beneficiaries is of high importance. First, the grandchildren are, in most cases, minors over whom their parents have guardianship. Thus, their parents will receive their children's shares, meaning that those parents with more children will earn more from the waqf. One can imagine that such cases can introduce complications among family members when a new child is born and tension escalates. Furthermore, as a family grows, so, too, does the number of beneficiaries; at the same time, the share that each beneficiary receives diminishes. Eventually, beneficiaries might no longer care about collecting their shares or fighting for their parts of the waqf, which could result in a waqf becoming vulnerable to exploitation by external parties or even its administrator, the mutawalli. Furthermore, it shows that although

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[107] Helli (1989, p. 456)

[108] Khomeini (2007, p. 73)

[109] Yazdi (2002, p. 188)

establishing a waqf could potentially shelter a family fortune, in the long run it will likely result in family disputes.

The second set of cases are those wherein the beneficiary may become extinct—and in so doing endanger the perpetuity of waqf. These cases are related to those wherein a minor child or a terminally ill patient is appointed as beneficiary. The problem with both of these cases is that if the beneficiary dies, the waqf remains without a beneficiary and the principle of the perpetuity of the waqf is violated. Those cases dealing with such scenarios attempt to find an alternative beneficiary or a method for leaving the waqf with an alternative beneficiary in the event that the original beneficiary passes.

Appointing an unborn individual or a minor child as a beneficiary has been a popular method of circumventing the law of inheritance. Among the Imami Ulama, Ayatollah Yazdi has argued that one cannot appoint an unborn child as the beneficiary of a waqf. Iranian civil law, based on Article 957, states that if said child is born alive then the waqf has been ratified correctly.[110] This is one case in which the modern laws dealing with waqfs in Iran are contradictory. As we shall see, according to civil law a waqf can be established only once, and one cannot set a time in the future for ratification of the waqf. Furthermore, a waqf's deed or Waqfnameh must not stipulate any conditions that might make the waqf invalid in the future. Hence, the case of an unborn child contradicts the rest of the rules regarding the establishment of a waqf.[111]

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[110] Ibid., p. 527

[111] This can also create potential problems for the founder: if he or she established the endowment and appointed his or her existing children as beneficiaries, in the event that he or she has another child in the future, that child cannot be included as a beneficiary of the waqf.

Two other conditions for the beneficiaries are that their lines must not be in danger of extinction in the near future and they may not be " infidels" with no Muslim relatives. There has been much debate over whether infidels can become beneficiaries. Furthermore, among the Imami Ulama Ayatollah Yazdi has argued that the act of appointing infidels as beneficiaries might inspire and encourage the rest of their family members to convert to Islam.[112] As in most modern considerations of this matter, Katouzian elaborates on the legal standing of waqf beneficiaries: based on clause seven of Article 961, one may not appoint a foreign national as the beneficiary of a waqf. For example, a foreign national may not be appointed as a beneficiary of an Iranian farm that has been converted into a waqf. However, the same law permits the revenues of that farm to be rendered to a mosque outside of Iran.[113]

Finally, according to Iranian civil law, as Katouzuian argues, someone who is terminally ill cannot become the beneficiary of a waqf. This is mainly due to potential complications with regard to waqf ownership. Once a waqf is established, the founder loses the rights to his or her property. Additionally, the waqf does not necessarily have corporate status (even if Iranian civil law claims that the waqf has such status). The waqf cannot remain valid without a beneficiary, and should a sick beneficiary die that property becomes subject to ownership issues. Thus, the law has taken pre-emptive measures to avoid such complexities. However, based on Article 69 of the civil law, should the Waqfnameh indicate different classes of beneficiaries and one of these classes is terminated, if the second class can take over the benefits, then the waqf will remain valid. In other words, a terminally sick person can become the beneficiary of a waqf only if the waqf anticipates different classes of beneficiaries, such that after the death of the first beneficiary, other beneficiaries will take over the proceeds. Essentially, and as a rule of thumb, there must not exist any moment

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[112] Yazdi (2002, p. 214)

[113] Katouzian (2005, p. 527)

when the waqf is without a beneficiary.[114] Moreover, in the case of a private waqf, Katouzian argues that because civil law has considered a waqf transaction to be in the nature of a contract, then several dates are crucial to the ratification of a waqf: the date when the Waqfnameh is produced, the date when the beneficiary accepts his or her status as a beneficiary, and the date when possession of the waqf transfers from the founder to the beneficiary.[115]

Beneficiaries in public waqfs

The beneficiaries of a public waqf can be both individuals and public utilities, such as mosques, schools, bridges, graveyards and drinking fountains. Again, similar to those of a private waqf, the beneficiaries of a public waqf can be specific or non-specific: for example, the poor (non-specific) or the poor from a particular neighbourhood (specific). In the case of utilities, a mosque can be the beneficiary of a waqf, but the potential recipient could be a specific mosque but does not need to be. Cases dealing with the beneficiaries of a waqf have two primary concerns: the first is to find a solution for how the proceeds should be spent on the waqf; the second is to define the correct beneficiaries for the waqf. In general, most problems arise a few years after the establishment of a waqf, particularly after the death of the founder, at which point confusion is often generated concerning how the waqf should operate. Theoretically, the Waqfnameh should be used as the reference point; likewise, the manual containing all of the directions and guidelines as stated at the time of the waqf's establishment by the founder can be consulted. However, in reality, there is no way that one can anticipate all possible future outcomes. This tradition has had a detrimental impact both on waqfs and, ultimately, on the economy in general. The main cases are concerned with waqfs connected to mosques and public waqfs for which the beneficiaries have not been identified.

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[114] Katouzian (2007, p. 519)

[115] Ibid., pp. 520–21

Waqfs connected to mosques

Historically, mosques have enjoyed a great deal of attention with respect to waqfs. There are two ways in which a waqf can support a mosque. The first is that the founder can convert his or her own property into a mosque or, alternatively, build a mosque. Disputes occur when someone allows a congregation to pray on his property but does not wish to establish a mosque on his estate. In this case, there are two sets of contradictory opinions. Ayatollah Khomeini argues that if a founder intends to convert his property into a mosque, then he must explicitly state so. He may establish that this waqf is for a particular purpose, or that "this piece of my property is going to become a mosque". On the other hand, if someone has set aside a portion of his or her property and has allowed people to say their prayers there regularly, that place does not become a mosque unless the founder explicitly expressed such wishes.[116] Such cases demonstrate that waqf properties have been subject to abuse. Having neither ownership nor the appropriate bureaucracy in place, both the waqf and the individual's private property have been subject to violation.

The second set of problems arises with regard to the question of how to spend the proceeds rendered by the activities of an already established mosque. There are many potential disputes that frequently arise among beneficiaries following a founder's death. Ayatollah Yazdi issued a fatwa on how the proceeds should be spent with respect to mosques. He argues that if the revenues from a waqf have been earmarked to finance a mosque, then those revenues have been set aside to facilitate that mosque's activities; thus, an order should be designated whereby the revenues are to be spent. First, the revenues should be spent on the repair and restoration of the mosque. Second, the remaining revenues should be spent on lighting; third, if there is anything left, it should be paid to the Imam Jomeh (the Imam Jomeh is the man who recites and conducts the daily congregational prayers in a mosque). However, if the mosque is not in need of restoration, lighting, etc., then the

[116] Khomeini (2007, pp. 62–3)

revenues should be diverted to another mosque that is in need of such services. Yazdi goes on to note that if the founder has designated a specific usage for his waqf, then that is the only way in which the waqf's revenues may be spent.[117] Jurists may be forced to grapple with certain specific cases; the complicated task of running a mosque, particularly in the future, cannot be narrowed down to the specific cases mentioned. Additionally, the administration of a waqf never has the necessary freedom to make rational decisions as called for because of limitations imposed on it by the Waqfnameh.

Fi Sabil Allah Waqf

The beneficiaries of a waqf might remain unknown because the waqf's deed has been lost or simply because the founder did not include one and indicated that the waqf is a Fi Sabil Allah waqf (that is, a waqf dedicated to pleasing the Lord). A few arguments concerning cases in which the exact usage of the waqf remains unclear and the only indicated purpose of the waqf is fi Sabil Allah have been presented. Sheikh-e Tusi argues that if the founder has not been specific about the exact usage of his or her waqf, and only indicated that it was for "good deeds", one third of the revenues should be spent on the soldiers of Islam, while the rest should be spent on the Hadj pilgrimage.[118] However, the popular verdict among the majority of the Imami Ulama contradicts Tusi's suggestion; here the argument is that the waqf's revenues are better spent on development projects aimed at delivering public goods, such as bridges, mosques, etc.[119] Nowadays, the founder is obliged to be very exact

[117] Yazdi (2006, p. 225)

[118] Tusi (1996, p. 23)

[119] Helli (1985, p. 450); Helli (1989, p. 451); Najafi (1997, p. 101); and Yazdi (2006, p. 218)

and must appoint specific beneficiaries. This is an attempt by modern waqf regulations to minimise potential confusion in the future.[120]

The waqf object

The last section of this chapter explores the third category of players pertaining to every waqf: the object (Moqufeh). The laws of waqf regarding the waqf object remain more or less the same as with old cases, some of which have been codified. The main development has been attempts to encourage cash waqfs, which are of great importance and could potentially rejuvenate many Iranian waqfs that have stagnated. In order to be converted into a waqf, an object must meet several conditions. The main rationale behind what can or cannot be converted into a waqf is based primarily on the concept of the perpetuity of a waqf. In other words, any object that could depreciate cannot be converted into a waqf. Cases related to the object of a waqf can be divided into two categories. The first deals with issues pertaining to the ownership of properties intended to be converted, or already converted, into waqfs. The second is related to those objects that can be

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[120] Khomeini (2007, p. 74); Najafi (1997, pp. 36–7); Gozaresh-e Ejmali as Tahavolat-e Waqf va Omur-e Kheirieh dar Bist Sal-e Gozashte, Tehran (2002, p. 36). The beneficiaries of a public waqf may also be identified under the titles of "the poor", "Muslims", or "waqf of Imam Hussein". Waqf of Muslims: The founder may have specified only that the beneficiaries of his or her waqf must be Muslims, or a waqf for Muslims. In this case, anyone who is a Muslim by birth or through conversion is eligible to become a beneficiary of that waqf, even if, as Sani argues, that person does not practice his religious duties, such as saying his daily prayers or fasting during the month of Ramadan. Waqf for "the Poor": The beneficiaries of a waqf may have been specified by the founder as simply constituting "the poor". Such cases have led to certain arguments among jurists, the primary one being whether the poor need to be Muslim, or whether the category may also include non-Muslim poor. Ayattollah Najafi argues that if there are no poor Muslims to be found, then non-Muslim poor may also benefit from the waqf. Waqf for Imam Hossein: perhaps the most popular waqf in Iran today is the type set by individuals in honour of Imam Hossein ibn Ali, the third Imam of the Imami Shi'it. These waqfs are called waqfs for Imam Hossein. Khomeini defines what can be qualified as such a waqf—a waqf for Imam Hossein is effectively one that renders the passion plays and other activities during the holy month of Muhharam. This type constitutes 13.4% of all waqf revenues in Iran, which makes it single-handedly the most popular and widespread waqf throughout the country.

converted into waqfs. Discussions about these objects are very important, as they reveal certain aspects of the Islamic economy; for example, when the lending of money was banned, waqfs potentially worked as vehicles for financing the economy.

The majority of the Imami Ulama agree with Mohaqeq Helli's argument, which asserts three conditions regarding what can be converted into a waqf:

1) Only tangible goods that can be possessed (services, because they are not tangible, may not be converted into waqfs);
2) The tangible goods must not be depreciable;
3) One must be able to actually acquire the tangible goods—for example, fish in the sea or a bird in the sky cannot be converted into waqfs.[121]

As mentioned earlier, these are general guidelines as to what can and cannot be converted into a waqf. However, the haphazard nature of properties in Iran, many of which have no formal bureaucracy to look after them, means that they are often subject to various types of disputes. The following question is first and foremost:

Can only one section of a property be converted into a waqf?

This question has been the subject of much debate among jurists. The common verdict among the Imami jurists is that one can convert only one floor of a house, or just a section of a piece of property, into a waqf; the Sunni schools of law, conversely, disagree.[122] Article 55 of Iranian civil law states that the specific (exact) property is needed in order for it to be converted into a waqf.

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[121] Helli (1989, p. 443)

[122] Helli (1985, p. 451)

Furthermore, Article 67 of civil law states that those things that cannot be acquired or exchanged may not be converted into a waqf unless the beneficiary is able to take possession of them.[123]

The reasoning behind this case is that if there is no precise way of knowing the whereabouts of a property, or if the property changes, then the section converted into a waqf will change, which would violate the principle of perpetuity in a waqf. For example, land that has a river running through it will most likely change its shape over time; if the waqf portion of the land is affected by this change, then the waqf itself will be affected. Change may also be deliberate. In most cases, the heirs of the founder would like to maximise their shares of the inherited property; by altering the property's landscape, they might achieve this goal. In order to manage such cases, Article 216 of civil law states that whatever remains unknown or ambiguous may not be converted into a waqf. Hence, if in the waqf deed the exact details of the property are not provided (i.e., this part is left blank), that waqf cannot be ratified. Katouzian, however, argues that because the institution of a waqf is charitable in nature, sticking to the letter of the law is not mandatory. For example, if someone says that he has converted all of his land in a city into waqfs in order to support a certain hospital, this is sufficient as far as the law is concerned, although the founder may not know the exact extent of the properties about which he is speaking.[124]

In this case, the rationale during pre-modern times can be understood when jurists, depending on the case, either allowed one to convert, or prevented one from converting, a fraction of a property to waqf. This act could create disputes among the beneficiaries, or between the mutawalli of the waqf and the heir to the property, with respect to neighbouring properties and so forth. It seems that modern legislation has aimed at bringing this under control. However, because the act of founding a

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[123] Katouzian (2005, p. 537); Qanun Madani, Majmu'e Qavanin Owqafi (2004, p. 135)

[124] Katouzian (2005, p. 539)

waqf needs to be promoted, it also needs to be simplified. Therefore, based on what Katouzian says, not much has changed, and the haphazard nature of establishing a waqf, with its subsequent expenses to the economy, remains an on-going problem.

The second most common case is when a waqf is established through the conversion of something of which the individual is neither the owner nor the acting agent of the owner. It was noted previously that modern legislation has made it mandatory that the founder be the actual owner of the property. However, in the past, ownership of property did not carry as much weight as it does today.

Jointly held assets

The popular verdict among Imami scholars is in favour of the conversion of jointly held properties and assets into waqfs. Allameh Halli issued a fatwa indicating that those properties that have joint ownership can also be converted into waqfs.[125] The Sunni schools of law share a similar view, agreeing that a property that has joint ownership can be converted into a waqf. Article 58 of Iranian civil law allows properties that have joint ownership to be converted into waqfs.[126] There are two ways one can view these cases and their economic significance. On the one hand, founding a waqf can be done easily. On the other hand, such ease and the almost informal fashion of establishing a waqf can have a very costly economic impact on the other owners of the property. It has been indicated that by converting a property, one effectively takes that property out of the economic cycle. Therefore, the solitary action of one of the owners would end up affecting the entire property. In other words, one of the owners could use his right and convert his share of the property into a waqf and in doing so affect the economic value of the entire property. In the process, the founder

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[125] Helli (1985, p. 450); Helli (1989; p. 444); Shirvani (2006, p. 181)

[126] Qanun Madani, Dar Zemn Qavanin Owqafi (2004)

may not need to secure the permission of the other owners, which effectively shows how weak their rights have been and still are regarding the security of their private property.

A departure from what has traditionally been stated with regard to the objects that can be converted into waqfs is that, in reality, there have been many objects that did not necessarily meet the initial conditions for a waqfed object. These objects came to play a role because there was a demand for them, which the vehicle of the waqf appeared to ratify. For example, there are cases of shoes being waqfed to the pilgrims of the Imam Reza in Mashhad who lost their own. There are cases in some cities of wedding gowns and suits being waqfed to those who cannot afford them, and so forth. Another reason for these objects being waqfed has been to provide the necessary goods, labour and/ or financing required of a particular enterprise.

Immovable goods

This section investigates immovable objects. Generally, it is agreed that goods converted into waqfs must be goods that are not excluded from legal traffic and that can be the object of a valid contract. In other words, individuals must be able to take possession of them; thus, the fish in the sea or the birds in the sky may not be converted into waqfs. Additionally, the consumption or usage of these goods must be lawful; hence, no musical instruments, objects used for worship in other religions (such as crucifixes), or "impure" goods such as wine and pork are permitted. Finally, these goods must not be otherwise excluded from legal traffic (hence, they cannot be public domains or belong to waqf property). These are the general requirements that are applicable to all contracts involving the transfer of property. In addition, there are some other requirements that are specific regarding the founding of a waqf. Only physical goods (Ayn) that are clearly defined and exist at the moment that the waqf is founded can be converted into a waqf. A "debt" or "one of the houses owned by me" (in the event that the founder owns more than one house) may not validly constitute the object

of a waqf. Furthermore, the founder must be entitled to dispose of the intended object of the waqf. He cannot convert into a waqf another person's property or his own property if it has been pledged to another. A waqf must be perpetual. However, if there is controversy regarding the implications as to the object of a waqf, then it can potentially be terminated. One can categorise the criteria for those immovable goods that may be converted into a waqf as follows:

1. Movable goods related to an immovable property, such as slaves, animals and agricultural tools belonging to a rural estate[127]
2. Movable goods mentioned in certain hadith as constituting valid objects for conversion to waqfs, such as horses and weapons used for jihad
3. Movable goods that people are accustomed to dedicating as waqf, such as shovels, pickaxes and biers to be used in graveyards, copies of the Quran to be read in mosques or schools, and cooking pots to be used in public kitchens for the poor

The next category of cases has to do to with whether gold and silver can be converted into waqfs. At first glance these cases do not seem to carry much importance, at least not economically. However, further investigation and comparative work is needed in order to understand the reasons behind such cases and their importance. As mentioned earlier, when the lending of money was banned by Sharia, given the absence of banks, waqfs came to play a significant role as a financing

[127] Katouzian (2005, p. 545); Helli (1989, p. 168). This brings us to another question—what is the verdict for the byproducts of a waqf? Are the byproducts of a waqf also waqfs, or should they be treated differently? For example, are the fruits of the trees in an orchard that has been converted into a waqf also considered to be waqf property? The majority of Ulama argue that the byproducts of waqfed items and properties are also waqf. However, Sani argues that such byproducts can only be considered part of a waqf if the common knowledge of the local people confirms this. Katouzian, referring to Article 68 of civil law, states that the byproducts of a waqf belong to the waqf, unless otherwise stated—i.e., if the founder expressed his wishes in this regard in the Waqfnameh.

mechanism in Islamic countries. The main question, however, remained: can gold and silver be converted into waqfs?

The practice of instituting cash waqfs dates to the 14th century and today is used especially in Turkey and the Balkans. This type of waqf has served two different yet very important functions. First, as Cizakca notes, waqfs have traditionally been limited to immovable goods, and, as discussed earlier, one of the major motivations for establishing a waqf has been the ability to shelter wealth. Perhaps this method worked in favour of individuals who were rich not because of their assets but because of their liquid wealth—moneylenders, for example. This was one of the groups that advocated fatwas in favour of cash waqf. On the other hand, the general public also supported this type of waqf, because of the demands on the economy. As is the case in every society, in the Ottoman Empire—where the cash waqf started—there was demand for consumption loans yet no institution that provided financial services. This was because of the Islamic ban on charging interest. Hence, these waqfs served an instrumental role in the economy. In fact, it is reported that cash waqfs accounted for more than half of all new waqfs in the Ottoman Empire.[128] Finally, a further impetus to the formation of cash waqfs came from cash-rich individuals seeking to establish a steady revenue stream to finance charitable services, the expenses of which were expected to remain roughly constant; for example, schools, whose primary expense would be teachers' salaries.[129]

Cash waqfs have played a crucial role in reshaping the waqf system. They have undoubtedly limited one of the problems associated with the law of static perpetuity. They have enabled the transfer of waqf capital across economic sectors simply by redirecting loans from one set of borrowers to

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[128] Kuran (2001, p. 874)

[129] Cizakca (1995, pp. 323–37)

another. Whereas a waqf of immovables might have its capital tied up in an increasingly unproductive farm, a cash waqf's commitment to a particular sector is limited only by its loan period. That said, cash waqfs have by no means been free of operational constraints. Like the founder of an ordinary waqf, that of a cash waqf could restrict its beneficiaries and limit its charges. The restrictions imposed on a cash waqf typically reflected, in addition to the founder's personal tastes and biases, the prevailing interest rates at the time of its establishment. Over time, these could become increasingly serious barriers to a waqf's exploitation of profit opportunities. As Kuran observes, precisely because cash waqfs have been required to keep their rates fixed, only one fifth of them survived longer than a century.[130]

Part of the problem is that whereas a bank pools the deposits of many individuals, a cash waqf has typically been formed through a single individual's savings. Moreover, just as there have existed legal impediments to resource-pooling via waqfs of immovables, so it has been with cash waqfs. This has limited the size of the average loan, and probably also the size of the business enterprises that have been formed. It is true that there has been nothing to prevent borrowers from pooling capital themselves by taking loans from multiple cash waqfs. Nonetheless, borrowing is never costless, and the cost of obtaining many small loans undoubtedly exceeded that of taking an equivalent large one. There was, in fact, very little pooling on the demand side of this credit market. As Cizakca explains, insofar as cash waqfs lent to individual borrowers are concerned, they have generally involved small-scale loans to consumers rather than to businesses.[131] To evolve into a type of bank, the cash waqf would have had to overcome an additional restriction of Islamic law—its aversion to the concept of a juristic person. This did not happen. Created as a device to circumvent the Islamic law of inheritance and enhance the credibility of private property rights, both major

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[130] Kuran (2001, p. 845)

[131] Cizaka (1995, p. 324)

legal restrictions, the cash waqf was unable to transcend the anti-corporatism of the law. This anti-corporatism was rooted in early efforts to unite the nascent community of Muslims by denying all political boundaries except those separating areas inhabited by Muslims from those inhabited by unbelievers; these have been noted by both Lewis and Lambton.[132]

Few case studies deal directly with cash waqfs in Iran. That said, the outcome of the research previously discussed does shed some light on cases involving cash waqfs as well as those regarding the conversion of gold and silver into waqfs.

Conversion of silver and gold into waqfs

Gold and silver, as immovables and as goods whose use is tied to their consumption such that they will wear out with use, are technically not permitted for conversion into waqfs. However, some jurists have argued for the conversion of such goods into waqfs based on the fact that gold and silver are considered to be immovable properties. There is a divide between the verdicts of jurists with regard to this matter; whereas Sheikh Tusi is against it,[133] Allameh Helli has a more sympathetic opinion. He argues that if silver and gold are in the form of decorative objects or jewellery, then they can be converted into waqfs.[134] More recently, Ayatollah Najafi has expressed an opinion on this subject based on Allameh Halli's verdict;[135] he argues that only gold and silver that takes the form of jewellery or a decorative object—and thus does not exist in solid form—can be turned into waqfs.

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[132] Lewis (1956, pp. 97–106); Lambton (1981)

[133] Tusi (2000)

[134] Helli (1985, p. 451)

[135] Najafi (1997, p. 18)

Finally, based on Article 58 of Iranian civil law, because gold and silver retain their value and do not depreciate, they might possibly be converted into waqfs. Although this is a common practice, particularly at shrines, civil law does not express any particular view here. Perhaps the reasoning behind the argument that gold and silver in the form of objects or jewellery (rather than in coin form) is valid is related to the fact that the mutawallis were, in fact, the money-lenders; by maintaining the waqf in a another form, such as jewellery or a decorative object, it was easier to keep track of waqf properties and retain a somewhat tighter control over the lending of money.

Debates regarding whether or not cash can be converted into waqfs are not new. This issue has, in fact, been a matter of dispute among Imami Ulama from the earliest days. have all issued fatwas against this conversion. They based their arguments on a comparison between cash (in their time, gold and silver coins) and consumer goods (such as food or candles), which may not be converted into waqf. The reasoning behind this is that a waqf must be perpetual; consumption of something that had been converted into a waqf would effectively terminate the endowment.[136]

On the other hand, several fatwas have been issued by other Ulama in favour of such cash conversion waqfs. Both Shahid Avval and Allameh Helli argue that cash can be converted into a waqf under the condition that the value of the cash does not depreciate.[137] Advocating that the cash waqf become acceptable within modern legislation has been extremely important and could potentially act as a way to rejuvenate many old, abandoned and stagnated waqfs. In one very successful case, by referring to such fatwas a bill was passed by the Iranian parliament in May 1986 allowing a waqf institution the exclusive right to sell some of its assets and invest them in shares or other types of liquidities. Section 44 of Article 58 enables the waqf institution to reinvest the

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[136] Makki (1962, p. 221)

[137] Helli (1985, p. 125)

funds[138] generated from converting assets into other forms of liquidities, such as shares or bonds. Those shares of companies or bonds, however, were to be automatically converted into a waqf, and their generated revenues had to be spent in accordance with the initial wishes of the founder of the sold assets. Astan-e Qods-e Razavi, the world's largest waqf complex, supported this shift: in 2005 it owned between fifty and 100 percent of at least fifteen major enterprises throughout Iran.[139]

Concluding remarks

This chapter explored the main players involved in waqfs. For each waqf, all of these players must be present in order for a waqf to be properly established. This is due to the concept of perpetuity, which is discussed in the next chapter. A variety of cases were shown relating to each of the players in a waqf. For example, the founder can establish a waqf not only as a means of providing some sort of public good but also for a variety of other reasons, among them the prospect of circumventing the Islamic law of inheritance, or in order to shelter his wealth and escape taxation or creditors. The cases we considered illustrate the ways in which the socioeconomic rationale behind the development of such laws has functioned. Our research shows that jurists have had two initial concerns. First, they have sought to make waqfs inclusive of as many individuals as possible vis-à-vis the fabric of society. However, the rapid method of establishing a waqf made the institution vulnerable to many potential abuses. Correspondingly, the second concern evident from the cases we examined demonstrates that jurists have sought to minimise potential abuse of the system by disqualifying certain individuals. Modern civil law of Iran has mainly codified these old cases, with some scattered attempts to rationalise certain ambiguous cases in order to protect the institution. With respect to the founder, one can still exploit a waqf for reasons outside of charitable purposes. Moreover, and more importantly, it has been shown that there is a lack of cases wherein a waqf was

[138] It should be noted that even in this case these were bonds and shares, not hard currency.

[139] Kasai (2006, pp. 65–73)

established by more than one individual or by an institution. This important discovery reveals the unincorporated nature of the waqf system, which is examined in greater detail in the next chapter, where civil law claims that a waqf has a corporate personality will be considered.

In the case of beneficiaries, the founder is able to select individuals across multiple generations to become the waqf's beneficiaries in the future. Additionally, two other significant factors were addressed: first, the founder can potentially appoint beneficiaries so that, in practice, no one comes forward to use the waqf. In other words, although it seems as if there does exist a valid beneficiary, hardly anyone qualifies to use it; this constitutes another method for abusing the system. A second form of abuse occurs when, in reality, one of the primary reasons behind establishing the waqf was to preserve the family fortune by circumventing the Islamic law of inheritance. In the long run, this has often resulted in disparities and disputes among family members. The modern legal system does not necessarily add anything to these traditional cases, which have primarily concerned issues regarding who qualifies as a beneficiary, particularly with regard to later generations and as divisions proceed. However, the law encourages the founder to divide the proceeds equally between male and female descendants.

The last player in a waqf is the object. Traditionally, the object of a waqf has had to be something that would not wear out over time, so as to not violate the waqf concept of perpetuity. Furthermore, in reviewing a variety of cases it has become clear that private property laws have become interlinked with the establishment of waqfs. Moreover, this chapter demonstrated that the institution of waqf has been used as a vehicle for financing the economy. In the absence of banks and financial institutions, waqf-related gold and silver have been used as a method of financing. Finally, a recent development in the laws of waqf, which could potentially revive many stagnated waqfs, was examined. The right to sell its unwanted assets and invest the generated revenues into other

profitable businesses has been exclusively granted to Iran's largest waqf institution and has proved to be financially successful.

In short, this chapter introduced the primary players in waqf. The rationale behind the creation of the pre-modern laws that treat each of them and their eventual shift into modern civil law was also explored. The next chapter will look at the legal effects of waqf, where the legal relationship between these players will be demonstrated.

Chapter IV: Legal Effects

This chapter chronicles the legal procedures that transpire during and after the establishment of a waqf. In the previous chapter, the main players of a waqf, such as the founder and beneficiaries, as well as the waqf's object, were discussed. After establishing who can become a founder or beneficiary of a waqf, and what may or may not be eligible to be converted into a waqf, the time comes to actually form one. There are two main components to the procedure, on which this chapter focuses. The first concerns how a waqf is legally formed; the second, the manner in which the process is legally recorded. Ultimately, it is this second component, concerning the recording process, that is the main focus of this thesis. The ownership of a waqf is a matter of dispute between different Islamic schools of law and among jurists. Because a waqf does not have a legal personality, if one cannot record its owner the waqf might not be protected by law. Given the scale of this institution, ambiguities over the ownership of waqfs not only make the respective properties vulnerable to opportunists, they also hugely affect waqfs' productivity and overall performance. Finally, after establishing the shortcomings of traditional laws related to waqf ownership, and documenting the process of establishing a waqf, the modern version of waqf laws, such as they appeared in 20th-century Iran and are still in practice, are examined so as to evaluate the level of progress.

The chapter is essentially divided into two parts. The first part, which deals with the establishment of waqfs, is itself divided into two sections: the first section focuses on the importance of waqfs' verbal declarations and the weight that jurists have given them; the second section considers factors related to the production of the waqf deed, the document detailing how the endowment is to be run and operated, indefinitely, based on the founder's wishes. As the word suggests, this is a very serious document, into which much thought is invested so as to ensure that it is produced correctly.

This thesis is specifically concerned with the question of the extent to which these considerations, rules and regulations—which were set by traditional jurists over a lengthy period of time—remain relevant today. Are they compatible with Iran's modern civil law, and what impact do they have on the productivity of waqfs?

