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Judicial Applications Of Referral Rules In Waqf Matters And Their Role In Enhancing The Maliki School Of Thought: A Case Study Of The Algerian Supreme Court Decisions

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Abstract:

The Algerian legislator has been keen to preserve the religious reference through laws related to waqf (endowment), stipulating that its supplementary source is exclusively Islamic law, as stated in Article 222 of the Family Law and Article 02 of the Waqf Law. This approach contrasts with the multiple supplementary sources adopted in other laws. This specificity has led to several issues in its application, particularly because the Algerian legislator, unlike most [1]Arab legislations, did not specify a particular school of Islamic jurisprudence to refer to in the absence of legislative text. Hence, the idea of this study emerged.

The importance of this topic lies in its practical application, as it addresses the judiciary's contribution to the reinforcement of the referral rule to Islamic law and its adherence to the religious reference. Therefore, in this research paper, we will address the following problem: To what extent have the judicial applications of the Supreme Court reinforced the Maliki school of thought in waqf matters?

Keywords: *Islamic law, the Maliki School, waqf.*

Introduction:

Waqf is a charitable act that Muslims have competed in over generations, as it is an ongoing charity, whose benefit remains and reward renews until the Day of Judgment. Waqf has played an active role in developing the Islamic society through the ages, contributing to social solidarity, raising educational and cultural levels, and achieving economic development. However, in Algeria, waqf faced neglect and destruction during the colonial period, followed by marginalization and neglect post-independence.

The Algerian legislator did not overlook the protection of waqf, issuing several legislations organizing and protecting it. These include Executive Decree No. 62-157 dated 31/12/1962, Decree No. 64-283 dated 17/9/1964, which includes the system of public habous properties, and Law No. 84-11 dated 9/6/1984, which includes the Family Law. The constitutional value of waqf was crowned in the 1989 Constitution, with Article 49, paragraph 3, stating: "Waqf properties and charitable associations' properties are recognized and protected by law." This constitutional protection continued in successive constitutions up to the current one.

The legal existence of waqf properties and their distinction from national properties were embodied in the Land Orientation Law No. 90-25 dated November 18, 1990, which mentioned waqf properties alongside public and private properties. Then came Law No. 91-10 dated April 27, 1991, concerning waqf, followed by Executive Decree No. 98-381 dated December 1, 1998, which specified the conditions for managing, administering, and protecting waqf properties.

Completing the Land Orientation Law 90-25, which made waqf properties an independent system after being part of national properties, Executive Decree No. 2000-336 dated

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October 26, 2000, established a special register for waqf properties, independent of public property registers. To benefit from waqf in development, Law 01-07 dated May 22, 2001, was issued to specify the methods and forms of investing waqf properties.

Since the provisions of waqf are generally based on jurisprudential effort (ijtihad) and reflect the schools of thought of jurists, the legal texts concerning waqf derive their rules from Islamic jurisprudence and refer to Islamic law for any issues not covered by the texts. This is stated in Article 222 of the Family Law: "Anything not provided for in this law shall be referred to Islamic law," and similarly in Article 2 of the Waqf Law No. 91-10 mentioned above, due to the legal texts not covering all aspects of waqf, aligning with its charitable nature.

However, the Algerian legislator, unlike Arab countries, did not a particular school of Islamic jurisprudence to refer to in the absence of legislative text, prompting this study. While waqf does not differ in its purposes and objectives across all schools of thought and regions, its detailed rulings vary among jurisprudential schools. The Maliki school, predominant in Algeria and contributing to the waqf system, coexists with the Hanafi school, the official school during the Ottoman period in the Maghreb, and the Ibadi school, still adhered to by its followers, such as in Ghardaia waqf.

The referral to Islamic law rules in waqf matters allows the judge discretionary power in choosing the school of thought to draw from.

The significance of this topic lies in its practical application, as it discusses the judiciary's role in enforcing the referral rule to Islamic law and its adherence to the religious reference. Therefore, in this research paper, we will address the following problem:

To what extent have the judicial applications of the Supreme Court's referral rules in waqf matters reinforced the Maliki school of thought?

