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Waqf

'*Wuquf*' and '*awqaf*' are the plurals of '*waqf*' and its verb is '*waqafa*', though '*awqafa*' is also rarely used, as in *al-Tadhkirah* of al-Allamah al-Hilli. The word *'waqf'* literally means 'to detain' and 'to prevent', as in '*wuqiftu 'an sayri*', i.e. 'I was prevented from making my journey.'

In the context of the Shari'ah it implies a form of gift in which the corpus is detained and the usufruct is set free. The meaning of 'detention' of the corpus is its prevention from being inherited, sold, gifted, mortgaged, rented, lent, etc. As to dedication of the usufruct, it means its devotion to the purpose mentioned by the *waqif* (donor) without any pecuniary return.

Some legists consider *waqf* to be illegal in the Islamic Shari'ah and regard it as contradictory to its basic principles except where it concerns a mosque. But this view has been abandoned by all the schools of *fiqh*.

Perpetuity and Continuity

All schools, excepting the Maliki, concur that a *waqf* is valid only when the *waqif* intends the *waqf* to be perpetual and continuous, and therefore it is considered a lasting charity. Hence if the *waqif* limits its period of operation (such as when he makes *waqf* for 10 years or until an unspecified time when he would revoke it at his own pleasure, or for as long as he or his children are not in need of it, etc.) it will not be considered a *waqf* in its true sense.

Many Imami legists hold that such a condition nullifies the *waqf*, though it will be considered as valid *habs* (detention)[1] if the owner of the property intends *habs*. But if he intends it to be a *waqf*, it will be void both as *waqf* as well as *habs*. By a valid *habs* is meant that the usufruct donated by the owner for a particular object will be so applied during the period mentioned and return to him after the expiry of that period.

However, this is not something which contradicts the provisions of perpetuity and continuity in *waqf*, although al-Shaykh Abu Zuhrah has made a confusion here due to his inability to appreciate the

difference between *waqf* and *habs* in Imami *fiqh*. Consequently he has ascribed to them the view that perpetual and temporary *waqf* are both valid. This is incorrect, because according to the Imamiyyah a *waqf* can only be perpetual.

The Malikis say: Perpetuity is not necessary in *waqf* and it is valid and binding even if its duration is fixed, and after the expiry of the stipulated period the property will return to the owner.
Similarly, if the *waqif* makes a provision entitling himself or the beneficiary to sell the *wuquf* property, the *waqf* is valid and the provision will be acted upon (*Sharh al-Zarqani*, vol. 7, 'bab al-waqf').[2]

If a *waqf* is made for an object which is liable to expiry (such as a *waqf* made for one's living children, or others who are bound to cease existing) will it be valid? Moreover, presuming its validity, upon whom will it devolve after the expiry of its object?

The Hanafis observe: Such a *waqf* is valid and it will be applied after the expiry of its original object to the benefit of the poor.

The Hanbalis say: It is valid and will thereafter be spent for the benefit of the nearest relation of the *waqif*. This is also one of two opinions of the Shafi'is.

The Malikis are of the opinion that it is valid and will devolve on the nearest poor relation of the *waqif*, and if all of them are wealthy, then on their poor relatives (*al-Mughni*, *al-Zarqani*, and *al-Muhadhdhab*).

The Imamiyyah state: The *waqf* is valid and will devolve on the heirs of the *waqif* (*al-Jawahir*).

Delivery of Possession

Delivery of possession implies the owner's relinquishment of his authority over the property and its transfer to the purpose for which it has been donated. According to the Imamiyyah, delivery is a necessary condition for the deed of *waqf* to become binding, though not for its validity. Therefore, if a *waqif* dedicates his property by way of *waqf* without delivering possession, he is entitled to revoke it.

If a *waqif* makes a *waqf* for public benefit (e.g. a mosque or a shrine or for the poor), the *waqf* will not become binding until the custodian (*mutawalli*) or the *hakim al-shar'* takes possession of the donated property, or until someone is buried in the donated plot of land, in the case of a graveyard, or prayers are offered in it, if it is a mosque, or until a poor person uses it with the permission of the *waqif*, in a *waqf* for the benefit of the poor. If delivery is not effected in any of the above-mentioned forms it is valid for a *waqif* to revoke the *waqf*.

If a *waqf* is made for a private purpose, such as for the benefit of the *waqif*' s children, if the children have attained majority, it will not become binding unless they take possession of it with his permission, and if they are minors the need for giving permission does not arise because the *waqif's* possession of it as their guardian amounts to their having taken possession.

If the *waqif* dies before possession has been taken, the *waqf* becomes void and the property assigned for *waqf* will be considered his heritage. For example, if he makes the charitable *waqf* of a shop and dies while it is still in his use, it will return to the heirs.

The Malikis say: Sole taking possession does not suffice and it is necessary that the donated property remain in the possession of the beneficiary or the *mutawalli* for one complete year. Only after the completion of one year will the *waqf* become binding and incapable of being annulled in any manner.

The Shafi'is and Ibn Hanbal in one of his opinions, state: A *waqf* is completed even without delivering possession; rather, the ownership of the *waqf* will cease on the pronouncement of *waqf* (Abu Zuhrah, *Kitab al-waqf*).

Ownership of the Waqf Property

There is no doubt that prior to donation the *waqf* property is owned by the *waqif*, because a person cannot make *waqf* of a property that he does not own. The question is whether, after the completion of the *waqf*, the ownership of the property remains with the *waqif*, with the difference that his control over its usufruct will cease, or if it is transferred to the beneficiaries. Or does the property become ownerless, being released from ownership?

The legists hold different opinions in this regard. The Malikis consider it to remain in the ownership of the *waqif*, though he is prohibited from using it.
The Hanafis observe: A *waqf* property has no owner at all, and this is the more reliable opinion according to the Shafi'i school.3 (*Fath al-Qadir*, vol.5, 'bab al-waqf'; Abu Zuhrah, *Kitab al-waqf*)

The Hanbalis say: The ownership of the *waqf* property will be transferred to the beneficiaries.

Al-Shaykh Abu Zuhrah (1959, p.49) has ascribed to the Imamiyyah the view that the ownership of the *waqf* property remains with the *waqif*. He then observes (p.106): This is the preponderant view of the Imamiyyah.

Abu Zuhrah does not mention the source relied upon by him for ascribing this view, and I do not know from where he has extracted it, for it has been mentioned in *al-Jawahir*, which is the most important and authentic source of Imami fiqh. According to most legists, when a *waqf* is completed, the ownership of the *waqif* ceases; rather, it is the preponderant view and the authors of *al-Ghunyah* and *al-Saria'ir* have even reported an *ijma'* on this view.

Though all or most Imami legists concur that the ownership of the *waqif* ceases, they differ as to whether the *waqf* property totally loses the characteristic of being owned (in a manner that it is neither the property of the *waqif*, nor of the beneficiaries. and, as the legists would say, is released from ownership) or if it is transferred from the *waqif* to the beneficiaries.

A group among them differentiates between a public *waqf* (e.g. mosques, schools, sanatoriums, etc.) and a private *waqf* (e.g. a *waqf* for the benefit of one's descendants). The former is considered as involving a release from ownership and the latter a transfer of ownership from the *waqif* to the beneficiary.

The difference of opinion regarding the ownership of *waqf* property has practical significance in determining whether the sale of such property is valid or not, and in the case where a *waqf* is made for a limited period or for a terminable purpose. According to the Maliki view that the *waqf* remains the *waqif's* property, its sale is valid and the corpus will return to the *waqif* on expiry of the period of *waqf* or when the object for which the *waqf* was made terminates. But according to the view which totally negates the ownership of *waqf* property, its sale will not be valid, because only owned property can be sold, and a *waqf* for a limited period will also be invalid.

According to the view which considers the ownership of *waqf* property as transferred to the beneficiaries, the property will not return to the *waqif*. The consequences of this difference will be more obvious from the issues to be discussed below. It is necessary to understand this divergence of viewpoints because it affects many issues of *waqf*.

The Essentials of Waqf

There are four *arkan* (essentials) of *waqf:* (1) the declaration (*al-sighah*) (2) the *waqif* (3) the property given as *waqf* (*al-mawqufah*) (4) the beneficiary (*al-mawquf 'alayh*).

The Declaration

There is a consensus among all the schools that a *waqf* is created by using the word '*waqaftu'* (I have made a *waqf*), because it explicitly signifies the intention of *waqf* without needing any further clarification. They differ regarding the creation of *waqf* by the use of such words as '*habastu'* (I have detained), '*sabbaltu'* (I have donated as charity), '*abbadtu'* (I have perpetually settled) etc., and go into needless details.

The correct view is that a *waqf* is created and completed by using any word which is capable of proving the intention of creating a *waqf*, even if it belongs to another language, because here words are means of expressing one's intention, not an end in themselves.[4]

Al-Mu'atat (The creation of Waqf without the Sighah)

Is a *waqf* completed by an act (such as when someone makes a mosque and calls the people to pray in it, or allows burials to take place in a piece of land with an intention of making it a *waqf* for a graveyard) without one uttering *'waqaftu'* or '*habastu'* or similar words, or is it necessary that the declaration take place, the act by itself being insufficient?

The Hanafi, Maliki and Hanbali schools say: An act by itself is sufficient and the property becomes, consequent to the act, a *waqf* (Ibn Qudamah's *al-Mughni*, vol.5, 'bab al-waqf'; *Sharh al-Zarqani 'ala Mukhtasar Abi Diya'*, vol.7, 'bab al-waqf').