The second part of this chapter focuses solely on the issues of waqf ownership. Most Islamic schools of law argue that once a property is converted into a waqf, the owner (i.e., the founder) loses his property rights over it. However, what has become a source of dispute is the fact that not only do the schools of law disagree as to who should take ownership of the property, jurists within the same schools of law also have not been able to arrive at a unified answer. The result is that the transfer of ownership, which clearly takes place with the establishment of a waqf, cannot be recorded. Consequently, the endowment cannot be protected by the law, as its ownership remains unclear.

Focusing on the ownership of waqfs is the most important part of this thesis, as the discussion not only sheds light on the most important, yet the weakest, aspect of Islamic law regarding the protection of private property but also reveals the impact of the absence of the concept of a corporation in Islamic law. Hence, during the 20th century, when such concepts were introduced to Iranian civil law and when traditional laws on waqfs were being codified, contradictions began to appear which have been vastly neglected. However, in order to elaborate clearly on how the ownership of a waqf under traditional laws worked, and the process of its transition into civil law, a few underlying stages should be discussed. For example, whether the act of founding a waqf happens through a unilateral or bilateral contract has been the subject of much debate among jurists for centuries. The answer to that question would largely clarify the question of ownership of a waqf. However, neither of these questions has been clearly defined by jurists, which results in ownership

of waqf properties remaining unknown as well. Furthermore, in reviewing jurists' arguments regarding the waqf as a contract, it becomes clear that the concept of a corporation has been completely alien to them, even as of the late 19th century. Finally, when the laws were codified in Iran into the modern body of civil law, on the one hand waqfs maintained their traditional identity, in this case as being unincorporated; on the other hand, civil law granted waqfs corporate status. This is one of the many issues concerning the modern laws of waqf in which there exists a huge contradiction, one that legal experts have been trying to explain for some time, generally without much success.

Traditionally, jurists have advocated that a waqf needs a verbal declaration from its founder, through the pronunciation of a waqf formula, in order to correctly establish its endowment. Gradually, a written form of waqf deed was introduced. This advancement in the direction of centralising waqfs determined certain principles for both how a founder establishes a waqf and how a waqf's deed is produced. Moreover, it became very important that the deed made clear how the endowment was to be run, particularly following the founder's death. In any case, in order to secure the future of a waqf, the issue of ownership became vital. The main question for jurists has been: what happens to the ownership of a piece of property that has been converted into a waqf? This important question has remained a subject of much dispute within both traditional Islamic law and modern civil law. The case has to be dissected from the very beginning of the process of establishing a waqf. For example, the jurists must decide whether they should treat a waqf as a legal procedure similar to a will, whereby the beneficiary would not need to accept or sign a contract in order to become a beneficiary, or like a contract to which both parties must agree. Each theory has its own legal implications, which could potentially identify the rightful owner of the waqf property. Scholars have examined various elements of the process: the act of establishing a waqf; the procedures for producing the waqf's deed; the transfer of the right of usage of an endowment from

founder to beneficiaries; whether or not a waqf is a contract, and, if so, what type of contract it is; and who eventually becomes the owner of an endowment. The findings demonstrate that not only do traditional laws of waqf fail to identify what happens to the ownership of a waqf, modern civil law also fails to do so. Civil law claims to give waqfs corporate status. However, as has been shown, these same laws do not allow a waqf to act as a corporation. Therefore, the hugely important issue of waqf ownership remains disputed, and, moreover, has gone completely unnoticed.

The second set of findings sheds light on aspects of traditional laws in which there is a clear lack of cohesion. More important is that these inconsistencies not only become cohesive in the process of the codification of laws, but also, in most cases, simply enter civil law, thereby creating inconsistencies within civil law. On the one hand, for example, in considering the endowment as correctly ratified, many jurists place a great deal of weight on the verbal declaration of the waqf formula by the founder. On the other hand, there is another type of waqf, known as a Mo'atati, which refers to cases in which the verbal declaration of the waqf formula by the founder is deemed unnecessary. Similarly, there have been many arguments as to the importance of a waqf's perpetuity, from the moment of the waqf's establishment through the production of its deed, its administration, and so forth. There is even yet another type of waqf, known as a Monqateh, which allows the waqf not to be perpetual, at least for limited periods of time. These traditional cases can seem irrational in terms of present-day laws and the effectiveness of the contemporary economy. Nonetheless, all of these contradictory laws have been codified into civil law.

The third part of the chapter considers some cases that, on the surface, seem to be merely practical matters of a day-to-day nature. However, an in-depth look at these cases reveals the forces behind the evolution of the legal system. For example, much has been said about the transfer of the right of usage in a waqf. In other words, what is the correct procedure for a founder to follow, from the

moment of a waqf's founding until the designated beneficiaries begin receiving the proceeds or are able to use the endowment. Many cases deal with many particulars of individual cases. However, the underlying theme reveals the necessity of a clear procedure with respect to the contract and the transfer of ownership within the waqf system. These cases, therefore, both directly and indirectly support the arguments presented in the first two parts of the chapter.

The chapter begins with the act of founding a waqf. The focus of this section is the particularities related to the initial stages of formally establishing an endowment. The founder must be clear about his intention. More importantly, the founder must verbally declare his intention and pronounce something known as a waqf formula. The waqf formula has gone through a lengthy process of rationalisation within the framework of traditional law. The most notable development in this process has been that the waqf formula can be pronounced in Persian rather than in Arabic, which has generally been the only accepted language of Islamic law. Furthermore, even following the introduction of the waqf's written deed, the importance of the verbal declaration did not decline. Unlike most cases, in which the verbal declaration merely has ceremonial value and it is the written version that carries legal weight, with waqfs the verbal declaration stands side-by-side with its written version. This leads to a situation in which, within the traditional sphere of law (with most traditional laws simply having been codified into civil law), some laws may have been rationalised on the basis of new methods of doing things and through fatwas. However, the old methods of doing things, along with the older fatwas, have not become obsolete in the process; they also remain in practice alongside the new laws. In other words, the old and the new laws coexist in a parallel way. Lastly, traditional laws are intrinsically bound to lack cohesion. In the first section, we see that jurists have argued for the importance of waqfs having a verbal declaration. However, they also advocate for those waqfs for which the founder never verbally declared the deed. These laws, with

their contradictions, have entered into Iranian civil law without full consideration of their economic impact on the country.

The second section of the chapter examines those conditions—and the related general principles—that jurists have developed over time to act as a blueprint for founders in producing deeds for waqfs. These sets of principles and rules have had two important kinds of impacts. The first is that they have set some form of standardisation for the production of waqf deeds. This centralisation makes producing, reading and following the directions for producing a waqf deed easy. The style of writing of a waqf's deed can change and become subjected to regional customs/laws in addition to those related to the era during which the waqf was established. The second set of findings is related to the practical and economic implications of those rules and regulations on Waqfnamehs. We discover that some of the principles that were imposed by the jurists with respect to waqf deeds have had a stagnating effect on the performance of waqfs. Furthermore, these rules and directions have simply been codified into the body of Iranian civil law. As a result, in Iran the modern laws of waqf have not only failed to modernise the traditional laws but, more importantly, they also have resulted in contradictory laws within civil law. The main principles that one has to follow in producing a Waqfnameh are related to the perpetuity, irrevocability and immediacy of the waqf being established. For example, after a waqf is established its mission cannot change. This has come at a great cost, as new needs and immediate demands can no longer be added to already-established waqfs. On the one hand, civil law gives a waqf a legal personality; on the other hand, it does not allow the institution to alter its mission if it should prove necessary. This is one very clear example of how poorly the process of codification of traditional waqf laws into civil law has been carried out.

The third section of this chapter examines waqf ownership. There are two other aspects that the reader must understand before tackling the matter of ownership. First, jurists have had to consider many cases related to the transfer of the right of usage. The founder might refuse to allow, or express apprehension about allowing, beneficiaries to use an endowment, or about handing the waqf over to them at all. These cases have initiated debates as to what happens to the ownership of a waqf. In order to answer this question regarding waqf ownership, there is yet another aspect that must be considered, which is how a waqf works as a contract. Jurists accept that a waqf is a contract. However, the type of that contract, which results in identifying the rightful owner of the waqf, remains disputed. Iranian civil law has attempted to solve this long-term dispute by giving the waqf a legal personality. However, in practice a waqf can never exercise that legal personality. Too many laws prevent the waqf from exercising the latitude that modern institutions enjoy.

Finally, cases will be presented in which the transfer of the right of usage and the perpetuity of the waqf have been discussed. The importance of these cases is that, first, they contribute to an understanding of the peculiar nature of waqfs. Second, they demonstrate that a waqf's perpetuity, one of the most important pillars of a waqf, can be broken through traditional law by applying the concept of momentary waqfs. This contradictory system, which in practice became inevitable, was not addressed and rationalised through the codification of relevant laws but was incorporated into civil law without significant modification, resulting in laws that either do not make sense or contradict other legislation.

The act of establishing a waqf

Most Islamic schools of law mention the four main pillars of waqfs. These pillars are the founder, the beneficiary, the object and the act of founding a waqf. This section explores the final pillar: the act of founding a waqf. The general rule of thumb regarding the declaration of intent, according to

most schools of law, implies that if the wording of the declaration is obvious and unambiguous (Sarih), the declaration alone is constitutive; otherwise—i.e., if the declaration is indirect (kenayeh)—circumstantial evidence that reflects the intent of the founder of the waqf is required. This might include, for example, additional phrases, such as "it shall not be sold, given away or inherited". This declaration would normally be recorded in a document known as the waqf deed (the Waqfnameh). It is important that we do not confuse the verbal declaration (Siqeh waqf) with the waqf deed, a document that essentially works as user's guide. The waqf deed and its conditions will be covered later in this chapter.

Article 56 of Iranian civil law states that a waqf can be established by the founder with whatever terminology or expressions provide an understanding of his desire in creating that waqf. Furthermore, the acceptance of the first generation of the waqf's beneficiaries is needed for the establishment of a waqf.[140] Evidently, civil law eliminates the need for using Arabic terminologies generally associated with the waqf formula; all that is needed is verbal usage of the word "waqf". This verdict reflects a long process. One of the most recent and most influential fatwas is that of Ayatollah Khomeini, who argued that all that is needed for a founder to convert his property into a waqf is his verbal declaration that "this property is a waqf".[141] This is an over-simplified way of concluding a legal transaction in this day and age. For example, in the previous chapter cases in which someone mistakenly or deliberately converted someone else's property into a waqf were reviewed. One would anticipate that there should be some precautionary measures taken in order to prevent such mistakes and loopholes. However, the method that Ayatollah Khomeini advocates, though making it incredibly easy to establish a waqf, opens the door to many potential problems and to exploitation of the system. We have already noted the many reasons whereby one could

[140] Forouzesh (2007, p. 134)

[141] Khomeini (2007, p. 62)

abuse the waqf system. Furthermore, as will be covered later, the act of founding a waqf must be immediate; in other words, the waqf is formed immediately after the founder's verbal declaration. The problem is that once one establishes an institution intended to be perpetual, everything related to that institution becomes irrevocable and irreversible, as the waqf principle suggests. One would imagine that a more comprehensive method is needed in order to set things in order.

Regarding the establishment of a waqf, and in particular the importance of the verbal declaration (the Siqeh waqf), jurists' records date as early as the 13th century. Sheikh-e Tusi argues that, first and foremost, the founder must have a genuine interest in founding a waqf. Furthermore, he only accepts those waqf formulas in which the word "waqf" has been stated. Finally, he considers that the only proper method of establishing a waqf is via verbal declaration, perhaps in opposition to the written form. In the traditional style, whereby jurists refer to fatwas from previous jurists that are similar to theirs, Tusi argues that the word waqf must be specifically pronounced; otherwise, there is the possibility of confusion as to whether the endowment is actually a Sadaqeh (alms) or a waqf. In order to avoid this, the founder should clearly state that his intention is to establish a waqf, not to pay alms.[142] Most important here is that although on the surface waqfs and Sadaqehs appear to be very similar, their legal parameters are quite different. Most notably, waqfs and Sadaqehs differ in terms of ownership. With a Sadaqeh, the beneficiary becomes the owner of the endowed object, whereas with a waqf ownership is often a matter of dispute. As mentioned earlier, the institution of waqf has played a significant role in protecting private property, whether through sheltering wealth or circumventing the law of inheritance. Therefore, one can imagine how important it must have been for the founders of waqfs to ensure that they did not mistakenly transfer ownership of their properties to others.

[142] Tusi (1996, pp. 228–29)

The verbal declaration of a waqf traditionally had been stated in Arabic, like all other contracts in Iran that potentially involve religion—for example a marriage or the founding of a mosque. Making a founder first declare something verbally, perhaps not in his or her own language, has proven to cause much confusion and unfavourable outcomes. For example, Mohaqeq Helli, who also advocates for the importance of a verbal declaration by the founder, argues that the word "waqf" must be stated by the founder in the waqf formula. Moreover, he emphasises very explicitly that only the word "waqf" must be used, and not any of its synonyms, such as Habs (meaning to lock or imprison). He bases his argument on the fact that many deeds, such as those related to the paying of alms (Sadaqeh) or Islamic tax (Zakat), share similar terminology with those related to waqfs. In order to avoid confusion, it is, therefore, vital to use the word "waqf" and nothing else.[143]

The apparent confusion and mistakes finally led jurists such as Ayatollah Tabatabai to issue fatwas eliminating the use of Arabic from the waqf formula. He argues that, whatever the method and terminology indicating the founder's wish to establish a waqf, it is valid. He continues by stating that the nature of the endowment itself and local knowledge of it are sufficient reasons for accepting the validity of a waqf. He does not see any reason why a Persian-speaking Iranian pronouncing an Arabic word should play such a vital role in the establishment of an endowment. Furthermore, he argues that the potential confusions between waqf, Sadaqeh and Zakat would be eliminated if the Persian terminology was used instead of the Arabic terminology.[144] That is, perhaps, the reason Ayatollah Khomeini tried to simplify the situation further by stating that all that is needed for a founder to convert his property into a waqf is the verbal declaration, "this property is a waqf".[145] It

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[143] Shirvani (2006, p. 164)

[144] Yazdi (2006, p. 184); Najafi (1997, p. 57). We should note that, at almost the same time, some of the Ulamas suggested that perhaps a verbal declaration is not as important as some of their predecessors had indicated. For example, Sheikh Mohammad Hassan Najafi, unlike Helli and Tusi, is not as concerned about the true wishes of the founder with respect to formally ratifying a waqf.

[145] Khomeini (2007, p. 62)

is evident that Iranian civil law has also been influenced by this development, as there is no mention of the need to use any specific Arabic phrase. However, the word "waqf" must be explicitly stated in the formula. This may be the only example we find in which traditional laws, prior to their codification into civil law, had already been rationalised by jurists.

Mo'atati waqf (a waqf without a formula)

The importance of this type of waqf is that it can be viewed as an attempt to centralise the establishment of waqfs. However, there are exceptions to this rule. In exceptional cases, a waqf can be founded through acts that imply intention. If, for instance, a person builds a mosque and allows other people to pray there, or if he establishes a graveyard and lets other people bury their dead there, this is regarded as tantamount to founding a waqf. That is, certain acts are by custom regarded as an expression of the intent to perform a certain legal act. This type of waqf is known as a Mo'atati. Certain stipulations are regarded as contrary to the essential characteristics of a waqf, such that their inclusion would make a waqf null and void. Some such stipulations have already been discussed: waqfs dedicated to an unlawful aim, or for which the founder is designated as beneficiary.

Mo'atatis have generally referred to already-established waqfs with which jurists have had to contend. In some cases, jurists noticed a need to centralise certain waqf laws; at the same time, they could not simply call for excising waqfs that did not necessarily comply with the new conditions.

The importance of the verbal declaration is obvious. However, the question remains: if someone initiated an act to have his property converted into a waqf, is doing so sufficient so as to legitimately consider that property a waqf? Or must the waqf formula be pronounced in order for a waqf to be formed? Allameh Helli argues that a waqf is only established with the pronunciation of

the word “waqf”. Therefore, a Mo’atati waqf is similar to a mosque that only becomes a mosque once the mosque formula is pronounced. The same argument applies to graveyards. The fact that someone is buried in a place does not mean that that place automatically becomes a graveyard; it only becomes a graveyard when the proper formula is read. Historically, this was logical in order to protect private property from potential abuses. However, jurists later declared that some forms of waqfs do not need a verbal declaration. For example, Ayatollah Yazdi, in addressing the verdict of earlier jurists, advocated for the importance of a verbal declaration by the founder himself. However, there are exceptions when it comes to mosques. Because most mosques are built without a formula being pronounced, he argued that they should be considered exceptions. He then argues that in some cases, such as the construction of mosques, bridges and orchards, when the resulting product is to shelter or feed the poor, pronouncing a waqf formula is not vital.[146] Similarly, Ayatollah Khomeini argued that if a waqf is a public one and is providing a service to the public—such as mosques, roads, bridges and trees (in public places)—then whether or not the waqf formula is pronounced is unimportant. He argues that the only crucial consideration is whether the founder wishes to build a building for the purpose of, say, constituting a mosque.[147] Finally, Moqineh also makes an exception for mosques, which, he argues, can be built without a formula.

Iranian civil law (in Article 65) has made it very clear that a waqf is only properly ratified through a verbal declaration by its founder. Much effort has been made to centralise the initial stages of the establishment of a waqf. However, there are still exceptions; for example, public goods from which the public might benefit can potentially be converted into waqfs without initial verbal declaration. The initial problem, which was to minimise potential violations of private property, decreases with

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[146] Yazdi (2002, pp. 184–85)

[147] Khomeini (2007, p. 63)

this step. However, the problem remains with such cases as mosques, as well as, potentially, with certain public goods, as was addressed by Ayatollah Khomeini.

Conditions for producing a waqf deed (a Waqfnameh)

This chapter explores waqf documentation. The issue of the waqf's deed shall be addressed first. This is a crucial document, forming the basis upon which the waqf will operate indefinitely. The aim here is to illustrate how the manual for this institution is produced based on Islamic law, a process that subsequently has been codified into civil law. The flexibility (or inflexibility) of this document is also a matter of importance. This document allows a waqf to embark on new means of production, technology and demand as time moves on—or prevents it from doing so.

In the process of establishing a waqf, the first step is the verbal declaration, or Siqeh waqf, which the founder should pronounce. The second step is the waqf deed, or Waqfnameh. This document effectively constitutes a manual for the running of the waqf. The beneficiaries, administrator and manner of the endowment's operation are documented, often in extreme detail. The instructions stated by the founder in the Waqfnameh are essentially considered to be law in terms of the waqf's operation, likewise with respect to any potential disputes. However, there are some principles to which the founder must abide in producing a waqf deed. This concept has been referred to as "perpetuity" on many occasions throughout this thesis. Another set of conditions that must be taken into account is the subject of this section of the chapter. Thus, there are three main conditions that the founder must follow: the waqf's irrevocability, perpetuity and compulsion. The importance of understanding these conditions is that they provide the background to the next part of the chapter, concerning the ownership of a waqf.

Two principles must be considered when a waqf is founded. The first is the immediate effect of the act of founding a waqf (Tanjiz); the second is a waqf's perpetual character. The Imami Islamic schools of law agree that founding a waqf such that it only becomes effective at a future point in time, or in such a way as to make it dependent on an uncertain condition (Moallaq), renders the act void. However, there is an exception to this rule: almost all jurists allow a person to found a waqf by testament, becoming effective upon his death. Such an act is governed by the rules of testament (Vassiat). In any event, any stipulation that the waqf was founded for a limited period of time—or with the condition that the founder may revoke, sell or give away the waqf property—is considered by all jurists to be contrary to the required principle of the waqf's perpetuity, invalidating its founding.

The first of these sets of conditions is the waqf's irrevocability. The decision to establish a waqf is an irrevocable one. This is a statement with which almost all Imami Ulama agree.[148] Following such rules makes dealing with the affairs of a waqf very difficult. One can think of many small yet important details that may have been left out of the waqf's deed and can no longer be implemented into the waqf after its founding. Moreover, as was mentioned in the previous chapter, there are waqfs that have been established by a founder who was not the actual owner of the converted property. According to this principle, such waqfs can no longer be terminated, particularly if time has passed and the waqf is already fully established. Finally, this causes significant restrictions on the administration of a waqf. We look at this in greater depth in the next chapter. For now, it suffices to note that future generations may no longer be able to deploy new means of production, updated managerial skills, and so forth, in order to maximise a waqf's utility. These limitations have had an impact on those involved with waqfs, who have subsequently pressured the jurists to write fatwas allowing for greater flexibility with deeds. The jurists did not change or remove the principle of

[148] Tusi (1996, pp. 226–27); Daneshpajouh (1992, pp. 442–43) ; Helli (1985, p. 446); Shirvani (2006, p. 166); Karaki (1998, pp. 58–9); Najafi (1997; p. 88); Daneshpajoush (1990, p. 137)

irrevocability. However, they did issue fatwas that, in some cases, allowed for the manipulation of waqfs. The result has been that these cases, which were intended as exceptions, provided the basis for loopholes in the waqf laws, paving the way for alterations and abuses.

The first of these cases comes from Sheikh-e Mofid, who contends that waqfs are part of those types of alms that are irrevocable. However, he continues, there are exceptions to this rule. For example, a waqf could be damaged in cases for which Sharia forbids aid of a beneficiary, or in cases accepting certain beneficiaries.[149] Mofid argues that when the founder converts his property into a waqf, his decision is irrevocable. He cannot change the mission of the waqf or anything related to it. (What comes next most likely comes from a particular case, with which he dealt in a very informal way). However, the founder might, at the time of the waqf's establishment, insert certain clauses, stipulating, for example, that if the founder, during his lifetime, needed to have access to the revenue of the waqf or even to sell the endowment; following his death the beneficiary cannot sell the waqf or lease it. Moreover, the beneficiaries cannot change anything related to that waqf, unless it is being destroyed and no one (i.e., neither the ruling king nor religious magistrate) is in charge of or has paid attention to its conditions so as to repair it; in this case, the beneficiary can sell the property and enjoy the revenue generated from that sale.[150] This fatwa was most likely derived from a rather small case handled by the jurists. One can see that the waqf property had been abandoned, and there was no hope that it would ever be resurrected. In this case, the jurists issued a fatwa that the heirs to the founder could sell the waqf property and divide the revenue between them, just as they would their inheritance money. The fatwa begins with a very clear statement indicating that the founder cannot change the mission of the waqf; neither can he sell or lease the property. However, the next section contains a complete shift, defining a case whereby, if there is

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[149] Tabrizi (1999, p. 18)

[150] Ibid, p. 187

no one to care for the property, that waqf can essentially be terminated and sold and the revenues divided between the founder's heirs, just as with any inheritance money. Such fatwas have paved the way for families to consciously neglect waqf properties converted by their male heads, thus causing the property to become completely dilapidated; fatwas could then be issued, such as the one cited, in order to terminate the waqf and sell the property. The outcome is that, first, the waqf is unable to provide a sustainable service as was initially anticipated. Additionally, the fatwa opens the door for those heirs who were unhappy with their father's decision to convert assets they would have inherited into a waqf; now they can simply neglect the property, allow it to become dilapidated, and then try to sell it. Both of these outcomes do not favour positive economic development. The resources stagnate by virtue of letting the property go beyond the possibility of repair; additionally, the anticipated services from the waqf are not generated. These fatwas remain valid, and little has been added by civil law in order to add modern interpretations that align with Iran's contemporary needs.[151]

Another fatwa not only confirms what has already been stated but also highlights the issue of waqf ownership. Ayatollah Yazdi claimed that once a waqf is established, the founder loses all of his rights to his property. However, if clauses have been inserted in the waqf's deed with respect to beneficiaries, then the founder can interfere with the waqf's affairs. For example, if the beneficiary of a waqf was to be poor in order to be eligible, and, at a later point in time, the individual is no longer qualified in this respect, the founder can interfere in the waqf's affairs. Such exceptions do

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[151] The second jurist to issue fatwas in this regard was Allameh Helli (1985, p. 446). He tells the story of a man named Abdollah-ibn-Zeid, who gave away his house as alms and appointed the Prophet Mohammad as its mutawalli. Sometime later, Abdollah's parents went to the Prophet and explained to him that the house has been the only thing they had owned. The Prophet returned the house to them, and ultimately the parents inherited the house. Helli explains that such cases exist, but that they are exceptions derived from the Prophet's tradition, whereby he indicated that the founder could not retain possession of his wealth. Evidently, Helli's fatwa also derives from the mounting pressure to allow waqfs to become revocable. Therefore, he makes some exceptions by referring to the hadith.

not, however, represent a change to the waqf's mission but rather to the beneficiary.[152] There are also hadith confirming that after the establishment of a waqf, the founder loses his ownership rights over it. For example, a hadith from Jafar Ibn Mohammad, the sixth Shi'ite imam, states that, according to the Prophet Mohammad, anyone who donates alms and wants to have them returned is like someone who eats his own vomit.[153] Another hadith, again from the sixth imam, states that anyone who donates alms in order to become closer to God should make his donation to the poor and that he or she cannot revoke this donation.[154] This is probably the first instance in which the issue of transfer of ownership of a waqf is mentioned. Based on this hadith, the founder, upon establishing a waqf, loses his rights, inclusive of his rights of ownership of the waqf property. Therefore, with the establishment of a waqf a transfer of ownership takes place. Yazdi does not elaborate in this fatwa regarding what happens to the ownership of the waqf, but he has issued several other fatwas in this regard. If we consider a fatwa issued by Mofid, we can recognise the important factor here, which is that the beneficiaries (i.e., the founder's heirs) could ultimately claim ownership of the waqf through a loophole whereby the founder's heirs are able to terminate the waqf. Therefore, one can conclude that, based on these two fatwas, ownership of waqfed properties effectively transfers from founders to beneficiaries. However, as we shall see, the issue of waqf ownership is much more complicated than this.

The three main principles

The three sets of principles that every waqf—and, therefore, every waqf deed—must follow are Elzam, Tanjiz and Ta'bid. These three sets of rules may be considered compulsory, irrevocable and perpetual. In other words, the Waqfnameh must be produced in a manner that does not allow for any

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[152] Yazdi (2002, pp. 191–92)

[153] Tabresi (1989, p. 513)

[154] Ibid.

possibility that the waqf might be revoked or lose its perpetuity based on the manner of its production. We examine each of these principles here.

The first is Elzam, which essentially means that a waqf's deed cannot include any clauses that violate the principle of perpetuity. With regard to this case, both Shahid Sani and Allameh Helli argue that the founder cannot insert any new clauses into the Waqfnameh that would enable him to alter the waqf or to manipulate it in the future; converting something into a waqf means giving up respective property rights completely for the benefit of the designated beneficiaries and God.[155] In other words, the waqf mission, according to their respective fatwas, cannot be changed, manipulated or altered. The most obvious problem with such a strict system is that the waqf cannot change according to evolving needs over time. For example, the Carvansaries, which are no longer used and are located on old trading and pilgrimage routes, cannot be converted into restaurants or hotels that would fit the needs of contemporary society.[156] Similarly, an apple orchard converted into a waqf in the 18th century must remain exactly the same apple orchard in the 21st century, even if that orchard now exists in the middle of an urban area where it may no longer be justifiable to grow apples or use the land in an agricultural manner.

Fatwas have also been issued that contradict the above fatwas to a degree. Although jurists began advocating for fatwas in which no changes to waqfs were allowed, in practice this proved to be impractical. Hence, there are fatwas in which the concept of Tanjiz has been challenged. For example, Tusi argues that if the founder includes clauses in the Waqfnameh indicating such, in case of need he may spend the waqf revenues on himself. Moreover, if, prior to taking recourse to the

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[155] Shirvani (2006, pp. 171–72); Helli (1985, p. 454)

[156] There are many exceptions to this rule. For example, the Abbasi Hotel in Isfahan is actually an ancient waqf that was successfully converted into a hotel. However, in practice, for the majority of the cases nothing has changed, resulting in the stagnation of significant resources.

waqf he should die, then his heir will inherit his wealth.[157] Other Ulama may not go as far as Tusi, but the majority agree that, if the founder loses his prosperity, then he may terminate the waqf and use its resources. Perhaps it would make sense for the Ulama to allow the founder to include himself among the beneficiaries (which he may not) rather than to terminate the waqf. By enabling the founder to terminate the waqf in the event that he becomes poor, two sets of problems arise. One is that this stipulation contradicts the principles of waqf, particularly that of perpetuity, which paves the way for all sorts of tricks that the founder might employ if he no longer wishes to have a waqf—for example, the founder can now terminate the waqf by simply pretending that he is poor. Furthermore, the termination of a waqf includes no contingency plan for the beneficiaries, the recipients of the waqf's services, who are now left empty-handed.

In the most contemporary opinion on this matter, Ayatollah Khomeini argues that it is better not to reclaim the waqf's property under any circumstances. However, if the founder dies in poverty, then his heir will inherit the waqf.[158] We will return to this fatwa again, as this is another case for which the fatwas are not coherent and create serious confusion concerning the waqf's ownership. There are no particular discussions related to Elzam in Iranian civil law. Therefore, potentially, one can insert conditions in order to be able to revoke a waqf in the future.

The second principle is Tanjiz. This principle enforces the idea that the act of founding a waqf cannot become conditional with respect to the occurrence of another event. For example, the

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[157] Tusi (2006, pp. 595–96)

[158] Khomeini (2007, p. 67)

founder cannot say, “if my son returns safely from his journey, then I will waqf my house” or “from the beginning of the next month, I will call my property a waqf”.[159]

The main question here is, can someone write in his will that he wants to convert a property into a waqf after his or her death? Previously, I mentioned testimonial waqfs. Here, I present jurists’ views from both the Imami and the Sunni schools of law. Mohaqeq Sani argues that one cannot convert something into a waqf in a will; he does argue, however, that this can happen if the founder dies. For example, the founder cannot set a condition such that “if I die (because he may not die), my property will become a waqf”. However, he could write, “when I die, my property will become a waqf”.[160] Ayatollah Khomeini’s view is that if the words of the founder are interpreted so as to indicate that he had desired to establish a waqf, then after his death his property will be converted into a waqf.[161] Katouzian elaborates on this matter with his interpretation of Iranian civil law: in the event that one included in his will the intention to establish a waqf, the founder only has a right to one-third of his property, what is effectively his testimonial power. Should the founder wish to convert a larger share of his wealth into a waqf, he must do so during his lifetime.[162] This is a situation in which civil law has attempted to rationalise the process.

