

The State's Guardianship Over Waqfs (Endowments) Between Oversight and Direct Management

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Abstract:

This research seeks to provide a comprehensive analytical vision of the issue of balancing the state's supervisory authority and the necessity of preserving the functional independence of endowment institutions, considering this a crucial approach to ensuring their effectiveness in achieving sustainable social and economic goals. It starts from a conceptual framework that clarifies the meaning of "state guardianship" and "endowment" as a civilizational and social institution. It also traces the historical development of the forms and practices of this guardianship, showing how the relationship between the ruling authority and the nation's endowments was formed over the ages.

The analytical core of the study lies in examining the legitimate and legal limits of the state's guardianship over endowments, relying on the wisdom and objectives that justify this intervention, which range from protecting endowment funds to ensuring compliance with the conditions set by the endower and the public interest. The study then compares two main patterns of administrative intervention: the supervisory oversight model and the direct management and administration model, with an in-depth review of the advantages and disadvantages of each in terms of administrative efficiency, operational flexibility, innovation capacity, and responsiveness to societal changes.

The research concludes that the nature of this balance—between supervision and independence—is the decisive factor in the endowment's ability to perform the essential tasks for which it was established, calling for the formulation of a "wise" supervisory model based on guidance and support, which protects the administrative and financial independence of the endowment as an essential condition for its vitality and continuity as an authentic developmental resource.

Key words: state, Guardianship, wasfs(Endowments), Oversight, Management, Civilisation

Introduction:

The practical practices of the state's authority over endowments throughout history have often shown negligence and neglect, even exceeding and violating the endowments by the agencies in charge; this has caused the endowment to fail to fulfill the tasks for which it was established. Therefore, it was necessary to define clear boundaries for the state's authority over endowments, starting from where its authority begins so that it cannot neglect it, and boundaries where it ends in that practice.

Endowments (awqaf), as one of the most important financial and social institutions in Islamic societies, require effective management and oversight to ensure the

achievement of their noble objectives. However, throughout history, the state's authority over endowments has sometimes shown shortcomings and negligence, leading to abuses that harm the interests of the endowments. Nevertheless, understanding the limits of this authority remains an important subject of discussion, especially in light of contemporary social and economic changes. This research addresses the issue of the state's authority over endowments, aiming to provide a comprehensive analysis that defines the boundaries between oversight and direct administration.

The importance of the study ; It stems from the urgent need to understand and define the limits of state authority over endowments (awqaf) in Islamic law, especially given the repeated violations and neglect witnessed in historical practices, which sometimes led to the loss of the legitimate and social objectives of the endowments. The research is based on a review of literature addressing the history of governments and their management of endowments, where studies have shown that government intervention was often unorganized, leading to violations and corruption, necessitating the establishment of clear controls on the limits of governmental influence. Through the study of the works of Professor Belbali Ibrahim, it becomes clear that understanding a legal and Sharia framework that defines the responsibilities of the state and the rights of the endowments contributes to protecting these vital institutions, ensuring their sustainability and the achievement of their objectives, and preventing their exploitation or neglect. Studies also confirm that the effective administration of endowments requires a delicate balance between oversight and direct intervention, preserving their independence and ensuring management in accordance with Sharia principles. Therefore, this study seeks to provide a comprehensive vision that aligns with contemporary developments, defining

a legal and Sharia framework that regulates the relationship between the state and the endowments, contributing to ensuring their sustainability and achieving their social and economic goals.

Research Problem :

It revolves around defining the limits of the state's authority over endowments in Islamic law, raising two main questions: Is this authority limited to oversight and regulation only, or does it extend to include the direct management of endowments? This concerns the balance between preserving legitimate rights and social objectives, and protecting the state's interest and its system. It is possible to explore the extent of the state's powers in terms of direct intervention versus merely playing a supervisory role, and to determine the compatibility of this with the Islamic rulings that emphasize the independence of endowments (Waqfs).