A group of major Imami scholars also holds this view, including al-Sayyid al-Yazdi in his work *Mulhaqat al-'Urwah*, al-Sayyid Abu al-Hasan al-Isfahani in *Wasilat al-najat* and al-Sayyid al-Hakim in *Minhaj al-Salihin*. Al-Shahid al-Awwal and Ibn Idris have also been reported to hold this view.

The Shafi'is observe: A *waqf* is completed only by the recital of the *sighah* (*al-Mughni*, vol.5).

Acceptance

Does *waqf* require acceptance or is its declaration as *waqf* (by the *waqif*) sufficient? In other words, is *waqf* created by a single decision, or is it necessary that there be two concurrent decisions?

In this context the legists have divided *waqf*s into public (in which the *waqif* has no specific beneficiary in his mind, e.g. *waqf*s made for the poor and *waqf*s of mosques and shrines) and private *waqf*s (e.g. a *waqf* made for the benefit of one's children).

The four Sunni schools concur that a public *waqf* requires no acceptance, and according to the Malikis and most Hanafi legists a private *waqf*, like a public one, requires no acceptance.

The Shafi'is incline towards the necessity of acceptance (al-Hisni al-Shafi'i, *Kifayat al-akhyar*, vol.1, 'bab al-waqf'; Abu Zuhrah, *Kitab al-waqf*, p. 65, 1959 ed.).
The Imami legists differ among themselves, holding one of the following three opinions:

1. Necessity of acceptance in both public and private *waqf*s.
2. Absence of such necessity in both kinds of *waqf*s.
3. A distinction is made between a public and private *waqf*, and acceptance is necessary only in the latter. This is the same view which the Shafi'is have favoured, and is also the correct one.[5]

Al-Tanjiz

The Malikis observe: It is valid for a *waqf* to depend upon a contingency. Therefore, if the owner says: "When such and such a time comes, my house will become a *waqf*," it is valid and the *waqf* is completed (*Sharh al-Zarqani 'ala Mukhtasar Abi Diya'*, vol. 7, 'bab al-waqf').

The Hanafi and the Shafi'i schools state: It is not valid to make a *waqf* contingent on the occurrence of an event; rather, it is *wajib* that *waqf* be unconditional, and if it is made to depend upon a contingency, as in the above-mentioned example, it will remain the property of the owner (Shirbini's *al-'Iqna'*, vol. 2, 'bab al-waqf'; *Fath al-Qadir*, vol. 5, 'kitab al-waqf').

I don't know how these two schools allow divorce to depend upon a contingency, while they disallow

similar dependence in other spheres of *fiqh*, despite the fact that caution and stringency are more necessary in marital issues when compared to other issues.

The Hanbalis say: A *waqf* can be made contingent on the occurrence of death. Apart from this, dependence on any other contingency is invalid (*Ghayat al-muntaha*, vol. 2, 'bab al-waqf').

Most Imami legists consider *tanjiz* (its being unconditionally operational) as *wajib* and do not permit its being made contingent on a future event. (al-'Allamah al-Hilli, *al-Tadhkirah*, vol. 2; *al-Jawahir*, vol. 4; and *Mulhaqat al-'Urwah*, 'bab al-waqf').6 Therefore, if a person says: "When I die, this property will become a *waqf*," it will not become a *waqf* after his death. But if he says: "After my death, make this property a *waqf*," it will be considered a will for creating a *waqf* and the executor of the will will be responsible for creating the *waqf*.

Al-Waqif

The schools concur that sanity is a necessary condition for the creation of a *waqf*. Therefore, a *waqf* created by an insane person is not valid, because the Shari'ah does not burden him with any duty and does not attach any significance to his decisions, words or deeds.

The schools also concur upon maturity as a necessary condition. This implies that a *waqf* created by a child, irrespective of his being discerning or not, is invalid, and neither is the guardian entitled to create a *waqf* on his behalf, nor the *waqif* empowered to act as a guardian in this regard or to allow the creation of such a *waqf*. Some Imami legists consider a *waqf* created by a child over ten years as valid, but most of them oppose this view.

An idiot is also incapable of creating a *waqf*, for it is a disposition of property and an idiot is not authorized to carry out acts of such a nature.7 The Hanafis say: It is valid for an idiot to bequeath one-third of his wealth provided that the bequest is for charitable purposes, irrespective of whether it is in the form of a *waqf* or otherwise (*al-Fiqh 'ala-madhahib al-'arba'ah*, vol.2, 'bab mabhath al-hajr 'ala al-safih').

Niyyat al-Qurbah

There is no doubt that the intention of creating a *waqf* is necessary for its creation. Hence if a declaration signifying the creation of *waqf* is made by a person who is intoxicated, unconscious, or asleep, or is made in jest, the recital will be void, because of the principle of unchanged status of the ownership of the property.

The schools differ on the question as to whether *niyyat al-qurbah* (the intention to seek God's good-pleasure) is a necessary condition like sanity and puberty (so that if a *waqif* makes a *waqf* for a worldly motive it would fail to be operative) or if it becomes operative without it.

The Hanafis say: *Qurbah* is a necessary condition and requires to be fulfilled, either presently or ultimately; i.e. the property donated should necessarily be used for charitable purposes, either from the time of creation of the *waqf* or at a later date; e.g. when one makes a *waqf* for the benefit of some wealthy people presently alive, and after them, for the benefit of their destitute descendants (*Fath al-Qadir*).8

Malik and the Shafii'is observe: *Niyyat al-qurbah* is not necessary in a *waqf* (Abu Zuhrah, *Kitab al-waqf*, p.92 ff.).

The Hanbalis state: It is necessary that *waqf* be made for a pious, spiritual purpose (e.g. for the poor or for mosques, bridges, books, for relatives, etc.,) because the Shari'ah has created the institution of *waqf* for acquiring spiritual reward, otherwise the purpose for which it was incorporated in the Shari'ah is not achieved (Ibn Dawayan, *Manar al-sabil*, p.6, 1st ed.).

From among the Imamiyyah, the authors of *al-Jawahir* and *Mulhaqat al-'Urwah* observe: *Qurbah* is not a condition for the validity of *waqf*, or for taking its possession, rather it is essential for acquiring its spiritual reward. Therefore a *waqf* is completed without the presence of a spiritual motive.

Death Illness

An illness resulting in death or generally capable of causing it is called death illness (*marad al-mawt*).

All the schools concur that if a person in such an illness makes a *waqf* of his property, it will be valid and will be created from the bequeathable third, and if it exceeds this limit the consent of the heirs is necessary regarding the excess.

Summarily, all those conditions required of a seller (e.g. sanity, puberty [*bulugh*], maturity [*rushd*], ownership, absence of a legal disability, such as insolvency or idiocy) are also necessary for a *waqif*.

Al-Mawquf

The schools concur that a *mawquf* property should fulfil all the conditions required of a saleable commodity, that it should be a determinate article owned by the *waqif*. Therefore the *waqf* of a receivable debt or an unspecified property (such a when the owner says 'a field from my property' or 'a part of it') or that which cannot be owned by a Muslim (e.g. swine) is not valid. The schools also concur that the *mawquf* should have a usufruct and must not be perishable. Hence that which cannot be utilized except by consuming it (e.g. eatables) will not be valid as a *waqf*. To this class also belongs the *waqf* of usufruct; therefore, if a tenant makes a *waqf* of the usufruct of a house or land which he has rented for a specific period, it will not be valid, because the notion of *waqf* as something in which the property is detained and its usufruct dedicated for a charitable purpose is not fulfilled here.

There is consensus as well regarding the validity of *waqf* of immovable property, e.g. land, building,

orchard, etc.

All the schools, excepting the Hanafis, concur on the validity of *waqf* of movable property, such as animals, implements and utensils, for they can be utilized without being consumed.

According to Abu Hanifah, the *waqf* of movable property is not valid. But of his two pupils, Abu Yusuf and Muhammad, the former accepts the *waqf* of movable property provided it is attached to an immovable property (for instance, cattle and implements attached to an agricultural land) and the latter limits its validity to the weapons and horses used in war (*Fath al-Qadir*, vol.5, and *Sharh al-Zarqani*, vol.7).

The schools further concur that it is valid to make *waqf* of an inseparate share (*musha'*) in a property (e.g. an undivided half or one-fourth or one-third) except where it is a mosque[9] or graveyard, because these two are incapable of being jointly owned (al-'Allamah al-Hilli, in *al-Tadhkirah*; al-Shi'rani in *al-Mizan*; Muhammad Salam Madkur in *al-Waqf*).

According to the author of *Mulhaqat al-'Urwah*, a work on Imami *fiqh*, the *waqf* of the following forms of property is not valid: 1) mortgaged property; (2) property whose possession cannot be delivered (for instance, a bird in the sky and a fish in water, even if they are owned by the *waqif*); (3) a stray animal; (4) usurped property which the *waqif* or the beneficiary are unable to recover; but if this property is made a *waqf* for the benefit of the usurper the *waqf* is valid because the condition of possession is achieved.

The Beneficiary (al-Mawquf 'Alayh)

Al-mawquf 'alayh is the person entitled to the proceeds of the *waqf* property and its usufruct. The following requirements must be fulfilled by the beneficiary:

1. He should exist at the time of the creation of the *waqf*. If he does not (as when a *waqf* is created for a child to be born later), the Imami, Shafi'i and Hanbali schools consider the *waqf* as invalid, while the Maliki school regards it as valid. It is stated in *Sharh al-Zarqani 'ala' Mukhtasar Abi Diya'*: A *waqf* in favour of a child to be born in the near future is valid, though it will become binding only on its birth. Therefore, if it is not conceived or miscarries, the *waqf* will become void.

