



The Principle of the Endowment Stated in the Text of Law According to the Decisions of the Court of Cassation

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ABSTRACT

Endowment (Waqf) has a great importance in public life, and thus it receives special attention and care from researchers, as it is not just a social and moral system that achieves benefits for its parties, whether they are the endower or the beneficiaries, but it extends to the society by achieving the element of social solidarity and providing employment opportunities and financial resources for sectors of the society. Additionally, endowment has a religious aspect related to the endower's connection to Allah Almighty, as some scholars have stipulated the proximity to Allah Almighty for the validity of endowment. Thus, endowment has reached the level of sanctity, making it perpetual and making it an independent person from the owner (endower) of the property. This relieves the endower from financial obligations, but this is voluntary and by the endower's will, driven by religious motives, as it seeks proximity to Allah Almighty.

Keywords:

Introduction:

Endowment (Waqf) has a great importance in public life, and thus it receives special attention and care from researchers, as it is not just a social and moral system that achieves benefits for its parties, whether they are the endower or the beneficiaries, but it extends to the society by achieving the element of social solidarity and providing employment opportunities and financial resources for sectors of the society. Additionally, endowment has a religious aspect related to the endower's connection to Allah Almighty, as some scholars have stipulated the proximity to Allah Almighty for the validity of endowment. Thus, endowment has reached the level of sanctity, making it perpetual and making it an independent person from the owner (endower) of the property. This relieves

the endower from financial obligations, but this is voluntary and by the endower's will, driven by religious motives, as it seeks proximity to Allah Almighty.

"This importance granted to endowments has given them a particularity in terms of their establishment, management, and registration, which has led to the emergence of legal rules specific to endowments that do not apply to anything else. In addition to their economic power related to the size of the properties, people, and movable assets, among others, that have been endowed, which has led governments to seek control over them and to employ their enormous capabilities to serve their interests. We find that the Iraqi legislator issued the Waqf Management Law No. 64 of 1966, which is currently in effect, and the

Endowment Management and Investment Authority Law No. 18 of 1993, which invests and manages endowment funds according to the provisions of Islamic law and the conditions of the endowers. The Ministry of Endowments was disbanded and replaced by the Sunni Endowment Council, the Shia Endowment Council, and the Endowment Council for Non-Muslim Sects by Temporary Governing Council Resolution No. 82 on November 5, 2003. It is worth noting that the Iraqi legislator allowed for the liquidation of atomic endowments by Decree No. (1) of 1955, and most of the atomic and joint endowments were liquidated by the judiciary. However, there are still atomic and joint endowments that arise from endowers by issuing a legitimate Waqf argument, and there is no legal obstacle to that." In general, it is permissible to establish all types of endowments.

However, we find that the atomic endowment, as a type of endowment, is avoided by endowers because it can be liquidated based on the request of one of the mercenaries or one of his future heirs who are entitled to it. However, this approach by the Iraqi legislator is subject to consideration, as Muslim jurists did not differentiate between its types as defined by modern charitable, atomic, and common legislation. Additionally, the endowment is a continuous charity whose purpose is to please Allah, and the atomic endowment is a charity that brings people closer and maintains family ties as long as it fulfills a need and prevents poverty, etc. It prevents the dissipation of family wealth and preserves its entity.

The endowment was established to serve the interests of people and to promote social solidarity, which is considered an important pillar in the development of the Islamic community guided by the Holy Quran and the Prophet's Sunnah. The Holy Quran has urged and encouraged in many verses to do good and be benevolent, which is what the endowment aims to achieve.

Problem of Research: There is no doubt that the endower has the freedom to endow whatever they wish, and people should respect their conditions, and scholars have an opinion

on the sanctity of these conditions. However, there may be a problem in these conditions due to ignorance of the true nature of religion and law, and deviation from their established rules. We find that there are problems with endowments due to the lack of awareness of endowment laws and their ambiguity among legal professionals such as judges, lawyers, endowment managers, employees, legal practitioners, and those interested in this subject.

Research Method: The researcher relied on the analytical method in this study, in which the researcher analyzes legal texts and judicial decisions and comments on them. The researcher also examined the laws related to endowments in Iraqi law

Research Plan:

We will divide this research into two sections, as follows:

First section: Definition of Waqf (endowment)

First item: Definition of endowment

Second item: Elements of endowment

First branch: The Endower

Second branch: The endowment property

Third branch: The beneficiaries of the endowment

Fourth branch: Formalities

Third item: Types of endowment

First branch: Charitable endowment

Second branch: Family endowment

Third branch: Joint endowment

Fourth item: Regulations for the guardianship of endowment

Second section: endowment lawsuit

First item: Ways to challenge judgments issued in endowment lawsuits

First branch: Judgments issued by personal status courts

Second branch: Judgments issued by the Court of First Instance

Third branch: Decisions of the Guardianship Accounting Committee

Second item: Commentary on judicial decisions.

First section:

In this section, we will discuss the definition of endowment (Waqf) and clarify its definition, types, pillars, and the provisions related to it.

We will dedicate four requests, the first request is dedicated to the definition, the second request is dedicated to the pillars of the endowment, the third request is dedicated to the types of endowment, and the fourth request is dedicated to the provisions of endowment.

First Article:

Definition of Endowment (Waqf):

In the Arabic language, "Waqf" is derived from the root verb "aqafa" which means to stop, and it also means to detain people for a reckoning. It is said "Waqft al-ardh" or "Waqft al-dar" which means to dedicate it for the sake of God and it becomes dedicated and unalienable ⁽¹⁾. This is the commonly known definition in the classical Arabic language, and the only usage of "Oqfet" in speech is when it is said that someone has stopped doing something. The endowment property is called "Al-Dar Al-Waqf ⁽²⁾."

In Islamic jurisprudence, the scholars have differed in defining the meaning of the endowment in the following ways:

1. The Hanafi school: To detain the property under the ruling of Allah the Almighty in a way that its benefits return to the people (the public) ⁽³⁾.
2. The Shafi'i school: To detain a property that can be used for its benefits while its ownership remains intact, and it is managed by a competent person or institution ⁽⁴⁾.
3. The Maliki school: To dedicate the benefits of a property, even if it is leased or rented, to a deserving person or entity for a period determined by the person who made the endowment ⁽⁵⁾.
4. According to the Hanbali school of thought, the person who has absolute control over a property must be detained while the property remains under his management, and a portion of the property must be confiscated. The income generated from the property should be directed towards charitable causes on land, while the benefits should be brought closer to Allah ⁽⁶⁾.

1. Muhammad Amin bin Aabideen, "Radd al-Muhtar 'ala al-Durr al-Mukhtar Sharh Tanweer

al-Abasar," Study, Verification, and Explanation: Adel Ahmed Imad al-Mawjood and Ali Mohammed Awad, vol. 6, pt. 2, Dar al-Kotob al-Ilmiyah - Beirut, 2013 AD, p. 98.