Examining Ayatollah Khomeini’s fatwa more closely, it becomes apparent that it can be interpreted in a very subjective manner. He states that “if it is interpreted from the words of the founder that he

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[159] Helli (1985, p. 452); Helli (1989, pp. 168–69); Khomeini (2007, p. 67); Yazdi (2002, p. 196) Helli argues that if this condition has been met and the founder is aware of it the waqf is automatically ratified. Shahid Sani In this vein, both Ayatollah Yazdi and Ayatollah Khomeini suggest that if the founder sets a condition at the time of the establishment of a waqf, the waqf has been ratified correctly regardless of whether, later on, the founder is aware of the condition being met or not. In other words, a waqf cannot be subjected to any conditions, even if a condition was put in the Waqfnameh.

[160] Moqnieh (2002, p. 592)

[161] Khomeni (2007, p. 67)

[162] Katouzian (2005, pp. 482–83)

had desired to establish a waqf, then after his death, his property will be converted into a waqf". This principle can be applied in a very subjective manner; additionally, he provides no detail as to whether he means that the entire property can be converted into a waqf, or only a portion of it. Furthermore, both the Ulama and civil law have neglected here the issue of the verbal declaration of a waqf. All place great importance on pronouncing the verbal declaration in order to formally establish a waqf. Yet, once a prospective founder is dead, how is this possible? This is one of many issues pertaining to waqfs; despite the fact that civil law has somewhat rationalised the situation, with respect to the bigger picture, many shortcomings remain. Additionally, the fact that the founding of a waqf may not condition the establishment of the waqf to a potential event means that, in practice, the scope of services each institution can provide is limited. For example, one cannot establish provisional waqfs for natural disasters such as earthquakes, floods, and the like.

The transfer of the right of usage (I)

Based on the concept of Tanjiz, a waqf must be established immediately. However, in reality the process a founder must follow in order to allow his or her beneficiaries to use a waqf may take some time. The founder might create a series of excuses to prevent the use of premises by anyone; essentially, the entire waqf comes to act as a front. This situation has generated a number of fatwas and has also initiated a series of interesting legal debates.

There are a few points of view concerning this issue. The Imami Ulama hold that, in a manner analogous to gifts, a waqf is not binding or irrevocable until the property has actually been transferred to the beneficiaries or administrator. If, prior to that, the founder should die or lose his right of disposal over the property as a result of bankruptcy or serious illness, the waqf is rendered void. Regarding public utilities, the transfer of property is assumed to have taken place as soon as a

founder permits the public to use them. In this case, however, the requirement set by the Imami jurists is that the property be handed over to an administrator.

This process is the subject of some dispute (as will be discussed in the next chapter, the founder can take the position of administrator of the endowment). Those who do not require a transfer of the property argue that the aforementioned hadith of Ammar does not state the transfer as a condition, and that the founding of a waqf is more like the freeing of a slave (an act that does not require such a transfer) than the giving of a gift. In other words, it is a unilateral act on the part of the founder only, not a reciprocal act involving a consensus between founder and beneficiaries. The second set of arguments maintains that a waqf is, in fact, a bilateral transaction, one that requires the agreement of the beneficiaries in addition to the wishes of founder. A difference of opinion also exists regarding the question of whether the irrevocability of a waqf requires that the immediate beneficiaries (if they are specified) accept their rights as such. In an attempt to weave together the fragmented legal pieces related to waqfs and align them with Iran's modern laws, civil law holds that, in a manner analogous to bequests, a waqf is only binding and irrevocable after the immediate beneficiaries have accepted it. The beneficiaries, in acquiring their right following the waqf's founding, do not need to formally accept to become beneficiaries. They may reject it, meaning that they consequently forfeit their rights. We will examine later in this chapter whether the act of founding a waqf constitutes a unilateral or bilateral decision, as this provides the basis for waqf ownership.

The final condition is the so-called Ta'bid, or condition of perpetuity. This means that the waqf deed produced by the founder cannot contain terms, conditions or any other language that would result in termination of the waqf. The majority of the Ulama tackle this issue from the point of view of the beneficiaries. Here, the Ulama are almost unanimous in their opinion. Tusi argues that you cannot

appoint distinct beneficiaries.[163] Mohaqeq Helli and Allameh Helli both argue that a waqf should have a beneficiary who reflects continuity. It is not right for beneficiaries to be designated on a momentary basis.[164] This means, for example, that one can appoint "the poor" as a beneficiary as, presumably, there will always be poor people. However, one cannot appoint the victims of an earthquake as the beneficiaries of a waqf. This is because said victims would only temporarily qualify as beneficiaries. Furthermore, because earthquakes in general, are few and far between, the waqf could potentially become without a beneficiary, which would revoke its perpetuity. However, in practice there must have been waqfs established for these purposes. There is a fatwa issued by Mohaqeq Helli in which he argues that in such cases, the heir to the founder will inherit the waqf.[165]

Based on Iranian civil law, Katouzian maintains that a waqf must be permanent. If someone establishes a waqf based on the revenues of a property for a designated purpose and places a time limit on that, from a legal perspective it cannot be considered a waqf.[166] We should not forget that the perpetuity of a waqf is bound to the existence of the object of the waqf and its beneficiaries. How can a waqf maintain its perpetuity if either the object or the beneficiaries are terminated? This is a significant question, the resolution of which I shall attempt in the following sections of this chapter.

The practical conditions for producing a Waqfnameh

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[163] Tusi (1996, p. 231)

[164] Helli (1985, p. 453)

[165] Helli (1989, pp. 448–49)

[166] Katouzian (2007, pp. 454–55)

The second part of our discussion is dedicated to those rules and conditions related to producing a Waqfnameh. In the first section, we covered the principles in a more theoretical way; in this part, we consider the more practical aspects.

A Waqfnameh should have certain characteristics that make it free from ambiguities and provide sufficient instructions to permit the smooth operation of the waqf. The first important stipulation, agreed to by all schools of law, is that the Waqfnameh must contain a statement describing the exact nature of the activities envisaged by the founder. In other words, a waqf, much like a modern establishment, needs to have a clear mission statement. Allameh Helli argues that the usage and the purpose of the waqf must be stated in the Waqfnameh, otherwise the waqf is not valid. He continues by stating that a waqf is similar to a transfer of ownership or the revenues generated by it assets. His argument is that establishing a waqf is akin to selling a house, and one cannot sell a house without having a buyer and a set price (although it can be said that this represents more the case for having a beneficiary, not how the beneficiary should benefit from the waqf).[167] Mohaqeq Sani argues that not specifying the waqf's usage undermines one of the important pillars of a waqf, the beneficiaries. Thus, the usage of a waqf must be stated in advance.[168]

Ayatollah Khomeini highlights three cases according to which the waqf's mission must be clearly indicated. He supports his argument by citing examples for each case. The first is when the beneficiaries are Ulama or "the poor". In this case, the Ulama, or "the poor", who share similarities (i.e., many Ulama are poor), would become the beneficiaries. The second is when the beneficiaries are not specified (they could be the poor from a particular city or from a mosque in another town). In this case, the benefits will go to one of the two on the basis of drawing lots. The third is when

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[167] Helli (1985, p. 457)

[168] Helli (1989, p. 816)

there is no way of knowing the waqf's usage or of having any knowledge about the beneficiaries. In this case, the magistrate must spend the respective waqf revenues as alms.[169] These are likely cases that had been presented to him and which he found difficult to judge, primarily because the Waqfnamehs were not sufficiently specific.

Based on Iranian civil law, Katouzian maintains that a waqf must be permanent. If someone establishes a waqf based on the revenues of a property for a designated purpose and places a time limit on that, from a legal perspective, it cannot be considered a waqf.[170] We should not forget that the perpetuity of a waqf is bound to the existence of the object of the waqf and its beneficiaries. How can a waqf maintain its perpetuity if either the object or the beneficiaries are terminated? This is a significant question, the resolution of which we shall attempt in the following sections of this chapter.

Finally, according to article 71 of Iran's civil law, a waqf must have a clear beneficiary. A public waqf with an unclear beneficiary can cause confusion as to whom should ultimately benefit from it. However, in cases where the understanding is that the waqf's revenues should render charitable functions, the law states that if the beneficiaries of a waqf are unclear, and the waqf's revenues could support and promote Islamic instruction and the restoration of old waqfs, then said revenues will render such activities under the supervision of the waqf organisation. Katouzian argues that although the law has not specified whether this will be the case for both types of waqf, the argument most definitely stands with respect to public waqfs. After a waqf's usage is determined, selecting the beneficiaries is easy.[171] In this case, civil law primarily targets older waqfs that might not have

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[169] Khomeini (2007, pp. 74–5)

[170] Katouzian (2007, pp. 454–55)

[171] Katouzian (2005, pp. 533–35)

been established in alignment with contemporary standards. Moreover, for those waqfs currently being established, the law provides clear instructions concerning how to produce Waqfnamehs. The rules for producing Waqfnamehs are as follows:

A Waqfnameh must be produced in keeping with certain standards. In other words, there are certain clauses and conditions that can and cannot be placed in a Waqfnameh. These clauses and conditions can be divided into two types:

First are the clauses that can be contradictory to a waqf's mission. Needless to say, these clauses should be avoided. Nevertheless, in practice, such conditions, whether deliberately or not, sometimes are placed in Waqfnamehs. Second are those clauses in which the explicit directions for running the waqf and spending its revenue, or concerning the conditions pertaining to beneficiaries and so forth, are stated.

Most jurists have issued fatwas dealing with such matters. Among the Imami jurists, Shahid Sani argues that the founder can put a clause in the Waqfnameh allowing him to sell the waqf's property at a later date.[172] The sale of a waqfed property is something we will explore in the next chapter. However, jurists have failed to agree on a united verdict regarding what can and cannot be put included in a waqf deed. Some of these statements clearly violate the concept of perpetuity, which they themselves have advocated.

The main arguments and discussions involve the following question: what is the verdict if the mission of a waqf is incompatible with holy Sharia law? Ayatollah Khomeini argues that clauses in a Waqfnameh must not contradict the waqf's mission, even if the mission is not fully compatible

[172] Sani (2007, pp. 871–72)

with Sharia.[173] What happens, for instance, if someone converts his house into a waqf for drug addicts, but at the same time allows the addicts residing there to consume alcohol or drugs? More broadly speaking, must the waqf be terminated, or must the clause in the Waqfnameh allowing the consumption of alcohol and drugs be removed from the Waqfnameh? Mohaqeq Helli argues that any clauses in a Waqfnameh that do not contradict the mission of a waqf and are also compatible with Sharia law can be inserted into a Waqfnameh.[174]

Allameh Helli states that any conditions compatible with Sharia and which do not contradict the waqf's mission must be met. However, these conditions must have been stated in the Waqfnameh. Therefore, the founder may not add a condition to the Waqfnameh after it has been ratified. Likewise, the founder cannot exclude any of the already-stated beneficiaries from his waqf. However, he does have the power to add beneficiaries, even after the Waqfnameh has been ratified.[175] Additionally, if the founder adds a condition concerning a school that belongs to a religious sect, this condition must be met as well.

Ayatollah Khomeini argues that the founder cannot include himself directly among the beneficiaries of a waqf (i.e., a private waqf) that he has established. For example, he cannot say: "I waqf this farm in order that its revenues should pay my debts". However, he can appoint his family members to receive the same revenues. He continues that the family of the founder can be the beneficiary, but the founder cannot expect to transfer all of his financial responsibilities to his family in connection with the private waqf that he has established for them.[176] Yet again, all of these examples reflect specific cases in which jurists have issued fatwas in order to resolve the related situation.

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[173] Khomeini (2007, p. 67)

[174] Sani (2007, p. 815)

[175] Helli (1985, p. 452)

[176] Khomeini (2007, p. 68)

Another common question is, can the founder insert a clause in the Waqfnameh whereby, if he becomes poor later in life, he could then take recourse to the waqfed property? The majority of Ulama argue that, in this case, the founder can terminate the waqf and take recourse to the property. Another issue that arises is, if the founder dies, depending on whether his heirs are rich or poor, should the waqf be kept or terminated?[177] We have discussed similar cases: potentially, a founder can terminate his or her waqf by claiming (or pretending) that he is very poor.

What all of these jurists fail to address is how a waqf should function when contradictory aspects exist in the mission statement? The biggest issue is perhaps exactly this. Failure to create a framework for correcting waqf deeds has exacted a huge toll on the efficiency of waqfs in Iran. We will consider this in greater detail in the next chapter, in which we will address the administration of waqfs.

Article 66 of Iranian civil law indicates that one cannot establish a waqf mission that is incompatible with the Sharia. Furthermore, Article 87 of Iranian civil law states that the founder can insert clauses whereby a waqf's revenues are divided between the beneficiaries either evenly or unevenly. Alternatively, this matter can be delegated to the waqf's mutawalli.[178] The law here does not give sufficient guidance by which we might conclude that the challenges with the traditional laws have somehow been overcome. One would expect that, based on the test of time and the economic feedback from waqf administrators, the law should allow changes to be made to the initial missions of waqfs. For a number of reasons, these changes would be of crucial importance. First, there is always the possibility that in the waqf deed's initial version, some minor or even

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[177] Khomeini (2007, p. 67); Sani (2007, pp. 171–72)

[178] Majmu'e Qavanin Owqafi (1986, p. 137)

major points were omitted. Furthermore, as is evident in the rulings of many jurists, there have been many cases where the waqf deed has contained several contradictions. The jurists failed to find remedial solutions in such cases, as did civil law. Finally, given the perpetual nature of waqfs, one can imagine the possibility that a waqf founded centuries ago in order to meet the demands of that time is no longer relevant today. One would expect the law to contain some provisional clauses enabling the periodic review of waqf missions in order that they might be updated to suit changing circumstances. Ultimately, often the Waqfnameh contains very specific instructions as to the operation and running of an endowment. Yet again, with the passage of time, newer and more productive and effective ways are discovered for maximising the full potential of waqfs. Historically, jurists have not allowed Waqfnamehs to be updated; in the preindustrial world, when the pace of change was fairly slow, the inability to adapt Waqfnamehs may not have had such a strong impact on waqfs. In contemporary times, however, it is of high importance that an institution is able to embrace the latest scientific and technological achievements in order to maximise its output. This consideration has been heavily neglected by Iranian civil law, which has completely ignored the problem and has merely sought to codify traditional laws.

The waqf as a contract

Discussions concerning the transfer of right of usage have led to two theories, both of which have been discussed. The transaction entailed in converting a property into a waqf and appointing certain individuals to be beneficiaries must be treated as a contract if issues such as the transfer of ownership—and, more importantly, that of property ownership—are to be addressed. One can say that a waqf may be considered a contract in legal terms, meaning an exchange of promises with a specific remedy for their breach. All Islamic schools of law agree that a waqf is a contract. However, the type of contract has been the subject of much dispute.

Contracts may be bilateral or unilateral. A waqf can somehow easily fit into each of these categories depending on how one looks at it. A bilateral contract is what most people think of when they think of “contract”. It is an agreement in which each of the contractual parties makes a promise or promises to the other party(ies). For example, in a contract involving the sale of a house, the buyer promises to pay the seller an agreed-upon sum in exchange for the seller's promise to deliver the deed to the property. In Islamic law, this type of contract is known as Aqd.

In a unilateral contract, only one party makes a promise. A typical example is a reward contract—A promises to pay B a reward if B finds A's missing property. B is not obliged to find A's property, but A is obliged to pay the reward to B if B does so. The primary consideration here is B's reliance on A's promise, that B relinquishes his or her legal right to do whatever he or she wants to do at the point that he or she becomes engaged in finding A’s property. The offer of a unilateral contract is often made to multiple individuals (i.e., “the world”) by means of advertisement. In this situation, acceptance only occurs when the condition of the contract is satisfied (in this example, with the finding of A’s property). If the condition is something that only one party can perform, both parties are protected: the offerer is protected because he will only ever be contractually obliged to one of the many offerees; the offeree is protected in that, if he or she does meet the condition of the contract, the offerer is contractually obliged to pay him or her. In Islamic law, this type of contract is known as igha. The same concept also applies to wills, in which the beneficiaries do not play a role. The contract is unilateral in the sense that fulfilment of the deceased’s wishes regarding his wealth occurs after his death. The acceptance of the wealth by the recipient during the production of the will is not necessary for the will to be ratified.

The technical difference between these contracts relates to whether or not the beneficiary accepts his or her role. In unilateral contracts, the requirement that acceptance be communicated to the

offerer is waived. The offeree accepts simply by meeting the condition of the contract; the offeree's performance is also treated as the price, or consideration, of the offerer's promise. The offerer is master of the offer; it is he or she who decides whether the contract will be unilateral or bilateral. In a unilateral contract, the offer usually is made to the public at large. In a bilateral contract, there are obligations on both sides, rights on both sides and considerations on both sides. If an offerer makes an offer such as, “If you promise to paint my house, I will give you £100”, it becomes a bilateral contract once the offeree accepts the offer. Each party has promised to do something, and each will receive something in return.

The future of the ownership of a waqf property depends on whether or not jurists agree as to which type of contract the act of establishing a waqf is—that is, what type of contract is a waqf, unilateral or bilateral?

The jurists disagree. Among Shi’ite jurists, there are three opinions concerning the nature of a waqf as a contract. First are those who consider a waqf to be a bilateral contract, regardless of its type. The second group argues that a waqf is a unilateral contract, regardless of its type. The third group believes that a family waqf is a bilateral contract and a public waqf is a unilateral contract.

Ayatollah Najafi Esfehani is among those who contend that a waqf is a bilateral contract. He argues that the transfer of wealth from one party to another requires the second party’s consent. Therefore, a waqf is a bilateral contract. Moreover, if a waqf were a unilateral contract, and the beneficiary rejected the donor’s offer, the waqf would be invalid; this is an opinion shared by many other members of the Ulama. He then adds that the endowment itself remains part of the wealth of the founder; in other words, the ownership of the endowed property does not change hands—it remains with the founder. Thus, a waqf is a bilateral contract.

Tabatabai , based on the opinion of many of his predecessors, argues that a waqf is a unilateral contract. He mentions that earlier jurists did not posit the beneficiaries' acceptance as a condition of either a waqf Khas (private waqf) or a waqf am (public waqf). Hence, a waqf is a unilateral contract and is only ratified by the founder. Sheikh Yusof Behbahani argues that most of the Shi'ite Ulama consider acceptance of a waqf unnecessary. What research into this matter has shown is that, regardless of whether a waqf is public or private, acceptance by the beneficiaries is not a vital condition of the contract. Therefore, a waqf is a bilateral contract.

Third, there are those who argue that the type of contract depends on the type of waqf. From this group, Allameh Helli argues that because in a public waqf the number of beneficiaries can be very large, it is not practical to have the consensus of each and every one of them. However, in such cases as when a mosque is converted into a waqf, or when the beneficiary is an infant, then the consent of the mosque's manager or the infant's guardian is required for the waqf to be properly ratified.[179] Finally, Shahid Sani, in Lomeh, states:

"If the beneficiaries of a public waqf are the poor or akin to them, then their consensus is not necessary for the establishment of a waqf. However, it is better to have the approval of the ruler or whoever speaks on behalf of the public in these matters. We should bear in mind that once a waqf is established, it is forever, and there is no way to get the approval of all of the next generation of beneficiaries."[180]

Unlike the first generation, with respect to whom the waqf represents a bilateral contract in which they are mentioned in connection with the waqf's ownership—which in his opinion, remains with

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[179] Helli (1985, p. 446)

[180] Shirvani (2006, pp. 164–66)

the founder—with respect to the second and third generations we cannot speak about the transfer of ownership at all.

Article 199 of Iran's civil law maintains—based on an idea held by some Shi'it jurists (probably based on fatwas issued by Ayatollah Khomeini)—that, regardless of whether a waqf is public or private, given that it is a bilateral contract, acceptance by the beneficiary is vital for the establishment of a waqf. Article 56 explains that, with a private waqf, acceptance by the first generation of beneficiaries is necessary.[181] Based on the law's verdict—which has tried to put an end to all of the disputes concerning the contractual nature of waqfs—a waqf effectively becomes a bilateral contract. Again, based on Iranian civil law, if a property is concerned the bilateral contract is always a transaction of wealth between two parties. This is where contradictions in civil law are evident, as well, as ownership of the waqf cannot be identified. In a desperate attempt to make the law appear rational, Katouzian elaborates that a waqf is unlike any other transaction in wealth represented by a contract. The legal structure of the waqf institution is different—there is no agreement between the founder and the beneficiary. The founder designs and establishes the waqf, and the beneficiary has no say. It is only after a waqf is established that one can become a beneficiary of it.[182] Moreover, the beneficiary has no say in the management and future of a waqf. The founder appoints a manager (mutawalli) and possibly a supervisor (Qazi), but both are unrelated to the beneficiary.[183]

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[181] Emami (2008, pp. 69–70)

[182] As noted earlier, based on Iran's civil law and the rulings of most Shi'ite jurists, the founder cannot include himself as a beneficiary. It seems that Dr. Katouzian make a mistake here from a strictly legal point of view.

[183] Katouzian (2007, pp. 487–90)

Katouzian fails to elaborate as to why the waqf institution is different and, if it is so, to describe the legal attempts that have been made to make this exception work. According to Katouzian, a "waqf does not necessarily satisfy the definition of a bilateral contract". He goes on to note that a waqf is possibly similar to a social contract, for example like those pertaining to social rights, which are also bilateral contracts. However, social contracts do not always satisfy the precise definition of a bilateral contract. Katouzian argues that, when it comes to social contracts, inasmuch as gaining the acceptance of each and every individual is not a viable option, the public effectively delegates their rights to representatives, who accept or reject offers on their behalf.[184] Based on Katouzian's explanation, in the case of a public waqf it is the religious magistrate who accepts the contract on behalf of the public. In the case of a private waqf, the question arises as to whether the first generation of beneficiaries has the right to make a decision that impacts future generations. Katuzian points out that the legislators have deliberately codified waqf laws in order to produce cohesion between the different types of waqfs.

Katouzian admits that, within the framework of modern Iranian law, a waqf cannot always be considered a bilateral contract. The ambiguities that occur with waqfs and related types of contracts are of extreme importance. The type of contract that is selected will determine future ownership of the waqf property. Given the scale of waqf properties in Iran, ambiguities and disputes over ownership are very costly to the economy.

Ownership of a waqf

It is evident from the majority of accounts found in traditional law, as well as in civil law, that the establishment of a waqf is considered a kind of contract. However, both systems have failed to

[184] Ibid., pp. 488–90.

situate the institution of waqf under any known form of contract. Consequently, the future ownership of endowments often becomes a matter of controversy. This section began by asking, what happens to the ownership of a waqf once the founder converts his property into a waqf? Does ownership remain with the founder, or does it transfer to someone else?

There are four major positions in this regard. The first is that the founder remains the owner of the waqf. The second is that ownership of the waqf transfers from the founder to the beneficiaries. The third is that ownership depends on whether the waqf is private or public; with a private waqf, ownership transfers to the beneficiary, whereas with a public waqf, ownership transfers to God. The fourth is that ownership, regardless of the type of waqf, belongs to God.

Among the Imami Shi'ites, the jurists Ayatollah Yazdi and Shahid Avval both argue that the founder remains the rightful owner of the waqf.[185] Many Imami jurists, on the other hand, argue otherwise and consider the beneficiary(ies) to be the new owner(s) of the waqf. Helli and Sheikh Hassan Najafi are among those who advocate this position.[186] Shahid Avval is one of the few who advocates the third position. He also makes exceptions in the case of mosques.[187] The most contemporary fatwa, which has had a huge impact on the formation of contemporary waqf laws in Iranian civil law, comes from Ayatollah Khomeini, who rejects the idea that ownership of a waqf remains with the founder. He argues that the founder cannot alter or manipulate the waqf in any way or under any circumstances. He has, therefore, already lost his ownership rights over the waqfed property. Khomeini also rejects the argument that the beneficiaries become the new owners of the waqf. Interestingly, he also rejects the view that God becomes the new owner. Ultimately, Khomeini

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[185] Karaki (1998, p. 234); Yazdi (2006, p. 232)

[186] Helli (1989, p. 450); Najafi (1997, pp. 88–90)

[187] Tusi (2000, pp. 98–111)

views ownership of the waqf as being unknown or unidentifiable.[188] Therefore, he not only rejects all previous views on this matter, he also does not offer any alternative solution. Not knowing who is the owner of a property makes that property and its related endowment vulnerable to expropriation by opportunists.

We must remember that waqf properties were generally productive establishments that the founders, in order to protect them, converted into waqfs. It is easy to imagine that when there was no defined owner of a given property, soon after the founder died the property was without protection. We shall look at the limitations that ambiguities over waqf ownership have caused with respect to the administration of waqfs in the next chapter.

In Iranian civil law, ownership of waqfs is still a grey area. Article 3 of waqf and charity law states that every waqf has a corporate status.[189] This can be viewed as a large step forward, one that could potentially elevate the status of this medieval institution into the 21st century. However, this law fails to weave together different elements of waqfs. It was mentioned in Chapter 2 that, according to civil law, corporations still may not become founders of waqfs, and it remains the task of a single individual to establish a waqf. Moreover, a waqf must remain perpetual and its mission irrevocable, both of which are incompatible with the concept of a corporation. Finally, while a corporation may have assets like a waqf, unlike a waqf, it can sell its assets, expand or become smaller over time without affecting its corporate nature. Conversely, a waqf remains perpetually bound to its initial assets. In other words, a waqf may not sell its assets, nor expand in any way or form. Moreover, if, for example, a waqf building collapses, the waqf itself also comes to an end. As a result, a waqf

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[188] Khomeini (2007, p. 135)

[189] Majmu'e ghavan va Moqararate owqafi (2004, vol. 3, p. 58)

does not function as corporation according to the definition of corporation given by Iranian civil law.

Given the level of importance of the matter of waqf ownership, the debates and disputes around this issue are also significant. Most contemporary discussion on this topic has attempted to compare waqfs with their foreign equivalents (such as trusts in England) and to find a remedial solution for waqfs, an inspiration to solve this domestic challenge and to modernise the old waqf system. What is commonly agreed upon is that the initial aim of founders was to keep their properties intact, in order that the actual properties should remain the same and the generated revenues remain constant. The current debates regarding the modernisation of waqfs, and whether or not its role should be updated to suit more contemporary needs, can be divided into five categories. The first possibility is that the founder should donate the designated capital or portion of his wealth to a corporation (organisation) with a mission and wishes that are similar to those of the founder. This would seem a rational suggestion. However, in practice it has not worked, as this idea does not necessarily comply with the primary reasons for establishing a waqf. Using this method, the founder becomes merely a donor, a different scenario from that of the founder of a waqf. The founder usually leaves his name on the endowment, which will survive long after he is gone; this is not the case with a donor. Additionally, the founder profits from economic benefits (at least temporarily), such as preventing his property from being fragmented, having his wealth sheltered, avoiding paying taxes, and so forth.

The second is that the founder should produce a will donating the same portion of his wealth to the same organisation (this method is known as a testimonial waqf). The third is that the founder should establish a foundation and donate money to it. The fourth is that the founder should provide for the establishment of such an organisation in his will. Finally, the founder could set aside some capital

during his lifetime and begin financing the activities of such an organisation (very much like a waqf in its traditional form). The impact of these suggestions has not been significant; interestingly, all of these remedial suggestions point toward foundations as substitutes for the old waqf system.

One may venture to suggest that those in charge of Iran's waqf laws had the testimonial waqf in mind, whereby the founder can set aside up to one third of his wealth for a designated activity, such as might correspond to a waqf, or establish a foundation and continue supporting it. This could well be another reason why civil law has given corporate status to waqfs. Furthermore, a waqf can be established without any official permission or even registration and still have a legal identity.[190] Many lawyers argue that the corporate status that the law has given waqfs is primarily for the purpose of attracting founders to more modern philanthropic institutions, e.g., individuals who intend to establish a foundation or institution based on a testimonial. Indeed, in Iran one finds both waqfs and foundations operating. The foundations that benefit from modern laws and certain approaches to charity work have proven to be much more successful than waqfs, which have remained the same. The primary problem remaining with contemporary Iranian civil law is that, on the one hand, it gives waqfs corporate status and, on the other, tries desperately to preserve all of their non-corporate aspects.

The transfer of right of usage

As discussed in the Chapter 1, one of the characteristics of the legal rules in their traditional form is that they are not necessarily coherent and are often contradictory. In this section, we consider exceptions to the principle of perpetuity, which have resulted in the formation of a completely different type of waqf, known as a Monqateh waqf or abrupt waqf. We examine the reasons and

[190] Katouzian (2007 pp. 461–82)

rationale behind such waqfs and their incorporation into modern laws related to waqfs, which came about as a result of the codification of traditional laws into Iran's civil law in the 20th century.

As with every aspect of waqf laws, there are exceptions to the rule. As discussed above, a founder loses all property rights with respect to the asset being converted into a waqf immediately after the waqf's establishment. Moreover, his or her decision remains an irrevocable one. In practice, jurists have had to consider some exceptional cases related to waqfs that were long established, or concerning the manner in which Waqfnamehs were produced. They often have taken a pragmatic approach when dealing with these waqfs.

There are two sets of opinions within the Imami school of law: those who argue for setting a time limit on waqfs and those who are opposed. Those in favour of a limit refer to a hadith from Imam Baghir (Mohammad ibn Ali, Baqir al-Ulum), which states: "The founder may tell his adult children or the beneficiaries of a waqf that after his death, the waqf will be terminated and become part of his children's inheritance".[191] On the other hand, some jurists, such as Ayatollah Yazdi, have argued that no time constraints can be placed on a waqf. He refers to another hadith, from the same Imam, who was asked about a man who had converted his land into a waqf and now wanted to construct a building on that piece of land. Yazdi responded that if the waqf's beneficiary is the founder's infant child and a guardian was appointed to him, then he cannot construct the building; on the other hand, if the child has not yet reached adulthood, and the founder has appointed himself as mutawalli, then he can interfere in the waqf's affairs—that is, he can construct the building on the child's behalf. Moreover, if, when the child grows up—if the founder has not transferred the affairs of the waqf to him, and the child has not disputed the waqf deed—the founder could interfere. This is because the

[191] Shirazi (1998, p. 297). There are many such hadith, which often were written in order to justify a very specific case.

beneficiary, who is now an adult, has not yet seized the waqf.[192] These hadiths support specific cases, making it very difficult, if not impossible, to use them as a reference for the law. However, the main point in citing this hadith is that it indicates that the actual beneficiary of a waqf must be able to use and receive the proceeds directly.