According to all the schools, when the beneficiary ceases to exist after having existed at the time of the creation of *waqf*, the *waqf* is valid (as when a person creates a *waqf* for his existing children and their future descendants). Regarding a *waqf* in favour of a foetus, the Shafi'i, Imami and Hanbali schools consider it invalid, because a foetus is incapable of owning property until it is born alive. This principle is not negated by the allocation of a share in inheritance for an unborn child in anticipation of its birth and by the validity of a bequest in its favour, because these two instances have specific proofs for their validity. Furthermore, the allocation of a share in inheritance for an unborn child is meant to safeguard its right and to avoid the complications which would arise as a result of redistribution.

2. He should be capable of owning property. Hence it is neither valid to create a *waqf* nor to make a bequest in favour of an animal, as done by Westerners, especially women, who bequeath part of their wealth to dogs. Regarding the *waqf* of mosques, schools, sanatoriums etc., it is actually a *waqf* in favour of the people who benefit from them.

3. The purpose of the *waqf* should not be sinful (as it would be when made for a brothel, or a gambling club, pub or for highwaymen). As to a *waqf* made in favour of a non-Muslim, such as a *dhimmi*, there is consensus about its validity, in accordance with this declaration of God Almighty:

لاَ يَنْهَاكُمْ اللَّهُ عَنْ الَّذِينَ لَمْ يُقَاتِلُوكُمْ فِي الدِّينِ وَلَمْ يُخْرِجُوكُمْ مِنْ دِيَارِكُمْ أَنْ تَبَرُّوهُمْ وَتُقْسِطُوا إِلَيْهِمْ انَّ اللهَ يُحِبُّ المُقسِطين

God does not forbid you respecting those who have not waged war against you on account of your religion and have not driven you forth from your homes, that you show them kindness and deal with them justly. Verily, Allah loves the doers of justice. (***60:8***)

The Imami legist al-Sayyid Kazim al-Yazdi observes in the chapter on *waqf* of his book *Mulhaqat al-'Urwah*: "...Rather, it is also valid to create a *waqf* in favour of a *harbi* and to show kindness to him in order to encourage him to righteous conduct."

Al-Shahid al-Thani, in *al-Lum'ah al-Dimashqiyyah*, *bab al-waqf*, states: "A *waqf* in favour of *dhimmis* is valid, because it is not sin and also because they are creatures of God and a part of humanity which has been honoured by Him." He adds: "It is not valid to create a *waqf* in favour of any of the Khawarij or Ghulat,[10] because the former charge Amir al-Mu'minin 'Ali ('a) with unbelief and the latter ascribe divinity to him, while the middle path is the right one, as mentioned by 'Ali ('a) himself:

هلك فيَّ اثنان: مبغض قالٍ، ومحبٌّ غال

Two kinds of people will perish concerning me: the one who hates me and the other who goes to the extreme in his love for me.

4. The beneficiary should be specifically known. Thus a *waqf* created in favour of an unidentified man or woman will be void.

The Malikis say: A *waqf* is valid even if the *waqif* does not mention the purpose of the *waqf*. Hence if he says: "I dedicate this house of mine as *waqf*, without adding anything else, the *waqf* will be valid and its usufruct will be spent for charitable purposes (*Sharh al-Zarqani 'ala Abi Diya'*).

The Imami, Shafi and Maliki schools observe: It is not valid for a *waqif* to create a *waqf* for the benefit of his own person or to include himself among its beneficiaries, because there is no sense in a person

transferring his property to himself. But if, for instance, he makes a *waqf* in favour of the poor and later becomes poor himself, he will be considered one of them, and similarly if he creates a *waqf* in favour of students and later becomes a student himself.

The Hanafi and Hanbali schools, however, permit such a *waqf* (*al-Mughni*; Abu Zuhrah, al-Shi'rani's *al-Mizan*; *Mulhaqat al-'Urwah*).

A Waqf for prayers (al-waqf 'ala al-salat)

The invalidity of a *waqf* created for the *waqif's* benefit reveals the invalidity of a large number of such *waqf*s in the villages of Jabal (Lebanon) which have been created by their *waqif*s to meet the expenses of the prayers to be offered posthumously on behalf of their behalf. This is so even if we accept the validity of a proxy reciting *mustahabb salat* on behalf of the dead - aside from its validity with respect to the *wajib salat* - because it is in fact a *waqf* in one's own favour.

Doubts Concerning Waqf

The Imami author of *al-Mulhaqat* observes: If a doubt arises as to which among two persons is the beneficiary, or which among two purposes is the intended object of the *waqf*, the solution is effected by drawing lots or by effecting a 'compulsory compromise.' (*al-sulh al-qahri*). 'Compulsory compromise' means distribution of the usufruct among the two parties or purposes.

If the purpose of the *waqf* is unknown and we do not know whether it is for a mosque or for the poor or for some other purpose, the *waqf* will be applied to charitable purposes.

If a doubt arises as to which of two properties is subject of *waqf* (such as where we know the existence of a *waqf*, but are not certain whether it relates to the *waqif*'s house or shop) resort will be made to drawing lots or to a compulsory compromise; i.e. a half of both the house and the shop will be treated as *waqf*.

Conditions of a Waqif and His Pronouncement

The Waqif's Intention

If a *waqf* is a gift and a charity, the *waqif* is the giver of that gift and charity, and it is obvious that any sane and mature adult free of financial disability is free to grant from his property whatever he wishes to anyone in any manner he chooses. It is stated in the hadith:

الناس مسلّطون على أموالهم

People have been given full authority over their properties, and one of the Imams ('a) has said:

للوقوف بحسب ما يقفها أهلها

*Waqf*s are to be managed in a manner provided by their *waqif*s.

Accordingly, the legists say: The conditions laid down by the *waqif* are like the words of the Lawgiver, and his pronouncements are like His pronouncements as regards the obligation of following them. Similar is the case of a *nadhir*, *halif*, *musi* and *muqirr*.[11]

Consequently, if the intention of the *waqif* is known (that he had a specific intention and none else), it will be followed even if it is against the commonly understood meaning of his words. For instance, if we know that he intends by the words 'my brother' a particular friend of his the *waqf* will be given to the friend, not to his brother. This is because usage is valid as a means of determining one's intention, and where we already know the intention, the usage loses its significance. But if we are unaware of the intention, the usage is followed, and if there is no particular usage concerning it and nothing special is understood from the words of the *waqif*, the literal meaning will be resorted to, exactly like the procedure applied regarding the words of the Qur'an and the Sunnah.

The Permissible Conditions

We had observed that a *waqif* meeting all the conditions is entitled to lay down conditions of his choice. Here we mention the following exceptions.

1. A condition is binding and enforceable when it is contiguous to the creation of *waqf* and occurs along with it. Thus, if the *waqif* mentions it after completing the deed, it will be null and void, because the *waqif* has no authority over the *waqf* property after its ownership has passed on from him.

2. He may not lay down a condition which contradicts the nature of the contract (for instance, the condition that the ownership of the *waqf* property will be retained by him, so that he could pass it on as inheritance to his heirs, or sell it, or gift it or rent it or lend it if he so intends). The presence of such a condition implies that it is and is not a *waqf* at the same time. Because the presence of such a condition abrogates the deed creating the *waqf*, the *waqf* will be left without a deed, while the presumption is that it is not executed without a deed. In other words, such a *waqif* is similar to the seller who declares: "I sell this to you on the condition that its ownership will not be transferred to you and that its consideration will not be transferred to me." This is the reason why the legists have concurred that every condition contrary to the contract, apart from being void, also nullifies the contract.

But the famous legist al-Sinhuri mentions in his compilation of select laws from Islamic *fiqh* that the Hanafis exclude mosques from the above rule. Hence a void condition does not nullify its *waqf*, while in *waqf*s other than for mosques such a condition is void and also nullifies the *waqf* (Madkur's *al-Waqf*).

3. The condition should not oppose any rule of the Islamic Shari'ah. For instance, it should not require

the performance of a prohibited or the omission of an obligatory act. It is mentioned in the hadith:

مَن اشترط شرطاً سوى كتاب الله عزّ وجلّ فلا يجوز ذلك له ولا عليه

He who lays down a condition contradicting the Book of God Almighty, it will neither be valid for him nor against him.

One of the Imams (A) states:

المسلمون عند شروطهم، إلاّ شرطاً حَرَّم حلالاً أو أحلّ حراماً

Muslims are bound by the conditions that they lay down, except those which prohibit a *halal* or permit a *haram*.

Excepting the above-mentioned kind, all other conditions mentioned at the time of the deed that neither contradict its spirit nor any rule of the Book and the Sunnah are valid and their fulfilment is *wajib* by consensus (for instance if the *waqif* lays down the condition that a home is to be built for the poor from the agricultural produce of the *waqf* or if it is to be spent on the scholars, etc). Summarily, the *waqif*, like anyone else, is required to base all his dispensations on the principles of logic and the Shari'ah, irrespective of whether they pertain to *waqf* or matters of diet, travel. etc. Therefore, if his act is in accordance with the Shari'ah and reason, it is *wajib* to respect it, not otherwise.