To address this issue, we have divided our research paper into two sections:

Section One: The Concept of Referral Rules to Islamic Law

Section Two: Judicial Applications of Referral Rules to the Maliki School in Waqf Matters

We concluded our research paper with a set of findings and recommendations.

Section One: The Nature of Referral Rules to Islamic Law

Islamic law occupies a prominent position in many decisions of the Algerian Supreme Court. Judicial jurisprudence has explicitly stated that "no ruling is superior to Sharia,"[2] and it has clarified that "a decision not based on any legal or Sharia foundation is flawed with a lack of legal basis."[3]

The principle of referral to Islamic law holds significant importance in achieving legal solutions in waqf matters, as legal texts do not regulate all aspects of waqf on one hand, and it facilitates judges in finding solutions to many issues presented before the court that lack legal regulation. Therefore, various Arab legislations refer to it in waqf and family laws.

First: Definition of Referral Rules to Islamic Law

The Algerian legislator explicitly referred to the principle of referral to Islamic law in Article 222 of the Family Law and Article 2 of the Waqf Law mentioned above, without defining the concept of referral or specifying a particular school of thought to resort to in the absence of a legal text.

[2] Judicial Precedents of the Personal Status Chamber - Special Issue - Supreme Court Documents Section, National Office for Educational Works, Algeria, 2001, pp. 100-103.
[3] Ibid., p. 279

Referral rules to Islamic law are defined as: "The judge's transition to a Sharia ruling based on the legislator's desire under certain conditions to reach a specific solution for a matter that the legislator has not provided a legal ruling for."[4]

Referral to Islamic law does not necessarily mean reverting to the Maliki school, especially since judicial jurisprudence has decided that "it is permissible in a waqf contract to adopt any Islamic school when concluding the habous contract."[5]

Second: Conditions for Applying Referral Rules to Islamic Law

Based on the legislations that stipulate referral rules to Islamic law, some conditions necessary for applying these rules can be inferred:

1. **Existence of a Legal Text that Specifies Referral:** To transition from legal texts to Islamic jurisprudence, there must be a legal text permitting this in matters not covered by legal provisions, as stated in Article 222 of the Family Law and Article 2 of the Waqf Law.
2. **Absence of a Legal Text Regulating the Matter:** Referral rules can only be applied to matters not regulated by law, as the general rule is that there is no ijtihad (jurisprudence) with the presence of a text. This is confirmed by Article 222 of the Family Law and Article 2 of the Waqf Law mentioned above.

Third: Conditions for Applying Referral Rules to Islamic Law:

These conditions vary depending on whether the referral is restricted or unrestricted:

1- **Conditions for Applying Restricted Referral Rules:** Restricted referral means the legislator obligates the judge to follow a specific school of thought, where the judge must revert to the school specified by the legislator and is not permitted to refer to another school. An example is Article 183 of the Jordanian Personal Status Law of 1976, as amended, which states, "What is not mentioned in this law is referred to the predominant opinion in the Hanafi school," and Article 2, paragraph 3, of the UAE Personal Status Law, which states, "If there is no provision in this law, the ruling is according to the predominant opinion in the Maliki school, then the Hanbali school, then the Shafi'i school, then the Hanafi school."

If the legislator specifies a particular school, and that school has different opinions, the judge refers to the predominant opinion of that school. If the legislator arranges the schools that the judge should refer to, the judge must respect that arrangement.

2- **Conditions for Applying Unrestricted Referral Rules:** Unrestricted referral rules are those that refer to Islamic law without specifying a particular school, such as Article 222 of the National Family Law and Article 2 of the Algerian Waqf Law. In this case, the judge is free to choose among the schools according to what they see fit with the overall legal texts, as exemplified by Algerian, Iraqi, and Omani laws.[6]

In this situation, the judge must choose the school most compatible with the overall legal texts. The judge has the freedom to select the most suitable school but must provide reasoning and explain the compatibility between the chosen school's opinion and the legal texts that mentioned this referral.