2. Ismail bin Hammad al-Jawhari, "Al-Sihah Taj al-Lughah wa Sihah al-Arabiyyah," Edited by: Ahmed Abdel Ghaffour Attar, vol. 4, pt. 3, Dar al-Ilm lil-Malayeen - Beirut, 1984, p. 1440.

3. Burhan al-Din Ali bin Abi Bakr al-Marghinani, "Al-Hidayah Sharh Bidayat al-Muhtadi Ma'loom bi Sharh Fath al-Qadeer," vol. 5, pt. 1, Al-Matba'ah al-Kubra al-Amiriyyah - Egypt, 1989, p. 40.

4. Shams al-Din Mohammed al-Shafi'i al-Saghir, "Nihayat al-Muhtaj ila Sharh al-Minhaj," vol. 5, pt. 3, Dar al-Kotob al-Ilmiyah - Beirut, 2003, p. 358.

5. Abu al-Barakat Ahmed bin Mohammed bin Ahmed al-Dardir, "Al-Sharh al-Saghir 'ala Aqrab al-Masalik ila Madhhab al-Imam Malik," vol. 4, without pt., Dar al-Ma'arif al-Masriyyah - Cairo, 1974, p. 97.

6. Mansour bin Yousuf bin Idris al-Bahouli, "Kashf al-Qina' 'an Dhamm al-Aqba'," Reviewed and Annotated by: Helal Mustafa Helal, vol. 4, without pt., Maktabat al-Nasr al-Hadithah - Riyadh, without date, p. 240.

5. According to the Ja'fari school of thought, the original property must be detained, while the benefits must be directed towards charitable causes ⁽¹⁾.

We prefer the definition of the Hanbali and Ja'fari schools of thought as they accurately reflect the concept of "waqf" (endowment) by detaining the property and prohibiting its disposal, and donating its benefits in a perpetual manner.

In legal terminology, the Iraqi legislator defined Waqf as: "It is the property that was owned and then dedicated to one of the parties for legitimate reasons ⁽²⁾." It is clear from the text that Waqf involves the exit of the asset from the ownership of the Waqif (the person who dedicates the property), its detention, prevention of disposal, and the donation of its benefits to the party on which the Waqif appointed it permanently. The Iraqi legal jurisprudence ⁽³⁾ also defined Waqf as the detention of the owned asset according to the

judgment of Allah Almighty and the donation of its benefits to the eligible persons according to the conditions of the Waqf. Paragraph (4) of Article (1) of the Waqf Management Law No. 64 of 1966 also defined Waqf as: "The valid Waqf is the property that was owned and dedicated to one of the parties and includes the attached land." The Iraqi legislator had defined Waqf in previous legislations as follows: "The valid Waqf is the property that had a head (owner) and then was dedicated to one of the parties." According to Article (1) of the Waqf Management Law No. 27 of 1929, which was repealed. It is noted that the two definitions are identical, but the definition in the Law No. 64 of 1966 was implicitly modified after the liquidation of the right of Al-Aqr (the designated share) under Law No. 17 of 1980. Al-Aqr refers to the designated fixed share of the owner of the Al-Aqr or whoever legally replaces him in cases of land tenure in accordance with the provisions of Article (225) of the Land Registry Law No. 43 of 1971, as all real estate transactions are conducted in accordance with the provisions of Article (225) of the Land Registry Law. It states that all real estate transactions, such as sale, donation, Waqf, and will, apply to the Al-Aqr, and it passes on to his heirs upon his death without the need for the owner's consent.

The judicial jurisprudence has indicated that the Waqf (endowment) is a form of relinquishment, such as emancipation, and the endower relinquishes his ownership rights to the property or money that is endowed. It is not permissible to retract from this relinquishment because what is relinquished cannot be recovered ⁽⁴⁾.

(1) Abu Al-Qasim Al-Musawi Al-Khawli, Minhaj Al-Salihin, Vol. 2, Ed. 2, Adab Printing Press - Najaf Al-Ashraf, 1972, p. 269.

(2) Article (6/b) of the Real Estate Registration Law No. 43 of 1971.

(3) Mohammed Taha Al-Bashir, Ghani Hasan Taha, Al-Haqq Al-Ainiyah, Vol. 1, No Publisher, Ministry of Higher Education and Research, Baghdad, 1982, p. 26.

(4) Court of Cassation's Decision No. 242/Expanded Civil Panel/2007 dated 30 July 2007, which states the following: "Upon examination and deliberation by the Expanded Civil Panel in the Court of Cassation, it was found that the appeal was filed within the legal period, and thus it was accepted formally. Upon reviewing the appealed decision, it was

found to be incorrect and contrary to the law and Sharia, as the property subject to the lawsuit was already endowed by the plaintiff as a charitable endowment (Waqf) based on a Waqf certificate dated 10/17/2001, issued by the Personal Status Court in Mosul under No. 286/Register 1412. One of the provisions of a charitable endowment is that the ownership of the endowment shall cease to the owner after the endowment is established, and it shall not be permissible for him to revoke the endowment, which has become the property of the endowment at that time and not of the owner. Therefore, the claim related to the request for nullifying the Waqf certificate and returning the ownership of the endowment to its owner is a claim without a legal or Sharia basis, and it requires its rejection. Therefore, the appealed decision was overturned, and the case was referred back to its court to follow up on what has been presented, with the cassation fee remaining applicable to the outcome. The decision was issued by agreement on 16/Rajab/1428 AH, corresponding to 30 July 2007."

Second Article

Elements of Endowment

Waqf is one of the actions carried out by humans and this action requires the availability of legal and financial elements. The jurists did not agree on defining its elements due to their differences in the components of the nature of the action. Some jurists consider waqf as a form of donations and endowments, and thus the waqif (endower) is the only element of waqf. Waqf is established when the waqif meets its legal and regulatory conditions ⁽¹⁾. Since the establishment of waqf is based on the will of the waqif, who must have the legal capacity, the continuation of this capacity is a requirement for the validity of the waqf termination, and it is a condition for the validity of the waqif's action. The Hanafi school of thought considers the formula only as the element of waqf, while the Maliki, Shafi'i, Zaidi and Hanbali schools of thought believe that the elements of waqf include the waqif, the object of the waqf, the property subject to the waqf, and the formula ⁽²⁾. I will present them as follows.

First Branch: Waqef (Endower)

This pillar requires the presence of the will of the Waqif (endower), expressed positively by someone who has full legal capacity, and whose capacity is not affected by any incapacitating factors ⁽³⁾. Donation must not cause pure harm, and the Waqif's will must be free and voluntary.

It should be noted that the Iraqi legislator allowed an exception - the will that leads to the Waqf (endowment) being issued by a person who is insane or lacks legal capacity, restricted to one-third of the property ⁽⁴⁾. However, this is subject to review.