The Contract and This Condition

There is no doubt that a void condition, whatever its form, does not require to be fulfilled. It is also evident that a void condition which is contrary to the spirit of a contract nullifies the contract itself. Hence there is consensus regarding its being void in itself and its nullifying effect extending beyond itself, without there being any difference between *waqf* and other forms of contract in this regard.

The schools differ regarding a condition which is contrary to the Book and the Sunnah without going against the spirit of the contract (for instance, when a person makes his house a *waqf* in favour of Zayd on condition that he perform *haram* acts in it or abstain from performing *wajib* duties), as to whether the invalidity of this condition necessitates the annulment of the contract as well (so that the carrying out of the contract is not necessary, in the same way as fulfilment of the condition is not necessary), or if the invalidity would be limited to the condition.

According to the Hanafis, as mentioned by Abu Zuhrah in *Kitab al-waqf*, p.162: The conditions which contradict the regulations of the Shari'ah are void, while the *waqf* is valid. It does not become void due to their invalidity, because a *waqf* is a charity and charities are not invalidated by void conditions.

The Imamiyyah differ among themselves. Some among them observe that the presence of a void condition does not necessitate the annulment of the contract while others consider that necessary. A third group abstains from expressing any view (*al-Jawahir* and al-Ansari's *al-Makasib*).

Our view here is that the invalidity of a condition which contradicts the precepts of the Book and the Sunnah does in no manner entail the invalidity of the contract. The reason is that a contract possesses certain essentials (*arkan*) and conditions, such as, the offer, its acceptance, the contracting party's sanity, maturity, and ownership of the subject of transaction, and its transferability. When these aspects of the contract are fulfilled, the contract is undoubtedly valid. As to the presence of void conditions, which have no bearing, immediate or remote, on the essentials and conditions of the contract but exist only marginally, their invalidity does not extend to the contract. Even if it is presumed that the invalidity of a condition creates a discrepancy in the contract - such as an uncertainty resulting in risk in a transaction of sale - the contract will be void in such a situation as a result of the uncertainty, not because the condition is void.

The author of *al-Jawahir* also holds this opinion. With his singular acumen and precision, he observes: "'The claim that an invalid condition if considered restrictive entails the invalidity of the contract and if considered hortative does not lead to its invalidity, is sophistic and fruitless."

Such a distinction is obviously sophistic and nonsensical, because in practice there is no recognizable difference between the two conditions, and it is evident that the regulations of the Shari'ah have been framed on the basis of the general level of understanding of the people and not on the basis of subtle logical distinctions.

We have mentioned that the legists divide the conditions into valid and invalid ones, and regard the fulfilment of the former as obligatory. They have also divided invalid conditions into those which contradict the spirit of the contract and those which do not, yet contradict the rules of the Shari'ah. They concur that the first kind is both invalid and invalidating, and differ concerning the second, some considering it as invalid without being invalidating, while others consider it both invalid and invalidating.

The legists then differ regarding many particular cases and issues as to whether they belong to the class of invalid conditions, and supposing that they do, as to whether they are invalidating as well. Here we shall mention a few of such cases.

The Option to revoke (al-Khayar)

According to the Shafi'i, Imami and Hanbali schools if a *waqif* lays down a condition giving himself the option for a known period to either confirm the *waqf* or revoke it, the condition is void along with the *waqf*, because this condition is contrary to the spirit of the contract.
According to the Hanafis both are valid (*Fath al-Qadir*, *al-Mughni* and *al-Tadhkirah*).

Inclusion and Exclusion (al-Idkhal wa al-Ikhraj)

According to the Hanbalis and the preponderant Shafi'i opinion, if a *waqif* lays down a condition entitling him to exclude from the beneficiaries of the *waqf* whomever he wishes and to include others as beneficiaries, the condition is not valid and the *waqf* is void, because the condition is contrary to the spirit of the contract and invalidates it (*al-Mughni and al-Tadhkirah*).

The Hanafis and the Malikis consider the condition valid (*Sharh al-Zarqani* and Abu Zuhrah).

The Imamiyyah make a distinction between the right to include and the right to exclude. They state: If he lays down a condition stipulating an option to exclude whomever he wishes from the beneficiaries, the *waqf* is void, and if the condition is that he may include those who would be born in the future among the beneficiaries, it is valid, irrespective of whether the *waqf* is in the favour of his own children or those of someone else (*al-Tadhkirah*).

Waqif's Maintenance and the Payment of his Debts

The Imami and the Shafi'i schools say: If one creates a *waqf* in favour of someone and includes a condition requiring the payment of his debts and the provision of his maintenance from the proceeds of the *waqf*, the *waqf* and the condition are both void (*al-Jawahir* and *al-Muhadhdhab*).

A Note

In view of the mention above of the condition of option (*shart al-khayar*) and the cases of *waqf* which are limited by a condition, it will be appropriate here to point out the difference between the following terms commonly used by Imami legists: *khayar al-shart* and *shart al-khayar*, *mutlaq al-'aqd* and *al-'aqd al-mutlaq*.

Shart al-khayar is involved where the executor of a contract makes an explicit mention of the word *khayar* (option) while executing the contract and thereby reserves for himself the right to use it. For instance, he may say: "I sell this article to you and I shall have the option to annul the sale and revoke it within such and such a period." As to *khayar al-shart*, which is more properly an option that results from the non-fulfilment of a condition, the party executing the contract makes no mention of it in the contract; rather, it is implicit in some condition that he lays down; such as where .the seller says to the customer, "I sell this thing to you on the understanding that you are a scholar" and later on the buyer turns out to be illiterate. The non-fulfilment of the condition gives the seller the option to avoid the sale and revoke it; he may either confirm the sale if he wishes or revoke it. The difference between the meanings of the two terms is obviously great.

The difference between *al-'aqd al-mutlaq* and *mutlaq al-'aqd* will become clear when we understand the different forms of the contract. The kind of contract in which no conditions are stipulated is called *al-'aqd al-mutlaq*. Another kind is a conditional contract (*al-'aqd al-muqayyad*), which may contain either

positive or negative conditions. A contract in general, irrespective of inclusion of any positive or negative conditions, is *mutlaq al-'aqd*, a term which includes both *al-'aqd al-mutlaq* and *al-'aqd al-muqayyad*. Accordingly, *al-'aqd al-mutlaq* and *al-'aqd al-muqayyad* differ from each other, yet are two kinds that fall under *mutlaq al-'aqd* (like 'man' and 'woman' with reference to 'human being'). 12

Sons and Daughters

If a *waqf* is created in favour of sons, it will not include daughters, and vice versa. If it is created in favour of children, both are included and will equally share the benefit. If the *waqif* states: "The male will receive twice the female's share" or "they will both share equally" or "the female will receive twice the male's share," or states, "the woman that I have married will not have a share in it," all these provisions are valid, considering that they are conditions laid down by the *waqif*. I did not find among the books of the five schools of *fiqh* that have been accessible to me any view which differs from what has been mentioned, excepting the one which Abu Zuhrah narrates on page 245 of *Kitab al-waqf* from the Malikis. There it is stated: Consensus prevails among the Malikis that it is a sin to create a *waqf* in favour of sons to the exclusion of daughters, and to entitle someone to its benefit on condition of his abstinence from marriage; and some of them consider its sinful character the cause of its invalidity.

I believe that the opinion holding the invalidity of the above conditions, as well as the opinion which includes daughters in the *waqf* when it has been created solely in favour of sons, have both been abandoned and carry no weight among the Malikis. Though I have with me more than five works of the Malikis, including their voluminous as well as shorter works, despite my search I have not found in them any reference to this view.

On the contrary, they contain the following observation: The words of the *waqif* will be understood according to the common usage and they are like the words of the Lawgiver with respect to the obligation of their observance. Indeed, it has been narrated from 'Umar ibn 'Abd al-'Aziz that he made an effort to include daughters in *waqf*s made in favour of sons, but he was not a Maliki. Apart from this, if his efforts prove anything, they prove his compassionate and humanitarian disposition.

The Grandchildren

In the same way as the legists differ concerning the validity of some conditions, as to whether the invalid ones are just void or are void as well as invalidating, they also differ concerning the meaning of certain words, and among such instances is the case where the *waqif* says: "This *waqf* is in favour of my children (*awladi*)," without making any further clarification. Here the question arises a to whether the words 'my children' includes grandchildren as well, and if they do, whether they include both the sons' and the daughters' children or the sons' children only.

The preponderant (*mashhur*) Imami view is that the words 'my children' do not include grandchildren, although al-Sayyid al-Isfahani states in *Wasilat al-Najat*: "The word 'children' (*awlad*) includes both male

and female grandchildren," and this is the correct view because that is what it means in customary usage, which is the criterion in this regard.

The author of *al-Mughni* has narrated from Ibn Hanbal that the word 'child' (*walad*) applies to one's sons and daughters and to the son's children, not to the daughter's children.

The Shafi'is observe: The word' child' (*walad*) includes both sons and daughters, but it does not generally include grandchildren. But the words *walad al-walad* (grandchild), according to them as well as the Hanafis, include both the sexes (*Fath al-Qadir* and *al-Muhadhdhab*).

The Malikis say: Females are covered by the word *awlad*, but not by the phrase *awlad al-awlad* (children's children) (al-Zarqani).

This view of the Malikis is self-contradictory, because both the word *awlad* and the phrase *awlad al-awlad* are derived from the same root, *w.l.d*. How can it include both the sexes when used singly and only males when used in a construct phrase?