While the Maliki school is predominant in Algeria and has contributed to building the waqf system, some waqf institutions are based on the Hanafi school, which was the official

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[4] Ali Sanousi, 'Referral to Islamic Sharia Provisions in Algerian Family Law between Absolute and Restrictive: How Effective in Solving Muslim Family Issues?' Judicial Precedent Journal, vol. 13, no. 2 (Issue No. 27), October 2021, p. 1076

[5] Judicial Precedents of the Personal Status and Inheritance Chamber, Judicial Journal, no. 1, 1989, p. 118."

[6] "As stated in Article 181 of the Personal Status Law in the Sultanate of Oman, if there is no provision in this law, it is judged according to the most appropriate rules of Islamic Sharia. Article 222 of the Family Code: 'Anything not explicitly provided for in this law is referred to the provisions of Islamic Sharia.' Article 1, paragraph 2, of the Iraqi Personal Status Law also states: If there is no legislative text that can be applied, it is judged according to the principles of Islamic Sharia that are most appropriate to the provisions of this law."

school during the Ottoman period in the Maghreb, and the Ibadi school, which continues to be followed by its adherents, such as in the waqf of Ghardaia.

Therefore, when applying referral rules, according to Article 222 of the Family Law and Article 2 of the Waqf Law, the judge must choose among these three schools the most suitable one for the issue at hand and provide reasoning and demonstrate compatibility with the legal texts.

Section Two : Judicial Applications of Referral Rules in Waqf Matters

It has been previously mentioned that even though the Maliki school of thought is predominant in Algeria, the Hanafi and Ibadi schools also coexist. Their adherents continue to adhere to the rulings of these schools widely in some regions of the country. Therefore, referring to the rulings of Islamic Sharia does not always mean referring to the Maliki school. When drafting a waqf contract, the waqif (donor) has the right to choose the school of thought he desires. The judge must refer to the rulings of the school chosen by the waqif in the waqf contract. "The waqf contract is subject to the provisions of the Family Law, not the Maliki school, and the Algerian Family Law does not adhere to any specific school of Islamic Sharia in waqf matters."[7] Even though the jurisprudence of the Supreme Court often refers to the Maliki school, it also refers to other schools of thought.

First: Application of Referral Rules to the Maliki School in Waqf Matters

The Maliki school, as interpreted by Imam Malik, leads the jurisprudence of the Supreme Court when there is no specific provision in the law. The court strongly refers to:

- Mukhtasar Khalil[8]: This text is often cited by name and quoted[9] because it forms one of the primary references for the Maliki school in Algeria. It holds a prominent place in the teaching of Maliki jurisprudence and is the preferred text among contemporary Malikis, serving as a reliable authority. Scholars must read Mukhtasar Khalil annually, or their fatwas are not trusted[10].

- Famous Opinions of Imam Malik: In addition to Mukhtasar Khalil, the Supreme Court's jurisprudence heavily relies on the famous opinions of Imam Malik.

One such judicial precedent derived from Imam Malik is: the precedent that waqf cannot be acquired by prescription, the precedent that it is not permissible to revoke a waqf, the precedent affirming the validity of a contingent waqf, the precedent that it is not permissible to transfer the ownership of a waqf property, and the precedent that rules.

1. **Non-acquisition of Waqf by Prescription:** The Algerian legislature overlooked the issue of waqf prescription, as there is no explicit provision in Article 3 of Decree No. 83-352 dated May 21, 1983, excluding waqf properties from properties that can be acquired by prescription. The Waqf Law No. 91-10, as amended, does not contain an explicit provision preventing these properties from being subject to prescription regardless of the duration.

Thus, reference is made to the rulings of Islamic Sharia for issues not specified by law, according to Article 2 of Law No. 91-10 and Article 222 of the Family Law. According to the famous opinion of Imam Malik, waqf properties cannot be acquired by prescription, no matter how long the period. Ibn Rushd stated that waqf, if transferred by inheritance after seventy years, must be returned to waqf[11]. This principle has been adopted by the Supreme

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[7] Supreme Court Precedents, Civil Chamber, Decision No. 1184602, issued on 15/6/2017, Judicial Journal, no. 1, Supreme Court Documents and Legal and Judicial Studies Section, 2018.

[8] Nasr, Khalil bin Ishaq Al-Maliki, Mukhtasar Khalil, corrected and commented on by Ahmad Dar Al-Fikr, Beirut, 1981.