1. Muhammad Shafiq Al-Ani - Provisions of Endowments. Third edition, 1995, Rishad Press, p.12.
2. Dr. Muhammad Obaid Al-Kubaisi - Endowment Provisions in Islamic Sharia - Baghdad edition 1977 - p.147.
3. The effects of mental incapacity on legal capacity, including insanity, idiocy, intoxication, and ignorance. For more details, see: Dr. Abdul Majid Al-Hakim, Abdul Baqi Al-Bakri, and Muhammad Atiya Al-Bashir, Al-Wajeez in the Theory of Obligation - Sources of Obligation, Vol. 1 (PhD), Iraqi Ministry of Higher Education and Scientific Research - Baghdad, 1980, pp. 79-80.
4. Please refer to articles 109/1 and 110 of Iraqi Civil Law No. 40 of 1959 for further information.

Second Branch: The Suspended Property

The conditions for a property to be considered suspended are that it must be a tangible asset that can be utilized while still remaining intact, and can be collected. It is not permissible to suspend something that is not a tangible asset, such as an expedited or deferred debt owed by a debtor or creditor, or a sentence that has not been carried out or delayed until a later date. This is contrary to the principle of giving it effect, comparing its impact to its cause. Therefore, it is different from the necessary lease of a specific animal property ⁽¹⁾. Some scholars believe that in order for a property to be considered suspended, it must meet three conditions: it must be a valuable asset, it must be known at the time of suspension, it must be owned by the person who suspends it, and it must be real estate by nature or by designation or by customary practice.

The Third Branch: The Property on Which Suspension is Imposed

When defining suspension and explaining its ruling, we find that the ultimate goal of the person who suspends the property is to seek proximity to Allah Almighty and to ensure continuous reward. Therefore, scholars have made every effort to explain the conditions of the property on which suspension is imposed, and they are almost always summarized in four

conditions, which are called "the property on which suspension is imposed ⁽²⁾." In Iraqi law, they are referred to as "mercenaries" in relation to the atomic or joint suspension. They are entitled to the yield of the suspension according to the terms of the person who suspends it or deals with it when it is lost, upon expiration of this decree ⁽³⁾. It should be noted that these definitions were derived by the Iraqi legislator from the books of jurisprudence, and some of them were taken from Syrian law ⁽⁴⁾. The mandatory conditions that must be met by the property on which suspension is imposed are as follows:

The first condition: The property on which suspension is imposed must be for a charitable purpose.

The second condition: The property on which suspension is imposed must not be interrupted.

The third condition: The suspension must not benefit the person who suspends it.

The Fourth Branch: Formality

the origin in legal actions is voluntary and not formal, but most legal regulations require the manifestation of the actor's will in a specific manner for some important legal actions due to the danger of the action and the protection of others ⁽⁵⁾. This specific form becomes a corner of the action ⁽⁶⁾. Registering real estate transactions in the Land Registry is a cornerstone of its validity ⁽⁷⁾.

1. "Sheikh Mohammad Hassan Al-Jawahiri Al-Najafi - Jawahir Al-Kalam fi Sharh Shara'ea Al-Islam - Dar Ihya Al-Turath Al-Arabi - Seventh Edition, Beirut 1981, pp. 21-38.
2. Dr. Ahmed Obaid Al-Kubaisi - previous reference - Part One, p. 399.
3. Paragraph (d) of Article (1) of Decree No. (1) of 1955 allowing the liquidation of the modified atomic endowment.
4. Mohammad Shafiq Al-Ma'ani - Ahkam Al-Awqaf, 3rd ed., Al-Rushd Printing Press - p. 126.
6. See: Article (1/132) of the Iraqi Civil Code No. 40 of 1951.
7. Dr. Abdel-Razzaq Ahmed Al-Sanhuri, Al-Waseet fi Sharh Al-Qanun Al-Madani Al-Jadeed, Sources of Obligation, without a publisher, Egyptian universities publishing house, Cairo, 1952, p. 170."

As for the waqf (endowment), it is a voluntary legal action that does not require a specific form unless the law stipulates otherwise. The Iraqi legislator did not stipulate any formalities for creating a waqf. The Iraqi judiciary has adopted the Abu Yusuf doctrine that it is established in a form indicating its creation and is proven by all means of proof, including testimony, dealing, and its registration in the Land Registry is not necessary for its creation or proof⁽¹⁾.

It should be noted that Article 10 of the Iraqi Waqf Management Law No. 64 of 1966 states: "The judgments issued by the Sharia courts regarding endowment shall not be executed unless they are communicated to the Endowment Department after their issuance." This article applies to all Sharia judgments, including those related to endowment, substitution, borrowing, maintenance, etc., after their issuance. The Iraqi legislator may have intended this to study the judgments and challenge them if they are contrary to Sharia and the law before the competent endowment department and to register them with the land registry and follow up on their implementation as a general trustee for all endowments and protect them from encroachment or violation.

The Fourth Branch Types of Waqf (Endowment)

Waqf is divided into charitable, hereditary, and joint waqf, depending on the purpose for which it was established.

The First Type Charitable Waqf

This is a type of waqf that is established for the benefit of one or more charitable causes. Any expenditure made from it should be for the sake of Allah, as stated in Decree No. 1 of 1955 on the Liquidation of Hereditary Endowments, which defines charitable waqf in accordance with paragraph (b) of Article (1), which states: "Charitable waqf refers to what is endowed for a charitable purpose that is permanently established or assigned to it." The mentioned article does not specify the meaning of the term

"charitable cause," but it seems that it refers to acts of kindness and public welfare, as the term "charity" includes anything that brings benefit or prevents harm. Charitable waqf is linked to acts of kindness and public welfare, and this public welfare may be for a specific group of people.

Islamic jurists have defined endowment (waqf) as the act of withholding ownership of a property from oneself and dedicating its benefits to a specific charitable cause that is perpetual and uninterrupted. The charitable endowment is a public endowment that any poor, needy or destitute person can benefit from, as this is the purpose of the endowment, even if it is not explicitly mentioned⁽²⁾.

1. Article (2/3) of the Iraqi Real Estate Registration Law No. 43 of 1971.
2. Ragheb Al-Sarjani, and Wa'ae Al-Awqaf in Islamic Civilization, 1st edition, Nahda Misr Publishing and Printing Company, 2010, p.10.

Second Branch: Family Endowment or "Dhurri"

Family endowment or "dhurri" endowment involves a person dedicating their own property for the benefit of their family and descendants, and it is sometimes referred to as a personal endowment. The difference between this type of endowment and the charitable endowment lies in the purpose of the endowment. If the endowment is for a general cause, it is considered a charitable endowment, but if it is for the benefit of the endower's family or relatives, it is considered a family endowment⁽¹⁾. Islamic scholars have differed on the validity of this type of endowment. Some consider it permissible and valid if certain conditions are met, while others do not. Most jurists consider it permissible, even though the lineage may be discontinued or extinct⁽²⁾.

In Iraqi law, the family endowment is defined in Article 1 of Decree No. 1 of 1955 on the Liquidation of Family Endowments as follows: "The family endowment refers to what the endower dedicates to himself, his descendants, or a specific person or their descendants, or to the endower and his descendants with a specific person and their descendants." This

definition differs from the definition in Law No. 28 of 1954 on the Liquidation of Endowments, which stated that the endowment would be transferred to a charitable cause upon extinction of the lineage, as advocated by Hanafi jurisprudence. Since the family endowment is subject to liquidation upon the request of the beneficiaries, according to Article 3 of the Decree, it is necessary to specify the beneficiaries of the endowment.