Hypotheses: The hypotheses in this research manifest in several directions, where it is assumed that the state's authority over endowments should be limited to oversight and accountability roles, without direct intervention in the management of endowments, to ensure their independence and achieve the desired legal and social objectives. However, there is another belief that the state should intervene directly in the management of endowments in cases of clear negligence by the endowment supervisors, in order to protect the interests of the endowments and ensure they are not harmed. Additionally, it is assumed that the existence of a clear legal framework defining the limits of the state's authority over endowments contributes effectively to protecting the endowments and ensuring their sustainability, by regulating the relationship between the authorities and the endowments in a manner consistent with Sharia and preserving the rights of all parties.

Definition of Wilaya, State, and Endowment:1. Definition of Wilaya

A: Definition of Wilaya in language

Wilaya linguistically comes from "wali" (to be a guardian or to take charge of something), and "wilaya" or "walaya" (with kasra and fatha). It is said that with fatha it is a verbal noun, and with kasra it is a noun, like "imara" (emirate), because it is the name of what one has taken charge of and performed.(1) (alzubaydi, p. 20/310)

As for the noun, it comes to mean authority, emirate, kingship, and the land over which the wali (governor) has control. (Altanam, 2016)

2: Definition of " the State ":

A: Linguistic Definition :

The word "state" (الدولة) in the language, with the letter "dal" emphasized and either with a fatha or dhamma, means the outcome in wealth and war. It is said: with a dhamma it refers to wealth, and with a fatha it refers to war. Others say: with a dhamma it refers to the hereafter, and with a fatha it refers to this world. Its plural is "dool دول". "Idala" means dominance; it is said: "Udil lana 'ala a'da'ina," meaning He gave us victory over our enemies. (Ibn manzur, p. 11/252)

It is understood from this that the state is either derived from circulation, transformation, or from dominance, which is supremacy, and both meanings exist in the state in the sense intended here. It is either derived from the circulation of governance within it or from authority, which is one of its pillars; because authority in it means supremacy.

B: The technical definition of the state:

The state is defined as a people settled on a specific territory, subject to a certain political authority. This definition is agreed upon by most jurists because it contains the main elements necessary for the

establishment of any state: the people, the territory, and the authority, although they differ in the formulation of the definition. This difference is due to each jurist issuing their definition based on their legal perspective of the state.

Therefore, the state's jurisdiction over endowments means extending its legislative, executive, and judicial powers over endowment institutions and funds. The state's jurisdiction over endowments means enacting legal texts that govern the endowment sector, implementing those legislations, and obliging everyone to respect those texts through the judicial authority.

2.State Intervention in Endowments from a Historical Perspective:

The administrative structure of the endowment, in its early beginnings, was simple and uncomplicated. The oldest body responsible for managing the endowment was the overseer of the endowment, initially called the custodian or governor. It was mentioned in the hadith of our master Umar ibn Al-Khattab, may God be pleased with him, previously referenced: "(... there is no blame on the one who manages it to eat from it or feed others who are not financially capable)," then he was later called a supervisor or trustee.

The governor of the endowment was a person who managed the affairs of the endowment, including collecting its revenues if it was exploitable, distributing them to the beneficiaries, maintaining the endowed property and its buildings if needed, and defending the endowment in its name if it was violated. In summary, he performed all actions that served the interests of the endowment and the beneficiaries according to the stipulations of the founder and within the limits of Islamic law.

The person in charge of the endowment may be the endower himself, though there is a difference of opinion among jurists, or he may be one of his relatives, or he may be a stranger, or he may be the judge. Among

the most famous who dealt with endowments was our master Umar ibn al-Khattab, may Allah be pleased with him, who then entrusted this responsibility to his daughter, our lady Hafsa, the Mother of the Believers, may Allah be pleased with her. Most endowments were in this manner; that is, the endower himself would oversee his charity. Imam al-Shafi'i, may Allah have mercy on him, said: "Most of what we have in Medina and Mecca of charities, as I have described, Muslims from the early generations continuously gave in charity and managed it themselves."