[9] Judicial Precedents of the Personal Status Chamber, previous reference, p. 48.

[10] Mohamed Sanni, 'The Limits of the Concept of "Islamic Sharia" in Judicial Precedent in Supreme Court Decisions (Personal Status Chamber),' Journal of Legal and Political Research and Studies, vol. 2, no. 2, 2012, p. 187.

[11] Referenced in Nadia Arkam's thesis, 'The Legal Status of Waqf in Algerian Law,' PhD thesis in Law, Faculty of Law and Political Science, Mouloud Mammeri University, Tizi Ouzou, 2016, p. 48.

Court in several decisions, including Decision No. 39360 dated January 13, 1986, in the case of: "Inadmissibility of invoking prescription on waqf properties" (unpublished), which held that "it is not permissible to invoke prescription in the exploitation of waqf land due to the lack of ownership intent." Another decision, No. 478951 dated February 11, 2009, established the principle that "there is no prescription in waqf," reaffirmed in Decision No. 1345727 issued by the Civil Chamber on October 7, 2020, stating: "Prescription rules do not apply to waqf," a principle derived from the famous opinion of Imam Malik as previously mentioned.

It is noteworthy that the Supreme Court had a different stance regarding private or family waqf, which in one of its decisions, ruled that it can be acquired by prescription. Decision No. 1179721 dated October 11, 2018, recognized that waqf is divided into charitable and family waqf, with charitable waqf considered public property and thus not subject to acquisition by prescription, whereas there is no legal provision preventing the acquisition of family waqf by prescription. This decision contradicted the view of the majority of Sharia scholars, including the Maliki school, leading to its reversal in Decision No. 1345727, which determined that prescription rules do not apply to waqf in absolute terms, covering both charitable and family waqf.

2. **The precedent affirming the necessity of a valid waqf and the prohibition of revoking it**: Maliki jurists consider an immediate, non-contingent waqf to be a binding contract that cannot be revoked or subjected to any transfer of ownership. The waqf property remains under the ownership of the waqif but cannot be sold or gifted, and it is not inherited upon the waqif's death. This means that the waqif cannot revoke the waqf once it is binding and perpetual; otherwise, it would be invalid. This principle was upheld by the Supreme Court in decision No. 692342 dated 14/7/2011, which affirmed the principle: "It is not permissible to revoke a valid waqf as it is an eternal charity."[12] Another decision on 19/12/2011 stated: "It is established in Sharia that a waqf contract cannot be revoked unless it is according to the Hanafi school. Since the waqf in the present case was based on the Maliki school, which does not allow the revocation of waqf, the judges erred in their application of the law."
3. **The precedent permitting contingent waqf:** Islamic jurisprudence varies on the issue of contingent waqf. Jurists distinguish between a contingent waqf and a waqf contingent on death, considering the latter a special case that does not fall under general rules because death is certain. Jurists agree that a waqf contingent on death is only valid for one-third of the property, but they differ on the permissibility of revocation. Shafi'i[13] and Hanbali[14] jurists view it as a will that is not binding beyond one-third and can be revoked while the waqif is alive. Upon the waqif's death, the waqf becomes binding. Malikis consider a waqf contingent on death to be binding and irrevocable, only valid up to one-third. For non-death contingencies, most jurists deem it invalid, insisting the waqf must be immediate. Malikis[15], however, allow both contingent and added waqf, whether on a certain or uncertain event, and permit the waqf to be contingent on a dissolving condition. If the condition occurs, the waqf ends, and the property returns to the waqif or their heirs[16]. The Supreme Court recognized that a contingent or added waqf can be revoked, but an immediate and binding waqf cannot, as stated in decision No. 102230 dated 21/7/1993[17]. This decision allows for contingent or added waqf but erroneously permits revocation contrary to the Maliki view that a waqf, once contingent, is not binding until the condition is met without allowing revocation.