Third Branch

Joint Waqf (Endowment)

The Joint Waqf is defined as the Waqf in which the Waqif (endower) allocates some of their property for the benefit of both individuals or groups, with a specific or unspecified share of participation, as endowments that are dedicated to charitable purposes but subject to the condition that any surplus should be distributed to individuals or groups. In a Joint Waqf, the legal settlement can only be made in the presence of the director of Waqf or their representative. Therefore, the Joint Waqf is the one that combines both charitable and individual endowments. Some commentators consider certain types of Waqf as Joint Waqf, such as the specific Joint Waqf, which involves two or more individuals dedicating their shares to the endowment, with each person knowing their specific share. However, in the Iraqi legal system, Joint Waqf is only one of the three types of Waqf, and the difference is that the Waqf can be made by one or more persons, with each person or group having a designated share, while the Joint Waqf involves common shares without specific allocation or designation.

1. Ragheb Al-Sarjani, same source, p.12.
2. Ragheb Al-Sarjani - same source, p.13.

"Also known as what the endower has dedicated to a charitable cause or to individuals or descendants, and the participation percentage between them can be either specified or unspecified. As for disputes, they cannot be legally concluded without the presence of the director of the endowment or his legal representative ⁽¹⁾.

Regarding the provisions of the Endowment Administration Law regarding the division of endowments, it is as follows:

1. Valid Endowment: It is the endowment of a property that was owned and then dedicated to one of the causes, and it includes the suspended contract ⁽²⁾.
2. Corrected Endowment ⁽³⁾: It includes:
 - A. Valid Endowment, which did not specify any guardian or whose guardianship conditions were cancelled.
 - B. Invalid Endowment.
 - C. The endowment that has been managed by the Endowment Departments for 15 years.
 - D. The endowments of the Two Holy Mosques, except for the flood endowments.
 - E. The noble individuals of charitable organizations that are inclined towards endowments, based on the Decree on the permissibility of liquidating atomic endowments or their substitutes."

Article 4:

Provisions of guardianship over endowments

There is no disagreement, as it appears from the texts of the jurists in their compilations, that it is permissible for the endower to appoint himself as the guardian as long as he is alive or for a period of time, either independently or in partnership with others, whether they are one or more than one. Likewise, he may appoint one or more successors, and thus he may stipulate that he has the right to appoint and replace whoever he wishes if necessary. He may also give each guardian he appoints the right to appoint another after him. The upshot is that the owner of the endowment has control over the choice and appointment of the guardian when the endowment is established, just as he has the right to establish the endowment as he wishes. He may also stipulate for himself or others what relates to the management and disposal of the endowment for the benefit of the legitimate entities for which it was established.

1. Judge Rabie Mohammed Al-Zahawi, Al-Waqf, 1st edition, Dar Al-Sanhouri, 2015, p.32.

2. Zahdi Yakun, *Ahkam Al-Waqf*, 1st edition, Al-Maktaba Al-Asriya Publications, Lebanon, no year, p.20.

3. Article 1, paragraph 6 of the Iraqi Waqf Administration Law No. 64 of 1966, as amended.

As for the guardianship over the endowment, it is a description that confirms for its owner, who is called a "guardian," the right to put his hand on the endowed property and to manage its affairs, such as preservation, administration, cultivation, and distribution of its harvest to those who are entitled to it ⁽¹⁾. The purpose of the guardianship over the endowment is to defend the endowed property and to fulfill the endower's conditions, and the guardian can develop, cultivate, and manage the endowed property, whether the guardian is the endower himself or someone else, during the endower's life or after his death ⁽²⁾. Therefore, it is correct to say that whoever the endower appoints as the guardian during his life will act as his deputy in his capacity as the original guardian, not the one he appointed.

After the death of the benefactor, the guardian (the one appointed to oversee the endowment) is not separate from the benefactor but rather acts as a representative for the endowment. This is because the guardian is appointed according to the conditions of guardianship outlined in the legal proof of endowment. We find that according to the jurists and legal commentators, representation is divided, in terms of its source that grants the representative status, into conventional representation, as in the case of a proxy, where the contract of agency appoints the representative, and judicial representation, such as the executor, the guardian, and the court-appointed custodian, because the competent judicial authority appoints them, as well as legal representation, such as the legal guardian appointed by law to care for someone ⁽³⁾. The Iraqi legislator made guardianship applicable to the benefactor or to anyone specified for guardianship in the legal proof of endowment, or as required by practice. If guardianship is not specified for anyone and there is no prior practice of dealing with the

endowment, then it belongs to the Ministry of Endowments ⁽⁴⁾. The Iraqi judiciary has directed to make it in the best interest to appoint the relatives of the endower (waqif) ⁽⁵⁾, and the endowment cannot be established if there is any of the endower's descendants present ⁽⁶⁾.

The Iraqi judiciary has tended to follow the Hanafi school of thought, which stipulates that the guardian should be from the benefactor's family, unless there is no one suitable among them, as they are more concerned than others about the endowment of their father and anyone seeking to attribute the endowment to them ⁽⁷⁾. This is a trend that is worthy of support, and a careful and direct review by the Iraqi legislator, after the issuance of the effective Endowment Law No. 64 of 1966, led to the establishment of guardianship for those for whom guardianship is conditional, either through the legal proof of endowment or through established practice, and the guardianship is held by the Endowments Administration for those endowments for which guardianship is not specified for anyone, or for which the condition of guardianship is no longer in effect.

1. Judge Rabia Mohammad Al-Zahawi, a former source, page 40.
2. Hashem Marouf Al-Husseini, *Al-Wasaya Wal Awqaf*, vol. 1, Dar Al-Qalam, Beirut, 1980, p. 189.
3. Abdel Razzaq Ahmad Al-Senhoury, *Al-Waseet Fi Tasre' Al-Qanon Al-Madani Al-Jadeed*, vol. 1, Sources of Obligations, Dar Al-Nashr Liljamiat Al-Arabiya - Cairo, 1952, p. 190.
4. Referring to the judgment of the Ja'fari Shari'a Court in Baghdad numbered 1946/479 on 16/12/1946, published in the Official Collection of Court Decisions, issued by the Committee for the Publication of Court Decisions for the Ministry of Justice, Issue No. 1, Second Year, Government Printing Press, Baghdad, 1947, p. 135.
5. Referring to the decision of the Sunni Shari'a Appeal Board numbered 1947/302 on 1/9/1947, published in *Al-Qadaa Magazine*, Issues 2-3-4-5, Fifth Year, 1947, p. 418.

6. Muhammad Amin Ibn Abidin, Radd Al-Muhtar Ala Al-Durr Al-Mukhtar Sharh Tanweer Al-Absaar, edited by Adel Ahmed Abdel Mawjood and Ali Mohammed Mouawad, vol. 6, part 2, Dar Al-Kotob Al-Ilmiyah, Beirut, 2003, pp. 137-138.

