LAW OF FAMILY WAQFS : NEED FOR A RECONSIDERATION

*Danial Latifi**

FAMILY WAQF, or *waqf ala'l-aulād*, is an institution whereby a Muslim can provide for the maintenance and support of himself, his family and descendants for an indefinite period to which there can be no end.[1] Under the ordinary law such a settlement would be void as it would offend against the rule of public policy which prohibits perpetual settlements beyond a fixed limit. The limit is "lives in being plus 21 years." This principle of public policy is based on the experience that whenever such settlements of inalienable lands have been sanctioned by law, a demoralised class of "pensioners" has been created. The policy was expounded as early as 1732 by Sir Joseph Jekyll in the following words:

> The law does abhor what is called a perpetuity . . . the reason of which is the mischief that would arise to the public from estates remaining for ever or for a long time inalienable or untransferable from one hand to another, being a damp to industry and a prejudice to trade, to which may be added the inconvenience and distress that would be brought on families whose estates are so fettered.[2]

This policy will not allow a person to tie up the *corpus* of his property in perpetuity and reserve the income of it for his children and descendants indefinitely.

The aforesaid policy was extended to the family *waqfs* of Indian Muslims by the Privy Council in *Abul Fata's* case[3] as early as 1894. Repelling the suggestion that the Prophet of Islam had sanctioned perpetual family settlements, the Privy Council had said:

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*Presented on behalf of the Muslim Progressive Group, New Delhi, of which the author is general secretary.

1. For the details of this institution see Fyzee, *Outlines of Muhammadan Law*, 291-303 (1964).
2. *Stanley* v. *Leigh* (1732) All E.R. 917 at 918.
3. *Abul Fata Mohammed* v. *Russomoy Dhur Chowdhry* 1894 I.A. 27.

> It would be doing wrong to the great lawgiver to suppose that he is commending gifts for which the donor exercises no self-denial; in which he takes back with one hand what he appears to put away with the other; which are to form the centre of attraction for accumulations of income and further accessions of family property; which carefully protect so-called managers for being called to account . . . and which do not seek the benefit of others beyond the use of empty words.[4]

However, Indian Muslim opinion at the time, dominated as it was by feudal elements and others carried away by sentiments, challenged the Privy Council's interpretation. The Muslims launched a powerful agitation[5] and eventually obtained from the legislature the Mussalman Wakf Validating Act of 1913.[6]

That Act enabled an Indian Muslim to create a *waqf* for an indefinite period, for the maintenance and support (wholly or partially) of his family, children or descendants, provided that the ultimate benefit was expressly or impliedly reserved for the poor or for any other purpose recognized by the Muslim law as religious, pious or charitable.[7] The Act further said that no such *waqf* shall be deemed invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature was postponed until after the extinction of the family, children or descendants of the founder of the *waqf*.[8]

Thus, an Indian Muslim can lawfully tie up his property indefinitely for the maintenance and support of his family, children or descendants provided he makes a provision that the ultimate benefit goes to a purpose recognized by the Muslim law as religious, pious or charitable and which is also of a permanent nature. It is thus open to the founder of a family *waqf* to postpone any benefit reaching charity till the extinction of all his family and descendants.

Modern Muslim jurists tend to the view that the enactment of this Act in 1913 was a phyrric victory for the Muslims. Its social consequences were devastating. It blocked any initiative by the Muslim upper class in the direction of industry. It perpetuated a pathetic class of pensioners devoid of economic initiative who were bound in the long run to become a drag on the community. Distressed by these evils modern jurists favour repeal of the Act of 1913 restoring thereby the law as it stood declared by the Privy Council in *Abul Fata*'s case in 1894. It may be noted that the

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4. *Ibid.*
5. See Ameer Ali, I *Mohammedan Law*, 273-379 (1912).
6. Act VI of 1913, given retrospective effect by Act 32 of 1930.
7. S. 3.
8. S. 4.

said decision is already, and has ever since 1894 been, the law of the Muslims in Kenya.[9]

It is submitted that in view of the recent amendments introduced into the law of family *waqfs* in Egypt, Syria, Tunisia and Lebanon, the Muslims should review their attitude and adopt a realistic approach.

9. See *Fatuma binti Mohamed* v. *Mohamed bin Salim* (1952) A.C. 1.