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[12] Supreme Court Decision, Civil Chamber, issued on 4 July 2011, File No. 692342, Supreme Court Journal, no. 2, Documents and Legal and Judicial Studies Section, 2011, p. 32

[13] Sulayman bin Muhammad bin Umar Al-Bijirmi Al-Shafi'i, Al-Bijirmi on Al-Khatib, vol. 3, 1st ed., Dar Al-Kutub Al-Ilmiyya, Beirut, Lebanon, 1999, p. 342

[14] Ibn Qudamah Al-Maqdisi, Al-Mughni, vol. 8, 3rd ed., Dar Alam Al-Kutub, Riyadh, 1997, p. 216

[15] Al-Qarafi, Al-Dhakhira, vol. 6, 1st ed., Dar Al-Gharb Al-Islami, 1994, p. 326

[16] Al-Kharashi, Sharh Mukhtasar Khalil, vol. 7, 2nd ed., Al-Matbaa Al-Kubra Al-Amiriya, Bulaq, Egypt, 1317 AH, p. 91

[17] Supreme Court Decision, Civil Chamber, No. 102230, dated 21/7/1993, Judicial Journal, 1995, p. 77

4. **The precedent prohibiting any transfer of ownership of waqf property:** In Maliki jurisprudence, waqf is defined as "the granting of the benefit of owned property, even for rent or its yield, to a beneficiary for a specified duration as determined by the waqif."[18] The phrase "for a specified duration as determined by the waqif" means perpetuity is not required, allowing for a time-limited waqf[19]. It is also defined as "withholding property from ownership transfers while keeping it under the waqif's ownership, and mandatorily donating its yield to a charitable cause, not requiring perpetuity."[20] .

This definition indicates that waqf grants only the benefit of the property, not its ownership, unlike a gift. Thus, waqf property cannot be subjected to any transfer of ownership, as the waqif retains ownership and is prohibited from transferring it. This principle is supported by multiple Supreme Court decisions. Decision No. 157310 dated 16 July 1996 ruled that: "It is legally and religiously established that waqf property cannot be transferred by sale, gift, or otherwise. When the appellate court disregarded the primary appellant's request to nullify the sale of waqf land and instead validated the sale in a notoriety act despite it being waqf land, the judges erred in their application of the law and violated Islamic Sharia principles, necessitating the annulment of their decision."[21] .

Another Supreme Court decision, No. 188432 dated 29 September 1999, stated: "In this case, the appellate judges rightly annulled the sale of waqf property based on Article 23 of Law No. 91-10 dated 27 April 1991 concerning waqf, prohibiting the transfer of waqf property ownership to others."[22] This decision confirmed the invalidity of selling waqf property. Another ruling on 10 March 2011, No. 636028, stated: "It is not permissible to transfer the ownership of waqf property in any form, whether by sale, gift, or otherwise."[23] The Supreme Court's stance aligns with th e Maliki school in this matter, differing only in perpetuity, as the Maliki school allows for temporary waqf, unlike the Supreme Court, which requires perpetuity.

5. **The precedent requiring the waqif's ownership of the waqf property:** Waqf is one of the charitable contracts that jurists agree must involve property owned by the donor, meaning that the property being made waqf must be owned by the waqif at the time of creating the waqf. This has been affirmed by the Supreme Court multiple times. In decision No. 271299 dated May 26, 2004, it was stated: "It is legally established that for the validity of waqf, the waqif must own the property. Since it was proven in the present case that the original waqif had sold the land intended for waqf, ruling the waqf contract invalid is a correct application of the law."[24]
6. **The precedent prohibiting the division of waqf property among heirs as a transfer of ownership:** We have seen that in Maliki jurisprudence, waqf is defined as "withholding the property from ownership transfers while keeping it under the waqif's ownership and mandatorily donating its yield to a charitable cause without requiring perpetuity."[25] However, this ownership by the waqif over the waqf property is

[18] Ahmad Al-Dardir Al-Maliki, Al-Sharh Al-Saghir ala Aqrab Al-Masalik ila Madhhab Al-Imam Malik, commentary: Ahmad Al-Sawi Al-Maliki, edited by Mustafa Kamal Wasfi, vol. 4, Dar Al-Maarif, Cairo, n.d., pp. 97-98

[19] Ibid., p. 98

[20] Ahmad Ali Al-Khatib, Waqf and Wills: Two Forms of Voluntary Charity in Islamic Sharia, with an Explanation of the Legal Provisions Regulating Them, 2nd ed., University of Baghdad Press, Baghdad, 1978, p. 44