The Management of Waqf (al-Wilayah 'ala al-Waqf)

The *wilayah* over *waqf* is the authority granted to someone for managing, developing and utilizing the *waqf* and for applying its yield for its specified purpose. This *wilayah* is of two kinds: general and particular. The general *wilayah* is enjoyed by the *wali al-'amr*, and the particular one by any person appointed by the *waqif* at the time of the creation of *waqf* or by *hakim al-shar'*.

The schools concur that the *mutawalli* should be an adult, sane, mature and trustworthy person. Rather, the Shafi'i and some Imami legists include tbe condition of *'adalah* as well. In fact, trustworthiness and reliability (*wathaqah*), along with the ability to fully administer the *waqf*, suffice.

The schools concur that the *mutawalli* is a trustee and is not liable except in the event of breach of trust and misfeasance.

The schools, except the Maliki, also concur that the *waqif* is entitled to grant himself the authority of administering the *waqf*, either alone or along with another person, for life or for a fixed period. He is also entitled to give this authority to someone else.

According to *Fath al-Bari*, Malik has stated: It is not valid for a *waqif* to grant himself the *wilayah*, for then it may become a *waqf* in one's own favour, or the passage of time may lead to the fact of its being a *waqf* being forgotten, or the *waqif* may become insolvent and apply it for his own benefit, or he may die and his heirs may apply it for their own benefit. But if there is no fear of any of these conditions arising, it does not matter if he keeps its administration in his own hands.

The schools differ where the *waqif* does not grant anyone this authority to himself or someone else. The

Hanbalis and the Malikis observe: The authority of managing the *waqf* will rest with the beneficiaries provided they are known and limited, otherwise the *hakim* will exercise it (*al-Tanqih* and *Sharh al-Zarqani*).

The Hanafis state: The *wilayah* will remain with the *waqif* even if he does not explicitly mention it (*Fath al-Qadir*).

The Shafi'is differ among themselves, holding three opinions. The first opinion is that the *wilayah* will rest with the *waqif*, the second that it will rest with the beneficiaries, and the third that it will be exercised by the *hakim* (*al-Muhadhdhab*).

The preponderant view among the Imamiyyah is that when the *waqif* does not name the *mutawalli* the *wilayah* belongs to the *hakim*, which he may exercise personally or appoint someone to it. Al-Sayyid Kazim, in *al-Mulhaqat*, and al-Sayyid al-Isfahani, in *al-Wasilah*, observe: This is correct in respect of public *waqf*s, but as to private *waqf*s it is for the beneficiaries to safeguard, improve, rent the *waqf* and realize its income without the *hakim's* permission, and this has been the practice.

The Imamiyyah say: If the *waqif* retains the *wilayah* over the *waqf* for himself and is not trustworthy, or gives it to a person of known impiety (*fisq*), the *hakim* is not empowered to annul the *wilayah* of either the *waqif* or the person appointed by him. This is mentioned in al-'Allamah al-Hilli's *al-Tadhkirah*. Rather the author of al-*Mulhaqat* observes: If the *waqif* provides that the *hakim* should have no say in the affairs of his *waqf*, it is valid, and if the person appointed by the *hakim* to administer the *waqf* dies, this power will rest with the beneficiaries or *'adil* individuals from among Muslims.

The Hanafi author of *Fath al-Qadir* (vol.5, p.61) states: If the *waqif* retains the *wilayah* with himself, in the event of his being untrustworthy the *qadi* is bound to abrogate his authority. Similarly, if he provides that the ruler and the *qadi* are not empowered to abrogate his authority and hand it over to another, the condition is void because it opposes the rule of the Shari'ah.

I do not know how this view could be reconciled with what Abu Zuhrah has narrated in *Kitab al-waqf*, p. 372, from *al-Bahr*, that a *qadi* is not to be removed on grounds of impiety; for in such a circumstance the *mutawalli* is better entitled to remain, because the administration of justice is a more elevated and sensitive job.

When the *waqif* or *hakim* has appointed a *mutawalli*, no one has any authority over him as long as he is fulfilling his *wajib* duty. But if he falls short of his duty or breaches the trust reposed in him, so that his remaining would be harmful, the *hakim* is empowered to replace him, though it is better that he appoint, as observed by the Hanbalis, a trustworthy and energetic person alongside the former.

If the person appointed by the *waqif* dies, or becomes insane, or is affected by any other disability which renders him incapable, the *wilayah* will not return to the *waqif* unless he had so stipulated at the time of executing the *waqf* contract.

The Malikis permit its return to the *waqif*, and he is also empowered to remove the *mutawalli* at his pleasure.

The Imamiyyah and the Hanbalis state: If the *wilayah* is granted to two persons, they will act independently if so stipulated by the *waqif*, and if one of them dies or becomes incapable of performing his duty, the other will singly perform the task. But if the *waqif* provides that they act jointly and not individually, it is not valid for any one of them to act individually. Where there is no explicit provision in this regard, the *waqif* will be understood to have meant that they should not act individually, and hence the *hakim* will appoint another person and make him join the existing one (*al-Mulhaqat* and *al-Tanqih*).

It has been narrated in *Fath al-Qadir* from Qadi Khan al-Hanafi: Where the *waqif* grants the *wilayah* to two persons, if one of them provides in his will that his companion is entitled to exercise his *wilayah* over the *waqf*, after he dies it becomes valid for the person alive to exercise *wilayah* over the whole *waqf*.

The author of al-*Mulhaqat* observes: If the *waqif* provides a part of the benefits of the *waqf* for the *mutawalli*, the same will hold good irrespective of whether it is a large or a small amount, and if nothing is provided, he will be entitled to the compensation for a comparable job (*ujrat al-mithl*). This is in concurrence with what *Madkur* narrates in *Kitab al-waqf* regarding the Egyptian law.

The schools concur that the *mutawalli* appointed by the *waqif* or the *hakim* is entitled to appoint an agent for the achievement of any purpose of the *waqf*, irrespective of whether the appointing authority explicitly provides for it or not, except where it insists on his performing it personally.

The schools also concur that the *mutawalli* is not empowered to transfer the *wilayah* after him to another person where the original *wali* prohibits it. Similarly, they concur upon the validity of his delegating the *wilayah* to someone else where he has been authorized to do so. But where the *wali* has made no mention of this issue, either affirmatively or negatively, the Hanafis hold that he is entitled to do so, while the Imami, Hanbali, Shafi'i and Maliki schools consider that he is not so entitled, and if he does delegate it, his act is null and void.

The Children of 'Ulama' and Awqaf

There exist in our times *'ulama'* whose greed for mundane things equals Imam 'Ali's love for his faith. Hence, they give the *wilayah* over the *waqf* in their hands to their children and then to their grandchildren and so on till the day of resurrection. They hide their intention by using the words "...the most capable in order of capability from this lineage."

I do not intend to criticize this innovation - or tradition - by quoting verses and traditions. But I will raise some questions here. Is the intention of such an *'alim*, while transferring this authority to his progeny, the betterment of the *waqf* and society, or is it only for securing the private advantage of his descendants? Does the motivation of this idea come from moral sense, continence, piety and self-denial for the cause of the faith, or is it motivated by a wish to provide some booty for his descendants by selling and

exploiting one's religion? Does such a person have knowledge of the future through which he knows that the most capable among his descendants would be better for the cause of Islam and Muslims than the most capable individual from someone else's descent?

Consequently, why doesn't this *'alim* take a lesson from the rift he has observed and witnessed between the children of the *'ulama'* and the people of the place where the *waqf* exists, as well as between the children themselves in determining 'the most capable', and their eventually concurring over the distribution of *waqf* as if it were inherited property?

The Sale of Waqf

Do there actually exist causes which justify the sale of *waqf* property? What are these causes if they exist? And if such a sale is valid and takes place, what is the rule concerning the proceeds? May we replace it (the original *waqf* property) with something capable of fulfilling the objectives of the *waqf*, so that a new property takes the place of the old one and is governed by the rules applicable to it?

Al-Makasib and al-Jawahir

We will discuss the opinions of the different schools in detail and this discussion will make clear the replies to these as well as some other questions. I haven't come across anyone among the legists of the five schools who has dealt with this issue in such detail as the two Imami legists al-Shaykh al-Ansari, in *al-Makasib*, and al-Shaykh Muhammad Hasan, in *al-Jawahir*, 'bab al-tijarah'. The two have examined the issue from all the angles, together with its numerous sub-issues, and have sifted the various opinions expressed in this regard. We will present a summary of the important issues dealt with in these two incomparable books on which we have relied more than any other work in presenting the Imami viewpoint.

In this regard it may be pointed out that al-Shaykh al-Ansari and the author of *al-Jawahir*, in what they have left of their works, do not save the reader from toil and effort; rather, they require from him application, patience, intelligence and a substantial educational background. Without these it is not possible to follow these two authors or even to trace the path they have taken. Rather, they leave him lost and unable to find safe passage.

But one who has a firm educational base is bestowed upon by them the most precious of gems (*jawahir*) and the most profitable of earnings (*makasib*), provided he possesses patience and persistence. I am not aware of any other Imami legist from among the earlier or later generations who has bestowed Ja'fari *fiqh* and its principles life and originality to the extent given to it by the mighty pen of these two.

I apologize for this digression which I was compelled to make by my sense of gratitude as a pupil of these two great figures, or more correctly of their works.