An old argument involving the Imami jurists concerns the question of whether a waqf is ratified once the waqf formula has been pronounced. In other words, when a waqf becomes the possession of its beneficiaries, is it formally ratified? Sani argues that the beneficiary having control of a waqf is an indication that the waqf has been rightfully established.[193] Moqnieh, on the other hand, argues that having possession of a waqf is not a vital condition for the waqf being properly ratified.[194]

Mohaqeq Helli argues that a waqf has been properly established once it comes into the possession of the beneficiary. However, he does make a few exceptions. He argues that, in some cases—if someone decides on his deathbed to establish a waqf, for example—the founder must have the consensus of all of his heirs, or he may establish only one third of his wealth as a waqf, which is his given testimonial power based on Sharia.[195] Ayatollah Yazdi essentially agrees with all of the other jurists, who argue that transfer of the possession to the beneficiary is the action that validates a waqf. Furthermore, he adds that if the founder of a waqf dies prior to the completion of this transaction, then the waqf is no longer valid. Additionally, the heir of the founder would then inherit those assets automatically. Moreover, he argues that the only correct way for the beneficiary to obtain a waqf is by first securing the founder's permission.[196] In Yazdi's opinion, most jurists argue

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[192] Yazdi (2002, p. 186)

[193] Shirvani (2006, pp. 167–68)

[194] Moqineh (1992, pp. 587–88)

[195] Helli (1989, p. 218)

[196] Yazdi (2002, p. 187)

that it is necessary for the beneficiary to have possession of a waqf, but this process does not need to occur immediately.[197] Finally, if the founder wishes to convert a piece of his property into a waqf at a time when that particular property is rented or leased to the beneficiary, the process of handing over possession of it has already taken place and there is no need for it to be repeated.[198] In this respect, a public waqf shares a great deal in common with a private waqf, in terms of rules and regulations. A representative of the ruler or the religious magistrate may take possession of a waqf. Likewise, much as with a private waqf, if the founder dies prior to completion of the transaction the waqf shall no longer be valid.[199]

There are many cases related to the transmission of rights of usage on which jurists have issued fatwas. We review some of the most well-known cases here. The importance of these cases is that in Iran they are still relevant for proving a case in court. These cases will be examined to see how civil law has managed to codify them.

First there is the case of the infant child as beneficiary. It was noted in previous chapters that appointing a minor child as a beneficiary has long been in practice as a way of sheltering wealth. The founder, who is also the child's guardian, maintains control of the waqf and enjoys the generated revenue while avoiding his creditors and paying taxes. The question is, what happens when that child grows up? In the most likely scenario, the child, upon growing up, will ask for the proceeds to be directed toward him rather than his guardian. The verdicts are as follows: In the event that a father appoints his infant child as the beneficiary, there is no need for possession to change hands.[200] However, as previously mentioned, once the child reaches adulthood, this

[197] Yazdi (2002, p. 188)

[198] Ibid., p. 190

[199] Shirvani (2006, pp. 166–67)

[200] Tusi (1996, p. 78)

transaction must be completed; otherwise, it will become subject to dispute between the beneficiaries (in this case, the children who are now adults) and the founder (we consider this case at a later stage). The second case concerns mosques and graveyards. As was noted earlier, many fatwas only accept a waqf as valid if the founder pronounced a verbal declaration. In one of the examples that was discussed, if a founder allowed some members of a community to be buried on his property, or allowed people to pray there, his action was taken as converting his property into a mosque or a graveyard. It was noted that if the founder has a genuine interest in doing so, he should go through the process of establishing a waqf, which begins with a verbal declaration of his intention. If he does so, the final stage of the transaction concludes with the waqf becoming completely ratified when a prayer is said on the grounds or a dead person is buried there—the possession process is completed and the waqf has been successfully ratified.[201] These cases emerged during times when there were shortages of certain public goods, such as those provided by mosques and graveyards. In the absence of state intervention to provide such services, both the public and the state encouraged wealthy individuals to convert their properties into waqfs in order to meet public demand. Such fatwas are, in a sense, issued in order to control the related procedure. On the one hand, jurists maintain that the founder should have the intention of converting his property into a waqf; on the other hand, they want to ensure that if he does convert his property into a waqf the beneficiaries are also able to use it and that the waqf does not end up being a mere formality. When there is hierarchy (Tabaqeh) among the beneficiaries,[202] then, initially, possession by the ruler or the religious magistrate is a condition for the waqf to be ratified. Moreover, in cases in which the beneficiary is not specific (like "the poor"), there are two types of popular arguments.

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[201] Yazdi (2002, p. 190)

[202] Tabaqeh with respect to a waqf refers to the order in which the beneficiaries will receive the proceeds. There are many styles by which the Tabaqeh in a Waqfnameh can be identified; these vary depending on the time period and the region in which it was produced. However, the most common method for identifying the order of the beneficiaries is to consider the order in which they appear in the Waqfnameh.

The first is that the waqf is ratified the instant a dependent begins receiving benefits from the waqf. The second argues that until "the poor" formally take complete possession of the waqf, it has not yet been ratified.[203] Finally, there are cases in which the beneficiaries of a waqf are composed of the Ulama and "the poor." In other words, the beneficiaries are mutually exclusive. In this case, it is enough for the mutawalli (the administrator) of the waqf to take hold of the waqfed property. There are some disagreements regarding this view: those who oppose it argue that if someone other than the owner is appointed as the guardian of the waqf, he does not become its owner; rather his task is simply to ensure that the mosque or the tomb is vacant of other peoples' belongings.[204] (This issue clearly demonstrates that unresolved issues related to waqf ownership impact other waqf issues, as well). Article 59 of Iranian civil law stresses that if the founder does not hand over the waqf to the beneficiary, then the waqf will not be ratified. The instant the waqf has been handed over, it has been formally ratified. Moreover, if the founder dies prior to the transfer process, the waqf is no longer valid (Article 802). Article 60 of Iranian civil law indicates that the handover should take place with the founder's free will.[205] If the founder is unable to complete the transfer process with respect to the property to be converted into a waqf, then the waqf is not valid. For example, birds that are not caged and are thus free to fly cannot be waqf, unless the beneficiary is able to demonstrate that he can somehow get hold of them.[206] Article 62 of Iran's civil law states that if the beneficiary is specific, transfer of ownership to the first generation is sufficient. On the other hand, if the beneficiary is non-specific, then transfer of possession must have taken place with either the mutawalli or the ruler (which in this case is the waqfs organisation).[207]

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[203] Helli (1989, p. 449)

[204] Yazdi (2002, p. 191)

[205]Katouzian (2007, p. 543)

[206] Ibid.

[207]Katouzian (2005)

The laws mentioned above unite everything that has been discussed in this chapter. They attempt to define one final verdict concerning the transfer of the right of usage from founder to beneficiaries. Furthermore, they ensure that the first generation of beneficiaries or the religious magistrate accepts the offer of becoming beneficiaries so as to comply with the contractual nature of waqfs. Finally, the law prohibits founders from exploiting the waqf system by converting objects into waqfs that provide no service to the public and which are attempted entirely on pretentious and false grounds.[208]

Momentary waqf (waqf e Monqateh)

As has been discussed, perpetuity is one of the pillars of every waqf. However, over time so many waqfs have been established that their deeds do not necessarily follow the requisite uniformity in meeting the condition of perpetuity. This is due to many factors, the most common of which concerns the manner in which the Waqfnameh is produced. The beneficiaries identified in a Waqfnameh could become extinct, and the Waqfnameh provides for no provisional substitute. Jurists have had two options, one of which is to call such waqfs void; alternatively, they have created a way to justify such waqfs. Finally, there are cases in which it seems that the jurists were aware that the founder was converting his assets into a waqf in order to exploit the institution. In this case, it can be seen that, at least on certain occasions, jurists actually facilitated such actions. The problem is that such exceptions ended up becoming as important as the mainstream verdicts, resulting in confusing and contradictory waqf laws. In any event, the Monqateh waqf was created to facilitate such demands.

A Monqateh waqf is one for which the beneficiary is impermanent. In other words, the beneficiary is only going to need the support of the waqf for a certain period of time. The problem with this

[208] There is a famous saying in Persian: the dropped oil is always waqf for the Imamzadeh's shrine.

type of waqf is that if at some point the waqf is without a beneficiary it will become void, violating the principle of perpetuity. In this section, the three different situations in which this can occur and the verdicts that were made in connection with them will be considered.

A Monqateh waqf is a type of waqf that exists for a defined period of time. There are mixed views among the Shi'ite Ulama regarding this type of waqf. Some consider such waqfs to be valid; for example, Sheikh Mofid argues that one can appoint an unborn child to be the beneficiary of a waqf. In such cases, upon being born the child will assume the waqf's benefits from existing beneficiaries of the property.[209] Those who argue for this type of waqf, such as Allameh Helli, base their arguments on the fact that following the waqf's termination, it will return to the founder. Alternatively, in the event that the founder is dead by that time, the property returns to the founder's heir.[210]

Iranian civil law does not give a distinct opinion on this matter. Katouzian elaborates on this issue and notes that some believe—in reference to Article 90 of Iranian civil law—that the waqf's revenues must be spent on good deeds. However, we must first make sure that this is the founder's true wish, as his decision to establish a waqf cost him his rights toward his property.[211] As a result, Monqateh waqfs have survived as a practice whose parameters are based entirely on Sharia, and there is no sign that civil law has attempted any rationalisation. One can argue that Iranian civil law could not consider such waqfs because they exist in stark contrast to the principle of perpetuity, which the law has advocated previously.

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[209] Tabrizi (1999, p. 189)

[210] Helli (1985, p. 452). This is a clear indication that the jurists are/were aware of the true intentions of the founder and allowed him to abuse the system.

[211] Katouzian (2005, pp. 457–61)

The types of Monqateh waqfs:

Monqateh waqfs can be divided into three types, depending on whether the first, middle or final generation or class of beneficiaries failed to exist during any given period of time. These three types are called Monqateh al-Avval, Monqateh al-Vasat and Monqateh al-Akhar (meaning "cut at the beginning", "cut at the middle", and "cut at the end", respectively).

Monqateh al-Avval

The first type, Monqateh al-Avval, exists when the very first class, or first generation, of beneficiaries no longer exists. Allameh Helli and Tusi are among those who argue in favour of this type of waqf.[212] Ayatollah Khomeini also advocated this type of waqf and provided an example: if someone appoints a dead person as the beneficiary, this does not constitute a valid waqf.[213] However, someone may appoint his children and grandchildren as the beneficiaries of a waqf. Moreover, in the event that any of the beneficiaries dies, and in the event that the same beneficiary has an unborn child, that child will become a beneficiary of the waqf, as well. Khomeini argues that it is best that the waqf is renewed following the death of the first generation of beneficiaries.[214]

Finally, Katouzian explains that, based on Article 69 of Iranian civil law, one cannot appoint a dead person to be the beneficiary of a waqf. Moreover, he continues, with this type of waqf, only the beneficiary must be alive, even if he or she is unknown.[215] This is a situation in which civil law not only rationalises something from the traditional laws of waqf but also begins to contradict itself.

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[212] Tusi (1996, Chapter 3)

[213] Appointing a dead person as the beneficiary of a waqf generally means that the children of the deceased hired someone to say prayers for him or her, which is common practice. However, one cannot establish a waqf for such a purpose.

[214] Khomeini (2007, p. 70)

[215] Katouzian (2005, pp. 516–17)

Based on many articles in civil law, the beneficiary of a waqf must be identifiable. Therefore, the perspective that the beneficiary can be an unidentifiable person is completely contradictory to previous determinations.

Monqateh al-Vasat

The second waqf of this type occurs when the second class or second generation of beneficiaries no longer exists. This type of waqf is referred to as a Monqateh al-Vasat. Shahid Sani argues that, in the event that the first and final classes of beneficiaries are known, the waqf is valid, even if the beneficiaries in between remain unknown.[216] Katouzian suggests that if the final class of beneficiaries is identifiable, and the middle class of beneficiaries also can be identified, then the waqf should be designated as a Monqateh al-Avval.[217]

Monqateh al-Akhar

Finally, the most common type of waqf is that in which the beneficiaries are distinct and no substitute for them was appointed by the founder. This type of waqf is referred to as a Monqateh al-Akhar. In this case, many factors are at play and the waqf deed plays a pivotal role. In order for the waqf to be established, an alternate beneficiary to those who are no longer available must be found. The Waqfnameh might include instructions pertaining to this.

Concluding remarks

This chapter explored three major processes of documentation in the establishment of a waqf. The primary aim of the chapter was to address the issue of waqf ownership. However, it was first

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[216] Tabrizi (1996, p. 170)

[217] Katouzian (2005, p. 527)

necessary to review the entire process of establishing a waqf and its long and peculiar legal character. The stages that must take place for a waqf to be established are, first, the act of founding a waqf, second, the writing of the waqf deed, and, finally, the transfer of ownership of the converted property. Traditionally, the founder must be clear about his intention and select identifiable beneficiaries for the waqf. The founder's intention must be formally ratified by his verbally pronouncing a waqf formula. This verbal declaration has been much encouraged by jurists and has also entered into Iranian civil law; it carries the same legal importance as those made before the codification of the laws. However, it has gone through an almost unique evolutionary process. Unlike other popular formulas related to Sharia law, such as marriage and the establishment of mosques, all of which are said in Arabic, jurists agree that the waqf formula can be said in Persian. This is due to the fact that, for the average Iranian, the Arabic language is unfamiliar; moreover, inasmuch as the waqf formula shares a similar terminology with other types of institutions, it was decided that the formula can be pronounced in Persian. On the other hand, as in most cases regarding waqfs—and contrary to the strong advocating of jurists regarding the pivotal importance of the verbal declaration of the waqf—an endowment can be correctly established and recognised by both Sharia and civil law without a verbal declaration by its founder. This type of waqf, known as Mo'atati, is as valid as any other type of waqf. The arguments for the enforcement of a verbal declaration from the founder combined with a written deed for the waqf would seem to be the next logical step in order to ensure that everything is set up correctly and runs smoothly. However, some of the most recent fatwas, such as those issued by Ayatollah Khomeini, rely on only the most simple and basic form of declaration by the founder, which can bypass any written document or background check. Iran's modern laws attempt to tackle loopholes that opportunists might exploit, but traditional law remains ill prepared to tackle modern legal demands.

The second part of the chapter looked at the conditions under which a waqf deed must be produced. As far as written waqf deeds are concerned, the jurists traditionally have provided a unique set of rules that the founder must follow. This has acted as a method to minimise certain common mistakes in producing waqf deeds. There are three main principles that a waqf deed must follow: perpetuity, inalienability and irrevocability. These conditions make waqfs incredibly rigid institutions and can work against their own good. As will be shown in the next chapter, with the passage of time marginal or radical changes to the way things have operated or have been managed, and even to the nature of the waqf's mission, have been proven to be unavoidable. As will be discussed, over the long run such rigidities here paved the way for corruption, pragmatic management and/or a decline in the waqf. The inflexibilities in traditional laws regarding a waqf's mission and its principles were due to a lack of understanding of the concept of a corporation. Iranian civil law has simply codified almost all traditional principles related to producing a waqf deed and granted waqfs corporate status. This act resulted in many contradictions within Iran's civil law. The primary problem is that a waqf cannot operate like any other corporation in which the law is recognised. The traditional laws related to waqfs were created without the slightest idea of corporations and with the objective of maintaining them essentially as they were, while weaving them into a modern legal system that does, in fact, recognise corporations; this does not necessarily work.

The final part of the chapter looked at waqf ownership and a few related issues. The classic Islamic doctrine is that the founder loses all of his rights with respect to the property, inclusive of ownership, once he converts it into a waqf. The question on which the jurists fail to agree is what happens after the founder loses ownership. In order to address this vital question, the jurists have had to consider the waqf as a type of contract. They have all agreed that a waqf is a contract; however, they continue to disagree about the specific type. In most cases, jurists go to enormous

lengths to explain what type of contract a waqf is, but, in the end, they give up. As a result, no set verdict has been decided regarding waqf ownership. Some verdicts advocate that waqfed properties remain under the ownership of their founders, while others maintain that ownership transfers to the beneficiaries or even to God. There are two main issues resulting from the fact that no unified conclusion exists. First and foremost, not knowing what happens in terms of the transfer of ownership of a property means that it cannot be documented correctly; therefore, any violation to that property cannot be properly safeguarded. The problem in the past has been extrapolated to the present; waqfs did not have corporate status. Thus, the administrators of waqfs had no real legal right to represent their endowments in court.

Iran's modern civil law does not, as yet, provide clarity as to what happens to the transfer of ownership of a waqf. However, by granting a waqf a legal personality, it does give the waqf's administrator (the mutawalli) a bit more power when representing the waqf in court. Nevertheless, the lack of cohesion within traditional laws concerning waqf, and the absence of a clear verdict in Iran's modern civil law, has clearly taken a toll on both the performance of waqfs and the economy of the country as a whole.

Chapter V: Administration

In principle, the manager of a waqf must obey the stipulations of its founder to the letter. Additionally, ambiguities concerning the ownership of the waqf, and all of the details that might not have been foreseen by the founder in the Waqfnameh, present huge obstacles both in decision-making and in protecting the endowment from external violation. However, in practice the founder's directives often were circumvented, which contributed to corruption and the weakness of civil society. This chapter examines whether modern legislation concerning the waqf in Iran has overcome these traditional administrative problems.

In the previous two chapters, the main players with respect to waqfs and the laws regarding the establishment of waqfs were introduced. Thus far, there remain some shortcomings within both the collective work of the Islamic jurists who generated the traditional laws and the modern versions of the laws, which result from the codification of traditional laws and the addition of modern legal concepts, creating the current civil law of Iran. With respect to each case and section, some of the shortcomings of both the traditional and modern versions of the laws were highlighted. The two main shortcomings concerned the rigid structure under which waqf deeds must be produced—so as to impose perpetuity, inalienability and irrevocability—and the unresolved issue of the ownership of waqf properties, under both traditional law and the civil law of Iran. The latter problem has even lead to contradictions in Iran’s modern legal system, mainly due to cases whereby a waqf was transplanted with a legal personality as a result of modern laws, something not possible under traditional law. Correspondingly, the concepts of perpetuity, irrevocability and inalienability, which frame a waqf’s protocol, deed and mission, cannot comply with the modern concept of a corporation with a legal personality, whereby these things can change. This chapter is divided into two sections, the first of which deals with a waqf’s administration.

The administrator of a waqf, the mutawalli, must grapple with numerous restrictions as a result of the law, restrictions from which the manager of a modern enterprise is free. Specifically, there are two main issues that have a major impact on the performance and behaviour of a mutawalli. First, he must follow to the letter the instructions of the waqf's founder; if the ownership of a waqf is disputed, how does this affect his duties? Second, the legal formation of a waqf creates a secondary problem with the waqf's administration. Many discussions consider waqfs without a mutawalli—the ways in which one can be appointed to take that post, how his duties are assigned, what his salary should be, and the problem of redundancy. The second part of the chapter considers a collection of issues concerning waqfs and specific economic environments and related issues. The waqf is considered a piece of property, which can be sold, rented, divided or terminated. Finally, this section will consider one of the most current developments in waqf law: the resurrection of ancient, or even terminated, waqfs.

To begin, the intrinsic problems that frame the activities and decisions of a waqf's mutawalli will be highlighted. Recent studies of waqfs reveal that, on one hand, the administrators of waqfs tend to be very tight-handed because of the rigidities in waqf law; on the other hand, in practice they often enjoy a great deal of latitude. Such stark contrasts can be explained as a combination of pragmatic management and the relaxed litigation it fuels. However, such actions have had a long-term impact both on endowments and on the economy as a whole.

The second section of this chapter discusses the various topics that populate the majority of the legal texts. The main point here is to challenge the perception that the mutawalli is the "manager" of a waqf. It will be argued, instead, that the mutawalli shares only certain responsibilities with those of a modern-day manager. His decision-making powers are severely limited compared to

those of a contemporary manager. Consequently, a mutawalli, although constituting an economic agent, should not be mistaken for a manger in the modern sense. Furthermore, there are many aspects specific to a mutawalli, such as the nature of his appointment, his salary and his duties, that make him redundant. The majority of the issues that jurists have had to deal with have resulted from the concept of perpetuity and the great importance given to a waqf's deed. For example, many things can go wrong as a result of mistakes in a waqf's deed, or simply due to the passage of time, so that a waqf is left without a mutawalli. Without the waqf having a corporate status or constituting a legal personality—which would make appointing a new mutawalli an easy task—these issues can result in complicated challenges.

The waqf's lack of a legal personality, which is one of its hallmarks, results in issues regarding the mutawalli's salary and duties—which may not be adjusted according to the rate of inflation over time, and so forth. In the case of the mutawalli, such issues have become challenging. This study considers both the traditional verdicts from jurists tackling these problems and the adjustments that have been made by Iran's modern civil law. The main goal is to demonstrate how tiring and cumbersome the duty of administrating a waqf is, which is, arguably, one of the contributing factors to the decline of the institution and its performance.

The final part of the chapter is divided into two parts. The first looks at the most common problems that a piece of property encounters. Renting a waqf, dividing a waqf, selling a waqf and even terminating a waqf are topics that not only have been challenging for the endowment itself but also have had a significant impact on neighbouring properties, as this study shows. For those not already convinced that the waqf is not the most efficient institution, not only for delivering public goods but also for protecting its own goods, a remarkable event happened in Iran during the 1980s. Based on a fatwa issued by and in the personal interest of Ayatollah Khomeini, the country's parliament passed

a law allowing old and terminated waqf properties to be reconverted into waqfs. This created unprecedented problems for properties throughout the country and is the subject of the latter part of the final section of this chapter.

The administration of a waqf

Based on traditional waqf laws, and, to a great degree, their modern versions, the administrator of a waqf (the mutawalli) must obey the founder's demands to the letter. As a result, the system lacks flexibility for keeping up with the fast pace of present-day economic conditions. In other words, the majority of the laws which were generated in the pre-industrial world specifically suited the slow pace of change in that era, during which people would experience little to no change in the advancement of technology or new modes of production and demand. However, the laws of waqf are ill suited to the post-industrial era, in which new modes of production are constantly being introduced, more efficient managerial methods are available, and changes in the production of public goods must be evaluated constantly.

It has been mentioned that one should not mix the role of a mutawalli with that of the modern-day manager, primarily because of the mutawalli's fewer and much more restrictive decision-making powers compared to those of a manger. The second point that needs to be elaborated is the difference between operational flexibility and foundational flexibility. The founder enjoys a great degree of freedom because of the loose structure in establishing a waqf. On the other hand, the principle of static perpetuity limits the flexibility of those agents involved with the operating side of the endowment. The literal meaning of the term waqf suggests that its purpose is to stop something or to make it dependent and conditional. Perhaps what the system was meant to stop was the expropriation of waqf assets and deviations from the founder's directives. The goals of a waqf and its method for reaching them are both conditional. As has been shown, modern laws have continued

the same approach. The law still insists that the wishes of the founder constitute the most important goal of a waqf, and that they must be carried out regardless of expense.

Both the mission and the management of a waqf are subject to endorsement by the religious magistrate and are based on their operational rigidity. First, the mission of a waqf, as has been discussed, is irrevocable. The popular verdict is that even the founder of a waqf cannot implement any changes once the waqf is ratified. Furthermore, the objectives of a waqf such as are specified in the waqf deed (Waqfnameh) must be followed precisely. However, in practice, obeying those instructions to the letter would have caused the institution of the waqf to become dysfunctional. For example, numerous waqfs throughout Iran were built to support caravansaries in medieval times. Centuries later, shifts in trade routes and changes to the structure of travelling in general have made these endowments dysfunctional. In most cases, the long-dead founder neglected to allow future mutawallis to use their own judgment in order to transfer the assets from now-dysfunctional caravansaries to other enterprises.[218] As a result, the resources of the waqf have stagnated and lost their economic value. One would assume that modern laws would overcome such obstacles and that they would be more rational, in order to fit modern needs. However, Iranian civil law is similar to traditional law. Aside from a few cases, such as the waqf objects for the Astan-e-Qods-e Razavi, which could be liquidated, there has not been much development.

The level of flexibility that administrators of waqfs enjoy can be determined from a careful study of the fatwas related to waqf administration in general and of specific waqfs in particular. Every Waqfnameh can be subject to various ambiguities, which can produce creative interpretations for subsequent exploitation. In practice, the waqf system is far from being as rigid as waqf laws and

[218] The Iranian tourism board once proposed a project whereby caravansaries would be converted into guesthouses and restaurants. However, because of the rigidities imposed by waqf laws, it soon had to drop this plan; in the end, only a handful of conversions were carried out. Interview with the author.

regulations would suggest. However, such circumventions come at a cost, particularly when they occur frequently. In the long run, economic efficiency will be affected as a result of these circumventions and adjustments. Had the waqfs been allowed to be restructured and their missions updated according to the economic needs of their time, they might have avoided economic stagnation. Furthermore, the pragmatic management of these waqfs, which could lead to law breaking, could be controlled under the law. These are among several potential reasons why one might have expected waqf laws to be modernised during the process of codification. It has been shown, in fact, that very little has changed from the traditional laws to the modern ones.

The initial reason for such managerial rigidity can be traced to the rights of the founder of the waqf, who has the ultimate right to dictate the terms of the waqf's operation. The mutawalli is effectively not a manager but merely an executor of the founder's decision. The mutawalli's preferences thus are irrelevant in deciding legal cases. Borrowing certain economic terminology, in this case the mutawali can be designated as an agent[219] and the founder as the principal. In this case, the mutawalli is an agent hired to carry out the founder's directives. Problems arise when the directives are ambiguous, incomplete or even non-existent. In such cases, the mutawalli is confronted with the challenge of figuring out how and for what the founder would have aimed. Furthermore, the mutawalli does not have the right to make any operational changes, even when such actions would be beneficial to the waqf. In other words, the mutawalli's understanding of the founder's directives must determine his decision-making process, which may or may not reflect what constitutes the best solution at any particular time.

This process may become further complicated if the founder had also appointed a Qazi (judge) and the Qazi does not allow the mutawalli to carry out the founder's intentions. The Qazi is an agent

[219] The broad definition of an economic agent is a person, company, etc. that has an effect on a country's economy; for example, by buying, selling or investing.

similar to the mutawalli; he is appointed by the founder to enforce his wishes.[220] As one can imagine, the mutawalli and the Qazi might have different interpretations of the true wishes of the founder. The Qazi has the power to block the decisions of the mutawalli. Differences of opinion could happen under the pretext of, say, repairs, the ingredients in food (even in the smallest matter, e.g., lamb versus veal in a stew), or staff replacement. The ultimate effect is that the waqf is empowered with a parallel level of ritual continuity. However, continuity can come at the expense of the waqf's efficiency. This brings us to accounting for the vastness of the resources that waqfs control in Iran and the corresponding sub-optimal usage of resources, which suggests static perpetuity. Perhaps this system suited the slow pace of medieval times, when changes to the economy came relatively slowly. However, in modern times, the rigidities of the waqf have proven unsuitable for the fast pace of economic change. The case was equally true with traditional laws as it is today, with the codified version of the same laws. The main question here is, why have all of these restrictions been imposed on waqfs? Additionally, who wanted to make waqfs less flexible? Finally, if the social losses have been noticed, why have waqfs never been abandoned?

To begin with the public waqf, because the ownership of a waqf is subject to dispute and even today constitutes a grey area, the mutawalli of the waqf, particularly after the death of the founder, can easily be tempted to embezzle. Alternatively, the mismanagement of a waqf can potentially be costly to the establishment's economic performance. In such cases, it was believed that tight rules of management would enforce honesty. One must not forget that waqf laws were established at a time when technological and economic advancements developed slowly. Therefore, the general understanding has been that enforcing honesty and morality would improve economic efficiency and the consequences of "tying an administrator's hands" were widely ignored. For those waqfs that

[220] The role of the Qazi with respect to an Iranian waqf is unclear, and, in many cases, the founder, mutawalli and Qazi were all members of the same family. Presently, in Iran the Awqaf Organisation plays the role of Qazi for all waqfs..

provided public goods, it was in the interest of both ruler and founder to adhere to the perpetuity concept, thus ensuring a steady flow of related services. Moreover, for those founders who were genuinely interested in providing social services, the cost of immobilising a property and "tying its administration's hands" was negligible compared to the benefits accrued by preventing potential abuses in the future.

In the case of family waqfs, one can say that it was mainly in the interest of the founder to enforce rigid rules concerning the waqf's administration. In order to maintain a balance in the family, as well as to ensure that the family and the descendants were served based on the priorities he established, the founder would have wanted to limit the mutawalli's operational activities. The founders of such waqfs (not necessarily the beneficiaries) would support imposing restrictions on the administration of a waqf—and hence its perpetuity. In either case, a substantial revision to the waqf laws, as might have been expected, has largely been neglected with respect to Iran's modern laws.

Pragmatic management

As mentioned earlier, many studies have shown that, in practice, mutawallis enjoy a great deal of freedom in running endowments. This, of course, generally runs contrary to what has been imposed on them technically and legally. All of the limitations imposed on a waqf's administration by Islamic law encourage a pragmatic approach to management. In many contemporary waqf studies, close adherence reflects a very different image of reality concerning the administration of a waqf. Although the mutawallis are limited by many rules and regulations, in practice pragmatic management is usually evident. In many cases, mutawallis have deployed various methods in order

to maximise the output of waqfs.[221] In the absence of strong litigation enforcement, mutawalli and waqf employees have often enjoyed great latitude. Moreover, one can find occasional examples of waqf assets being sold or exchanged. These examples suggest that the entire argument concerning static perpetuity is, in fact, irrelevant. However, in the long term, it is evident that a significant number of waqfs have suffered from mismanagement and ultimately have disappeared for a variety of reasons. In most cases, the waqfs in question became dilapidated beyond the point of repair and were finally completely abandoned.[222] Such approaches and adjustments may sound not only wise but also inevitable; however, they come at a cost.