[21] Supreme Court Decision, Civil Chamber, No. 157310, issued on 16/7/1997, Supreme Court Judicial Journal, no. 1, Documents and Legal and Judicial Studies Section, 1997, p. 34

[22] Supreme Court Decision, Real Estate Chamber, No. 188432, issued on 29 September 1999, unpublished

[23] Supreme Court Decision No. 636028, issued on 10 March 2011, Supreme Court Journal, no. 2, Documents and Legal and Judicial Studies Section, 2011, p. 156

[24] Supreme Court Decision No. 271299, issued on 26 May 2004, Judicial Journal, Special Issue, vol. 1, p. 141

[25] Ahmad Ali Al-Khatib, Waqf and Wills: Two Forms of Voluntary Charity in Islamic Sharia, with an Explanation of the Legal Provisions Regulating Them, 2nd ed., University of Baghdad Press, Baghdad, 1978, p. 44

theoretical, as the waqif cannot transfer ownership, revoke the waqf, or include it in the estate upon their death. Therefore, the waqif cannot make a waqf for some heirs to the exclusion of others, and this property is not part of the inheritance to be divided as ownership transfer according to the shares. This principle was upheld in Supreme Court decision No. 501389 dated February 11, 2009, which stated: "Ordering the division of waqf property violates the law,"[26] and in decision No. 708046 dated December 13, 2012, which stated: "Waqf properties are not divided among heirs according to inheritance shares."[27]

This illustrates how the Supreme Court, in applying referral rules to the provisions of Islamic Sharia, has predominantly adopted the Maliki school in most disputed matters. However, this has not prevented the Supreme Court from considering the opinions of other schools in some issues

Second: Judicial Applications of Referral Rules to Schools Other Than the Maliki School

Although these applications are few, they demonstrate that the Supreme Court is not bound to follow the Maliki school exclusively. This was affirmed in its aforementioned decision: "In a waqf contract, the waqif has the right to choose any Islamic school of thought when drafting the waqf contract. Violating these principles necessitates the invalidation of any resulting contrary rulings."[28]

1. Precedent Permitting Waqf for Oneself

According to the Maliki school, it is not permissible for the waqif to make a waqf for themselves or to stipulate anything for themselves. This is stated in "Al-Taj wal-Ikleel" for Mukhtasar Khalil: "The waqf for the waqif alone is invalid by consensus."[29] However, the Hanafi school permits this. Abu Yusuf, a disciple of Imam Abu Hanifa, allows waqf for oneself, where the waqif can benefit from the entire or part of the waqf's yield as long as they are alive, and thereafter, it is transferred to the specified beneficiary. The Family Law, influenced by the Hanafi school, stipulates in Article 214 that "the waqif may retain the benefit of the waqf property for their lifetime, after which the waqf property shall be transferred to the designated beneficiary." This principle has been upheld by the Supreme Court. In Supreme Court decision No. 109957 dated March 30, 1994, it was stated: "Legally, waqf is the withholding of property from ownership by any person perpetually and its donation, but the waqif may retain the benefit of the waqf property for their lifetime, after which the waqf property shall be transferred to the designated beneficiary."[30] This precedent was reaffirmed in Supreme Court decision No. 137561 dated May 5, 1996.[31]

2. Precedent Mandating the Perpetuity of Waqf

Perpetuity in waqf means it is not limited by a specific term but continues indefinitely. Jurists differ on this matter; the Maliki school permits temporary waqf, where the waqf property is held for a specified period after which it reverts to the waqif's ownership. In contrast, the Hanafi school considers perpetuity a condition for the validity of waqf. The Family Law and the Waqf Law define waqf according to the Hanafi school, requiring

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[26] Supreme Court Decision issued on 11/2/2009, File No. 501389, Supreme Court Journal, no. 1, Documents and Legal and Judicial Studies Section, 2009, p. 232

[27] Supreme Court Decision, Family and Inheritance Chamber, No. 708046, issued on 13/12/2012, Judicial Journal, no. 1, Documents and Legal and Judicial Studies Section, 2013, p. 266