This method of managing endowments continued until the Umayyad period when the judge Tawbah ibn Numayr took over the judiciary. Historical sources indicate that the first bureau for awqaf (endowments) was established in Egypt by this judge in 118 AH / 736 CE during the reign of the Umayyad Caliph Hisham ibn Abd al-Malik.(1) Another bureau followed under this judge's tenure in Basra, and neither was separate from the administration of the judge. (Ben AbdAllah, 1996, p. 1/215)

In the Abbasid era, endowments expanded and it became difficult for the judiciary to oversee them, so the state established an administrative body to monitor and supervise the endowments. The head of this body was called the "Sadr al-Waqf." In the Ottoman state, this body was strengthened and its branches increased, and consequently, laws were issued regulating its jurisdiction, functions, and the manner of exercising its responsibilities and accountability. (sayf alnasr, n.d, p. 288)

Thus, we see that the state's intervention, represented by the judicial body or another body, in endowments began during the Umayyad state. By intervention of the judge in the endowment, I do not mean his involvement in resolving disputes that hinder its execution, but rather his involvement as a representative of the executive authority, meaning supervising it and managing its affairs.

We must first understand that judicial intervention in endowments, in terms of resolving issues that may hinder their establishment and continuity, was within the jurisdiction of the judiciary. There is no difference in this regard between public endowments and private endowments. Among the disputes that arose in private endowments were disputes over the appointment of the endowment's administrator, and the judiciary would handle these according to the conditions set by the endower and in accordance with Islamic law. This was a form of judicial supervision over the appointment by ruling.

As for public endowments, initially, they were managed by the endowers themselves or by those they appointed to manage and oversee them, without any supervision or intervention from the state. However, the increasing number of endowments and the development of life necessitated the establishment of specific bodies to oversee them. Thus, they were managed by judges or other individuals such as jurists and scholars, either directly or under their supervision, with the direct overseer being subordinate to the judge or the jurist. (Ben AbdAllah, 1996, pp. 1/215-216)

3. The State's Authority over Endowments from a Jurisprudential Perspective:

Jurists discuss the state's intervention in endowments when they want to determine who has the right to administer the endowments, that is, who has the authority to appoint the supervisors of the endowments. In the Hanafi school: the authority belongs to the endower according to Abu Yusuf if he is alive, then to his trustee if any, and then to the ruler. According to Muhammad, the endower has no authority except by condition.

4. Evaluating the State's Authority over Endowments and Deducing Its Limits

4.1. Advantages and Disadvantages of State Intervention in Endowments:

Historical facts have shown that the state's authority over endowments has advantages that positively influenced the endowment, leading to its prosperity in certain historical periods. Other facts have shown disadvantages of this authority, as the role of the endowment diminished due to this intervention. This is because the body supervising the endowment, which is the judiciary, was not always in good condition, enjoying independence in decision-making and being accountable to God Almighty in its actions.

Sheikh Muhammad Abu Zahra narrated in his book "Lectures on Endowments" that Jamal al-Din, whenever he wanted to take an endowment from the endowments, would set up two witnesses to testify that this building harms the neighbor and passerby, and that the prevention of danger lies in replacing it with another. The chief judge Kamal al-Din Ameer would rule for its replacement. Through this method, represented by the collusion of the judge with some influential people in the state, many endowments were seized.

4.1. The merits of the state's guardianship over endowments:

The funds of the endowment thereby gain more protection and safeguarding from the mischief of wrongdoers, as laws impose severe penalties on anyone who dares to assault public property. In addition, including the endowment funds under the umbrella of public funds grants them the advantages guaranteed by law for public funds, including tax exemption.

- Enacting organizing laws for endowment institutions, and undoubtedly this matter is of great importance because endowments, like other sectors, need to enact a set of legal texts that regulate the relations of the parties connected to them and define their rights and duties. Although endowments are governed by Islamic Sharia, there must be a

law that organizes them because most of their rulings are based on jurisprudential reasoning.

- Organizing the management of the endowment according to contemporary administrative systems, in terms of how to appoint employees working in the endowment sector, their remuneration system, and methods of motivating them, all with the aim of raising the productive efficiency of this economic establishment.

- Facilitating the process of oversight on the management of the endowment: Given the multiplicity of oversight bodies within the state, this will be a contributing factor in achieving the intended objectives of the endowments.