7. Articles 1/6-1 and 2 of the Waqf Administration Law No. 64 of 1966; Article 1 of the Trustees System No. 41 of 1970.

Topic 2 Waqf Lawsuit

Waqf lawsuits have characteristics that distinguish them from other lawsuits in terms of their connection to the general system, their validity, prescription, methods of proof, and the obligation to present them to the Court of Cassation. Some waqf lawsuits have litigation rules that differ from others, such as the procedures for liquidating a minor waqf, in addition to the prevailing trend among some legal scholars and jurists that the jurisdiction of waqf law applies to all people, meaning that if it is proven that a property is waqf under a claim filed by the waqf's founder, then if another person claims ownership of the property, the first judgment applies to him without delving into a new lawsuit ⁽¹⁾. However, most waqf lawsuits remain subject to the rules of general litigation and evidence, and there is no need to delve into the general rules, but we will clarify in the first request the specialized courts in hearing waqf lawsuits and the methods of appealing them, and in the second request, we will comment on some of the judicial decisions.

Request 1

Methods of Appealing Judgments Issued in Waqf Lawsuits

The methods of appealing judgments issued in waqf lawsuits are subject to the rules of general litigation law, with limited exceptions, including their inclusion in the *mandatory appeal*, which requires the court to send the file to the Federal Cassation Court for review in accordance with the provisions of Article (309)

of the Litigation Law. However, we have several types of judgments issued in waqf lawsuits, including those issued by the Personal Status Court and others by the First Instance Courts, in addition to the existence of differences in the time limits for appeal between these judgments, as well as for lawsuits heard by the Audit Committee of the Trustee established under the provisions of Article (4) of the Waqf Administration Law No. 64 of 1966 as amended, and we will explain these courts as follows:

First Section

Provisions Issued by Personal Status Courts

All provisions issued by Personal Status Courts are final and may only be appealed to the Federal Supreme Court for cassation, in accordance with Article (35) of the pleadings, which states: "The Supreme Court has jurisdiction over appeals from appellate courts, courts of first instance, and personal status courts, as well as other matters determined by law."

1. Mohammed Shafiq Al-Aani, former source, p.123

As most Waqf claims are brought before the Personal Status Court for Muslims, and the Personal Status Materials Court for non-Muslim Waqfs, where they involve issues such as guardianship and other matters falling within the jurisdiction of the Personal Status Court referred to in Article (300) of the pleadings, the period for filing an appeal in these cases has been extended to 30 days, in accordance with Article (204) of the amended Civil Procedure Law No. 10 of 2016, which provides that the period for appeal to the Supreme Court for Personal Status Courts, courts of first instance, appellate courts, and Personal Status Materials Court is 30 days, taking into account the provisions of Articles (172) and (216) of this law, as well as other civil laws.

Therefore, the period for filing an appeal has been unified between Personal Status Courts and courts of first instance, after the appeal period for Personal Status Court decisions was previously only ten days. The period for appeal begins on the day following the notification of the judgment to the litigant, in accordance with

Article (172) of the pleadings, which states: "The legal period begins on the day following the notification of the judgment or the date it is deemed to have been notified. Litigants must review the legal appeal procedures for judgments before they are notified."

It should be noted, however, that this applies only to judgments and not to the decisions of judges on requests (provincial orders) or in expedited judicial proceedings.

Second Section

Provisions Issued by the Court of First Instance

Some Waqf lawsuits are heard by the Court of First Instance according to the jurisdiction granted to it under the laws, which are divided into two types: the first concerns the liquidation of Waqfs, and the second concerns general lawsuits related to Waqfs in rental issues, prevention of opposition, ownership, and other matters that are not legally specified to be within the jurisdiction of a specific judicial authority. I will present them as follows:

1. Lawsuits for the liquidation of Waqfs: This type of lawsuits falls under the jurisdiction of the Court of First Instance if it is exclusively related to atomic or common Waqfs, in accordance with the provisions of paragraph (1) of Article (4) of Decree No. (1) of 1955 regarding the liquidation of Waqfs, which stated the following: "Courts of First Instance in the regions where the Waqf is located shall consider the liquidation of these Waqfs. If the Waqfs are multiple, the lawsuit can be filed in any court located in the region of one of these Waqfs, and then no other court shall consider it." The period for appealing the decision issued regarding the liquidation of the Waqf is thirty days, in accordance with the provisions of paragraph (1) of Article (11) of the Decree, which stated the following: "The judgments issued regarding the liquidation are fully appealable within thirty days, starting from the day following the judgment's notification to the concerned party, and from the day following the date of notification in absentia judgments. Other legal procedures are not followed in these judgments, except as provided in the following paragraph." The period for appealing

through the correction of the cassation decision is only seven days, in accordance with the provisions of paragraph (2) of Article (11) of the Decree, which stated the following: "Requests to correct decisions issued or to be issued by the Court of Cassation in accordance with the mentioned Decree may be submitted based on the reasons mentioned in Article (231) of the Civil and Commercial Procedure Law. The deadline for this request for the decisions that will be issued is seven days from the date of notification, and thirty days from the date of the entry into force of this law for the decisions issued previously."

These lawsuits are distinct from other lawsuits that are heard by the Court of First Instance in two aspects:

A. The provisions issued therein are subject only to two forms of appeal: cassation before the Federal Cassation Court and correction of the cassation decision. These provisions cannot be appealed through any other form of appeal, whether ordinary or extraordinary. They are also not subject to objection to the absentee judgment, appeal, objection of a third party, or retrial ⁽¹⁾.

B. As for jurisdiction, the court that considers a lawsuit to liquidate the endowment and any other lawsuit referred to it and consolidated with the lawsuit it considers, shall be convened locally and qualitatively in the court of first instance, according to the provisions of paragraph (1) of Article (5) of the Decree, which states the following: "When filing a lawsuit to liquidate an endowment in a competent court under the provisions of this Decree, this court shall have jurisdiction to consider all lawsuits filed in other courts relating to that matter at that time, pursuant to paragraph (b) of Article 4. In this case, these lawsuits are referred to that court." This means that the court's jurisdiction becomes mandatory to consider the lawsuit, even if the litigants did not request an exception from the provisions of Article (74) of the pleadings, which states the following: "The plea of lack of territorial jurisdiction must also be raised before addressing the subject matter of the lawsuit, otherwise the right to it is forfeited."

Because the plea of territorial jurisdiction is a right of the litigants under the general rules of pleadings.

2. As for other ordinary lawsuits, such as the prohibition of opposition brought by the trustee in the event of an attack on the endowment, or a lawsuit for abandonment or a claim for a debt to the endowment, the jurisdiction of the court of first instance shall be determined according to the general rules, taking into account what is considered in the ordinary lawsuit in terms of forms of appeal, the value of the lawsuit, the plea related to territorial jurisdiction, and any other defenses, similar to all other ordinary lawsuits.