[28] Supreme Court Decision No. 1184602, issued on 15/6/2017, Judicial Journal, no. 1, 2018, previously referenced

[29] Mohammed bin Yusuf Al-Abdari Al-Muwaqq, Al-Taj wal-Ikleel for Mukhtasar Khalil, vol. 6, no edition, Dar Al-Fikr, Beirut, 1978, p. 25

[30] Supreme Court Decision, No. 109957, issued on 30 March 1994, Supreme Court Judicial Journal, no. 03, Documents and Legal and Judicial Studies Section, 1994, p. 39

[31] Supreme Court Decision No. 137561, issued on 05 May 1996, Supreme Court Judicial Journal, no. 02, Documents and Legal and Judicial Studies Section, 1996, p. 147

perpetuity.[32] The Supreme Court's jurisprudence has consistently ruled that waqf is invalid if it is time-limited. Among the decisions reflecting this stance are Supreme Court decision No. 102230 dated July 21, 1993[33], and decision No. 692342 dated July 14, 2011[34], among others that uphold the principle of perpetuity in waqf.

In our view, considering the societal developments across various fields, it would be beneficial for the legislature to recognize temporary waqf. This could encourage more individuals to donate through waqf while protecting the interests of the owner and their heirs.

Conclusion

Waqf (endowment) in Algeria is a system that has evolved over the centuries, structured by Islamic jurists, adopted by legislators in their legal texts, and applied by the judiciary in its rulings and decisions. Before all this, it was embraced by the citizens who saw it as a protector of their properties during colonial times and a savior during difficult periods. Additionally, waqf is considered a charitable act and a continuous donation that benefits them on the Day of Judgment.

From our research, we have reached the following conclusions:

- The legislator has done well by referring to Islamic Sharia provisions for all issues not explicitly covered by law in waqf matters.

- The Supreme Court has considered any violation of Islamic Sharia as a violation of the law, invalidating any rulings that contradict Sharia.

- The legislator wisely did not mandate adherence to a specific school of thought in waqf matters, allowing the waqif to establish their waqf according to the school they deem appropriate, and similarly not binding the judge to a specific school as some Arab legislations have done. This allows the judge to choose the appropriate school based on the matter at hand.

- The Supreme Court's jurisprudence frequently references the Maliki school as a primary source in most of its rulings.

- The Supreme Court has, in a few cases, adopted views from schools other than the Maliki school, particularly in instances where the legislator also did not follow the Maliki school, such as in matters of waqf perpetuity and the permissibility of waqf for oneself.

Based on our research paper, we recommend the following:

- It would be beneficial for the legislator to establish an order of preference for the schools of thought that judges should refer to in waqf matters, making it easier for judges to research and transition from one school to the next in order.

- We believe that temporary waqf has significant benefits and encourages endowment, so it would be advisable for the legislator to permit it.

- Continuous training for judges in Islamic Sharia and jurisprudence so that they can accurately derive rulings.

- Encouraging judges to participate in training seminars, forums, and conferences on Sharia in general and modern developments in the field of waqf specifically.

- It would be beneficial for the Supreme Court to consult with a scholarly body comprising experts in Sharia and law, jurists from various schools of thought, and researchers to effectively address new and emerging issues.

Praise be to Allah, the Lord of all worlds.

References

[32] Monzer Kahf, Waqf in Contemporary Islamic Society, Ministry of Awqaf and Islamic Affairs, Islamic Research Center, Qatar, 1998, p. 202

[33] Supreme Court Decision No. 102230, issued on 21/7/1993, Judicial Journal, no. 2, 1995, p. 77.