- Protecting endowment properties from encroachment: The funds of these properties will be treated as public money, with the prohibition of disposing of them, placing liens on them, or acquiring them by prescription, in addition to the protection imposed by criminal legislation on these funds.

- Developing the endowment funds: The state possesses means of developing funds that are not available to other individuals.

It is noted that the basis of these advantages is the necessity of state control over all aspects, which is not desirable in economic matters. However, the state's management of endowments to assist in enacting laws that protect and promote endowments is a duty of the state, whether the endowments are managed by the state itself or by independent trustees not affiliated with it.

One of the biggest problems currently facing endowments is the lack of replenishment with new endowments. Although endowments are characterized by perpetuity, there inevitably comes a time when they are affected by adversities that diminish their benefits or reduce their value. Therefore, if it is desired to maintain the historical roles of endowments, it is

essential to increase the endowed assets to compensate for what has been lost or deteriorated in their properties and assets. This increase in assets can only be achieved by restoring trust between the community of benefactors and the authority overseeing the endowments. This trust hinges on the relationship between the trustees managing the endowments and the benefactors. If the relationship between the benefactors and the trustees is good, it will result in more endowments due to the benefactors' confidence that their endowments will be preserved and that their benefits will reach their intended goals. Conversely, if the relationship is not good for any reason, it will discourage endowment activities. (al'Anzi, 2014, p. 05)

When endowments in the Islamic state were managed by an institution regarded as the guardian of people's interests according to Islamic law, the relationship between this institution and the donors was strong and solid. Endowments became numerous and increased, and donors had no hesitation in placing their endowments in the hands of this institution. However, the relationship between those supervising the endowments and the community is not good now. One of the reasons for this is the drawbacks of state interference in endowments, some of which are presented here.

4.2. What the State Should Do Regarding Endowment Institutions :

First: In Terms of Legislative and Judicial Authority

The state must intervene in endowments by enacting proper systems, laws, and regulations that provide a suitable environment for the establishment and prosperity of the endowment institution. The state should also establish deterrent penalties for anyone who dares to tamper with any aspect of this process, even if the person represents the state itself. Endowment funds should be protected and safeguarded at a level higher than that of public funds. This duty of the state should

not be limited to cases where endowments are managed by the state itself. Therefore, what the Algerian Endowments Law did by removing certain endowments from the scope of regulated endowments is not a good matter, because regardless of the case, these endowments are part of the state's assets, and the state must enact laws to regulate their affairs.

These systems and laws must also meet the legitimate objectives and demands of the endowers, especially respecting their conditions and not violating them, respecting the duration of those conditions for the legitimate purposes of the endowment itself, and ensuring that there is nothing contrary to Sharia in them. Full preservation of the ownership pattern of the endowment properties must be maintained according to Sharia rulings, and no laws should be enacted that would treat these endowments as private or public property subject to disposal; the manager should not dispose of them as if they were his private property, nor should the state dispose of them as if they were public property.

As for the judiciary, it must work to protect endowment properties from illegal actions, whether those actions are by the overseers or by the state itself. It must take into account their special nature, whether these endowments are private or public. Therefore, Al-Mawardi says in "Al-Ahkam Al-Sultaniyyah," explaining the state's intervention in public endowments:

"Because there is no requirement for a dispute in them, the ruling was broader than in private endowments. As for private endowments, its consideration is contingent upon the grievance of its people when there is a dispute over it, as it is dedicated to specific parties. In case of conflict, the rights established before the ruler are acted upon, and it is not permissible to refer back to the Sultanate's office or to what is recorded about it in old books unless it is witnessed by trustworthy witnesses." (almawardi, pp. 103-104)

4.3.Regarding the executive authority

As for the intervention of the government or its representatives from public bodies, it should be limited only to general oversight or what is called "supervision and care," which involves preservation, protection, maintenance, development, providing assistance, consultation, technical expertise, and knowledge of the conditions of the endowments and the conduct and actions of their supervisors. Ibn Taymiyyah says: "...It is within the authority of the ruler to appoint an office that fully accounts for the funds endowed with the interest." (Mansouri, 2015, p. 10)