1. Mohammed Shafiq Al-Aani, former source, p.140

Section Three

Decisions of the Trustees' Accountability Committee

The Waqf trustee is subject to the supervision of the Waqf Department because the management of the Waqf is one of its fundamental tasks, as it sometimes leads to its expiration or liquidation. The utmost importance lies in the resources achieved by the Waqf and the size and development of its management system, which moved from the individual (family) management style characterized by a high degree of decentralization and was widespread in various historical stages, to another style, which is the government administration and is closer to central administration, as is present now, by establishing ministries, institutions, and diwans for Waqfs. The trusteeship system is considered one of the most important forms of administration, and the trustee is responsible for managing the Waqf in accordance with the donor's conditions, in accordance with the Shariah, laws, and regulations. This includes the guardian in the wills that result in the Waqf's exit. According to Article (4) of the Trusteeship System No. 46 of 1970, as amended, the trustee is not left without supervision but is subject to the supervision of the Waqf Diwan, and a committee was formed to hold them accountable if they committed any violation.

This committee performs its functions based on the provision of paragraph (4) of Article (4) of the Waqf Administration Law No. 64 of 1966, which states that "(committees are formed under the chairmanship of a judge and the membership of the director and accountant in the directorates, and from the assigned and other employees appointed by the head of the Diwan in the assigned accounting and examining the trustees and reviewing their actions and complaints filed against them, and those committees issue the necessary decisions)."

This committee has powers defined by the Trusteeship System, including removing the trustee completely or partially or temporarily, in accordance with Article (19) of the Trusteeship System. The committee carries out its work under the chairmanship of one of the judges appointed by a statement issued by the Supreme Judicial Council, and the committee applies the rules of civil pleading when considering any complaint filed with it, by inviting the trustee and a representative of the Waqf Department. The hearing is held in the presence of the accused trustee if he is present or absent if he does not attend any of the committee's sessions, according to the provisions of Article (21) of the Trusteeship System, and the decision issued by the committee is subject to appeal ⁽¹⁾.

1. Judge Salem Rawdan Al-Mousawi, "Waqf and Tawliyah Judgments: A Comparative Study", vol.1, Halabi Legal Publications, Beirut, 2016, p.123.

Second Topic:

Commenting on Judicial Decisions

Principle: One of the provisions of a charitable endowment (waqf) is the cessation of the ownership of the endower over the endowed property after its endowment, and it becomes the property of the endowment and not the endower. The endower is not allowed to retract from the endowment after that.

Firstly: The Personal Status Court in Mosul issued a judgment based on the Waqf Evidence No. 289 on 17/10/2001, affirming the validity

of the endowment of the property (D) owned by the endower (M) as a charitable endowment. The judgment included the following: "The endower endowed the property as his own and under his control, which includes the land (N), buildings, and the charitable endowment erected on the land. It cannot be sold, mortgaged, or given away, and he allowed himself to manage it and live in it as long as he is alive, then his wife can manage it, and after that, it can be inhabited by his weak male and female children, widows among his daughters, and poor married people who do not own a home. If there is no one from his children who is eligible to live in it, the last trustee will rent it to others and distribute the profits among his children and their descendants, males and females equally, and the poor from others will contribute 10% of the yield, and also distribute it to orphans and the disabled...etc."

It can be noted that the court's judgment did not precisely regulate the pillars of the endowment (the endower, the endowed property, the recipient of the endowment, the formula), its conditions regarding management, and others. The judgment also did not indicate the form and type of the endowment (charitable, perpetual, or shared). In addition to that, the court did not rule on the necessity of its validity based on the most likely opinions. Secondly, the attorney of the plaintiff (the Waqf holder) before the Court of First Instance in Mosul claimed that his client had previously issued a Waqf deed numbered 286/Sh/1412 on October 17, 2001, issued by the Personal Status Court in Mosul, which had designated the property belonging to him as Waqf. Whereas his client has expressed a desire to revoke this Waqf, he requested that the defendant, the Director of the Authority for the Management and Investment of Waqf Funds in Nineveh, be summoned to appear in court and issue a decision to invalidate the Waqf deed above, and to return the property to the ownership of his client, and to notify the Land Registry Department to annotate that in its records.

On June 20, 2006, the aforementioned court issued a verdict, numbered 2006/2571, which

invalidates the Waqf deed numbered 286, register 1412, issued on October 17, 2001, by the Personal Status Court in Mosul, and returns the property to the ownership of the plaintiff (the Waqf holder), and notifies the Personal Status Court in Mosul and the Land Registry Department to annotate it in their respective records. In addition, it orders the defendant to pay half of the lawyer's fees and expenses of the plaintiff's attorney, which amounts to fifty thousand dinars, in addition to his own fees.

The verdict refers to Article 14 of Decree No. (1) of 1955 on the Liquidation of Endowment, which states that the Waqf holder, if alive, has the right to revoke his Waqf by applying to the Court of First Instance to obtain a decision to invalidate the Waqf deed and return the property to his ownership. Since the text is general, it includes all types of Waqfs, and therefore, the court decided to invalidate the Waqf deed.

The following judgment is made:

1. Initially, the court must adapt the type of endowment to the provisions of Article (1 / A) of the decree.
2. The text of Article (14) of the mentioned decree was not general and did not include all types of endowments, because Article (2) of the decree indicated that the decree includes atomic endowments, joint endowments, while charitable endowments remain subject to the special legal and legal provisions.
3. The court issued a judgment in a lawsuit contrary to the text of Article (14) of the decree, and the court had to issue a decision to invalidate the endowment argument based on the request of the endower without a lawsuit, his opponents, and the presence of the defendant.

Thirdly, due to the lack of conviction of the defendant, in addition to his position as a judge in the Mosul court, he appealed to seek its annulment for the reasons stated in his lawyer's statement dated June 29, 2006. The Iraqi Court of Cassation decided in its extended civil judgment No. 242/2006 on July 30, 2007, to annul the distinguished judgment because it was incorrect and contrary to the Sharia and the law, as the property subject to the lawsuit

was endowed by the plaintiff (endower) as a charitable endowment, and one of the provisions of charitable endowments is the cessation of the endower's ownership of the property after endowing it, and he is not allowed to retract from the endowment, which has become the property of the endowment institution and not the endower.

" It was necessary to revoke the judgment in order for the court to conduct its procedures to determine the nature of the endowment, whether it was charitable or family-related, in accordance with the claim documents and the endowment argument. Based on the findings of the type of endowment, a judgment is made to either reject the claim if it is charitable, as it is not permissible to revoke or reject a charitable endowment, or to submit a request to the court of first instance according to the provisions of Article (14) of Decree No. (1) of 1955 on the Liquidation of Family Endowment.

Fourth: Following the precedent ruling above, the Mosul Court of First Instance issued a new ruling on 9/10/2007, in case no. 2571/B/2006, dismissing the claim and ordering the plaintiff to pay fees, expenses, and attorney fees.

Fifth: The plaintiff's representative appealed the first instance judgment, seeking its revocation for the reasons stated in the appeal submitted on 24/7/2007.

