

Series of Questions Addressed to the Eminent Scholar Ata Bin Khalil Abu Al-Rashtah,
Ameer of Hizb ut Tahrir through his Facebook Page (Fiqhi)

Answer to Question:

Endowment (Waqf) of the Tax (al-Kharaajiyah) Land

To: Yusuf Abu Islam

(Translated)

Question:

Allah bless you and benefit us with your knowledge. Kindly our sheikh I have two questions: The first: What is the evidence that in the endowment (Waqf), it is required that the person who makes Waqf be the owner of the Ayn (object) of the endowed property? Second: Are there Shari' rules other than the endowment (Waqf) that differentiate the disposition of the 'Ushriyyah land and the Kharajiyah land? May Allah bless us and our party in your life and health, and may Allah open up at your hands.

Answer:

Wa Alaikum Assalam wa Rahmatullahi wa Barakatuh,

First: As to the issue of Waqf (endowment) in the Kharajiyah land, opinions differ among scholars:

1- Some of them allow the Waqf of what is made on the land of buildings or crops, so if a person builds a school on the Kharajiyah land that he owns, he may make it a Waqf for students, or if he planted olive trees for example, he may make its fruits Waqf for the poor and needy on the condition that this Waqf is permanent:

The Kuwaiti Fiqh Encyclopedia states:

[Ibn Abidin reported from Al_Khassaf that he said: (The Waqf of shops in the markets is permissible if the land was in the hands of those who built it by leasing, and that the Sultan (the person with authority) does not drive them out of them, and we saw them in the hands of the building owners, and they inherited them and they divided them among themselves. The Sultan does not interfere with them nor bothers them, but they have yields which he takes from them and they were passed around, fathers to ancestors, and ages have gone by and they are in their hands selling them to one another, renting them to one another, and they were included in their wills. They demolish the buildings, rebuild them, and build others, so too the Waqf is permissible). Ibn Abdeen said: He approved it in Al-Fath and the reason is the continuation of perpetration.

And if what he had put on the ground is a plantation, then the ruling on its Waqf would be the rule of building. But if what he did on the ground was merely compressing the soil or composting, then it is not valid to make it Waqf.]

2- Others permit Waqf on benefit (manfa'ah) even if it is a temporary benefit. So, if a person rented a house for a period of one year, he may make this house Waqf for those in need for the duration of the year mentioned in the lease contract, or he may rent plantation for the duration of the harvest and make it Waqf for the needy for the duration of that crop according to the lease contract, meaning that they permit Waqf on the benefit without the condition of being permanent, but it can be a temporary benefit:

According to the Kuwaiti Fiqh Encyclopedia: The majority (jumhur) of Hanafi, Shafi and Hanbali scholars view the impermissibility of Waqf on benefit (manfa'ah) because they stipulate a condition that the property given as a waqf (Mawqoof) should be something from which benefit may be derived whilst its original essence remains, as well as they put the condition of the perpetuation of Waqf (1) Maliki jurists view the permissibility of Waqf on benefit, so if a person rented a house for a period of time, it is permissible for him to make its benefits Waqf in that period, and the Waqf will cease upon the expiry of rent, because according to them the perpetuation of the Waqf is not a condition (2)

(1) Mughni, Al-Muhtaj 2/377, Sharh muntaha al-iradat 2/492, Al-Bada'i 6/220, Hashiya ibn 'Abidin 3/359 ... (2) Hashiyat Al-Dusuqi 'ala Al-sharh Al-kabir 4/76, and Al-Sharh Al-Sagheer 2/298 T. Al-Halabi.]
End

Second: There is an outweighed opinion that Waqf is not permissible unless the land title (raqabah) is permanently owned by the person making the Waqf (the Waqif). This is what we outweigh in this matter according to the correct evidence in the matter, and here is the explanation:

1- The following is stated in the explanation of Article 133 of The Draft Constitution, Part 2:

(It is possible to trade and inherit 'Ushriyyah and Kharajjiyah land from its owners, because it is a literal possession belonging to its owner, and so all the rules regarding possession apply to it. In relation to 'Ushriyyah land this is clear, **and as for the Kharajjiyah land, possession of it is like the possessing the Ushriyyah land without any difference in them from the angle of possession except for two issues: firstly with respect to what it is that is owned and the secondly, with respect to what is obligatory upon the land.**

As for the issue of what it is that is possessed, the owner of the 'Ushriyyah land possesses the land itself and its yields, while the owner of the Kharajjiyah land possesses the yield alone. Consequently, if the owner of the 'Ushriyyah land wanted to give it as a charity, he is permitted to do so any time he wishes. However, the owner of the Kharajjiyah land is unable to do so, since in order to give anything as an endowment, it is a condition that the person donating it owns the object itself, and the owner of the Kharajjiyah land does not own the land itself, but rather he owns its yields, since the title of the land itself belongs to the Bayt Al-Mal.