The Present Question

Numerous views have been expressed in this regard and the clash of opinions visible here is not to be seen in any other issue of *fiqh*, or at least in the chapter on *waqf*. The author of *al-Jawahir* has dealt with the medley of conflicting opinions and we mention here a collection of his observations:

The legists differ regarding the sale of *waqf* in a manner the like of which we do not generally encounter in any other issue of *waqf*. Some of them absolutely prohibit the sale of *waqf,* some others allow it under certain circumstances, while a group among them refrains from giving any opinion. Rather, the number of opinions expressed is so large that each legist has his own specific view, and there are instances where a single legist has expressed contradictory views in the same book; for example, the view expressed by him in the chapter on sale contradicts his opinion in the chapter on *waqf*. Sometimes contradictory ideas have been expressed in a single argument, so that that which is observed in the beginning differs from the observations at the time of conclusion. The author of *al-Jawahir* has recorded twelve different opinions and the reader will learn about the most important among them from the issues discussed below.

Mosques

The rule applicable to a mosque, in all the schools of Islamic law, differs from the rules applicable to other forms of *waqf* in a number of ways. Hence all the schools, except the Hanbali, concur that it is not permissible to sell a mosque irrespective of what the circumstances may be, even if it lies in ruins or the people of the village or locality where it is located have migrated and the road to it is cut in such a manner that it is certain that not a single person will pray in it. Despite all this, it is *wajib* that it remain in the same state without any change. The reason given for this is that the *waqf* of a mosque severs all links between it and the *waqif* as well as everyone else except God Almighty, and, therefore, it is at times termed *fakk al-milk* (release from ownership) and at times *tahrir al-milk* (liberation from ownership). That is, earlier it was confined, while now it has become free from all constraints. Now when it is not anyone's property, how can its sale be valid when it is known that sale cannot take place without ownership?

Consequently, if a usurper utilizes a mosque by residing in it or cultivating it (when it is a piece of land), though he be considered a sinner, he is not liable for any damages, because it is not owned by anyone.

It is noteworthy that its ceasing to be anyone's property precludes its ownership through sale or purchase, but this prohibition does not apply if its ownership is acquired through *al-hiyazah* (acquisition), like all other forms of natural bounties (*al-mubahat al-'ammah*).

The Hanbalis say: If the residents of a village migrate from the locale of the mosque and it stands in a place where no one prays in it, or if it is too small for the number of people praying in it and its extension or building a part of it is also not feasible without selling a part of it, its sale is valid, and if it is not

possible to draw any benefit from it except through sale, it may be sold (*al-Mughni*, vol.5, 'bab al-waqf').

The opinion of the Hanbalis is similar in some aspects to the view expressed by the Imami legist al-Sayyid Kazim, who observes in *Mulhaqat al-'Urwah* that there is no difference between the *waqf* of a mosque and its other forms.

Thus dilapidation, which justifies the sale of other forms of *waqf* property, will also justify the sale of a mosque. As to the 'release from ownership', it does not hinder its sale in his view so long as the property has value. The correct view, in our opinion is that it is not valid to own a mosque through a contract of sale, though it is valid to do so through *al-hiyazah*.

That which gives strength to the view expressed by this great legist, that there is no difference (between the various kinds of *waqf*), is that those who permit the sale of a *waqf* which is not a mosque if it is in a dilapidated condition, do so because in a dilapidated state the structure is either unable to fulfill the purpose for which it was endowed or loses the quality made by the *waqif* as the subject of the *waqf* (such as where he endows an orchard because it is an orchard and not because it is a piece of land). This logic applies exactly in the case of a mosque as well, because the condition that it should be used as a place of prayer was what caused it to be made a *waqf*. Now when this condition is not being fulfilled, the property ceases in its use as a mosque. In such a situation, the rule applicable to a non-mosque *waqf* will also be applied here. In that it can be owned through any of the forms of acquisition of ownership, even if it be through *al-hiyazah*.

Properties Belonging to Mosques

Generally mosques have assets in the form of *waqf*s of shops, houses, trees or land, whose profits are utilized for the repairs and carpeting of mosques and for paying its attendants. Obviously, these forms of property do not enjoy the sanctity of a mosque and its merit as a place of worship, because there is a difference between a thing and the properties subject to it.

The two also differ with respect to the rules applicable to their sale. Therefore those who prohibit the sale of a mosque allow the sale of a mosque's assets because there is no causal *shar'i* or non-*shar'i* relationship between them, considering that a mosque is used for worship, a purely spiritual activity, while the waqf of a shop (owned by a mosque) is destined for material benefit. Hence a mosque belongs to the category of public *waqf*s – or rather it is one of the most prominent of its forms – while the properties owned by it are private *waqf*s belonging specifically to it. Consequently, it is doubtlessly valid to sell *waqf* properties belonging to mosques, cemeteries and schools, even if we accept the invalidity of the sale of a school or a graveyard.

But is it valid to sell the properties subject to a *waqf* unconditionally, even if there is no justifying cause – such as its being in a dilapidated condition or dwindling returns – or is it necessary that there exist a justifying cause so as to be treated exactly like a *waqf* in favour of one's descendants and other forms of

private *waqf*?

These properties are of two types. The first type is one where the *mutawalli* buys the property from the proceeds of the *waqf*, such as where a mosque has an orchard which the *mutawalli* rents out, or buys or builds a shop from its proceeds for the *waqf's* benefit, or obtains a shop from charitable donations received. In such a situation, both sale and exchange are valid if beneficial, irrespective of whether there exists any justifying cause mentioned by the legists, because, these properties are not *waqf* but only the proceeds or assets belonging to the *waqf*. Hence the *mutawalli* is free to deal with them in the interest of the *waqf*, exactly like he deals with the fruits of an orchard endowed for the benefit of a mosque,[13] except where the religious judge (*hakim al-shar'*) supervises the creation of the *waqf* of a real estate bought by the *mutawalli* in which case the real estate will not be sold unless there exists a cause justifying its sale. But where the *mutawalli* creates a *waqf*, it has no effect without the *hakim's* permission, because the *mutawalli* is appointed for managing the *waqf* and its utilization, not for creating *waqfs*.

The second type of property is one where the benefactors endow it as a *waqf* for the benefit of a mosque or school (as when a person provides in his will that his house, shop or land be made a *waqf* for the benefit of a mosque or school, or he himself makes a *waqf* of it). This kind of property is considered a private *waqf* and its sale is valid if the justifying causes, such as dilapidation or dwindling returns amounting to almost nothing, exist. But if they do not exist, it is not valid. I haven't come across in any work of the four Sunni schools in my possession anyone making this distinction.

This is what I have inferred from what al-Shaykh al-Ansari mentions in *al-Makasib* while discussing the rule applicable to a mosque's mat. He says: "A difference has been made between what is 'free' property (e.g. a mat purchased from the income of a mosque: in this case it is valid for a *mutawalli* to sell it if it is beneficial, if it has fallen into disuse or even if it is still new and unused) and between what is part of a *waqf* in favour of the mosque (e.g. a mat which a person buys and puts in the mosque, or the cloth used to cover the Ka'bah; the like of these are the public property of Muslims and it is not valid for them to alter their condition except in cases where the sale of *waqf* is valid)."

Thus when it is valid for a *mutawalli* to sell a new mat of the mosque which he has purchased from its funds, it is without doubt valid for him to sell other such items. and that which indicates an absence of difference (between a mat and something else) is the Shaykh's own observation soon after the above quotation. There he states: "The rule applicable to baths and shops which have been built for income through letting them and the like, is different from the rule applicable to mosques, cemeteries and shrines."

Exactly similar is the following view of al-Na'ini mentioned in al-Khwansari's *Taqrirat:* "Where a mosque is ruined or forsaken, in a manner that it is no longer in need of the income from its *waqf*s and other sources, the income from *waqfs* pertaining to it will be spent in worthy causes, though it is better that it be spent on another mosque." Similarly, if the *waqf* is in favour of a certain school or hospital which lies

in ruins, its income will be used for charitable purposes or for another institution of its kind.

Waqfs which are not Mosques

We have referred to the opinions held by the different school concerning mosques, and pointed out that the Imami, Shafi'i, Hanafi and Maliki schools are opposed therein to the Hanbalis. But concerning *waqf*s other than mosques, the Imamiyyah have their own specific stand regarding their sale. We will first mention the views of the four Sunni schools and then deal separately with the opinion of the Imamiyyah.

Since the Hanbali have allowed the sale of a mosque on the existence of a justifying cause, it is more in order for them to allow the sale and exchange of a *waqf* which is not a mosque, provided a justifying cause exists.

As to the Shafi'is, they absolutely prohibit its sale and exchange even if it is a private *waqf* (e.g.in favour of one's progeny) and even if a thousand and one causes exist, though they allow the beneficiaries to use up the private *waqf* themselves in case of necessity (e.g. using a dried fruit tree as fuel, though its sale or replacement is not valid for them).

The Malikis, as mentioned in *Sharh al-Zarqani 'ala Abi Diya'*, permit the sale of a *waqf* in the following three situations. First, where the *waqif* stipulates its sale at the time of creation of *waqf*; here his condition will be followed. Second, where the *waqf* is a movable property and is considered unfit for its prescribed purpose; here it will be sold and the amount realized will be used to replace it. Third, an immovable property will be sold for the expansion of a mosque, road or cemetery. Apart from these its sale is not valid, even if it lies in ruins and is not being utilized for any purpose.