[34] Supreme Court Decision No. 102230, issued on 21/7/1993, Judicial Journal, no. 2, 1995, p. 77

Books

1. Monzer Kahf. Waqf in Contemporary Islamic Society. Ministry of Awqaf and Islamic Affairs, Islamic Research Center, Qatar, 1998.
2. Mohammed bin Yusuf Al-Abdari Al-Muwaqq. Al-Taj wal-Ikleel for Mukhtasar Khalil, vol. 6, no edition, Dar Al-Fikr, Beirut, 1978.
3. Ahmad Ali Al-Khatib. Waqf and Wills: Two Forms of Voluntary Charity in Islamic Sharia, with an Explanation of the Legal Provisions Regulating Them, 2nd ed., University of Baghdad Press, Baghdad, 1978.
4. Ahmad Al-Dardir Al-Maliki. Al-Sharh Al-Saghir ala Aqrab Al-Masalik ila Madhhab Al-Imam Malik, commentary: Ahmad Al-Sawi Al-Maliki, edited by Mustafa Kamal Wasfi, vol. 4, Dar Al-Maarif, Cairo, n.d.
5. Al-Kharashi. Sharh Mukhtasar Khalil, vol. 7, 2nd ed., Al-Matbaa Al-Kubra Al-Amiriya, Bulaq, Egypt, 1997.
6. Al-Qarafi. Al-Dhakhira, vol. 6, 1st ed., Dar Al-Gharb Al-Islami, 1994.
7. Ibn Qudamah Al-Maqdisi. Al-Mughni, vol. 8, 3rd ed., Dar Alam Al-Kutub, Riyadh, 1996.
8. Khalil bin Ishaq Al-Maliki. Mukhtasar Khalil, corrected and commented on by Ahmad Nasr, Dar Al-Fikr, Beirut, 1981.

Theses

1. Nadia Arkam. The Legal Status of Waqf in Algerian Law. PhD thesis in Law, Faculty of Law and Political Science, Mouloud Mammeri University, Tizi Ouzou, 2016.

Academic Articles

1. Ali Sanousi. "Referral to Islamic Sharia Provisions in Algerian Family Law between Absolute and Restrictive: How Effective in Solving Muslim Family Issues?" Judicial Precedent Journal, vol. 13, no. 2 (Issue No. 27), October 2021.
2. Mohamed Sanni. "The Limits of the Concept of 'Islamic Sharia' in Judicial Precedent in Supreme Court Decisions (Personal Status Chamber)." Journal of Legal and Political Research and Studies, vol. 2, no. 2, 2012, p. 187.

Judicial Precedents

1. Supreme Court Precedents, Civil Chamber, Decision No. 1184602, issued on 15/6/2017, Judicial Journal, no. 1, Supreme Court Documents and Legal and Judicial Studies Section, 2018.
2. Supreme Court Decision, Family and Inheritance Chamber, No. 708046, issued on 13/12/2012, Judicial Journal, no. 1, Documents and Legal and Judicial Studies Section, 2013, p. 266.
3. Supreme Court Decision No. 636028, issued on 10 March 2011, Supreme Court Journal, no. 2, Documents and Legal and Judicial Studies Section, 2011, p. 156.
4. Supreme Court Decision issued on 11/2/2009, File No. 501389.
5. Supreme Court Decision issued on 11/2/2009, File No. 501389, Supreme Court Journal, no. 1, Documents and Legal and Judicial Studies Section, 2009, p. 232.
6. Supreme Court Decision No. 271299, issued on 26 May 2004, Judicial Journal, Special Issue, vol. 1, p. 141.
7. Judicial Precedents of the Personal Status Chamber - Special Issue, Supreme Court Documents Section, National Office for Educational Works, Algeria, 2001, pp. 100-103.
8. Supreme Court Decision, Real Estate Chamber, No. 188432, issued on 29 September 1999, unpublished.
9. Supreme Court Decision, Civil Chamber, No. 157310, issued on 16/7/1997, Supreme Court Judicial Journal, no. 1, Documents and Legal and Judicial Studies Section, 1997, p. 34.
10. Supreme Court Decision No. 137561, issued on 05 May 1996, Supreme Court Judicial Journal, no. 02, Documents and Legal and Judicial Studies Section, 1996, p. 147.
11. Supreme Court Decision, No. 109957, issued on 30 March 1994, Supreme Court Judicial Journal, no. 03, Documents and Legal and Judicial Studies Section, 1994, p. 39.
12. Supreme Court Decision No. 102230, issued on 21/7/1993, Judicial Journal, no. 2, 1995, p. 77.
13. Judicial Precedents of the Personal Status and Inheritance Chamber, Judicial Journal, no. 1, 1989, p. 118.