Economic analysis

Pragmatic management, which is only natural due to the inflexibility of waqf laws, may seem to be a natural way of handling things. On one hand, the rules and regulations are stringent; on the other, people find ways around them in order to accomplish the waqf's mission. However, such adjustments come at a cost. In this section we complete an economic analysis in order to examine the ways in which the economy has been affected by these tight rules and the costs involved in adjusting to them. In theory, the founder's directions must be followed to the letter. Therefore, mutawallis have been left short-handed, particularly with respect to decision-making. Even if a mutawalli has the best of intentions, he may not be allowed to carry out decisions such as changing the type of crop produced, creating a new position on his staff, or even changing the waqf's

[221] In Iran, the waqf organisation is potentially the only institution that can challenge a waqf's administration.

[222] There are many small towns throughout Iran in which the old part of the town has been almost evacuated and its population has had to move further out and essentially build a new town. The reason for this has been that the old town had a great number of waqf properties, the majority of which were beyond repair, causing risk to those living near them; unfortunately, the waqf laws were inflexible in regards to this issue.

menu.[223] The most striking feature of waqfs, from which this institution continues to suffer, is the fact that resources cannot be pooled. In other words, joint economic ventures cannot be formed under waqf laws. Thus, waqf A and waqf B cannot share their resources in order to achieve synergy as waqf C. Consequently, as Kuran argues, "a waqf on its own cannot deliver large scale projects, such as road maintenance or piped water".[224] If waqf laws were sufficiently flexible so as to allow smaller waqfs to pull together their resources, such complex tasks would be achievable.[225]

The second section of this chapter examines various situations related to the role, duties and challenges of the mutawallis. There are two important points here. First and foremost, the study demonstrates that the lack of the concept of a corporation can cause many problems for this institution and explores the ways in which modern waqfs have responded to this situation. Second, I illustrate how comprehensive, and often complicated, the laws relating to mutawallis have become, making the operation of a waqf a tedious task.

The Mutawalli

The founder of a waqf usually makes arrangements for the waqf's administration by appointing an administrator. The most popular type of administrator is the mutawalli.[226] Briefly summarised, the most common situation is that a founder identifies an agent and establishes rules for the

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[223] The majority of the modern waqfs in Iran are related to the month of Moharram. Most of these waqfs exist, in part, to provide sustenance for congregations. The founders of these waqfs may have explicitly ordered certain foods and/or recipes.

[224] Kuran (2001, pp. 841–98)

[225] In contemporary Iran such tasks are carried out by foundations, such as Jahad-e Sazandegi and Many Bonyads.

[226] Qayyim, Naziir and Naqib are other names that have been used for this agent. The word mutawalli, as a description of a waqf's administrator, first appeared at the time of the Safavids. Prior to that, in most cases, the word Naghib was used.

appointment of his successors. Most schools of law allow the founder to take up this position. The duties of the mutawalli are primarily the maintenance and exploitation of the waqf property. For example, he decides which repairs must be made as well as how to make the establishment more profitable. Ultimately, he is in charge of distributing the proceeds among the waqf's beneficiaries. Additionally, he is entitled to be paid for his activities. His position is similar to that of a guardian (the literal translation of mutawalli is, in fact, "guardian") over a minor or an insane person.[227] In some Islamic schools of law, the mutawalli's administration may become subject to the supervision of a Qazi (judge).

The above description is very similar to that of the tasks and duties of a manager of a modern enterprise. Hence, in most cases the role of the mutawalli can easily be taken as equivalent to the manager of the waqf. It is true that—on the surface, at least, and in abstract form—the mutawalli does share certain similarities with a modern-day manager. However, as will be demonstrated, in practice a mutawalli's functions are very different from those of a modern-day manager. This study evaluates the efficiency of a mutawalli in a traditional establishment. Moreover, it will be determined how and to what degree the role of the mutawalli was adjusted once its legal parameters were codified into civil law.

There are many situations whereby there is a waqf but no mutawalli for it. This could be due to a number of reasons. The waqf's deed might have been lost or may not be legible, those who were appointed to the position may have passed on or no longer be interested in the job, and so on. Therefore, many fatwas have been issued to address such cases.

How to appoint a mutawalli when there is none

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[227] This is the literal meaning of "mutawalli".

The most well-known fatwas related to mutawallis not only teach us about traditional laws but also highlight actual cases and problems with which jurists had to grapple. The Imami jurists have issued various fatwas on issues concerning mutawallis. In most cases, the fatwas dealt with the absence of, or ambiguities surrounding, someone entitled to take over administrative responsibilities. Furthermore, it appears that disputes over the ownership of waqfs generally have concerned the administration of the endowment. Among the Imami shi'ites, Sheikh Tusi argues that the founder of a waqf can appoint either himself or someone else to administer the waqf's affairs. However, if he fails to appoint someone to carry out this duty, there are two possible answers to the question of its administration. In the first instance, the task of mutawalli becomes the responsibility of the ruler (i.e., the king). This is because the ruler is the representative of God on earth (Tusi bases his argument on the idea that the transfer of ownership of the waqf is from the founder to God, and because the king is the shadow or representative of God on earth, the king is in charge). In the second instance, the beneficiaries become responsible for the waqf's management. However, if we apply the same logic as that related to the transfer of ownership, the implication in this case is that ownership of the waqf has been transferred from the founder to the beneficiaries.[228] This is something with which Tusi does not agree, as mentioned in the previous chapter. In other words, Tusi fails to come up with a system that is coherent; based on his verdict, transfer of ownership interferes with the finding and appointment of a new mutawalli.

The second fatwa was issued by Mohaqeq Helli, who argues that, in the absence of an appointed mutawalli, it is the duty of the beneficiaries to take responsibility for the administration of the waqf, inasmuch as now they have ownership of it.[229] (It is clear that he views the waqf as having undergone a transfer of ownership from the founder to the beneficiaries). Unlike Tusi, Helli does

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[228] Tusi (2000, p. 232)

[229] Helli (1989, pp. 444–45)

not contradict himself, and his views on both the appointment of a mutawalli and the transfer of ownership are consistent.

The third set of arguments comes from Allameh Helli, who suggests that a founder can appoint himself or someone else to be mutawalli of the waqf. In the absence of such an appointment, the founder has priority to become mutawalli. However, there are alternate views on this: some jurists believe that either the ruler or the beneficiary may take the position of mutawalli. Both of these views are valid and are based on which method of determining who has ownership of the waqf is used.[230] In short, identifying the administrator of a waqf is closely linked to the ownership of the endowment. Because the ownership of waqf has been a matter of dispute, hence the administration of it cannot be identified easily either . It is clear that the unresolved case of the waqf's ownership exacts a toll on its administration and, consequently, its efficiency.

Ayatollah Najafi argues that the founder can appoint more than one mutawalli to the waqf.[231] He states that in the event that the founder fails to appoint a mutawalli, regardless of whether the waqf is public or private, it is the ruler's responsibility to take charge of its administration. However, for those types of waqfs that provide public goods, such as trees that provide shade under which people can take refuge, the ruler's permission is not necessary.[232] (The view of the jurists is that the waqf becomes the property of God; hence, the representative of God on earth, the king, becomes in charge of it). Although Najafi formally declares that there is no owner of the waqf other than God, one can see that, based on his argument, the ruler or king effectively becomes the owner of the waqf.

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[230] Helli (1985, p. 460)

[231] Najafi (1997, p. 22). This fatwa, issued in the 19th century, is the first of its kind and initiated a tradition of having multiple mutawallis in order to manage particularly large-scale endowments.

[232] Yazdi (2002, pp. 227–28)

Finally, Ayatollah Khomeini argues that in the absence of an appointed mutawalli it is the ruler's responsibility to take over guardianship of a waqf. However, in cases involving silt removal from canals (i.e., dredging), the harvesting of crops, and so forth, it is the duty and responsibility of the beneficiaries. Moreover, after the king, it becomes the duty of any pious man to take over the administration of the waqf.[233] Khomeini's verdict can be perceived as somewhat pragmatic. However, as is the case with most of his verdicts, it lacks objectivity. His verdict is a very good example of how waqf laws were made during the second half of the 20th century. In the first half of the verdict, he emphasises the duty of the beneficiary to be proactive and assist with the waqf's affairs, from which they themselves benefit (i.e., silt removal and harvesting). Furthermore, when it comes to appointing a mutawalli to the waqf, his view is yet again very much based on a few specific cases, regarding which he takes a very pragmatic approach. However, one could link his views on ownership of a waqf (which, in this case, remains unknown) to the transfer of the administration of the waqf to the ruler.

Article 61 of Iranian civil law states that the founder can express in the Waqfnameh whom he intends to appoint as mutawalli. Furthermore, Article 61 states that a mutawalli may be appointed either directly by the founder or through the court in charge of running the daily affairs of the respective waqf.[234] Moreover, the law states that every waqf has a legal personality, and the mutawalli is the legal representative of that waqf.[235] Furthermore, in the absence of a mutawalli, regardless of whether the waqf is private or public, it is the responsibility of the Valie-e Faqih, or Supreme Leader of Iran, to take charge of the designated waqf (which can be delegated to a waqfs

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[233] Khomeini (2007, p. 84)

[234] Emami (2007, p. 87)

[235] Ibid., p. 58

organisation).[236] Considering the vast amount of land in Iran that has been locked for centuries into waqfs without valid waqf deeds or mutawallis, this law gives a huge amount of responsibility and power to the Vali-e Faqih. However, our main focus is on the law's statement that gives waqfs legal personalities and makes mutawallis legal representatives of these institutions. We will return to this point later in this chapter. First, a few additional verdicts on the cases related to mutawallis will be explored.

There is no prerequisite or condition for someone to take the position of mutawalli as defined in civil law. However, in Articles 79 and 80 the law indicates that if a mutawalli fails to fulfil his duties, he may become redundant.[237] Clause 2 of the regulation concerning waqfs without a mutawalli states that if the waqf does not have a religious function, three to five people can assume the position of mutawalli. These individuals must have a minimum age of twenty-five years, be literate and be of local origin; their eligibility must be approved by the waqfs organisation. Furthermore, they may not be appointed for a period of more than three years at one time, although the position can be extended.[238] As will be explored later, the law tries to centralise the administration of waqfs by requiring that mutawallis be approved by the waqfs organisation. This is contrary to the traditional setting, where there are few, if any, restrictions placed on who is appointed mutawalli.

It has been noted that the mutawalli must obey the founder's wishes to the letter and that this stipulation takes much away from his decision-making powers in terms of running the endowment in an optimal way. Moreover, it was noted that, in practice, many of those restrictions were ignored

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[236] Ibid., p. 57

[237] Ibid., p. 137

[238] Ibid., p. 101

by mutawallis; often, they had no choice but to adopt a pragmatic approach. In many cases, this approach might have solved the temporary problem; in the long run, however, it advocated law breaking and led to corruption. It is important to consider what the jurists have determined about a mutawalli's duties, as well as the ways in which they have adjusted the laws in order to both decrease corruption and make the mutawalli's role more efficient, given the fact that modern legislators have been fully aware of corruption within the waqf system,.

The responsibilities of the mutawalli

The responsibilities of a mutawalli can vary, largely depending on whether or not the founder provided explicit directions for running the waqf. If the founder provided such directions, the popular verdict of the Imami jurists has been that the mutawalli has the responsibility to develop the waqf and run its day-to-day business precisely as indicated by the founder.[239] It was previously discussed that the role of a mutawalli could be confused with that of a present-day manager. This is where differences begin to appear. While the mutawalli shares some of the responsibilities of a manager with respect to particular tasks, his decision-making powers, relatively speaking, are fairly limited. This is primarily due to the fact that he is obligated to follow the founder's directions to the letter. As we will see, this generally tends to become an issue with older waqfs. For example, a waqf that was established in the 18th century, and for which the founder provided the mutawalli specific directions, may prove impossible or nonviable to be run as stipulated. In any case, if the mutawalli wishes to obey the founder's directions completely, he effectively becomes little more than an executor of the founder's decisions regarding the waqf—in other words, at least theoretically, the mutawalli's role is more akin to that of an executor than a manager.

[239] Shirvani (2008, p. 178); Helli (1985, p. 460); Yazdi (2002, p. 231)

When there is more than one mutawalli

The complexities of a waqf's administration become complicated further when a waqf has more than one appointed mutawalli. There are disagreements among jurists regarding the decision-making process when more than one mutawalli has been appointed to a waqf. The mutawallis might divide the tasks and related decisions among themselves, which is the arrangement Helli suggests, or, as Shahid Sani argues, the mutawallis might not be permitted to operate independently of each other.[240] These two fatwas reveal the unincorporated nature of a waqf. If waqfs had corporate status, there would be no need for such arguments. Ultimately, Yazdi gives some direction as to how a waqf can be operated under multiple mutawallis. He argues that in the event that the founder of a waqf has not divided the tasks among the mutawallis, the mutawallis likewise may not divide the tasks among themselves. However, they can divide the revenue generated by the waqf among them. He continues that if one of the mutawallis has a claim over a portion of the waqf's revenue, the other mutawallis lose their claims over the same revenue. If the mutawallis mistakenly award the same revenue to two different people, the revenue should be reclaimed and redistributed correctly. In the event of a dispute between the mutawallis regarding how to run the waqf, it is the responsibility of the ruler to resolve the dispute. Furthermore, whenever multiple options exist with respect to running the waqf, the method closest to God's blessings is always the most correct one. The mutawalli does not have the right to delegate his duties to someone else without first obtaining the founder's permission. However, the mutawalli can seek assistance from the religious magistrate.[241]

It is evident that verdicts such as those issued by Ayatollah Yazdi are based on particular cases, and it might be impossible to expand this fatwa into a blueprint for the administration of a waqf.

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[240] Helli (1985, p. 460); Shirvani (2008, p. 178); Yazdi (2002, p. 230)

[241] Yazdi (2002, p. 231)

Furthermore, it is again evident that the concept of corporation was entirely alien to Ayatollah Yazdi in 19th-century Iran. As a result, the waqfs in Iran were unable to achieve a smooth operation and to exploit their full economic capacity.

Finally, Ayatollah Khomeini argues that the founder can, during his lifetime, give the mutawalli the right to appoint other mutawallis or help him with his duties, or appoint in his will a mutawalli following his death. Moreover, should the founder have failed to expressly mention anything regarding the appointment of other mutawallis, or if he, in fact, forbade the mutawalli from appointing a deputy in fulfilling his duties, the mutawalli may not do so.[242] It is apparent that such fatwas clearly do not facilitate the economic development of a waqf—and perhaps make it entirely impossible. A good mutawalli, then, is confronted with the challenge of trying to increase the productivity of a waqf and grow its endowment without having the power to select an assistant. Furthermore, if a mutawalli cannot appoint someone to help him fulfil his duties, in his absence practically nothing can be done.

Now that the traditional perspective on the legal parameters of a waqf's administration have been reviewed, let us shift the focus to Iran's modern civil law and see how waqfs have been handled. Article 75 of Iranian civil law states that the founder can appoint himself or another person to manage a waqf independently or (in the event that another person is appointed) in cooperation with another. The founder has the right to implement conditions as he wishes.[243] Article 77 states that if the guardianship (Towliat) of a waqf has been delegated to more than one person, in the case of the death of one of the mutawallis, his responsibilities transfer to the surviving one(s). A waqf's revenues must be collected by the mutawallis collectively, and the ruler must thus appoint a new

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[242] Khomeini (2007, p. 84)

[243] Emami (2008, p. 101)

mutawalli to fill the gap.[244] This law sheds light on one of the shortcomings in the modern legislation on waqf. If the waqf functioned like any corporation—and the law allegedly grants it such status—the waqf's board of directors (in this case, the mutawallis) might have been established such that, in the event of the death of one of the directors, they would be able to find a resolution regarding the future of the management of the foundation. Therefore, Article 77 is contradictory with respect to the concept of a corporation, as it takes decision-making power away from the mutawalli and gives it to another unincorporated body.

Based on Article 86 of civil law, the conditions determined by the founder dictating how the waqf should be run must be carried out by the mutawalli. The mutawalli may exercise his powers merely within the limits of what the founder has specified in the Waqfnameh; for example, reparation and restoration, renting out and dividing revenues, etc. In the event that the founder failed to establish such conditions, the mutawalli's responsibility is to run the waqf in the manner that is the norm for similar waqfs.[245] This law encourages the management standard of waqfs to be equal. However, it discourages any kind of managerial innovation or creativity that might lead to greater efficiency, productivity and/or development of the endowment. Based on Article 86 of civil law, if the founder did not place any conditions on how the mutawalli should operate a waqf, then the waqf's revenues should be spent on its running costs, its repair and restorations; any remainder might go to the beneficiaries. Such a law creates a huge incentive for the mutawalli to inflate operational and similar costs and avoid providing any services.[246] Furthermore, what is evidently absent from the law is a provisional article that might encourage the mutawalli to use his judgment in order to come up with the most appropriate plan of action. Modern law fails to allow the mutawalli to enjoy the

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[244] Ibid., p. 136

[245] Emami (2008, p. 102)

[246] Ibid., p. 85

level of decision-making freedom that a manager would have in an enterprise. However, this is by no means an indication that mutawallis have adopted a passive role. Many recent studies on waqfs have demonstrated that the very rigid regulations that theoretically restrict mutawallis are often ignored. The pragmatic management of waqfs will be addressed later in this chapter.

Appointing a judge (Qazi) to a waqf

There may also be another player connected with a waqf: the Qazi (judge), who essentially supervises the work of the mutawalli. The founder can appoint a supervisor to oversee the mutawalli's work, or a board of supervisors to ratify the decisions of the mutawalli. Article 87 of civil law states this, stipulating that the founder can appoint supervisors either to oversee the work of the mutawalli or to ratify his decisions.[247] As previously mentioned, the practice of appointing a judge to supervise the duties of a mutawalli has not been consistent in Iran. For example, during the Safavid era the founder would normally appoint himself as mutawalli and his eldest son to be the judge. The son, then, effectively assumes a paid apprenticeship under his father, whereby he learns how to operate the endowment. The son would ultimately succeed the father as the next mutawalli of the waqf. Moreover, it is also very unlikely that the son would ever formally disapprove of his father's decisions, which makes the role of a judge more a symbolic than a practical one. However, such practice seems to have become less popular during the Qajar era and is not common in modern Iran.[248]

The role of the judge is not very clear in Iran's modern legislation. The Awqaf Organisation has duties that generally can be associated with the supervision of waqfs, which can be considered a step toward the centralisation of the administration of waqfs.

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[247] Ibid, p. 85

[248] For more on this, see Masashi Haneda and Toru Miura's "Islamic Urban Studies" (1994).

The salary of the mutawalli

The founder can set a salary for the mutawalli. However, if for any reason he has not done so, it constitutes a matter of dispute among Imami jurists. There are two cases that are most common here. In the first, some detail may have been left out of the Waqfnameh. As discussed earlier, the Waqfnameh may not be altered in any form or way. Therefore, if the founder forgets to register a salary for the mutawalli, he may not easily be able to do so later. Additionally, as is quite often the case, a mutawalli's salary set decades, or even centuries, ago may not be increased in accordance with modern salaries. For example, consider a waqf established 100 years ago, whose founder allocated a salary of £5 a year to its mutawalli. Although the need to adjust the salary may seem obvious, it is actually quite a complicated matter.

Helli argues that the mutawalli should be paid, whereas Sani argues that the mutawalli should have requested from the founder that a salary be established at the time that the waqf was established. If he did not do so, his actions suggest that he was happy to perform his duties without compensation.[249] This fatwa suggests that once a waqf is established, one cannot make any changes. Furthermore, it demonstrates how difficult it can be to address subsequent complications created during the waqf's founding. The same arguments and disputes exist among Sunni schools of law. In an attempt to overcome such problems, Article 84 of Iranian civil law states that the founder should set a salary for the mutawalli. In the absence of this, the mutawalli should be paid the same payment as if he were performing an equivalent job in the market.[250] Emami argues further that the founder

[249] Helli (1985, p. 461); Shirvani (2006, p. 178)

[250] Qanun Madani, Majmu'e qavanin va moghararet owqafi (2004)

may not appoint himself as the waqf's beneficiary, but he can appoint himself as the waqf's mutawalli, while also setting a salary for himself.[251]

Making the mutawalli redundant

The popular verdict among Imami jurists is that after ratification of the Waqfnameh, the founder cannot implement any changes, inclusive of laying off the mutawalli, unless otherwise stated in the Waqfnameh.[252] On the other hand, including such clauses may not be possible, based on the fact that the founder loses his ownership rights over the endowment. Ayatollah Yazdi argues that the ruler can make the mutawalli redundant if it appears that he has betrayed his position or neglected his duties.[253] The Sunni schools of law share very similar views regarding how to make a mutawalli redundant. According to the Shi'ite verdict, it is very difficult, if not impossible, to make a mutawalli redundant.[254]

In another attempt to rationalise such a process, Article 79 of Iranian civil law states that neither the founder nor the ruler can make the mutawalli redundant. If it turns out that the mutawalli has been betraying his duties, it is up to the civil courts to render a decision and issue a redundancy verdict. Moreover, if the court makes a mutawalli redundant, the court shall then appoint a trustee to take over the responsibilities of the waqf until the mutawalli reforms his behaviour.[255] The law is somewhat contradictory vis-à-vis the fatwas issued by Ulama and seems to be more in tune with the corporate status given waqfs by civil law. Finally, Article 80 of civil law states that if the mutawalli

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[251] Emami (2008, pp. 85–6)

[252] Shirvani (2006, p. 178)

[253] Yazdi (2002, p. 229)

[254] Moghnieh (1992, p. 609)

[255] Emami (2008, p. 83)

fails to fulfil the initial requirements explicitly requested by the founder, he should be suspended from his position. For example, if the founder had expressed that the mutawalli should be a Muslim and Iranian and the mutawalli converts to another religion or adopts a different nationality, he shall be considered redundant with respect to his duties. Moreover, making a mutawalli redundant is an irrevocable action.[256]

Case study: The Haj Baqeri waqf

The Haji Baqeri waqf is a large property, approximately 10,000 square meters, located north of Tehran. This waqf is considered a family waqf as well as a waqf of the Imam Hossein.

Haj Baqeri Sr. was a landowner in the Shemiran district of Tehran. During the reign of Reza Shah, at the peak of the government's confiscation of properties, he decided to convert his property into a waqf. During the very first year, he circulated a rumour that his property was a waqf without officially ratifying it. However, a few years later, he had to finish the job officially. The property compromises an orchard and a few buildings. The beneficiaries were set as the founder's children and the Imam Hossein. He appointed himself as mutawalli and his eldest son to succeed him following his death. He also assigned a salary of 500 Tomans (currently around 30 pennies) a year for his activities. The buildings on the property are flats, a few of which have been occupied by Haj Baeghri's children while the rest have been rented out. Every year, part of the waqf's income goes to a mosque in east Tehran for the purpose of producing food during the month of Muhharam, in connection with the passion plays performed then. The founder specified the type of food to be served, Khhoresh-e-Qeymeh (a Persian stew which is served at funerals). This stew, which is served with rice, can be made with lamb, beef or veal, although the founder was specific about using lamb

[256] Ibid.

in this particular case. In an interview, the current mutawalli of the waqf, Haj Bagheri Jr., discussed some of the issues and challenges he has had to face in recent years. The first concerns the salary of the mutawalli, which was a substantial amount at the time of the waqf's establishment; since then, however, the salary has become meaningless. Because the waqf is perpetual and the terms of the Waqfnameh cannot be changed, altering the mutawalli's salary has proven to be very difficult. Ultimately, the waqfs organisation raised his salary from 500 Tomans (30 pennies) a year to 40,000 Tomans (25 pounds) a year.[257]

The second challenge is that the waqf had been approached by a housing development project, with the permission of the waqfs organisation. At first, the mutawalli objected to this. However, he later learned that he had no choice other than to cooperate; otherwise, he might be temporarily or even permanently made redundant. The housing development project took place in the end, and there are now more than 30 new flats being built as part of three apartment complexes. These apartment houses have been sold to private individuals. The owners of these flats, however, were required to pay a sum of money as rent to the Awqaf Organisation; these funds have been collected by the mutawalli. Finally, there has been a shortage of lamb for stews in recent years. Therefore, the mutawalli had to coordinate with the imam of the mosque (who acts in the capacity of Qazi) in order that he should be allowed to use veal instead of lamb. However, the biggest secret that Mr. Baqeri shared with me is that, although the income from his waqf has recently increased significantly (which, theoretically, must be invested according to the wishes of the founder), he still spends the same amount as he did previously. He elaborated that the Qazi accepts a small bribe and tells the waqfs organisation that they have fed a much larger crowd, which would be the appropriate amount for the income of the waqf.

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[257] The salaries of the mutawallis constitute one of the major issues surrounding many waqfs. Today it is advised that, instead of having it constitute a fixed rate, it should be indicated in the Waqfnameh as a set percentage of the revenues. This would both motivate the mutawalli to be more productive and allow his salary to grow over time and in keeping with the inflation rate.

In order to shed more light on the challenges confronting waqfs whose purposes are no longer relevant, it is helpful to look at a particular example. Mr. Khosravi, the editor of the journal Waqf, Mirath e Javidan, discussed the high number of Ab Anbars (traditional water conduits) in the city of Yazd, the majority of which are waqfed properties. Because piped water has been introduced to every residence in this city, these Ab Anbars have been abandoned and most are now dilapidated, well beyond repair. However, because these establishments occupy strategic locations within the town they are perceived as having high economic potential for development. The remedial solution proposed by the waqfs organisation of Yazd is a scheme whereby the Ab Anbars are leased long-term to private individuals for development. The Awaqf Organisation used the money generated from these leases to purchase and place water fountains throughout the town. The justification for such an act remains a legally grey area and is subject to dispute, according to both civil and Sharia law. The interesting way in which the waqfs organisation was able to overcome this obstacle shows us how little things have changed. It was mentioned previously that, under traditional laws, jurists issued fatwas based on individual cases. Moreover, many of the hadith cited were fabricated in order to support the jurists' claims. Likewise, in this example, the waqfs organisation, in order to sort out the issue of the Ab Anbars, took refuge in a concept known as Aqrab fi Aqhrab. This concept allows for the identification of a substitute that reflects, as much as possible, the original wishes of a waqf's founder when the initial proscribed usage is no longer needed. Interestingly, in this case there were not any fatwas or concepts existing in the traditional setting. This means that the members of the waqfs organisation were unable to rely on civil law alone in order to make the waqfs productive; they needed traditional laws to support their claims. Finally, in the absence of either, they found it necessary to adopt a pragmatic route and even to establish new concepts.

Having said that, civil law has a few provisional cases and stipulations for considering cases in which the waqf's mission is unclear or has become somewhat redundant.

According to Article 61 of Iranian civil law, the revenues of each waqf must be spent exactly as stated in the Waqfnameh. However, there is a clause in the law that, in the event that the Waqfnameh no longer exists or is no longer legible, constitutes a set of directions concerning how the waqf should proceed. The law refers to three provisional cases dealing with such situations. The first is when there is no knowledge available as to whether the waqf was originally private or public. If this is the case, based on Article 91, the revenues generated by the waqf should be spent on charitable deeds. The problem with modern civil law is that it not only complicates the process but also fails to address whether the purpose that the initial founder had in mind is still of concern. Hence, the related resources may end up being invested in things that are no longer necessarily of any great importance.

The second case concerns public waqfs. One example concerns a farm, the revenues of which were meant to support students, yet there are no details regarding eligibility; nonetheless, the revenues must be spent only on students. If no beneficiary is found in the Waqfnameh, then the revenues of the farm should finance charitable deeds (the waqfs organisation should take over in this case).

Finally, there is the case in which, for example, the founder converted several shops to support the maintenance of a bridge and the bridge no longer exists; here, the revenues should be spent on charitable deeds. The main point is that civil law has adopted a position based on the scattered nature of traditional law. In other words, modern law has not elucidated the logic and framework underlying traditional approaches; the reverse has been true. Even with all of the changes in the law, the nature of waqf laws has remained the same; the outcome is that this institution is economically

inefficient. The traditional laws related to waqfs made it very easy for a founder to establish one. However, they are incredibly rigid once the endowment is established. All of the potential methods for revision that jurists have suggested are incredibly costly, both in terms of the economic value of the endowment and also with respect to the mission that the waqf allegedly is designated to support.

For example, consider a shop that has been converted into a waqf in order to provide scholarships for the students of a designated school. At some point, the founder or his heir realises that their decision to convert their property into a waqf was perhaps not the best one. They may desire to support the school in question, but no longer via the income generated by the waqf shop. Traditional laws do not allow them to terminate their waqf, nor to change it into any other form. Furthermore, they gradually realise that the shop is falling behind in terms of its economic performance relative to similar establishments. This is due to the rigidities imposed on the waqf's mission (for example, if the shop were a green-grocer, it would be very difficult to change it to something which might now be more profitable). Furthermore, inefficiencies may be the result of problems with the administration of the shop. As mentioned earlier in this chapter, the waqf's mutawalli may not be able to increase his workforce, or to deploy new methods of management or technologies that might help him improve the endowment's productivity. The pragmatic management and the potential methods whereby a mutawalli might effectively break the law have previously been discussed; the only method that the law leaves him is to terminate the waqf. Regarding the conditions related to the termination of a waqf, it appears that, in the end, the founder or his heir receives the property. In the meantime, however, the waqf experienced an enormously lengthy period of decay without productivity. The piece of property was stagnating and the beneficiary was not receiving whatever had constituted the main purpose of the waqf. It is only after many years of deliberate neglect that the waqf officially becomes void; the process of rebuilding must begin "from scratch," which means that many resources were wasted in the meantime. It is apparent that modern laws do not

offer a practical alternative to the rigid traditional laws. In fact, in the case just noted, the modern institution of the waqfs organisation eventually becomes exasperated with modern legislation and seeks an alternative to traditional laws.