As to the Hanafi's, according to Abu Zuhrah in *Kitab al-waqf*, they allow the replacement of public and private *waqf*s of all kinds except mosques. They have mentioned the following three situations in this regard:

1. That the *waqif* should have specified it at the time of creation of *waqf*.

2. The *waqf* should fall in a condition of disuse.

3. Where replacement is more profitable and there is an increase in its returns, and there exists no condition set by the *waqif* prohibiting its sale.

This was a brief account of the views of the four schools regarding a *waqf* which is not a mosque, and, as noticed, they, as against the Imamiyyah, do not differentiate between private and public *waqf*s – excepting mosques – from the point of view of their sale.

Public and Private Waqfs

The Imamiyyah divide *waqf*s into two categories and specify the rules applicable to each one of them as

well as their consequences.

Private Waqf

It is a *waqf* which is the property of the beneficiaries, i.e. those who are entitled to utilize it and its profits. To this category belong *waqf*s in favour of one's progeny, *'ulama'*, or the needy, the *waqfs* of immovable property for the benefit of mosques, cemeteries, schools, etc. It is regarding this category that there is a difference of opinion between the legists as to whether its sale is valid when the justifying causes are present or if it is totally invalid even if a thousand and one causes exist.

Public Waqf

It is a *waqf* for the common benefit of people in general, not for a specific group or class among them. To this category belong schools, hospitals, mosques, shrines, cemeteries, bridges, caravansaries of the past, springs and trees dedicated for the use of passers-by, because they are not meant for any specific Muslim individual or group to the exclusion of other individuals or groups.

The Imamiyyah concur that these public *waqf*s cannot be sold or replaced in any situation even if they are in ruins or about to be destroyed and fall into disuse, because, according to them, or most of them, they are released from ownership, i.e. gone out of the ownership of the earlier owner without becoming anyone's property. Thus on becoming *waqf* such a property becomes exactly like the free gifts of nature, and it is obvious that there can be no sale except where there is ownership. This is in contrast to private *waqf*s which involve the transfer of ownership of the *waqif* to the beneficiaries in some particular manner. Hence (in the case of public *waqf*s), if the purpose of a *waqf* becomes totally impossible to achieve (such as a school which has no students and consequently no lessons can be held in it) it is valid to transform it into a public library or a conference hall.

We have already pointed out in the discussion on mosques that though they are precluded from being owned through sale, it is valid to own them through *al-hiyazah*. We also said that the author of *Mulhaqat al-'Urwah* has criticized the legists on the basis that there is no difference between public and private *waqfs* and that the reason justifying the sale of a private *waqf* also justifies the sale of a public *waqf*. He does not concede that a public *waqf* involves release and freedom from ownership, and there is no impediment to sale in his opinion even if it is accepted to be such, because, according to him, the factor justifying a thing's sale is that it should possess value.

However, we have some remarks to make about the opinion of the legists as well as that of the author of *al-Mulhaqat*. We reject the position of the legists on the ground that though the absence of ownership prevents ownership of a *waqf* through a contract of sale, it does not prevent its ownership through *al-hiyazah*.

Similarly, ownership by itself does not validate sale, because mortgaged property which is certainly owned (by the mortgagor), cannot validly be sold without the consent of the mortgagee.

We reject the position of the author of *al-Mulhaqat* because possession of value by itself is not sufficient, for the unowned gifts of nature, (such as the fishes in the water or the birds in the sky), though they possess value, cannot be sold (in that state). Therefore, as observed earlier, the only way of ownership is through *al-hiyazah*.

Cemeteries

We have already mentioned that cemeteries are public *waqf*s like mosques and that the Imamiyyah do not consider their sale valid in any situation, even if they are in ruins and their signs have been wiped out. I consider it useful to specifically discuss cemeteries in this chapter for the following two reasons.

1. The necessity of mentioning the rules in this regard because there are numerous Muslim cemeteries which have been forsaken and are used for other purposes.

2. Usually there is a difference between cemeteries and other forms of *waqf*s. This difference will become clear in the following discussion.

If we know about a cemetery that a person had donated his land for that purpose and it was used for burial, the rule applicable to public *waqf*s will apply to it, and it will be reckoned among *waqf*s whose sale is invalid even if its signs have disappeared and the bones of the buried have decayed.

But if we know that the cemetery was previously an unused land not owned by anyone and the people of the village used it as a cemetery – as is usually the case – then it is not a *waqf* ab initio, neither public nor private; rather it will remain the common property of all (*al-musha'*) and its *hiyazah* is valid for anyone who takes the initiative. But if a corpse is buried in a part of it, both the opening of the grave and using it in a desecrating manner are not valid. But anyone can personally utilize any part of this land by either cultivating it or building upon it if it is without graves or there are old graves whose occupants' bones have decayed.

Using this land is valid for him, exactly like it is valid for him to use abandoned land or land whose original user has migrated and it has reverted to its previous state.

Where we are unaware of the history of a piece of land which is being used as a cemetery – i.e. as to whether it was an owned land which was endowed by the owner, so that it would be considered a *waqf* and governed by its rules, or if it was an ownerless land which the villagers later used for burying their dead – it will not be considered a *waqf* because the presumption is the absence of a *waqf* unless its existence is proved according to the Shari'ah.

Here one might say: A *waqf* is proved if it is popularly known to be such; therefore why cannot the *waqf* of a cemetery be similarly proved?

Our reply is that if it is popularly known that a certain cemetery is a *waqf* and it has been narrated generation after generation that a particular person had endowed it for a cemetery, we would definitely

confirm it as a *waqf*. But if all that is widely held is that it is a cemetery, the sole knowledge of its being a cemetery is not sufficient to prove that it is a *waqf*. It could have been common land.

A Sub-Issue

If a person digs a grave for himself to be buried in it at the time of his death, it is valid for others to bury in it another corpse even if there is extra space in the cemetery. But it is better to leave it for him, refraining from troubling a believer.

Causes Justifying the Sale of Waqf Property

We have already mentioned that Imami legists concur that the sale of public *waqf*s, like mosques and cemeteries, etc., is not valid. But regarding private *waqf*s (e.g. the *waqf*s made in favour of one's progeny, scholars, or the needy) there is a difference of opinion between them where there exists a cause justifying their sale. The following causes justifying the sale of private *waqf*s have been mentioned by these legists.

1. Where there remains no benefit of any kind in the property from the viewpoint of the purpose for which it was endowed (e.g. a dried branch not yielding fruit, a torn mat fit only for being burnt, a slaughtered animal which can only be eaten), there is no doubt that this cause justifies sale.

2. Al-Sayyid Abu al-Hasan al-Isfahani observes in *Wasilat al-najat*: "The articles, carpets, cloth coverings of tombs, and similar items cannot be sold if they can be utilized in their present state. But if they are not required in the location any longer, and their being there would only damage and destroy them, they should be utilized in a similar alternative place, and if such a place does not exist or exists but does not need them, they will be used for public benefit. But where no benefit can be derived from them except by selling them and their retention amounts to their damage and destruction, they will be sold and the proceeds used for the same place if it is in need of it. Otherwise, it will be used in any other similar place if possible or for public benefit.

3. If a *waqf* is in ruins (such as a dilapidated house or an orchard which is not productive) or its benefit is so little as to be reckoned nonexistent, if its repair is possible it will be repaired, even if it entails its being rented out for years; otherwise, its sale will become permissible, provided its proceeds are applied for replacing the former property as mentioned below.

4. If the *waqif* provides for the sale of *waqf* property in case of dispute between the beneficiaries, or dwindling profits, or any other reason which does not make a *haram halal* and vice versa, his desire will be carried out.

5. Where dispute occurs between the beneficiaries of a *waqf* threatening loss of life and property and there is no way of ending it except through its sale, the sale is permissible and the amount realized will be distributed among the beneficiaries.

This is what the legists say, though I do not know the basis of their opinion except what they have mentioned regarding the countering of a greater by a lesser harm. But it is obvious that it is not valid to remove harm from one person by shifting it to another, and the sale of the *waqf* entails loss to the succeeding generations of beneficiaries.

6. If it is possible to sell part of a dilapidated *waqf* property and repair the remaining part with the proceeds of the sale, such a sale is permissible.

7. If a mosque is ruined, its stones, beams, doors, etc. will neither be treated in accordance with the rules applicable to the mosque itself, nor the rules applicable to fixed property endowed for the benefit of a mosque which forbid its sale except on the presence of a justifying cause. Rather, the rules applicable to them will be those which apply to the income of the mosque and its *waqf*s (such as the rent of a shop belonging to or endowed in favour of the mosque). In this regard the *mutawalli* is free to utilize it in any manner beneficial for the mosque.

The Sale Proceeds of a Waqf

Where a *waqf* is sold on the presence of a justifying cause, how will the sale proceeds be used? Will they be distributed among the beneficiaries exactly like the income generated by the *waqf*, or is it necessary, if possible, to buy with these sale proceeds a similar property to replace the one sold?

Al-Shaykh al-Ansari, as well as many other *mujtahids* observe: The rule applicable to the sale proceeds is the rule applicable to the *waqf* sold, in that it is the property of the succeeding generations. Therefore, if the sale proceeds are in the form of immovable property, it will take the place of the *waqf* sold; if it is cash, we will buy with it the most suitable replacement. The replacement does not require the reciting of a *sighah* for making it a *waqf*, because the fact that it is a replacement naturally implies that the latter is exactly like the former. Hence al-Shahid states in *Ghayat al-murad*: 'The replacement is owned on the basis of the ownership of the replaced property, and it is impossible that it be owned separately.'