While jurisprudence acknowledges the state's guardianship over endowments, it completely rejects the idea of integrating endowment funds into public funds and thus placing them under the state's direct disposal, similar to its handling of public funds, both in terms of managing the principal funds and their yields and fruits. Observing Al-Mawardi's earlier text, one finds that he limits the state's role to this, as he says: "As for the Sultan's supervision over the endowment, it is of two types: general and specific. The general begins with reviewing it, and if there is no grievance, he proceeds with it according to its course, and enforces the conditions set by the endower if known through one of three ways: either from the offices of governors appointed to oversee the rulings, or from the offices of the Sultanate based on the treatment it has undergone or what has been recorded and named, or from old documents whose authenticity is inherently reliable, even if witnesses do not testify to them."

5. Specifications of the Guardianship: over Endowments that Achieve Its Objectives Dr. Mundhir Qahaf believes that effective management of the endowment is institutional atomic management, which carries the following specifications. (kahf, 2006, pp. 309-310)

1- Each endowment fund should be

managed individually without combining these funds with one another, and without a centralized management responsible for making decisions related to the management of investment endowment funds.

2- Each endowment fund should have a manager. Usually, the manager is from the same locality as the endowment and has a close relationship with its purposes and beneficiaries...

3- The duration of that management should be specified for a certain period of time.

4- Subjecting it to governmental and popular oversight, and enjoying governmental support in aspects of planning, investment consulting, and financing,

5- Linking the personal benefits received by the contracted managers to the achievement of the institution's (endowment's) goals, and establishing effective and influential control methods to hold them accountable for their performance and deter negligence.

These conditions ensure that the supervisor remains keen on the interests of the endowment, as several material and moral motives and reasons are provided for this. Among these is that the supervisor feels a close connection to the endowment and sees that the benefits they receive are tied to their ability to preserve and develop the endowment. Additionally, they carry the feeling of being monitored by various governmental and popular entities, which may hold them accountable and subject them to civil and criminal responsibilities. These factors make the supervisor more diligent in maintaining and advancing the endowment. Without these factors, the supervisor would resemble a public employee who does not care about the progress of their institution.

Conclusion:

In conclusion, a set of key findings can be drawn from this study, which highlights

the historical development and legal framework of endowment management, specifically the role of the state in it. First, endowment management evolved from a simple, decentralized pattern, where the endowers themselves or their representatives managed their endowments under the title "Wali al-Waqf" (Custodian of the Endowment). With the expansion and complexity of endowments, the need for more organized administrative frameworks emerged, leading to the appearance of the terms "Nazir" (Supervisor) and "Qayyim" (Trustee). This phase witnessed the beginnings of state intervention, starting from judicial oversight as a representative of authority, followed by executive authority involvement through the establishment of specialized bodies affiliated with it.

Second, research into jurisprudential opinions revealed a consensus among scholars on the legitimacy of the ruler's or judge's intervention in endowment affairs in specific cases, such as appointing a supervisor in the absence of one designated by the endower, or if the appointee refuses to perform their duties. Jurists went further, considering the monitoring and accountability of supervisors as fundamental duties entrusted to the governing authority to ensure the achievement of the endowment's objectives.

Third, historical reality shows that state intervention in endowments was a double-edged sword. While it had significant positive aspects in protecting endowments from loss and neglect in many eras, it was also associated at times with serious negatives, such as violating the conditions set by endowers in appointing supervisors, maintaining property, or distributing income. These practices led to adverse outcomes, including a decline in endowment activity and donors' reluctance to establish new endowments for fear of their conditions being violated.

Fourth and finally, the study concludes the necessity of distinguishing between forms of state intervention. From a

legislative and judicial perspective, state intervention is an indispensable duty to organize the affairs of both public and private endowments. Provided that the primary principle governing this intervention is full respect for the conditions set by the endowers and consideration of the higher interest of the endowment and its beneficiaries. On the executive level, the role of the state should be limited to supervision, monitoring, and accountability, while avoiding direct management, especially of investment endowments, to ensure the efficiency of their administration and their independence within the framework of the objectives set by the endowers.

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