The final section of this chapter explores some of the activities that those operating a waqf property can consider.

Renting out a waqf

Rented waqf properties have been encountered by most of the public in Iran. However, whether a waqf can be rented out or not has been the subject of much debate. Yet again, we have a situation in which, lacking a framework with some guidelines, the jurists consider an issue based on previous cases that often are incredibly particular. For example, Allameh Helli argues that one of the duties of the mutawalli of a waqf is to rent out the waqf property. If the founder had already rented out the property, or set the terms and conditions for doing so, then said terms and conditions are set. Alternatively, should the founder not have set the terms and conditions, doing so becomes the duty of the mutawalli; in his absence, the beneficiaries must rent out the property.[258] Shahid Sani argues that this is acceptable if, by renting out a waqf, the beneficiary actually receives the rent. Thus, if the beneficiary dies, the rent contract is terminated. On the other hand, if the main purpose for renting a waqf is to finance another waqf, then that rent contract remains valid.[259] Both Allameh Helli and Mohaqeq Helli argue that once the rent contract is signed, the mutawalli and the waqf's beneficiary cannot alter or implement any changes to it.[260] Such a restriction has resulted in many

[258] Helli (1985, p. 460)

[259] Shirvani (1986, p. 188)

[260] Helli (1985, p. 461); Helli (1989, pp. 452–53)

waqf properties generating almost no income because they were unable to adjust their rents vis-à-vis the rate of inflation over time.

Taking a rather more pragmatic approach, Ayatollah Khomeini argues that if a waqf is set in such a way that it generates revenue for rendering an activity, then, regardless of whether it is private or public, the waqf can be rented out. On the other hand, those waqfs that provide public goods, such as mosque buildings, or even a house, and which could be a private waqf for the founder's children, may not be rented out.[261] Khomeini continues that a founder can convert his already-rented property into a waqf. However, the rent (i.e., the revenues from the waqf) should go to the beneficiaries.[262] What becomes clear here is that jurists, in general, do not disagree in principle with the idea of renting out the waqf. The main problem concerns how the generated revenues are spent. Iran's civil law does not provide any specific direction in this respect. However, the accepted method, according to the Awqaf Organisation, is that the rent generated by a waqf property must be reinvested as much as possible into whatever purpose the founder had in mind. This has proven to be a fairly effective method and one that has enabled many properties to escape stagnation. However, it has also created space for opportunism and corruption.

Selling a waqf

The object of a waqf and its conditions have been discussed. Moreover, the specific case of the Astan-e Qods-e-Razavi, according to which the assets could be sold and reinvested into other enterprises, was highlighted. This section will explore the issue further, as well as consider whether a waqf can be sold and why this question is important.

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[261] Khomeini (2007, pp. 80–81)

[262] Ibid., p. 68

The common verdict among Imami Shi'ite jurists rules against the sale of a waqf. However, depending on the view as to whether or not a waqf is a perpetual establishment, different opinions have been offered. Those Ulama who argue for the perpetuity of a waqf, such as Sheikh Mofid, oppose the sale of a waqf under any circumstances (even if, as a consequence, the waqfed property should lose its economic value).[263] On the other hand, some jurists argue that the sale of a waqf is legitimate, though only partially. For example, if the window shades in a waqfed property need to be replaced, the relevant parts can be sold and replaced by new ones. In other words, some components of a waqf can be sold, but not the establishment as a whole.

This fatwa not only illustrates how a waqf or one of its parts may be sold, it also reveals the degree to which the mutawalli is restricted. According to this fatwa, the mutawalli may not arrange anything unless the waqf remains exactly as it was initially represented. Some may argue that this fatwa preserves the tradition of the institution. Arguably, this is true, yet neither can any improvements of any form be introduced. Furthermore, if we place ourselves in the shoes of the mutawalli, who needs to see to the repair of the window shades in his waqf, we realise how difficult the process of making the necessary repairs is. He must either take recourse to a pragmatic approach and break some of the rules or simply ignore the needed repairs. In Iran, both outcomes can often be witnessed today with respect to waqfs.

Sheikh Tusi, among others, argues that a waqf may not be sold under any circumstance. Then, in a completely contradictory statement, he argues that, in the event that the founder becomes financially desperate, or the waqf property becomes unusable, the waqf's beneficiaries can sell it.[264] Quite possibly, this fatwa has influenced generations of Ulama following Tusi, many of whom

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[263] Ibid.

[264]Tabirizi (1999, p. 187)

argue that if a waqf property becomes unusable in a manner whereby the continued use of the property renders it hazardous to its residents, it can be sold. Additionally, as Sani argues, should there be on-going disputes and disagreements between the mutawalli and the waqf's beneficiaries, then the waqfed property can be sold.[265]

Allameh Helli disagrees strongly with the sale of waqfs under any circumstance. However, he contradicts himself: on the one hand (in a very similar case to that cited by Tusi), he argues that even if a wooden column in a mosque breaks, one may not sell the column in order to finance a new one. Moreover, according to Helli, the broken column should be relocated to somewhere else in the mosque. On the other hand, he argues that if the founder included in the Waqfnameh a clause stating that, in the event that he becomes poor he can sell the waqf, the waqf can be terminated and the property sold.[266]

Ayatollah Najafi argues that should a waqfed property be destroyed in a manner whereby it can no longer carry out its mission, the property can be sold.[267] Finally, Ayatollah Khomeini rules against any sale of waqf.[268]

It is evident that the issue of the selling of waqf properties is filled with disagreements and complexities related to traditional law. Iranian civil law does not allow a waqf to be mortgaged because of the fear that, if the borrower is unable to pay his dues the waqf property will be sold. This act at once supports the perpetuity of the waqf and prevents the waqf property from achieving its full potential economic value. According to civil law, a waqf may be sold if it meets a few

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[265] Shirvani (2006, p. 254); Helli (1989, p. 452)

[266] Helli (1985, p. 306)

[267] Najafi (1997, pp. 109–10)

[268] Khomeini (2007, pp. 78–9)

conditions. First, based on Article 88 of civil law, it may be sold if the waqf becomes unusable (i.e., due to broken furniture, broken walls, etc., that cannot be repaired). Alternatively, the damaged waqf may prevent the greater endowment from generating adequate revenue. Moreover, in such cases, if there is no one to be found who is able to take responsibility for repairing the waqf, then the property can be sold (meaning also that there is an incentive not to repair the property). Finally, based on Article 89, if by selling a portion of a waqf one is able to repair or restore the damaged parts, those parts can be sold.[269] The second condition is stated in Article 349 of civil law, which stipulates another condition whereby, if there is an on-going disagreement between the mutawalli and the beneficiary that is causing the waqf's destruction, the waqf can be sold.[270] Modern laws provide a bit of structure, and they rationalise, to a degree, traditional laws regarding the sale of a waqf. However, given the scale of waqf properties in Iran, and their economic importance, the extent of change has been very modest.

The extinction of a waqf

The first of this set concerns how (if at all) a waqf can be terminated. As has been mentioned on multiple occasions, a waqf is intended as a perpetual endowment. Nevertheless, jurists have imagined several situations that might result in a waqf's termination. There are five major reasons why a waqf may come to an end. The first occurs when the goods of the waqf perish; that is, the goods have been destroyed or damaged to the extent that they can no longer be used or exploited in the way envisioned by the founder. The general verdict among the Ulama is that the waqf becomes extinct and the remains of the goods revert to the founder or his heirs. Some jurists assert, however, that no possibility of alternative use or exploitation must be left unexplored prior to a waqf's termination, and they explore this possibility to great lengths. In principle, waqfs consisting of land

[269] Emami (2008, pp. 89–90)

[270] Ibid., p. 191

cannot be extinguished. It is also evident that this has proved to be a very effective way for the founder or his heir to try to terminate a waqf property—in other words, to release their property from the institution of waqf. There are a few major problems with this. The first is that either the waqf does not provide the service for which it was intended, or the delivery of those services is hugely compromised. The second problem is that, generally speaking, it takes a very long time for a property to degrade to a state that is considered beyond repair. In the process, not only will the beneficiaries not receive any benefits, the property will also stagnate. Finally, a street on which there are a few waqf stores could be considered. They may all at one point become vacant and be abandoned. The resultant neglect, as well as the complexities involved in dealing with the properties, may cause the entire neighbourhood to suffer both commercially and in terms of real estate values. Who wants to open a nice store or go shopping where there are ruins in the middle of the street?[271]

The second possibility is that a waqf might be declared null and void by the religious magistrate or the ruler if the conditions of validity are satisfied, or if the founder has introduced stipulations contrary to the essence of the notion of waqf. The third reason, which is merely theoretical, occurs when the founder apostatises from Islam, as a consequence of which his established waqf becomes null and void. The fourth reason applies to a waqf established in favour of a limited number of beneficiaries for the duration of their lifetimes or for a specified period; it becomes extinct when the last of the beneficiaries dies or when the specified period expires. The waqf property then returns to the founder or his heirs. As was discussed earlier, a waqf's deed cannot include conditions that could subsequently void the waqf.

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[271] For example, the downtown area of the town Lasht-e Nesha in northern Iran contains several waqf properties. The majority of these properties were neglected. The problem became so severe that, ultimately, the town had to be relocated to what used to be considered its suburbs. New high streets and a town centre were built. The old town is now effectively a semi-ghost town.

The five cases presented above are more or less hypothetical. In reality, cases are presented to the jurists for their verdict. For example, a very common case is that which determines the fates of waqfs responsible for the activities of a mosque that no longer exists. The common verdict among the Imami Ulama is that it is best that the revenues of those waqfs are directed to the poor.[272] Ayatollah Khomeini, on the other hand, disagrees with this verdict and argues that, in this case, the waqfs' revenues should fund similar activities as per the initial waqf.[273]

Dividing a waqf

Whether a waqf can be divided has been a matter of dispute among jurists. Allameh Helli argues against dividing a waqf.[274] On the other hand, Ayatollah Khomeini argues that if the waqf property is shared among a few people, the waqf can be divided. For example, if a house belongs to two brothers, and each brother has converted his share independently into a private waqf, and one of them appointed his children to be the beneficiaries and the other establishes that the revenues from the rent of his share should support a mosque's activities, then the waqf can be divided in order to avoid confusion.[275] In one case for which modern laws rationalised things, Article 559 of civil law was cited; it states that a waqf can be divided if the property is shared between a waqf and a private property.[276] Article 597 of civil law states that the beneficiaries may not divide a waqf between them, regardless of whether the waqf is private or public. It seems that, in Iran, it is only the waqfs organisation that has the power to divide a waqf.

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[272] Helli (1985, p. 466); Najafi (1997, p. 44)

[273] Khomeini (2007, p. 78)

[274] Helli (1985, p. 465)

[275] Khomeini (2007, p. 81)

[276] Emami (2008, p. 94)

Resurrection of old and ancient waqfs

The most striking development in waqf laws in recent years was inspired by a fatwa by Ayatollah Khomeini. On 14 September 1984, the Council of Guardians passed a bill whereby waqf properties that had been sold without the exceptions mentioned in previous sections (or without the permission of a religious magistrate) must be converted back into waqfs, and their ownership documents were deemed no longer valid.[277] This law is important because it potentially violates property ownership rights. As discussed earlier, one of the major reasons that people have converted their properties into waqfs throughout history was due to a lack of security regarding their private property. What is evident is that the lack of security over private property is still one of the most important issues confronting the Iranian economy. Based on this law, one's property rights can be made void if it is discovered that a property had been converted into a waqf at some point in the past. The most striking aspect of this law is that it does not have a time limit. In other words, the law does not define how far back one must go in order to prove whether a piece of property had once been designated as a waqf.

Case study: Rab-i-Rashidi

According to this example, an ancient waqf that was completely terminated more than 700 years ago can be resurrected according to the modern laws of waqf.

Rab-i-Rashidi was an academic centre in waqf form, established by Rashid-al-Din Fazlolah-e Hamadani, the minister of Ghazan Khan, during the Ilkhanid dynasty in 13th-century Iran, in the city of Tabriz. The compound comprised 30,000 houses, which were divided into residential facilities for teachers, staff and the students, educational centres, libraries, labs, factories and the

[277] Majmu'e Qavanin va Moqararat Owqafi (2004)

like. The activities of this massive centre were supported through numerous waqfs that were spread throughout Iran and beyond, some even in modern-day Lebanon and Egypt. The founder of the waqf, Rashid-al-Din Fazlolah, was killed not long after he established the centre, and the compound was plundered several times and neglected—today, few remains of the buildings are intact. However, the waqf deed for this monumental compound has survived the test of the time, and the original copy is kept in a museum; around 1000 copies of it have been produced.[278]

The manuscript of this waqf is very accurate and well written, which makes identifying the exact whereabouts of the compound itself, as well as the waqfs rendering its activities, easy. Consequently, the Awqaf Organisation has thus far identified around 5000 pieces of property throughout Iran that formerly belonged to Rabi-i-Rashidi. Furthermore, the actual location of the compound, which has been identified as being around the city of Tabriz, is to be resurrected as a university according to the wishes of Rashid al-Din Fazlollah. As a result of the new legislations, those identified properties that once were part of the Rashidi's waqf must revert back to the waqf form. This process has created a number of problems. On the one hand, many individuals have had their property rights violated. Those properties that have been identified as being either part of the compound—or, alternatively, converted into waqf form in order to render the original activities of the compound—will now, according to modern legislation, revert back to their original form, and their owners will lose their ownership rights. Alternatively (as is most often the case), in some cases a property is identified as a waqf and the Awqaf Organisation allows the owner to retain his or her possession on the condition that he or she pay rent to the Awqafs Organisation. Because of the risks of dealing with waqfed properties in Iran, this arrangement will affect future sales of the property

[278] for more on this waqf compound and the manuscript:
http://www.unesco.org/new/en/communication-and-information/flagship-project-activities/memory-of-the-world/register/full-list-of-registered-heritage/registered-heritage-page-8/the-deed-for-endowment-rab-i-rashidi-rab-i-rashidi-endowment-13th-century-manuscript/

http://en.wikipedia.org/wiki/Rab%27-e_Rashidi

by reducing its market value. On the other hand, some may argue that the "resurrection" of Rab-i-Rashidi after seven centuries was a great contribution to Iranian culture, encouraging philanthropic activities, which in turn helps one's name live on long after him.

Case study: Saheb Divani Waqf in Varamin

The Saheb Divani Waqf, one of the largest waqf complexes in Iran, has been used a case study in this thesis. Those important details that support the arguments in this thesis have been extracted and translated from Persian to English. Many of the arguments that have been brought forward from the legal point of view throughout this thesis can be proven by studying these waqfs: the primary reasons for converting large-scale assets into waqf; the minuscule mission of waqf versus the enormous scale of the assets which have been designated for this task; and the administration and development of the waqf in modern times.

This waqf was established in 1840 by Haj Alireza, the father of Ebrahim Khan Kalantar.[279] The waqf comprises properties, villages, and five Qanats (traditional Iranian networks of wells for irrigation purposes) located south of Tehran. The main purpose of the endowment is to provide candles for a few religious ceremonies; the founder provided detailed instructions in the Waqfnameh. What is striking about this waqf is its sheer size—about 8000 square miles—and its prime location in the south of Tehran. What is interesting is that the output is only about twenty candles per year!

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[279] Hajji Ebrahim Khan had been chancellor for Zand and Qajar rulers for some fifteen years. He played a very instrumental role in positioning three consecutive kings to achieve power: Lotf Ali khan Zand, Agha Mohammad Khan Qajar and, finally, Fath Ali Shah. His legs and hands were amputated and he was boiled alive. His sons were either killed or castrated in order to ensure that his lineage did not survive him.

Mr. Sahib Divani, the current mutawalli of the waqf and a direct descendant of the founder, told us that, officially, he is still the administrator of the waqf. However, due to the fact that he is in charge of two other major waqfs (one of which will be considered next), he has not had the manpower or the time to look after this endowment. There is no mention in the Waqfnameh that the mutawalli can hire help and pay from the proceeds of the waqf; he cannot afford to do so from his own pocket. Moreover, because those areas south of Tehran are no longer used as agricultural land and are much more suited for development plans, their endowments have been stagnating for decades. The farmers have migrated to the cities and have established new careers, and the farms have been abandoned completely. The land, on the other hand, has huge potential for development. However, based on the current laws of waqf, converting such land into something different—for example, an industrial tow, which would be economically a wise thing to do—proves to be very difficult. The primary reason is that the current law only allows a waqf to change or update its mission—say, from using land for agriculture to an industrial estate—if the mutawalli can produce a complete economic analysis including planning permissions, business plans, etc. Such tasks are very capital-intensive and there is no guarantee that they will be approved. Therefore, in the majority of cases, the mutawallis do not take on this task.

Case study: Saheb Divani Waqf in Fars Province

One of the largest in Iran, this waqf was established in the late 17th century; additional properties were added to the endowment in the 19th century. It comprises more than 50 villages, numerous farms, orchards, Qanats, wells, mills, etc. The waqf is still administered by a direct descendant of the founder and has an incredibly long and detailed Waqfnameh. What is striking about this waqf is its sheer scale: at 168,000 hectares, it is larger than the Kingdom of Fife in Scotland and home to

nearly 150,000 people, mainly in farming communities. The purpose of this massive endowment is feeding the congregations at certain times of the year—during the month of Moharram, for example—a few other religious activities, and also to pay for the maintenance of several Hoseinieh. The problem here is that, from the perspective of economic performance, there are too many assets invested for such little return. The mutawalli of the waqf informed me that the entire endowment has been creating losses as far as he could remember, such that even those activities that were designated in the Waqfnameh never had been supported fully. He stated that the situation was due to the very tight waqf laws. As was the case for the first waqf, he cannot hire employees and pay them from the proceeds of the endowment because this possibility was not mentioned in the Waqfnameh; therefore, his days are filled with small tasks, leaving him no time to focus on the development of the endowment. He also informed us that he has had many offers and much interest from property developers for many different projects, but that once they learn that the property is a waqf they consider it too risky an investment.

Concluding remarks

This chapter looked at the administration of a waqf and a series of economic activities in which waqfed properties might engage, such as renting, selling, the termination of the waqf, and so forth. The first half of the chapter considered the role of the mutawalli, his duties, and the challenges with which he might grapple. Most texts refer to the mutawalli as the manager or trustee[280] of a waqf. The initial finding was that although on the surface a mutawalli has many of the same duties and responsibilities as a manager or trustee, because of the severe lack of decision-making power imposed on him by the waqf laws he might better be considered simply an economic agent who

[280] Appendix III of this thesis contains a historical study comparing the roles and duties of the mutawalli with those of the trustee of an English Trust.

happens to administer the affairs of the waqf. However, in practice these restrictions have not prevented mutawallis from carrying out their duties but have forced them to adopt a very pragmatic approach in running the waqf's day-to-day affairs. While related actions may work as a short-term remedy, however, in the long run they contribute to the corruption of the system and the weakening of civil society with respect to the broader economy.

The second part of the chapter looked at the long-term impact of maintaining the concepts of the perpetuity, inalienability and irrevocability of a waqf. These concepts, derived from the traditional laws set by various Islamic jurists, and which have entered into civil law, were generated during the pre-industrial age and have remained more or less unchanged over time; eventually, they were codified into the civil law of Iran. The goal was to demonstrate how much trouble waqfs' lack of corporate status, along with their ambiguous ownership status, has been for administering endowments. Practices such as a appointing a new mutawalli, increasing his salary to match the rate of inflation, or making him redundant are all incredibly challenging and difficult. These are issues that a corporation deals with on a day-to-day basis but which become huge legal challenges for a waqf. More importantly, jurists, for a variety of reasons, enforced a very rigid structure on the manner of a waqf's rules, instructing each mutawalli to follow the directions of the waqf's founder to the letter or to uphold the waqf's exact mission, which may have become completely irrelevant through the passage of time. These factors, which have contributed to the inefficiency and inadequacy (in some aspects) of the running of waqfs, and which also have locked up vast resources, have caused economic stagnation.

The third and final section of the chapter looked at several economic activities in which a waqf may engage. These activities ranged from renting out the waqf, its sale, its termination and even its resurrection (in the case of an abolished waqf). As might be expected, nothing is straightforward

and easy when it comes to a waqf. In principle, everything is very difficult and may even look impossible to achieve; however, in practice, there is almost always a way (a jurist's verdict, or an alternative view or understanding) to achieve the desired end. In other words, aside from renting out a waqf, selling it, dividing it or terminating it, almost anything can be done, although it usually ends up being a very difficult and complicated task. Perhaps the most revenue generated by all of the waqfs in Iran is derived from renting out their properties. Essentially, the mutawalli of a waqf rents out the property and uses the rent as a means to fulfil the founder's wishes, whether it be feeding the poor or contributing to the repair of a mosque, etc. However, problems with this process remain, the main one being the question of whether the amount of rent is stated in the waqf's deed; if so, it becomes very difficult to increase the rent with the passing of time. Hence, the tenants of these properties enjoy a lower rate of rent that they would if they were renting property that was not waqfed.

Furthermore, as a result of new legislation, properties may be built on waqfed land and leased over the long term. Nonetheless, again, such properties have lower sales values because of the complications potentially caused by the waqf laws. Finally, one of the most recent developments related to waqf laws in Iran was discussed: if it becomes clear that if at any point in time a property had been a waqf, and for whatever reason it was converted back into a normal property, that conversion has been deemed unlawful and the property is reverted back to a waqf. There is no cut-off date for this law. Therefore, as was shown, waqfs like Rab-i-Rashidi, established nearly 800 years ago and terminated soon after, have been resurrected. The problem does not so much concern the few terminated waqfs that carry significant cultural or historical importance but rather the degree of uncertainty that such a law imposes on private properties in Iran. Anyone could potentially lose (at least partially) his or her property rights if it is discovered that there had once been a waqf on the property. This law greatly enhances the power of the Awqaf Organisation in a

very practical way throughout Iran. Waqf properties allegedly constitute the largest share of land in the country, and this new legislation increases the scale of waqf significantly. The Awqaf Organisation is directly under the auspices of the Supreme Leader, and none of the waqfs' accounts are transparent or open to the public. It thus can be concluded that Iran's Supreme Leader is, in effect, the largest landowner in the country, which naturally enhances his political power.

Conclusion

There have been few studies of Iran's waqfs in general, let alone concerning the institution's legal and socioeconomic importance in particular, which has been the main focus of this thesis. As such, this study contributes to the socioeconomic history of Iran. First, it sheds light on the inconsistencies and shortcomings of the modern laws of waqf and on the importance of the institution as one of the main and key holders of important assets, from early medieval to modern times. The waqf system may have lost its appeal and position as the sole provider of public goods in the country and as a philanthropic institution, but it still enjoys a greater share of wealth and assets than any other corporation in Iran—and continues to grow. The hypothesis of this study is that the modernisation of the laws of waqf that has taken place in the 20th century has been insufficient and remains incomplete. The result often has been stagnation in the development of the waqf system.

Contrary to most other Islamic countries, where waqf laws were thoroughly modernised and updated to meet modern legal standards during the early 20th century, in Iran the waqf laws merely have been codified from their traditional versions into Iran's civil law. This has resulted in a legal system that is fragmented, confusing and subjective; the vast majority of the country's assets being unable to be exploited to their full potential; and scarce resources. In order to prove this point, a substantial amount of material has been utilised, mainly from primary sources. This is the second most important contribution of this thesis. Most of the documents used in this study were identified, selected and brought back from Iran and were then translated into English and categorised into sections in order to support the thesis' arguments. These materials could also be used as sources for research conducted in other fields of study that involve Iran's waqfs or the Imami school of law.

This thesis aimed to examine issues related to the institution of waqf in modern Iran from a legal and socioeconomic point of view. Most Iranians have heard of the term waqf, have possibly passed by places designated as waqfs, or have purchased or rented properties that later turned out to have been designated as waqfs. However, very few people can claim that they receive benefits from waqfs, or that they realise that this institution potentially encompasses the greatest share of Iran's land and properties. Moreover, it is not simply that the majority of the public does not know what exactly the purpose of this institution is; very few official statistics are available in this respect, also. Finally, the head of the Awqaf Organisation in Iran is appointed directly by the Supreme Leader; likewise, the mutawallis of Iran's largest waqf complexes, such as Astan-e Qods Razavi, Haram-e Hazrat-e-Masoumeh and Shah Abdol Azim, are directly appointed by the Supreme Leader and are unaccountable to any organisation (meaning also that they are exempt from tax audits, among other things).

The institution of waqf in modern Iran can be described as simultaneously present and invisible. It is present in that it exists and encompasses a vast amount of properties. At the same time, it is invisible because, except with respect to certain occasional religious functions, it is rare that public goods are delivered through waqfs, which was initially the very purpose of the institution. Additionally, the majority of waqfed institutions for which financial records are available have produced a loss or, in the best-case scenarios, broken even. One example, used in this study, is the waqfs of Sahibdivani, which collectively are even larger than the county of Fife in Scotland (where the town of St. Andrews is located) and the aim of which was, at the time of its establishment in the 19th century, to feed certain people during particular religious ceremonies and to pay the maintenance fees of a small mosque. Essentially, the main obvious issue with respect to existing waqfs is that there is no meaningful correlation between the input they require and the output they

produce. Furthermore, the laws have made it incredibly difficult and costly for the massive endowment to be economically efficient and developed.

Throughout this thesis—and through an examination of most, if not all, legal aspects of waqf laws in Iran—it became clear that Iranian waqfs are not productive, and that the laws are one of the main reasons for this; in effect, they are causing an incredible trove of assets to stagnate economically, something that has both economic and social consequences for the country. This leads us to the second question: if the laws of waqf are preventing this large-scale institution from flourishing, what has been done to address this problem?

As was mentioned earlier, in modern Iran the institution of the waqf is not very transparent, nor do many people associate it with the supply of public goods. These two factors have contributed to waqfs receiving little public recognition. Hence, there has not been much discussion of the institution, or many (if any) studies undertaken concerning the socioeconomic impact of waqfs in Iran. Furthermore, as far as the legal structure of the institution is concerned, the general assumption and belief is that although it is mainly perceived as a religious institution, it should have been modernised during the 20th century in much the same way as other traditional institutions were.

This thesis argues that waqfs still have huge socioeconomic importance. The fact that they do not provide much in the way of public goods, as was initially intended, and still hold significant assets means that these otherwise valuable assets are now effectively useless and stagnating. By locking resources into dysfunctional waqfs, the country effectively becomes resource-poor; this affects its ability to establish enterprises and promote meaningful economic growth.

After establishing the importance of waqfs, what has been done to the institution from a legal point of view was determined. After all, as far as the law is concerned the general perception is that it has been modernised. In line with that, the laws of waqf should be rational, coherent, follow a logical structure, and should not operate on an entirely case-by-case basis. The chapters of this thesis have been organised so as to tackle the above question. They begin by giving a background as to why, historically, waqfs were established and what the main socioeconomic and political reasons behind them were.

The task of analysing the laws of waqf and investigating whether or not they have been sufficiently modernised or rationalised requires that we first understand the function of the law. This may seem obvious, but in the case of waqfs, given that it is an ancient institution, many of the related laws and legal parameters may appear odd or strange. Therefore, it is necessary first to explain how and why these laws and the institution as a whole came about. Consideration of some of the characteristics of Islamic law, along with a consideration of the history of waqfs, should provide a few ideas regarding the establishment of waqfs and support for the institution in general, which is heavily anchored in Sharia law. In other words, Sharia law helped create this institution as a response to some of its own shortcomings, particularly those related to the economy.

Some of the main characteristics of Islamic law that have contributed to finding a remedial solution are as follows: first, traditional Islamic law, even as represented by its most modern and liberal interpretations, does not honour private property and has never recognised it as a natural right. Islamic law (or its interpretations) prohibit the lending of money—and thus, effectively, financing. Furthermore, the Islamic law of inheritance does not allow one to have testimonial rights beyond one third of one's wealth; likewise, it does not recognise corporations.

The peculiar nature of Islamic law, combined with Iran's turbulent political history (as with many Islamic countries in the region), paved the way for Islamic jurists to stand by the institution of waqf, which may not even exist now in its original form, from the time of Prophet. The jurists essentially created a system within a system. In other words, the institution of waqf came about and grew as a legitimate escape route from traditional Islamic laws. By converting assets into a waqf, one could gain a fair degree of protection over one's private property and testimonial powers beyond one third of one's assets, while gaining social status and even the ability to influence politics.

These same reasons, which legitimised waqfs, also contributed to its pervasiveness, something still evident today. After Iran's disputed presidential elections of 2009, Akbar Hashemi Rafsanjani and his allies came under significant political and economic pressure. The Islamic Azad University, which is directly run by and associated with him, and which has an estimated 1.5 million students and generates over $20 billion in revenue annually, now faces an uncertain future and even possible confiscation. As a result, it was proposed that its assets be converted into a waqf, something that became headline news and generated many highly political and even legal debates in Iran.[281] Additionally, there have been sporadic events involving waqfs being used to support political causes. The most notorious example concerns a very modest elderly woman who converted into a waqf her only possessional wealth, a tiny flat in the city of Qom, and designated the generated revenues to support the research and development of Iran's nuclear programme.[282]

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[281] www.bbc.co.uk/persian/iran/2010/10/101011_103_azad_khamenei.shtml; ww.bbc.co.uk/persian/iran/2010/09/100929_107_iran89_larijani_azad_university.shtml; www.bbc.co.uk/persian/iran/2010/06/100601_139_azaduniversity_background.shtml; www.bbc.co.uk/persian/iran/2010/09/100923_138_iran_azad_uni_hashemi_rafsanjani.shtml.

[282] *Waqf-Mirath e-Javidan*, vol. 15, no. 4, Tehran: The Awqaf and Charity Organisation of the Islamic Republic of Iran, 2009.

The aim of the second chapter was to introduce the main players of a waqf and to evaluate their strengths and weaknesses from a legal point of view. One of the difficulties of explaining the laws of waqf is that there are concepts and principles that influence the endowment in the long run; in the interest of keeping these concepts intact, they end up influencing everything, including the main players. Every waqf needs to have a founder, a beneficiary or beneficiaries, and a waqf object. There is also the overall concept of the endowment's perpetuity, which needs to remain consistent. In other words, the main players of a waqf should be identified in such a way that none of them are ever terminated, go missing, etc., such that the waqf would become void. Furthermore, because waqfs have been used frequently as tools for sheltering wealth, traditional jurists have set many conditions in an effort to prevent this situation. However, because sheltering wealth (possibly from outright confiscation by invaders) was frequently practiced, jurists also tried to make the regulations as loose and inclusive as possible.