Then al-Ansari observes in *al-Makasib*, at the conclusion of the discussion on the first cause validating the sale of a *waqf*: "If it is not possible to buy immovable property from the sale proceeds, the money will be kept in the custody of a trustworthy person awaiting a future opportunity. If deemed beneficial, it is also permissible to do business with it, though the profits will not be distributed among the beneficiaries, as is done in the case of the income generated from the *waqf*; rather the rule applicable here will be the rule applicable to the *waqf* itself because it is part of the property sold and not a true increase."

This is what al-Ansari has said and he, may God be pleased with him, is better aware of his true intent. But I do not perceive any difference between the profits of the sale proceeds of a *waqf* and the income generated from the *waqf* itself. Therefore, as the income of the *waqf* is distributed among the beneficiaries, it is appropriate that the profits (from the sale proceeds invested) be similarly distributed, though it may be said that the income from the *waqf's* immovable property does not belong to the class

of the *waqf* property itself but is separate from it, whereas the profits from business are in the form of money which does not differ from it, and where there is a difference, the rule applicable will also differ. Whatever the case, if the mind is set to work, it finds a solution for every difficulty and doubt from a theoretical point of view. But, obviously, practice should be the criterion, and the tangible reality is that usage does not distinguish between the two situations, and therefore it should be resorted to.

Al-Shaykh al-Na'ini observes in al-Khwansari's *Taqrirat*: If another property is purchased from the sale proceeds of the first property, the latter will neither take the place of the former nor will it be considered a *waqf* similar to the former; rather it is exactly like the income generated from a *waqf* .and it is permissible to sell it without any justifying cause if the *mutawalli* considers its sale to be beneficial.

The correct opinion is the one mentioned by al-Ansari, al-Shahid and other researchers that there is no difference between the replacement and the property replaced.

Some Curious Waqfs

I did not intend to add anything about *waqf* after having finished discussing it and having mentioned the positions of the schools. But incidentally at the time when I had finished the chapter on *waqf* to go on to the chapter on *Hajr* (legal disability), I read a curious and interesting account regarding Egyptian *waqf*s during the eras of the Mamluks and earlier 'Uthmanis. I had received two magazines, the Lebanese *Lisan al-Hal* and the Egyptian *al-Akhbar* dated 7th July 1964, and I set aside my pen and started perusing them so to know about the current developments and to relieve myself of monotony.

By chance I happened to read in the magazine *al-Akhbar* that in the Directorate of *Waqf*, Egypt, is an iron vault that had remained locked for hundreds of years. The Directorate decided to open it to find out its contents. When the doors of this vault were opened, thousands of deeds and agreements covered with dust and piled upon one another were found. Twenty persons were appointed to study them. When they started this work they came across curious and amazing things: 300 deeds written with gold water, a deed executed a thousand years ago, and so on. It made an interesting and enjoyable reading either because it was actually so or due to my immersion in related research and writing. I mention a part of these contents hoping that the reader too would also enjoy reading them:

An immovable property was endowed for providing grass for the mule ridden by the Shaykh of al-Azhar at that time.

A woman created a *waqf* of 3000 feddans (1 Egyptian feddan = 4200.833 sq. metre) for the benefit of the *'ulama'* who followed Abu Hanifah.

Some *pasha* endowed 10,000 feddans for covering the graves of his relatives with branches of palm and myrtle.

A person endowed parts of his wealth for the water-carriers of the city mosque.

Another created a *waqf* for the reciter of the Friday sermon.

A lady created a *waqf* for providing ropes for pails used for supplying water to a mosque.

A *waqf* for providing caftans and outer garments for old persons.

A *waqf* for incensing study sessions.

I remember having read in the past about a *waqf* in Syria whose income is used to buy new plates to replace those broken by maid-servants to save them from the censure of their mistresses.

I have heard that in Homs there is a *waqf* for those who sight the new moon of the *'Id* of Ramadan. For this reason there is a multitude of claims of having sighted it in that region. There are also present *waqf*s in some villages of Jabal 'Amil for providing shrouds for the dead.

These *waqf*s, if they reveal anything, show the thinking prevailing at that time, the mode of living and habits of the society in which the *waqif* lived, and that there were a large number of families who could not even provide their dead with a shroud.

1. The difference between waqf and habs is that in the former the ownership of the waqif is completely ended, and this prevents the property from being inherited or disposed of in any other manner. In the latter case, the ownership of the habis is preserved, and the habs property may be inherited, sold, etc. This difference was not noticed by al-Shaykh Abu Zuhrah and he, as will be noticed, has ascribed to the Imamiyyah that which they do not hold.
2. This issue of perpetuity in waqf is intimately linked with the question concerning ownership of waqf property, which has been discussed separately in this chapter.
3. Abu Zuhrah has rejected this view (p.50), on the basis that the concept of the ownership of God is meaningless in this context, for God Almighty owns everything. But it will be noticed that the meaning of God's owning the waqf is not that it becomes a free natural bounty (like air and water); rather His ownership of it is like His ownership of khums al-ghanimah, as mentioned the Qur'anic verse:

وَاعْلَمُوا أَنَّمَا غَنِمْتُمْ مِنْ شَيْءٍ فَأَنَّ لِلَّهِ خُمُسَهُ
And know that whatever you acquire as ghanimah, a fifth of it is for God... (8:41)

4. As to those who say that waqf may be created only by using specific words, the gist of their argument is based on the presumption of the continuity of the ownership of the property by the owner. That is, the property was the owner's before the execution of the contract; following it, we will come to entertain a doubt (due to his failure to make his intent explicit through specific words) regarding the transfer of its ownership from him. Accordingly, we will presume the existing situation - which is the continuity of the owner's ownership - to continue.

It will be noticed that this argument holds where there is doubt as to whether the owner intended the creation of a waqf or not, or where despite the knowledge of his intention of creating a waqf there is doubt as to whether he has executed the contract and created the cause for its existence. But where we have knowledge of both his intention to create a waqf as well as his having fulfilled what is required to prove its existence, there remains no ground for doubt. Now, if a doubt arises, it will be considered a mere fancy and will have no effect, unless the doubt concerns the validity of the form of recital (al-sighah) as the cause creating the waqf and its effect from the point of view of the Shari'ah.

5. The distinction has been accepted by a group of leading Imami scholars, such as the author of al-Shara'i, al-Shahidayn (al-Shahid al-Awwal and al-Shahid al-Thani), al-'Allamah al-Hilli, and others. According to it, a private waqf is a contract

(‘aqd) and requires both an offer and an acceptance, and there is no legal and logical obstacle in a waqf being (bilateral) contract (‘aqd) in certain circumstances and a (unilateral) declaration (iqa’) in others, although the author of al-Jawahir has opposed it.

6. There is no proof based on the Qur’an, Sunnah or ‘aql (reason) concerning the invalidity of contingency (ta’liq) in ‘aqd and iqa’, and those who have considered it void have done so on the basis of ijma’. But it is obvious that ijma’ is authority only when we cannot identify the basis on which it is based; but if its basis is known, its authority will disappear, and the basis on which the mujtami’un (those who take part in the ijma’) have relied will itself be weighed to ascertain its authority. In this case the mujtami’un have relied on the assumption that the meaning of insha’ implies its immediate presence, and the meaning of being contingent on a future event is that the insha’ is not present, and this entails the presence and absence of insha’ at the same time.

This argument stands refuted on the ground that insha’ is present in actuality and is not contingent upon anything; only its effects will take place in the future on the realization of the contingency, exactly like a will, which becomes operational on death, and a vow that is contingent upon the fulfillment of a condition.

7. The schools differ concerning the disability of an idiot, as to whether it begins at the commencement of idiocy when the qadi has not yet made a declaration of his disability or if it begins after the declaration has been made. We will discuss it in detail in the chapter on wardship (‘bab al-hajr’).

8. By ‘Fath al-Qadir’ we mean the book which has become popular by this name, although we know it to be a collection of four books, one of which is Fath al-Qadir.

9. Al-Sayyid Kazim observes in al-Mulhaqat: If a person has a share in a house, he can make a waqf of it for a mosque, and those who come for prayers will take the permission of the other owners. I don’t understand what benefit lies in such a waqf.

10. For ascertaining the religious beliefs of a group, there is nothing more authentic than its religious texts – especially those on fiqh and law. Al-Shahid al-Thani, one of the greatest juristic authorities of the Imami Shi’is, has stated explicitly that the followers of other religions are better than the Ghulat and that they are honoured creatures of God. In view of this, is it possible to ascribe ghuluww to the Imamiyyah?

11. Nadhir means one who takes a vow (nadhr); halif means one who takes an oath (half); musi means one who makes a will (wasiyyah); and muqirr means one who makes a confession. (Trans.)

12. Of such pithy expressions common among the theological students of Najaf are: bi-shart shay’, bi shart la and la bi-shart. They mean by bi-shart shay’, ‘on condition that; laying down a positive condition, such as when one says: “I will give it to you if you do such and such a thing.” Bi-shart la implies stipulation of a negative condition, such as when one says: “I will give it to you if you don’t do such a thing.”

La bi-shart means regardless of any positive or negative conditions that may be involved (as when one says: “I will give it to you,” without mentioning any positive or negative condition). It is obvious that la bi-shart includes both bi-shart shay’ and bi-shart la.

13. The difference between property purchased from the income of the waqf and property purchased from the sale proceeds of a dilapidated waqf is noteworthy. In the former case, the property purchased will take the place of the waqf sold, while the property purchased from the waqf’s income will not take the position of a waqf.

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