Decision: After examination and deliberation by the extended civil panel in the Court of Cassation, it was found that the appeal was filed within the legal period and was accepted. Upon reviewing the distinguished decision to dismiss the plaintiff's claim, it was found that it was valid and in compliance with the law for the reasons cited. It followed the distinguished ruling in case no. 242/extended civil panel/2006, issued on 3/7/2007, because the plaintiff's request to invalidate the endowment argument and return the property to its owner had no legal basis, as one of the provisions of charitable endowments is that the property of the endower ceases to be his after endowment and becomes the property of the endowment entity. Therefore, the distinguished judgment was affirmed, the appeal dismissed, the

appellant ordered to pay the appeal fee, and the decision was issued on 16/Jumada Al-Ula/1429 AH, corresponding to 21/5/2008 AD."

Comment: It is noted on the above-mentioned discriminatory decision that it was made in a fundamental error, based on a flaw in interpreting the law, and we explain this as follows:

1- The Court of Cassation erred in understanding the type of endowment, contrary to what is stated in the evidence of the endowment and the conditions of the endower, which is a substantial error (5/203 pleadings). This is for the following reasons:

A- The court based its decision on the fact that the evidence of the endowment stated that the endowment is "a charitable endowment," and issued its decision stating that the charitable endowment cannot be revoked. The correct interpretation of this statement is that the endowment is a charitable property, as the property of every endowment is designated for a charitable purpose and cannot be deemed valid otherwise, as it would be an endowment that ceases to exist with the disappearance of the designated beneficiaries, which is a matter settled by the principles of endowment. Therefore, the Iraqi legislator dedicated 10% of each endowment that is liquidated to a charitable entity (Article 8/A of the Decree of Liquidation of the Atomic Endowment).

B- The evidence of the endowment states: "(the endower) may take care of it and live in it as long as he is alive..." This means that the endower endowed himself by making himself the beneficiary from the beginning by residing in it, and the benefit of residence is a suspended benefit that the endower is entitled to revoke. This is supported by the Court of Cassation's decision stating that "the suspended benefits of the endowment, such as the endowment for residence, can be liquidated" (refer to Decision No. 1362/H/1956 of 1956/11/4, published in Al-Qadaa Magazine, Issue No. 1, 1959, pp. 134-136). If one of the beneficiaries is entitled to request the liquidation of the atomic

endowment, it is preferable that the endower is entitled to revoke his endowment.

C- Paragraph (A) of Article 1 of Decree No. (1) of 1955 allows for the liquidation of the atomic endowment, stating that "the atomic endowment is what the endower endowed himself, his descendants, or both of them together..." Based on the above, the endowment may be subject to the Court of Cassation's decision as an atomic endowment, not a charitable one. This is confirmed by the fact that the Personal Status Court in Mosul, when issuing the evidence of the endowment, stated that the endowment is an atomic one.

2- The Court of Cassation issued its judgment regarding an error in interpreting the law. This is because Article 1 of the aforementioned decree clarified the meaning of an endowment, whether it is atomic, charitable, or joint. The description of an atomic endowment applies to the endowment subject to the Cassation decision. Therefore, the endower has the right to retract his endowment by submitting a request to the Court of First Instance to obtain a decision to invalidate the justification of the endowment and return the endowed property to his ownership (Article 14 of the Decree). Accordingly, the Court of Cassation issued its decision No. 1923 / Rights / 1963 on 18/3/1965, stating that the endower of an atomic endowment, if alive, has the right to retract his endowment and return the endowed property to his ownership (published in the decisions of the Court of Cassation, Volume 3, for the year 1965). The same meaning was also stated in its decision No. 665 / Personal / 1976 on 22/4/1976.

It is clear from the foregoing that the Court of Cassation erred in understanding the type of endowment contrary to the endower's condition and did not apply the law that regulated the issue, which should have been applied to the documents of the appeal, which did not leave room for the judiciary's and jurisprudence's discretion. In addition to what has been mentioned, the Court of Cassation pointed out that the charitable endowment becomes the property of the endowment, and this interpretation is debatable because what

the Iraqi judiciary has settled is that the endowment becomes in the possession of God Almighty and its benefit is for the endowment.

Principle: The trustee's receipt of rent allowances outside the legal framework is an invalid transaction and cannot be relied upon.

Firstly, the agent of the plaintiff (M) claimed before the Court of First Instance in Mosul that the defendant had previously obtained a judicial ruling to relinquish the salary he held with the client under the initial claim No. 2000/681 on 8/4/2000. The defendant carried out the decision in the execution report No. 2000/2390 issued by the Mosul Execution Directorate, renewed the lease contract, and received the rent allowances for the years 2000 and 2001. This was documented in two receipts dated 7/9/2000 and 6/9/2001, respectively. However, the court found that the defendant's receipt of these rent allowances was outside the legal framework and, therefore, invalid and cannot be relied upon.

One of the provisions of the judgment is that the plaintiff (the trustee) is entitled to carry out all legal actions that fall within the scope of managing the funds under the endowment, and to receive the rental payments from the defendant after the eviction judgment is issued, provided that the lease has been renewed.

Secondly, the defendant's representative (the trustee) appealed the primary judgment seeking to invalidate it on 30/10/2005. The Ninawa Court of Appeal issued a judgment on 11/12/2005, numbered 374/S/2005, which invalidates the appealed primary judgment of 2005/3887 on 18/10/2005. The defendant's appeal was rejected, and he was charged with fees, expenses, and attorney's fees for the plaintiff's representative.

The legal position of the Ninawa Court of Appeal is that the endowment funds are subject to the bidding and tendering system for endowments under Law No. 45 of 1999 regarding their rent, sale, and contract bidding. Receiving rental payments by the trustee of the endowment outside the legal framework is considered an invalid act and cannot be relied upon, as it is a clear violation of the current law's provisions.

Third: The attorney for the appellant (plaintiff) filed a request to appeal the judgment on August 8, 2006.

Decision: Upon review and deliberation, it was found that the appeal was submitted within the legal time limit, so it was accepted formally. Upon examining the judgment, it was found to be correct and in compliance with the law. The property in question in the lawsuit had its lease contract terminated by a judicial ruling that acquired a final and binding ruling of eviction. Therefore, the renewal of the lease must be done through public auction in accordance with Law No. 45 of 1969, the system of auctions and tenders for endowments. Thus, the receipt of the plaintiff's (trustee) rental compensation after the issuance of the eviction ruling does not constitute a renewal of the expired lease contract or a new contract, and this action violates the aforementioned law. Therefore, the appellate judgment was affirmed, the appeal was rejected, and the plaintiff was charged with the appeal fees. The decision was issued on 19 Rabi' al-Awwal 1427 AH, corresponding to April 17, 2006.

Comment: The Iraqi judiciary, represented by the Court of Appeal of Nineveh and the Court of Cassation, made the right decision in affirming the appellate judgment, as it confirmed that the trustee's and judge's actions must be in the interest of the endowment and not harm it. In addition, it applied Article 4 of Trustee System No. 46 of 1970, which states that the management of the endowment by the trustee must comply with the provisions of Islamic law, regulations, and systems. Therefore, the trustee's receipt of rental compensation for the suspended property outside the legal framework constitutes an invalid action, and cannot be relied upon, due to the violation of the aforementioned auction law.