The major finding in this chapter, which carries over into the rest of the thesis, is that legislators, when codifying the traditional laws of waqf, began with the details and worked their way up from there. The problem with this is that, with respect to individual cases, the laws ended up being more or less identical to their traditional versions; at the same time, when the institution as a whole came under consideration, the legislators tried to make waqfs more or less like corporations, which resulted in a great deal of inconsistency in the laws. For example, in Iran's modern civil law it is never stipulated that the founder of a waqf can be more than one person, or, more importantly, a corporation. With respect to individual cases, the law resembles its traditional form, whereby the founder must be one specific individual. On the other hand, when it comes to the institution of waqf as a whole, the laws give waqf (traditionally an incorporated institution) corporate status. Now, this is the only kind of a corporation that can be established by only one specific person as opposed to a group of investors, organisations, multi-nationals, etc. The same is true concerning the object of a

waqf: the waqf is bound to its object. For example, if someone converts a building into a school, the school is what constitutes the waqf. Therefore, if for any reason the object ceases to exist—say, the building in question collapses—then the waqf is terminated. In the case of the school, this limits its operational flexibility; a waqfed school may not expand in size or change its location, because this would violate the principle of the waqf's perpetuity. The law provides all of the details and specifics as to what traditionally can be converted into a waqf, without taking into account the fact that a modern-day corporation should have absolute control over its assets. I hope that this aspect of the thesis will inspire future research on other laws in Iran, laws that are generally presented as being coherent and modern, with the objective of establishing to what degree these claims are true.

The first part of the thesis looked at the main reasons and contributing factors which have historically resulted in the establishment of waqfs. These ranged from socioeconomic reasons to demonstrations of piety and political motives. It was also noted that, based on official reports, the majority of waqfs in Iran provide next to nothing. Therefore, they are unable to produce the public goods for which they were established, as the waqf only is productive if one breaks even; the profits render its mission.. It is also common knowledge in Iran that waqfed properties are easily exploited. In other words, waqfed properties have found themselves defenceless against violations. Theoretically speaking, a property can best be protected once ownership is clearly established, as it can thus be formally registered; in the event of disputes or violations, the state can then interfere and sort out whatever problems exist.

The case of ownership of a waqf is perhaps the most challenging topic that jurists have had to address. Jurists have long grappled with the issue of waqf ownership. They disagree as to whether or not a waqf should be considered a contract, and, if so, what kind of contract; based on the response to these questions, a whole new set of arguments follows. The main issue with traditional

laws is that there is no concept of corporation. In other words, for jurists, the concept that a waqf should own its own properties and govern itself is completely alien. Jurists have continued attempting to identify the person who owns the waqf, in spite of the fact that, inevitably, this becomes impossible. Unfortunately, Iran's civil law does not provide a clear verdict on this matter. The fact that there are so many properties in the country that are locked into this institution, as the matter of ownership remains unclear—thus leaving the respective properties vulnerable to opportunists—is alarming.

The laws of waqf in their traditional form lack the fundamental concept of a corporation. Hence, principles such as perpetuity, inalienability and irrevocability were assigned to waqfs, mainly so as to prevent the mutawalli of a waqf from embezzling money or committing other kinds of wrongdoing. Much has been written regarding the immediate and broader impact of such concepts on the productivity and efficiency of waqfs. In a sense, by virtue of observing such restrictions the mutawalli is reduced to the role of executer of the founder's wishes, rather than manager of the endowment, in spite of the fact that his assigned duties are generally to contribute to the development of the endowment and the exploitation of its potential.

It can be argued that traditional laws put the mutawalli in a position whereby he does not have a binding contract vis-à-vis the endowment (inasmuch as a waqf is not a corporation) and thus he must follow the wishes of the founder to the letter, so long as it is his responsibility to develop the waqf. Moreover, the less concrete a waqf's status is regarding its ownership, the easier it is for an opportunist to exploit it. This has resulted in mutawallis being easily corrupted; for instance, they may become tempted to embezzle money from the endowment. Mutawallis may also become corrupt simply because they have no alternative but to adopt a pragmatic approach to dealing with problems, such that they are forced to ignore the rules in order to accomplish their work. Given the

pervasiveness of waqfs and the number of mutawallis involved, it is not difficult to understand why respect for the law has never been significantly important over the course of Iranian history.[283]

Ultimately, the main question is this: how have Iran's modern laws responded to the shortcomings of traditional laws related to the position of the mutawalli? It has thus far been established that modern laws did not, in fact, manage to fix the problem of ownership with respect to waqfs and, indeed, have also produced many contradictions by giving waqfs corporate status while at the same time omitting much of the prerogative embedded in the nature of corporations. The traditional concepts of perpetuity, inalienability and irrevocability; the requirement that the mutawalli obey the founder's orders to the letter; and the idea that the founder of a waqf should be a single individual are only a few examples of carry-overs from traditional law contradicting a modern understanding of corporations. Additionally, the law has not managed to take drastic measures to sort out those laws related to the mutawalli. Therefore, the role of the mutawalli has become an incredibly peculiar one within the context of Iran's modern laws. On the one hand, he is considered the administrator of a corporation, much like any other administrator; on the other hand, he does not have even half of the decision-making powers of his counterparts.

There are no official statistics concerning the true scale of waqf in Iran; however, during the land reforms of 1962, 25% of the country's land was reported to be under the waqf's lock.[284] At the time of writing, the official statistics from the Awqaf Organisation of Iran found that the entire revenue of waqfs in Iran for the year 2000 was about 25 million dollars. The same report also noted that

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[283] Rouh-al-Amin (1998, pp. 72–3). Stories and poems from Golestan of Saadi and Divan-e Hafiz speak of the theft of waqfed properties

[284] Arasteh (1970, p. 121). This is a very conservative estimate and the actual figure must be far larger.

about 51,000 square miles were created as new, resurrected waqfs.[285] Furthermore, the world's largest waqf complex, Astan-e-Qods-e Razavi—which allegedly has accumulated properties collectively larger than Germany, with an estimated value of 15 billion dollars—recently announced with pride that it has a workforce comprising 20,000 people.[286] These figures beg the question: why would one add to the size of an institution that has at least one quarter of the country's land and has such a poor economic turnover?

As Acemoglu argues, the prosperity and poverty of nations lie heavily on their politics,, particularly those policies which involve institutions that provide incentives for innovation, investment or level playing fields. The majority of institutions throughout history have been extracting institutions. These institutions generally have been designed by a few members of the elite in society, who extract resources from the rest of the society. Furthermore, these extracting institutions do not generally encourage innovation or investment, and they certainly do not provide a level playing field for people to use their talents.[287]

The answer to the expansion of waqfs in Iran, perhaps, lies in politics. Historically, Iranian kings would establish waqfs in support of pilgrims going to Iraq in order that the preacher there might preach in the king's favour and maintain his popularity among the masses. In the 20th century, the head of the Awqaf Organisation, which effectively has ultimate power and control over the waqf system, is directly appointed by the Shah and now by the Supreme Leader. This effectively gives

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[285] Gozaresh Ejmali as Tahavollat Waqf va Oure Kheirieh dar Bist Sale Gozashteh (April 2001, pp. 20–65).

[286] Mo'men (1969); Atarodi (2002). There is no official record of how much money this institution actually generates, and that is why the employment record was taken into account. The same is true regarding the actual extent of the endowments.

[287] Acemoglu, Robinson (2012).

the leadership of the country ultimate control over the largest share of properties in the country. The expansion of this institution only increases the power of leadership.

Appendix I

This is a summary translation and an extraction of two lengthy Waqfnamehs (the manuscripts are attached), with some of the analysis of the waqf deed for Sahib Divan's family's two waqf complexes.

This can also be used as a case study, which incorporates almost everything discussed throughout the thesis. The images are photographs of photocopies made in 2010 of the original Waqfnamehs in scroll format. The original scrolls are privately held by the Sahib Divan family in Shiraz, Iran. Following the images are translations by the author and analyses of the two Waqfnamehs.

1.Waqfnameh of a waqf in Varamin, single-sided, dated 1840, Tehran on right (more images of the scroll follow)

The 1840 waqf in Varamin

This is a waqf that was established by the son of Ebrahim Khan Kalantar in 1840. The mutawalli of this waqf is Parvis Sahebdivani, who is a descendant of the founder. An original copy of the Waqfnameh was produced for me, which can be found in the appendices.

The first step is to review the entire Waqfnameh and identify all of the main players as well as the usage of the endowment. Additionally, the current state of this endowment was explored.

The founder comes from a wealthy family, one that has had many endowments. Therefore, there is no evidence in the Waqfnameh of common errors such as are generally committed by a new founder. The aim is to address a few questions based on the Waqfnameh and my meeting with the current mutawalli of the waqf.

The first question is, what are the most likely reasons that motivated the founder to establish this waqf? Second, how efficient has the waqf been in fulfilling its intended purpose? Finally, what is the current state of the waqf?

The founder

The waqf was established around 1840 by Haj Alireza, the father of Ebrahim Khan Kalantar.[288] The Waqfnameh does not begin by indicating the full title of the founder; it is only later, when the object of the waqf is described, that the founder is formally indicated, with his full title.

The act of founding the waqf

The first section of the Waqfnameh begins with a few verses from the Qur'an and the customary praise of those who are charitable and wish to leave a name for themselves long after they are gone. The document is decorated with many signatures and stamps from a variety of witnesses and other sources, ratifying the authenticity of the document. The Waqfnameh begins, in fact, by stating that the waqf is correct and fully complies with Sharia law.

The object of the waqf

This introduction is followed by a description of the waqfed objects (Raqabeh), which in this case are a number of properties, villages and five Qanats (traditional Iranian networks of wells for irrigation purposes). However, only one third (do dong) of these properties have been converted

[288] Hajji Ebrahim Khan had been chancellor for Zand and Qajar rulers for some fifteen years. He played a very instrumental role in positioning three consecutive kings to achieve power: Lotf Ali khan Zand, Aqa Mohammad Khan Qajar and, finally, Fath Ali Shah. His legs and hands were amputated and he was boiled alive. His sons were either killed or castrated, to ensure that his lineage did not survive him.

into two waqfs—and these not in their entirety. The location of all of these properties has been identified as Varamin, which is located in the south of Tehran. The waqf's deed continues by providing more information about and details regarding the designated waqf properties. The first part of the description indicates the names of the Qanats and notes that one of them is out of order. This is followed by information about some of the specific parts of this Vasat waqf. Identified specifically are an orchard, a castle with all its houses, and stables with the equipment that is kept there.

Statement of usage

The instructions for the use of the revenue generated by these objects begin with consideration of the orchards, the castle, and its belongings. The founder indicates his desire that the revenue (of one third of the endowments all together) be spent on providing light for the masses (Rowzeh) in honour of the Shi'ite imams. Moreover, the founder goes into great detail identifying how the lighting for these ceremonies should be carried out. The deed lists the relevant ceremonies in the order of their importance. The first is the Rowzeh of the first Imam, Ali; this is followed by memorial ceremonies in honour of other Imams, including Imam Hossein, his uncle Abbas, Imam Javad, Imam Asgari, and, finally, the twelfth Imam.

In the next section, a statement regarding use finally appears. After a confirmation that this waqf fully complies with the legalities of waqf, the statement of usage is presented. Any profit remaining after the waqf breaks even (this is, of course, referring to the one third of the properties that were converted), and after the costs of repairs and maintenance as well as the king's taxes have been deducted (the tax for the entire estate is also noted here, which is paid partially in crops and partially in cash), is divided into ten shares. In other words, we have a waqf that comprises many farms, a castle with a few houses, stables, and five networks of wells (Qanats) for irrigation. In the

event that the estate makes any profit (after paying taxes, maintenance fees, etc.), one third of that profit (in reality, the sum designated as waqf) must be divided into ten shares.

That these ten shares are necessary is explained next. The waqf's mutawalli receives two shares. The Qazi (Nazir) receives another share. The remaining seven shares must be spent on providing the lighting for the memorial (Rowzeh) ceremonies. In this section, the founder expresses his desire that the candles used in these ceremonies be of pure wax. The two candles for Imam Ali, the two for Imam Hossein, and the one candle for Abbas should be large. Another two large candles should be used for the ceremonies honouring Imam Javad and Imam Asgari, and one large candle is designated for the place (Sardab). Finally, two large candles should be used for the ceremonies honouring Imam Reza. The founder provides further instruction that the candles should remain lit from sunset to sunrise.

In the next section, directions are given as to how any surplus money should be spent. The founder expresses his wish that any surplus money be spent on Ta'zieh (the condolence theatre). Furthermore, he prefers that the Ta'zieh plays be performed by "Khames Al Aba" productions.

Administration

The appointed mutawalli of the waqf is the nephew of the founder from his brother's side. This is primarily due to the fact that the founder was a eunuch and could not have a child of his own. Furthermore, directions are given as to how the Towliat of the waqf is to transfer to Mir Fatah Ali Khan, the son of his nephew, after the founder's death. The role of mutawalli should transfer to the first agnate, who should be honest, reliable, devoted, etc. In the event that the line of the agnates becomes terminated, this task should transfer to the eldest male from the cognates. Finally, in the

event that the family becomes extinct, the Towliat of the waqf goes to the top magistrate of the Ulama from Tehran's Dar al-Khalafe.

Judge (Qazi)

At this stage, the founder also appointed a supervisor. The one appointed is another relative of the founder, named Haji seyed Nasr allah. We find a very similar provision concerning the Nazir (Qazi) as with the mutawalli in the event that he dies. Following his death, his duties transfer to his eldest son. Additionally, in the event that the agnate line in the family terminates, his duties are transferred to the eldest male and then to the eldest son from the cognate line.

Directions are provided regarding the duties of the Nazir. He should watch that the mutawalli does not rent out any of the waqfed properties for any period longer than three years. The founder indicated that if the rent went beyond three years, it would lead to corruption—in the event that this should happen, he hoped that the individual responsible would face the wrath of almighty God. However, in the next passages it is explained that the mutawalli will probably need to adjust the rent in line with taxes, as the low rent associated with the waqf since its founding would not be sufficient to meet any new taxes, which would probably cause problems.

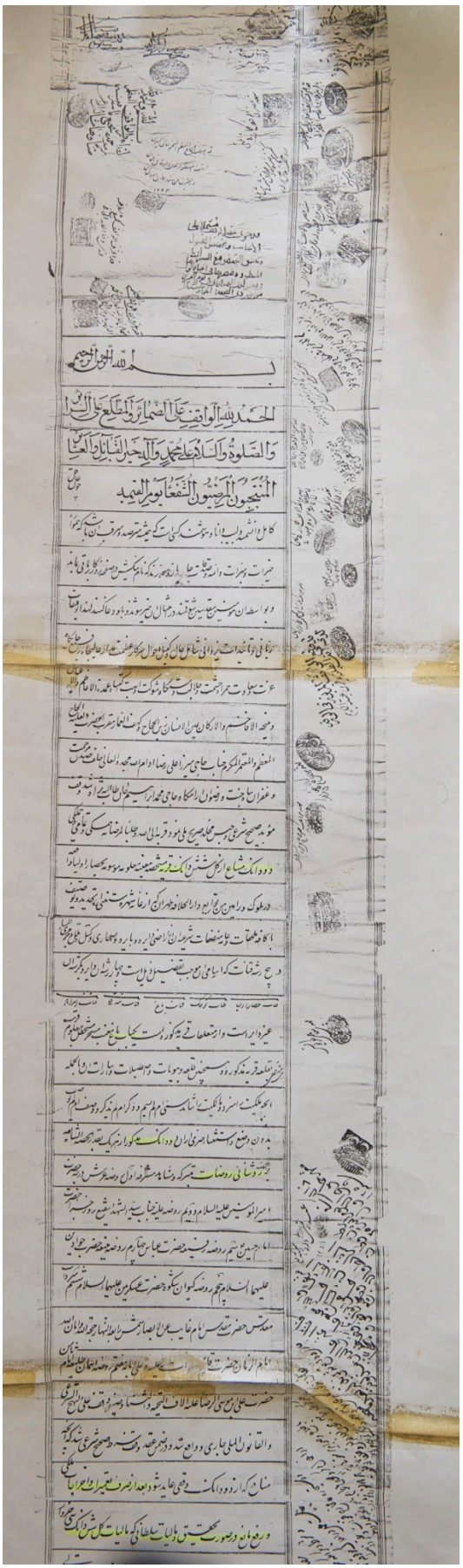
The second set of instructions is directed toward cases in which the tenants are unable to pay the rent, or, more broadly speaking, the entire endowment is operating at a loss. If such a situation arises, the mutawalli and the Nazir should not draw any salary. Furthermore, they should buy the stipulated candles with their own money. There is also a long list concerning how these candles should be used under poor financial circumstances. For instance, certain Rowzehes have priority over others (those corresponding to the first imams, Ali and Hossein, have priority over the rest).

Likewise, the candles should only be lit for three hours in the evening and an additional hour near dawn.

The founder continues to provide direction in the next passage of the Waqfnameh. These paragraphs are essentially his testimonial waqfs. He indicates that, following his death, one third of a village to be specified should be converted into a waqf. The purpose of that waqf will be to provide twelve candles to be lit during the same ceremonies. Additionally, the founder expresses his wish that the profits generated by the waqf be used to feed people on occasion, in connection with specific events based on the Islamic calendar. Finally, directions are provided indicating that any surplus should be spent on Ta'zieh and whatever else the mutawalli should select.

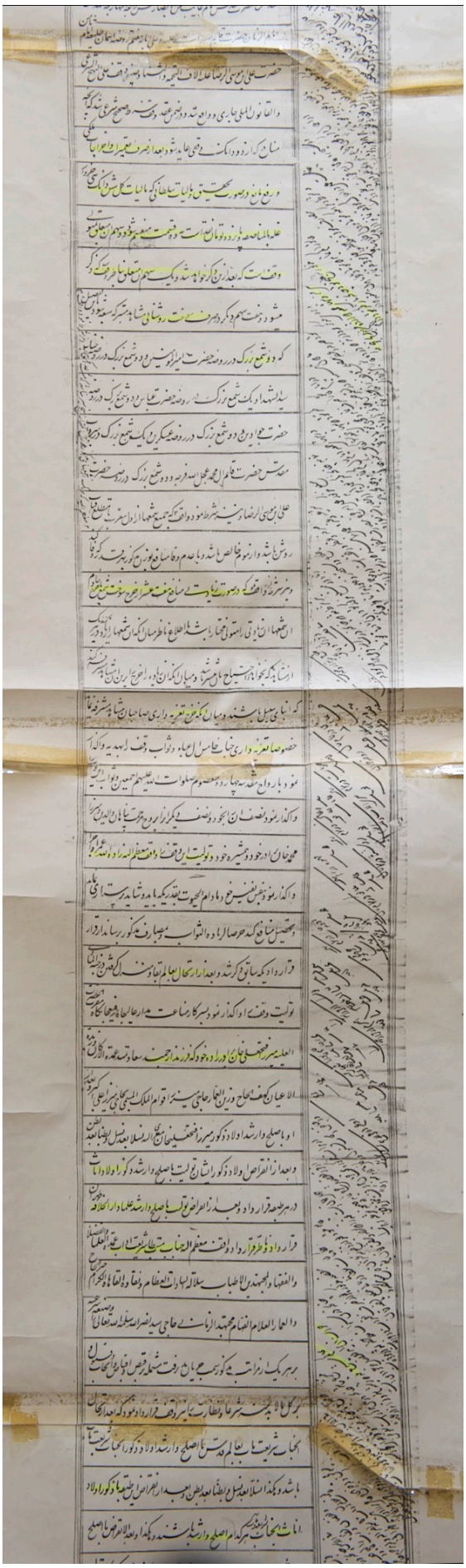
The second waqf in the same deed (testimonial waqf)

In the final passage, the founder notes the location of the designated village, which is not near Tehran but in the vicinity of Shiraz, the city from which the founder originally came. The founder adopts the position of mutawalli for this waqf for the duration of his life. Additionally, he appoints his other nephew, from a different brother, Mirza Mohammad Khan, to be mutawalli.



بسم الله الرحمن الرحيم

الحمد لله الواقف على الضمائر والمطلع على السرائر
والصلوة والسلام على محمد وآله الطاهرين الغر الميامين
المنجون المرضيون الشفعاء يوم الفصل



The 1600 waqf in Fars province (the second waqf)

This waqf is the second-largest waqf that this study has considered (after the Rab-i-Rashidi's waqf). The waqf is public and comprises many villages and farms, which the Waqfnameh describes in detail as to location and usage. There are two interesting aspects of this waqf. The first is that the waqf was initially established in the late Safavid period (probably around late 1600). It originally comprised more than 50 villages and numerous farms, orchards, etc. Much of the waqf was later confiscated from the founder and his family during the reign of the Nadir Shah. The current waqf was re-established by a descendant of the founder. The second founder managed to convert about half of the old waqf back to its waqf form. The second interesting aspect is that the administration of the waqf has remained in the family of the founder, and the current mutawalli is a direct descendant of the founder. The sheer size and scale of this complex means that most of the Waqfnameh is composed of a very long and detailed list of the properties and instructions regarding their intended purposes as well as how they shall be operated. The following are those extractions that are relevant to this thesis.

The waqf of Haj Ali Akbar Qavam

The founder

Haj Mirza Ali Akbar Qavam (Qavam al Molk Avval) was the fourth son of Haj Mirza Ebrahim Etemad al Dolleh. He was born sometime around 1820 and was the brother of Haj Mirza Alireza (the founder of the waqfs of Haj Alirezayee of Tehran). Furthermore, the founder had received the title of Qavam al Molk from Fath Ali Shah. Finally, the founder was appointed as one of the

mutawallis of Astan-e Qods Razavi for about three years before his death. He is buried in the Shrine of Imam Reza.

The waqf objects (Raqabehes)

The properties converted into waqfs are mainly in the province of Fars. The Raqabehes are in Kavar, Karbal, Sarvestan, Khafr, Simkan, Arsajan and Ramjerd. In total there are twenty-five farms, twelve entire villages and three mills that initially were converted into waqfs. Today there have been developments in some areas of these waqfs, and a few apartment buildings, shops and two Hosseiniehs have been established on these properties, as well. What is very important for us is that the entire waqf is over 168,000 hectares, which makes it slightly larger than the Kingdom of Fife, one of the provinces of Scotland. Finally, at this time there are nearly 150,000 people, mainly in farming communities, who live in these villages and work on the farms.

The usage of the waqf

According to the Waqfnameh, the income generated by the waqf must be spent first on its development, repair and maintenance. The generated profits then must be divided into ten shares. The mutawalli shall be paid one share as his salary. Furthermore, another half of a share shall be designated for the salary of the Nazir. After deducting these salaries, the remaining profits shall be divided into twelve equal shares. The founder's wishes are that most of the remaining money be spent on Ta'zieh and on feeding the congregation on the Thursday nights of the months of Moharram and Safar as well as, of course, the day of Ashura. Furthermore, it is expected that the mutawalli spend one fifth of that money on the repair and maintenance of a Hosseinieh, in addition to hiring a caretaker for that place (this man's salary shall be covered from that same share of money). There is also another one-fifth share to be spent on the poor of a specified place (Zolham)

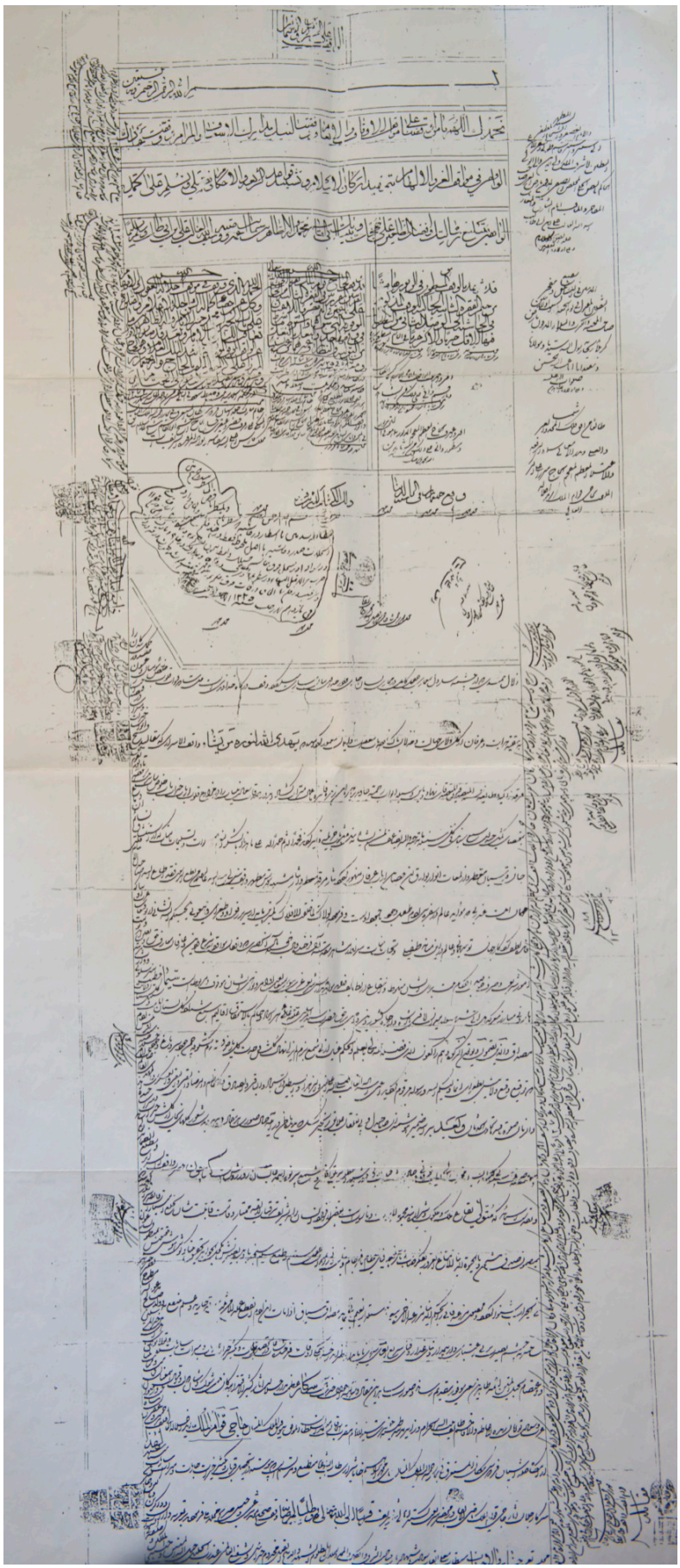
in any way in which the mutawalli decides. Moreover, another one fifth is to be spent subsidising the poor who want make a pilgrimage to Mashhad.

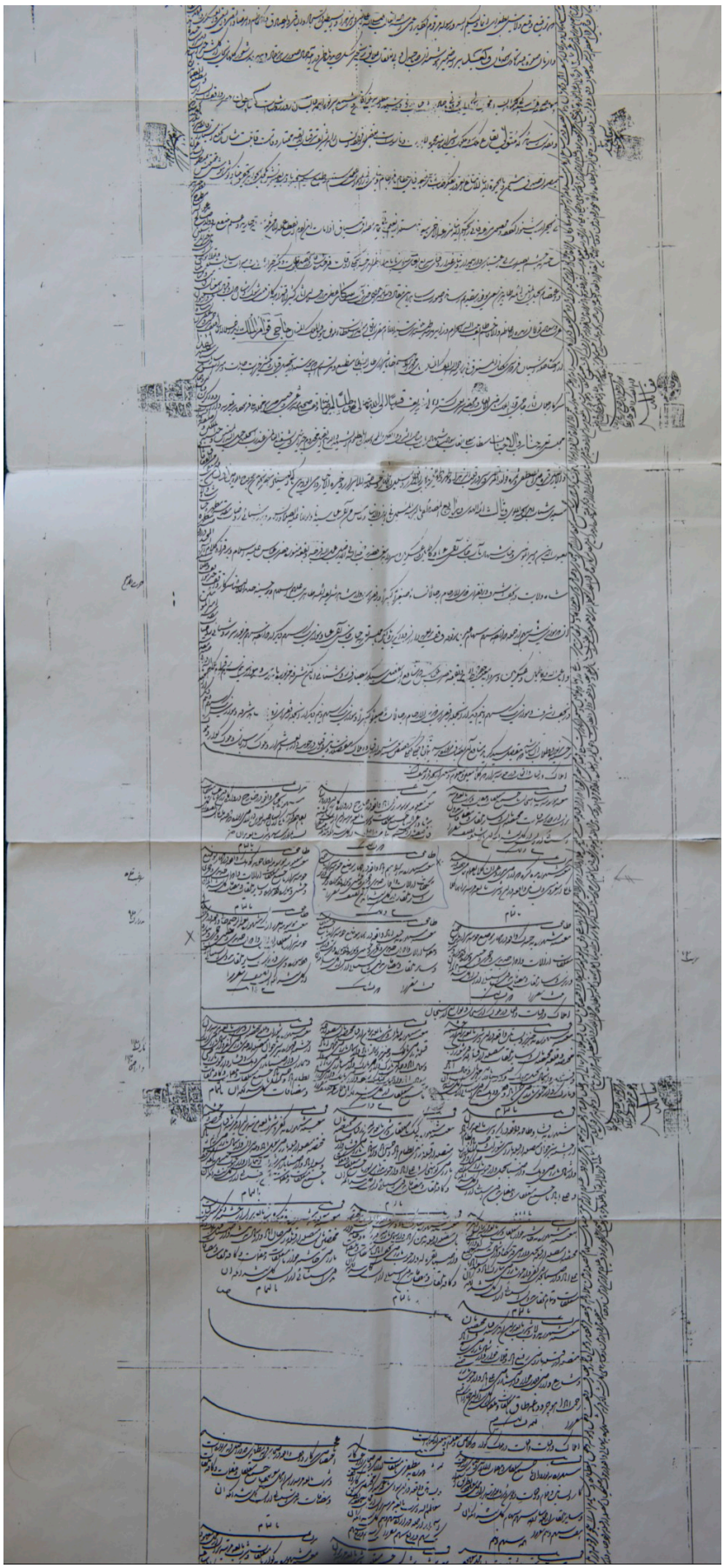
This leaves us with yet another share, which the founder wants to be divided into another eight equal shares. He wishes that seven and a half of these shares be spent on lighting (candles and oil) for the shrines of the Shi'ite imams in Iraq (all of which are described in detail). This sum of money also must be delivered to those shrines via a trusted man, as has been requested by the founder.