Decision: The first Personal Status Court was established in the Iraqi Court of Cassation on 24 Muharram 1430 AH, corresponding to January 21, 2009, and issued its decision under No. 38/First Personal Status Court/2009, which states:

Upon review and deliberation, it was found that the appeal in cassation was filed within the

legal period. It was decided to accept it as a formality. Upon consideration of the distinguishing judgment, it was found to be incorrect and in violation of the provisions of Islamic law and legislation. This is because the appellant requested that the respondent be obliged to execute the argument of the endowment on Mosque (A). Although the endowment is valid, it does not prevent this from happening. The status of the well-managed endowment does not differ from that of other endowments managed by the trustee except for the management, which is determined in the former to the Department of Endowments and in the latter to the appointed trustee. The Department of Endowments that manages the well-managed endowment is obligated to comply with the endowment's condition literally, except in cases of impossibility. Therefore, it was necessary to verify the endowment's condition to determine the appellant's obligations in addition to his function and to oblige him to do so if it was found that he did not. The matter should be referred to the committee of accountability for trustees to verify whether the Department of Endowments has executed what was stated in the argument of the endowment. Since the distinguishing judgment ruled contrary to what was stated, it was decided to overturn it, refer the matter back to its court to proceed with it according to what was presented, and to defer the case until the matter is settled by the committee of accountability for trustees. The decision was issued by mutual agreement on 24 Muharram 1430 corresponding to 21 January 2009.

Comment:

1- The Iraqi judiciary, represented by the decision of the Court of Cassation, has come to confirm the necessity of working with a jurisprudential principle, which is: "(The condition of the endowment is like the text of the Sharia) as long as it does not contradict the Sharia, legal provisions, the interest of the endowment and those for whom it was endowed, and the implementation of legal provisions that emphasize the commitment to apply the conditions of the endowers, including

Article (3/A) of the Endowment Management and Investment Authority Law No. 18 of 1993, which states: "(The Authority (Iraqi Endowment Management and Investment Authority) manages the endowment funds in accordance with the provisions of Sharia and the conditions of the endowers to ensure their preservation..)", as well as the text of paragraph (j) of the same article: "(The Authority takes care of implementing the conditions of the endowers in a way that ensures the safety of transactions with the endowment funds on Sharia grounds). However, the court's decision excluded the case of impossibility, in which there were no revenues for the endowment, or it required spending on the endowment for maintenance or to pay off its debts.

2- The pronouncement of the Court of Cassation saying "(It was the duty (of the competent court) to verify the condition of the endowment in order to determine the specific obligations on it in addition to its function (Endowment Department), and to oblige it to do so if it is found that it did not fulfill that)" came in agreement with the statement that the Personal Status Court is the competent authority to hold the Endowment Department accountable for managing the endowment that it is entrusted with, as the latter is a special trustee of the endowment, and that the Sharia judge in the court derives his right to accountability from his general jurisdiction over all endowments, as well as being the guardian of the ward who has no guardian.

3- If the court's direction to refer the matter to the Committee for the Accountability of Trustees, in order to verify whether the Waqf authority has executed the purpose of the endowment, is contrary to the law, because the mentioned committee is competent to hold the trustee of the attached endowment accountable (see Article 4 of the Waqf Administration Law No. 64 of 1966 and Trustees Regulation No. 46 of 1970), and it is not competent to hold the Waqf authority accountable for managing the regulated endowment. If the Court of Cassation intended to refer the matter to the Committee for the

Accountability of Trustees to seek its opinion as an expert, and then use it as a reason for its judgment, the committee would deviate from justice because two members of the Waqf authority required to be held accountable are among its members, namely the Director of the Waqf authority and the accountant of the trustees in it, and it is subject to appeal before the Higher Waqf Council. Thus, the committee's decision would be biased and in favor of the Waqf authority.

In summary, the decision of the Iraqi Court of Cassation confirms the implementation of the Sharia and legal provisions in part of it and is contradictory in its other part, as explained above.

Conclusion:

Firstly: The Results:

1. The Waqf (endowment): The owned property is detained indefinitely, the disposal of it is prohibited, and its benefit is granted to the party in accordance with the waqif's condition, and it must be granted to a pious entity, even if it is not a monetary one.
2. A waqf is created by the waqif's positive intention, which is an obligation to establish the waqf by depriving the owned property of its legal status and detaining it, and prohibiting its disposal. It does not require acceptance, and its benefit is granted by depriving the waqf of ownership, which will be transferred to the next in line, thus making the waqf a separate legal entity that is protected by a special guardian, and its benefit is granted to the party in accordance with the waqif's condition.
3. The pillars and conditions of the waqf are as follows:
 - a. The Waqif: His/her conditions are that he/she must be fully competent and not restricted or terminally ill.
 - b. The Waqf property: Its conditions are that it must be a well-established, known, and owned property.
 - c. The Waqf beneficiary: His/her conditions are that he/she must be a pious entity that does not cease to exist, even if it is not monetary, it can still be owned.

4. The waqf may become invalid due to certain circumstances that make it ineffective (unenforceable), and after their cessation, it can either be invalidated by revocation or executed by permission.

5. The Iraqi judiciary considers the charitable waqf binding and the waqif cannot retract from it, except by adding to it after death as part of a will. However, the waqif is allowed to modify the conditions of the waqf, such as the conditions of the guardianship over the waqf, as it is outside the other conditions. The waqif also has the right to modify other conditions, such as the ten conditions, if the condition allows it, or if the Islamic judge believes that it is in the best interest of the waqf.

Secondly: Recommendations:

1. We propose that the Iraqi legislator include a provision in the Iraqi Civil Law regarding the actions of some individuals in waqf (endowment), as follows: "(The transaction of the person under restraint due to foolishness or ignorance in waqf or will shall be valid if authorized by the court)"; and that the courts follow the Hanafi school of thought, where the waqf of the foolish and ignorant shall be initially on themselves, then on any charity or heirs, in order for the courts to ensure the benefit of the foolish or ignorant person by preserving their money for them through waqf on themselves, and then through a charity or endowment.

2. We propose amending Article 14 of Decree No. (1) of 1955 regarding the dissolution of perpetual waqfs so that the right of the waqif to retract their perpetual or joint waqf can be made through a request to the Personal Status Court rather than the Court of First Instance to obtain a decision to annul the justification of the waqf and return the endowment to its ownership. This is because the jurisdictional competence requires that the decision to retract be made by the Personal Status Court, which is the one with jurisdiction and competence to interpret the waqf justification and determine the type of waqf (charitable, perpetual, joint). Moreover, the retraction of the waqif in the joint waqf should be limited to

what was endowed on the lineage and not on the charitable side.

3. We propose that the Iraqi legislator amend Article (256) of the Iraqi Real Estate Registration Law No. 43 of 1971 as follows: "(The waqf specified on the right of registered real estate ownership based on a legal justification or a judicial ruling that has become enforceable in the name of the legal person (waqf) shall be recorded in special records indicating the type of waqf, the waqif, its conditions, the endowment and the trustee)."

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