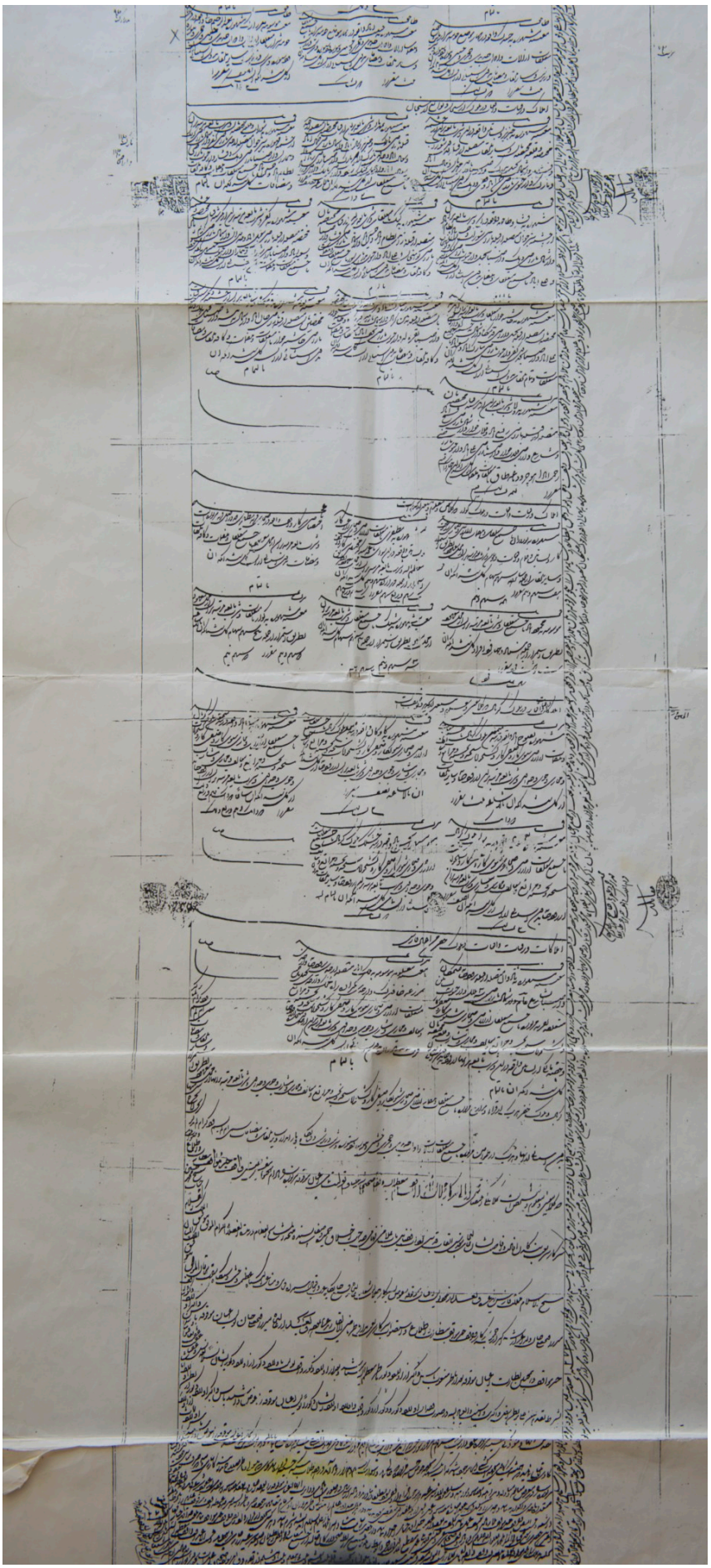
The remaining half-share is to be spent on the wages for a Rouzeh Khan for Friday nights, the Qads night and during the month of Ramadan.

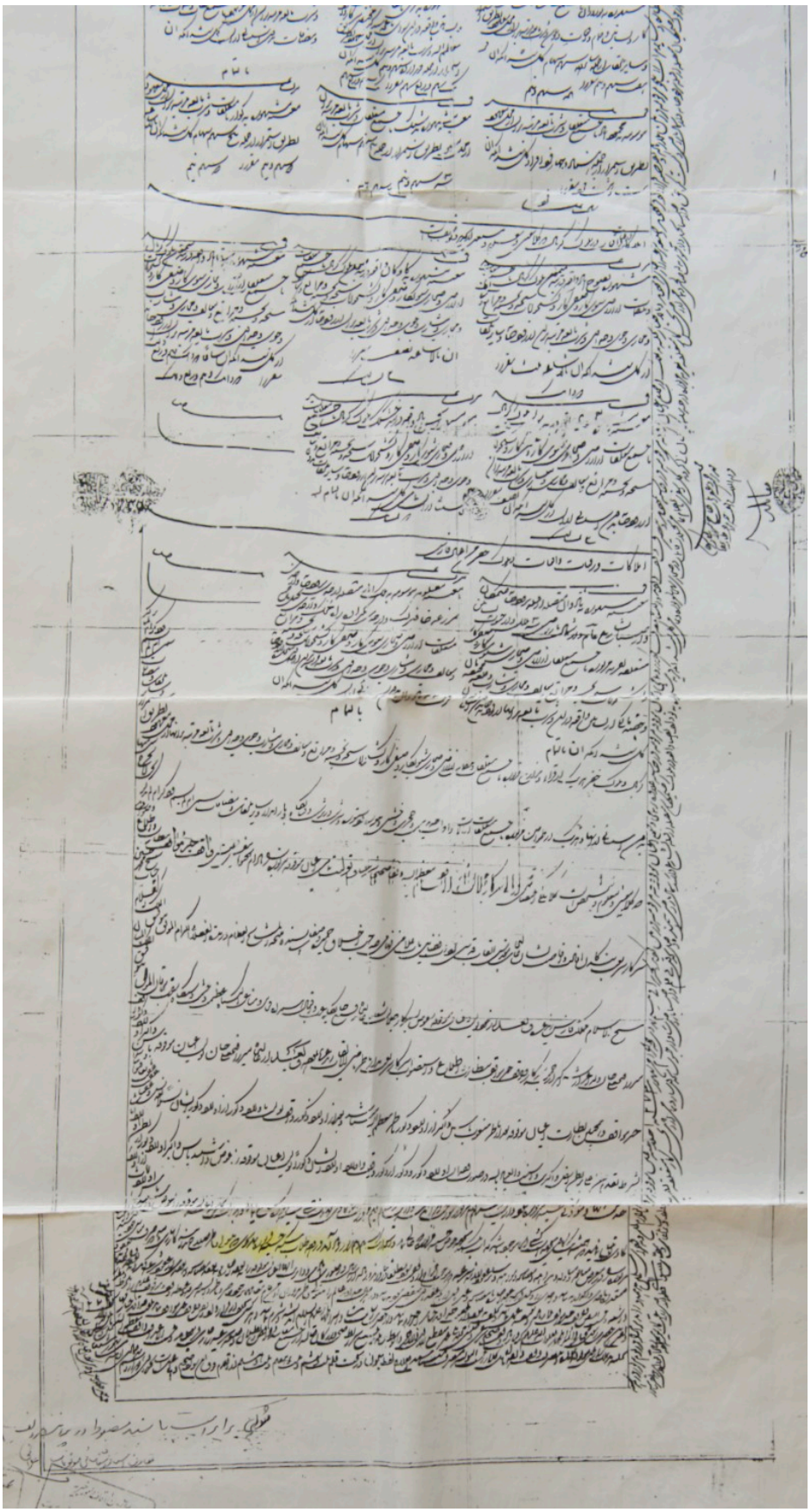
Mutawalli

The founder appointed himself as mutawalli and his eldest son as Nazir. The son will take the father's position after he is deceased. Mr. Sahib Divani in Shiraz is currently the mutawalli of the waqf and is a direct descendant of the founder.









Appendix II

This appendix features some arguments from the Imami and other Islamic schools of law concerning the institution of waqf.

The legitimacy of waqf

The early legal formation of waqfs as an Islamic institution

Our first aim is to argue that the institution of waqf, in its current shape and form, had its beginning about a century or so after the beginning of Islam, at a time when Muslim societies were experiencing enormous social, cultural and political transformation. As a result of the new economic order, the institution of the waqf came to play a pivotal role. From a legal standpoint, the ratification of such an institution created certain challenges, some of which made the authenticity of waqfs questionable. However, there is no doubt that the institution of waqf gained legitimacy by, and was heavily anchored in, Sharia.

Waqfs in Shi'ite jurisprudence

Every institution needs legal backing during its period of formation. Furthermore, in most cases, socioeconomic and political forces exist behind the establishment of an institution. In the case of waqfs, two sets of arguments were made in terms of how the institution received its seal of approval during the early days of Islam. The first of these argues that waqfs, in their current shape and form, already existed in the earliest days of Islam and even date back to the time of the Prophet. The second set of arguments advocates that waqfs came about a century or so after the birth of Islam, in response to the new socioeconomic demands of the time. In the first case, it is sufficient to establish that waqfs existed at the time of the Prophet and that he gave the institution his seal of approval.

With respect to the latter, any explanation is somewhat more involved. Both set of arguments have been presented here.

To begin, the legitimacy of any institution in Islamic law must be ratified by Sharia. All Sharia law is derived from two primary sources—the divine revelations set forth in the Qur'an and the sayings and example of the Prophet Mohammad as expressed in the Sunnah. Fiqh, or jurisprudence, interprets and extends the application of Sharia to questions not directly addressed in the primary sources, largely by including secondary sources. These secondary sources usually reflect the consensus of religious scholars as embodied in Ijma—that is, by drawing analogies with the Qur'an and Sunnah, what is known as Qiyas. Shi'ite jurists replace Qiyas—analogy—with Aql, or reason. Where it enjoys official status, Sharia is applied by Islamic judges, or Qadis. Interestingly, the word "waqf," never mind its legal parameters, is not mentioned in the Qur'an. Furthermore, the two words most closely associated with waqf, Sadaqeh (alms) and Habbeh (donation), also are not mentioned. Imami Shi'ite scholars argue for the legitimacy of waqf on the basis of two sets of arguments: Adelle Aam and Adelle Khas.[289] The former refers to arguments based on verses in the Qur'an, or recollections of the words of the Prophet Mohammad and/or the twelve Imams, what are known as hadith. Imami jurists have argued that the institution of waqf helps to improve the welfare of the community, and that the Quran in general—and many specific passages in particular—encourages deeds that improve general welfare. For example, Verse 90 states: "whatsoever ye spend for good, He replace it"; another verse states: "O ye who believe, When ye hold conference with the messenger, offer an alms before your conference".[290]

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[289] Alsivary (2000, p. 113)

[290] Similar injunctions can be found in verse 20 of Al-Mozmal and verse 177 of Baqara.

Waqfs derive their legitimacy primarily from the hadith. Many related hadith are shared by both the Imami Shi'ite and the Sunni schools of law. However, the earliest records of Shi'ite versions of related hadith date to the 10th century, whereas in the case of Sunni schools they date further back, to the 7th century.[291] The earliest examples of recorded hadith in Imami Shi'ite writings are in a book called Al-Suna va al-Ahkam, which dates to the 10th century.[292] Furthermore, all of the fundamental hadith that deal with the institution of waqf have been collected in a book called Vasael Shia.[293] The importance of these sources for studying contemporary waqfs in Iran is that they are still widely used in Iran's legal system whenever there may be a shadow of a doubt regarding the authenticity of a waqf.

The most widely cited hadith concerning the issue of a waqf's legitimacy are those by Ali ibn Abitalib, the fist Imam of Imami school: "When a man dies, only three deeds will survive him: alms [the actual word used here is Sadaqeh, not waqf], which continue to be paid; knowledge, which generates profit; and a child praying upon his soul".[294] The next hadith, again cited by Ali ibn Abitalib, states that paying alms and Habs (tying down wealth) are both ways of storing up wealth [points] for the next life.[295] Two sets of challenges arise when it comes to accepting these hadith as good enough to attribute legitimacy to an institution. First, because these hadith were collected over three centuries after the earliest days of Islam, their authenticity is questionable. There are many arguments whereby they are viewed as mere inventions, dating from later periods.[296] Furthermore,

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[291] This is almost the same time as when Fiqh was written for the first time.

[292] Saleki (2008, pp. 11–12)

[293] Shirazi (1998, p. 257)

[294] The same hadith is used by Sunni Muslims, only it is attributed to Ali and is referred to in the Sahih of Muslim Ibn Kudama al-Muqni, pp. 588–89.

[295] Tabrizi (1996 p. 511); Shirazi (1998, p. 292)

[296] Schacht (1953, p. 444)

even if we closely adhere to the two hadith cited above, we might note that the word waqf is not mentioned in either of them. The first hadith uses the word Sadaqeh, which entails very different legal parameters then waqf. Likewise, in the second hadith the word Habs, although close to waqf in meaning, is still not close enough to arrive at a clear verdict.

The second line of reasoning, Adelle Khas, refers to the early days of Islam. The waqf system derives its legitimacy from the idea that the Prophet approved it. The earliest waqf-related story dates to the Battle of Khaybar, in connection with which Umar received a piece of property. The Prophet asked him to make this land Habs and use it as a Sadaqeh (Habasta Aslaha wa-Tasaddaga bihd). Obeying the Prophet, Umar turned the property into a Sadaqeh: “it shall not be sold, nor given away, nor inherited, and its usufruct should be spent (Tasaddaqa) on the poor, the relatives [of the Prophet] (Dhawi'l, Qurba), and those who fight in God's wars (Sabilu'llahi)”. The second story is about a well in Medina. The well and its surrounding land were converted into a Sadaqeh by Ali. Its usufruct was given to three freedmen. Ali requested ink and a piece of parchment and wrote everything down. Although it appears that the three freedmen would have made a living working at the well and on the surrounding land, the first right to the usufruct was to pass to Ali's sons, Hasan and HusAyn; thereafter, it could not be sold and would be enjoyed by “the poor” and by the Abna al-Ablli. At this time Sadaqeh also had an aura of sanctity, or even taboo, as illustrated by a tradition related to Hasan, Ali's son and grandson of the Prophet, who, upon putting into his mouth a date that belonged to the Sadaqeh, was promptly admonished by the Prophet, who shouted: “‘kakh kakh, spit it out! Don't you know that you are not to eat Sadaqeh’? The Prophet would not eat anything that came from Sadaqeh, but only from a Hedyeh (a personal gift)”.

The main stories to which the Imami Shi’a refer are, first, that the Prophet converted one or more of his orchards into a waqf. However, his waqf was a family waqf, and only his children were

appointed as beneficiaries.[297] Also, there is a story about a man named Abu-Taleh, who was from Madinah. He had a date orchard known as Birha. This property was located directly in front of the Prophet's mosque. The Prophet often visited this orchard to drink water from its well. One day Abu-Taleh went to the Prophet and told him: "God says you have not yet understood the meaning of good deeds unless you pay alimony. Thus, I am going to pay the revenues of my orchard as alms (Sadaqeh). I would like to secure a place in heaven for my soul." The Prophet liked his proposal and advised him to appoint his relatives as the beneficiaries of those alms. Abu-Taeh thus divided the orchard between his relatives and made sure that his cousins received larger shares.[298]

It can be concluded that the earliest tradition concerning the conversion of one's property into a waqf was for the purpose of supporting and financing jihad. Furthermore, it is important to note that, as with the hadith, none of the historical references to institutions similar to waqfs actually use the word waqf but instead use the word Sadaqeh or Habs.

Arguments aimed at proving that waqf is a legitimate institution based on Sharia law are not exclusive to the Imami Shi'a. Almost all Sunni schools of law have engaged in similar debates and make use of their own hadith. For example, the Shafei' school of law refers to a hadith associated with the Prophet Mohammad which often is utilised to prove that waqfs are legitimate: all a man can take with him into the next life are his good deeds, his on-going alms (Sadaqeh) and his children's prayers upon his soul. In this passage, on-going or current alms are closely associated

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[297] Schacht (1953, pp. 995–96). Schacht elaborates on this story: in contrast to the admonition directed at Muslims who in their wills deprived their families of more than one-third of the wealth, it seems that Mohammad's own offspring were not permitted to inherit any of his property. Undoubtedly this was a result of the struggle that split the Muslim world, beginning with the war between Ali and Mu'awiya and continuing well into the Abbasid period. The resolution to limit the economic resources of Ali's descendants gave birth to traditions that were mainly generated by the alleged struggle of the Prophet's daughter Fatima to secure the inheritance of Fadak for herself.

[298] Ibid.

with waqf.[299] Furthermore, by citing another hadith associated with the Prophet, in which conversion of a property's revenue into Habs for someone's welfare is encouraged, jurists legitimise the institution of waqf.[300]

As noted earlier, in almost all of the manuscripts featuring stories about waqfs, or from which relevant hadith have been extracted, the word Sadaqeh, not waqf, is used. It is important to consider in greater depth the word Sadaqeh, as well as its legal parameters according to Sharia, in order to see if Sadaqeh can, in fact, be considered synonymous with waqf. Those who argue that waqf and Sadaqeh are the same thing base their arguments on a consideration of the words' respective roots, h-b-s and w-q-f, which in Arabic can constitute synonyms (likewise with respect to q-d-sh in Hebrew). Based on their literary meanings, Sadaqeh, according to Sharia law, has very different legal parameters than those of waqf, something that sets them apart from each other. Important here is that we more closely adhere to the passages in which the word Sadaqeh is used, as well as the context in which it is used. It appears that, during the early days of Islam, the Prophet had established a tradition whereby he would provide material incentives to new converts to Islam. Hence, in one case he ordered that a certain person be given a flock of sheep belonging to a Sadaqeh. Thus we see that during the early period of Islam Sadaqeh, like its synonyms waqf and Habs, denoted property common to the Ommat, mail al-Muslimin. Whatever remained from the booty acquired in various expeditions after each fighter had received his individual share—likewise, after the Prophet received what was due to him—was effectively considered waqf.

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[299] However, some argue that the word Sadaqeh (alms) has a very different meaning and different legal parameters than waqf. This argument has been challenged by making reference to the beneficiaries of waqfs who are not entitled to ownership of them. By contrast, the recipient of alms is the owner according to Sharia law.

[300] Shirazi (1998, p. 255)

The initial reasons why these individuals stood behind the institution of waqf is not entirely clear. However, the practice of Sadaqeh during the earliest days of Islam—particularly Sadaqeh associated with the tradition of the Prophet—does not necessarily correspond to what today would be considered waqf. Timur Kuran demonstrates that the earliest waqfs did perhaps satisfy the definition given at the outset, which seems to date from about a century following the birth of Islam. At some point following the first few decades of Islam, privately endowed organisations began to provide services that the original Islamic state had provided through property expropriated from non-Muslims or taxes collected under the category of Zakat. The juridical form of waqf took shape around the year 755, during the 2nd and 3rd Islamic centuries.[301] The question remains: why might it be that Muslims of the 8th century granted Islamic legitimacy to an institution that played no formal role in the original Islamic economic system?

By itself, the emergence of a demand for privately provided public goods does not guarantee the requisite supply. Nor does it require the selection of waqfs, as opposed to some other delivery mechanism, as the solution to the problem. In any case, it is hardly obvious that the expansion of Islam should result in waqfs being the most efficient way of delivering almost all public goods in such a highly decentralised manner. A clue to this puzzle might be the fact that the expansion of Islam fostered an increasingly large class of major landowners. Whereas in 7th-century Arabia most wealth was held by merchants and herdsmen in the form of movable commodities, in Syria and Iraq during the seats of the Umayyad and Abbasid dynasties that ruled much of the Arab world (661–750 and 750–1258 respectively), agricultural land and urban real estate became the predominant sources of wealth. This transformation would have generated a demand for sheltering immovable wealth from arbitrary taxation and confiscation, two common dangers of the period. Significantly, the rules for establishing a waqf require that an endowment consist solely of immovable property. They also

[301] Kuran (2001, pp. 841–98)

require the property in question to be available forever with respect to the designated mission. Insofar as establishing a waqf provided advantages to the founder, the owners of the properties and buildings would have been the principal beneficiaries. Currency is movable, and its excess is more difficult to prevent. Earlier, when the seat of Islamic power was still in Arabia, the owners of easily concealed and movable wealth obtained analogous privileges. In the case of medieval Iran, as Ann Lambton shows, legally it was only land that could be converted into waqf, the ownership of which would remain with the founder.[302]

Thus far, it has been found that there must have been charitable endowments during the early days of Islam that were approved by the Prophet. However, neither he nor any of the Imams of the Shi'ite school of law refer to those institutions as waqfs. They all use the word Sadaqeh or Habeh, both of which developed legal standings different from that of a waqf. Thus, assumptions whereby a waqf is considered to be synonymous with those charitable deeds are redundant. Waqfs most likely came about as a response to socioeconomic demands in the 7th century and are reflective of the changing lifestyle of the Muslim community, which transformed very rapidly from nomadic to urban. This development put pressure on jurists, too, as will be seen in the next section; they indicated their doubts regarding the authenticity of the institution as far as the law is concerned. Based on what they say, it is evident that, while they had doubts, they were also aware of the institution's great importance and were reluctant to simply rule against it outright.

Disputes over the legitimacy of waqf

It is apparent that the institution of waqf does not have a solid base with respect to its legitimacy, which in theory should be based on the fundamental sources of Sharia law. This fact has not gone unnoticed by many Islamic jurists, both Imami Shi'ite and Sunni. There are many cases in which

[302] Lambton (1997, p. 305)

jurists have expressed doubt regarding the authenticity of this institution. However, the interesting point here is that, in almost every case, jurists have been very careful not to challenge the institution as a whole while expressing their opinion. Perhaps this institution was carrying out a huge task to the benefit of society. Furthermore, the very scale of the waqf system, and the level of public involvement in it, has been its strongest selling point. In other words, the jurists have had no option but to accept the legitimacy of this institution. Additionally, jurists have derived a fair share of income from their various affairs involving waqfs, from those endowments that make the Ulama or jurists their direct beneficiaries to all of the various legal proceedings involving waqfs that they have had to carry out. For example, Allameh Helli, in his monumental work Tazkerat al Foghaha, after explaining and arguing the positions of both Imami Shi'ite and Sunni jurists states: "All of the compatriots of the Prophet established their own waqfs. However, none of them stated that a waqf is not one of the commandments of the religion of Islam". He then continues, in an ambiguous way, to argue that this only applies to the people of Kufeh and does not represent the popular view.[303] Moqineh also notes that some jurists only consider those waqfs that are related to mosques to be legitimate. At the same time, again, he notes that this is not the popular view. In another view, Imam Shafie disagrees with those who consider waqfs an illegitimate institution. Shafei argues that there are some who do not consider the waqf system to be fully legitimate. He argues that the story about the Prophet abolishing the perpetuity of a waqf is only valid in some particular cases.[304] Finally, Khomeni, when it comes to the question of legitimacy, argues that there are not any direct references to the institution of waqf in the Qur'an. However, because it is a fine tradition and has roots in ancient history, it should continue to survive.[305]As a result, some modern puritanical sects,

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[303] Helli (1985, p. 445)

[304] Shafei (1982, p. 52)

[305] Khomeini (2007, p. 109)

including the Wahhabi sect of Saudi Arabia, treat waqfs as a heretical innovation (bid'a) that appeared after the time of the Prophet.[306]

Iranian civil law does not make reference to any specific source in order to prove the legitimacy of waqf according to Sharia. However, it is generally noted that the institution of waqf is anchored in holy Sharia.

[306] Kuran (2001, pp. 6, 841–98)

Appendix III

Waqf versus trust

A very common question in this section concerns how a mutawalli would function in another form of "waqf," in a non-Islamic system. A logical comparison might be to contrast a waqf with England's trust system. Although perhaps not fully relevant to our focus, which is waqfs in the contemporary era, a study of Oxford's Merton College produces very interesting findings that might shed some light on how an endowment would be administrated in England compared to Iran. At this stage, we consider those trusts in England that have carried out missions similar to those of waqfs.

There have been a few studies comparing waqfs with English trusts. There are some evident similarities between the two institutions, which have led some to conclude that English trusts were initially inspired by the institution of waqf. Under both concepts, property is reserved and its usufruct appropriated for specific beneficiaries. Additionally, in both cases the property becomes completely inalienable. Estates for life can be created in favour of successive beneficiaries, both present and future. Finally, both institutions have very similar agents, waqif (the founder) or settlers, a mutawalli or trustee, and beneficiaries, both present and future.

This, however, is the point at which the similarities between these two institutions end and fundamental differences begin to appear. The first significant difference is that, in the event that the beneficiary of a waqf ceases to exist, a waqf must immediately find an alternative charitable purpose. For example, if because of a change made to a road a Caravanserai were no longer able to function as such, it could potentially be converted into a shelter for the poor. This second purpose might not necessarily be the most economically efficient or logical utilisation of the related assets. Nonetheless, as determined by most Islamic schools of law, a waqf becomes invalid if it does not

have a recognisable beneficiary.[307] Not having a recognisable beneficiary would violate the concept of perpetuity of an already-established waqf.[308]

The second major difference between a waqf and a trust is that the ownership of a trust transfers from the founder to the trustee. Unlike a waqf, for which even today the issue of its ownership is subject to dispute, a trust has a clear owner. The trustee is the owner of the trust, and he or she is responsible for administering the property for the benefit of the beneficiaries.

Third, a trust can have a board of trustees with the power to alter its mission based on their judgment and changing circumstances. A waqf, on the other hand, though able to have a board of mutawallis, is heavily restrictive of its function; such a board would only exist to execute the wishes of the founder, and it would be very difficult, if not impossible, for them to change the respective waqf's mission.

To illustrate these points, we look at a case study: the case of Merton College in Oxford. This case is important from several perspectives. First, it provides us with a good starting point and basis for comparison with equivalent institutions in the Islamic world. Second, it is relevant inasmuch as there have been several contemporary debates regarding claims that English law has its roots in Islamic law. This presents a good opportunity for taking a closer look at Merton College.

The case of Merton College

[307] A proposed legal solution around this issue is the Monqateh waqf, which has not always been approved by jurists.

[308] This is a case more often involving private waqfs than public ones.

Gaudiosi states that there is some evidence that Merton College may have been inspired by the Islamic institution of waqf.[309] Walter de Merton established Merton College in 1296. His initial reason for doing so was to secure a good education for his nephews. He obtained a license from his feudal overlord to vest certain properties for the support of university students. The establishment was perpetual as well as unincorporated. However, De Merton reserved for himself the right to modify the terms of the ordination. Later, in 1264, he exercised that right. Walter de Merton effectively reissued these statutes, apparently to confirm the establishment of a trust, which was created during a period of civil strife. These statutes also added a number of properties to the existing trust but made no essential changes to the college's structure or its governance. Later, in 1274, a new set of statutes was adopted. The latter document is generally credited with establishing the modern college system. Prior to 1274, Merton College had been an unincorporated, charitable trust. In contrast, the statutes of 1274 allowed the academic community to govern itself.[310]

Two centuries previously, the great colleges of the Islamic world, such as Baghdad's Madrasa Nizamiya, founded in 1065, had ceased to be a major source of scientific innovation. Having until then spearheaded a revival in interest in Hellenic philosophy, and contributed to advances in astronomy, optics and metallurgy, among other fields, the Madrasa lost intellectual leadership to the universities in the West. However, Western universities were very different organisations. To give an example of one revealing difference, only universities enjoyed legal personhood. When the institution granted degrees as an organisation, a successful Madrasa student would receive certificates of competency (ijaza) from his individual teachers.[311]

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[309] Gaudiosi (1988, pp. 1231–61)

[310] Prior to 1264, Merton College fit within the waqf tradition; however, after 1274, Walter de Merton's trust moved outside of the waqf tradition, inasmuch as it was incorporated.

[311] Makdisi (1981, pp. 140–52)

Appendix IV

Name of the Jurist	Date of Birth and Death	Place(s) of Activity	Title/ Info
Abu Jafar Mohammed ibne Ali ibne Moosa ibne Babawiya al Qummi al Khorasani ar Raazi	916-990	Qom	Sheikh Saduq
Sheikh Mofid	949-1022	Ukbara (north of Baqdad)	
Khawaja Muhammad ibn Muhammad ibn Hasan Tūsī	1201-1274	Tus, Mosul	Sheykh Tusi
Najm ul-Din Abul-Qasim Ja'far bin al-Hasan bin Yahya bin al-Hasan bin Sa'id	1205–1277	Al- Hilla	Mohaqiq Helli/ Uncle and teacher of Allameh Helli
Allameh Helli Jamal ad-Din Hasan ibn Yusuf ibn 'Ali ibn Muthahhar al-Hilli	1250-1325	Al- Hilla	Student of Sheikh Tusi
Muhammad Jamaluddin al-Makki al-Amili	1334–1385	Jabal 'Amel/ Al-Hilla	“Shahid Avval” “First Martyr” and the pupil of pupils of Allameh Helli
Ali ibn Abdul-Aal al-Karki	14xx-1533	Jabal 'Amel, Qazvin, Isfahan	Mohaqiq Karaki/ Mohaqiq Sani
Zayn al-Din al-Juba'i al'Amili	1506–1558	Egypt, Syria, Hijaz, Baitul Muqaddas, Iraq Constantinople and Iran.	“Shahid Sani” ,Second Martyr
Sheikh Hasanali Esfehani Najafi	1862-19xx	Najaf, Isfahan, Mashhad	Saheb-e-Javaher
Ayatollah Kazem Tabatabai Yazdi	18xx-1916	Yazd, Najaf	
Ayatollah Ruhollah Musavi Khomeini	1902-1989	Najaf, Tehran	Imam Khomeini

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