As for the issue of what is obligatory upon the land, the 10 or 5 per cent is applicable to the 'Ushriyyah land; in other words, the Zakah upon what was actually produced by the land if it reached maximum applicable amount (Nisab). The land tax (Kharaj) is imposed upon the Kharajjiyah land; in other words, the annual amount specified by the state...) End. As you can see, Waqf is not permissible in the Kharajjiyah land because Waqf requires the ownership of the land title of the property itself, and the land title (raqabah) of the Kharajjiyah land belongs to the Bayt Al-Mal, so the owner does not own the property itself, but he owns its yields.

2- We have previously issued an Answer to Question on the subject, on 13/2/2019, which is what you may be referring to in your question, which says: (... For example, Endowment (Waqf) requires the ownership of the property to be endowed, Consequently, if the owner of the 'Ushriyyah land wanted to give it as a charity, he is permitted to do so any time he wishes. However, the owner of the Kharajjiyah land is unable to do so, since in order to give anything as an endowment, it is a condition that the person donating it owns the object itself, and the owner of the Kharajjiyah land does not own the land itself, but rather he owns its yields, since the title of the land itself belongs to the Bayt Al-Mal.) End.

3- As for the evidence pertaining to the ownership of the land title (raqabah) (the original property from which benefit is derived) as a condition for the endowment (Waqf) to be valid, and it includes the following:

- Al-Bukhari narrated in his Saheeh from Ibn Omar: (Omar acquired a land at Khaibar. He came to the Prophet (saw) and sought his advice in regard to it. Omar said to the Prophet (saw): "O Messenger of Allah, I have got a land from Khaybar, and I have nothing that is more precious to me than that. What do you command me to do with it?" The Prophet (saw) said, «إِنْ شِئْتَ حَبَسْتَ أَصْلَهَا وَتَصَدَّقْتَ بِهَا» **"If you want you can put aside the original land and give in charity from it"** So, Omar gave the land in charity (on the condition that the original land would neither be sold nor given as a present, nor bequeathed, (and its yield) would be used for the poor, the kinsmen, the emancipation of slaves, Jihad, and for guests and travelers, and its administrator could eat in a reasonable just manner, and he also could feed his friends without intending to be wealthy by its means. I narrated this hadith to ibn Sireen and he said: without storing the property with a view to becoming rich").

- And al-Bukhari narrated in his Saheeh from Ibn Omar (In the lifetime of Allah's Messenger (saw), Omar gave in charity some of his property, a garden of date-palms called Thamgh. Omar said, "O Allah's Messenger (saw)! I have some property which I prize highly and I want to give it in Sadaqah (charity)." The Prophet said, «تَصَدَّقْ بِأَصْلِهِ لَا يَبَاغُ وَلَا يُوهَبُ وَلَا يُورَثُ وَلَكِنْ يُنْفَقُ نَمْرَهُ» **"Give the original land in Sadaqah (i.e. as an endowment) on the condition that the original land would neither be sold nor given as a present, nor bequeathed, but the fruits are to be spent in Sadaqah."** So, Omar gave it in charity, and it was for Allah's Cause, the emancipation of slaves, for the poor, for guests, for travelers, and for kinsmen. The person acting as its administrator could eat from it reasonably and fairly, and could let a friend of his eat from it provided he had no intention of becoming wealthy by its means.)

- As well as Muslim narrated in his Saheeh from Ibn Omar said: (Omar acquired a land at Khaibar. He came to the Prophet (saw) and sought his advice in regard to it. Omar said to the Prophet (saw): "O

Messenger of Allah, I have got a land from Khaybar, and I have nothing that is more precious to me than that. What do you command me to do with it?" He said, «إِنْ شِئْتَ حَبَسْتَ أَصْلَهَا وَتَصَدَّقْتَ بِهَا» **“If you want you can put aside the original land and give in charity from it”**, Omar gave it Sadaqah **but the original is not to be sold nor given as a present, nor bequeathed.**” He said, “Omar gave it to the poor as Sadaqah, to the relatives, to free slaves, and to the guest. There is no sin for one who administers it if he eats something from it in a reasonable manner, or if he feeds his friends and does not hoard up goods (for himself). He (the narrator) said: I narrated this hadith to Muhammad, but as I reached the (words)" without hoarding (for himself) out of it." he (Muhammad' said:" without storing the property with a view to becoming rich." Ibn 'Aun said: He who read this book (pertaining to Waqf) informed me that in it (the words are)" without storing the property with a view to becoming rich...".)

Thus, the hadiths of the Prophet (saw) are clear in stating that Waqf is the confinement (putting aside) of the origin of ownership with access to the benefit of it, and its confinement requires that the land title (raqabah) of the property to be endowed is owned by the person who is putting it aside, i.e., the endower (Waqif), before he puts it aside and endow it, because a person cannot make waqf of a property that he does not own. So putting aside a property is only the right of its owner because it is a disposal in the land title (raqabah) of the thing. So, if the land title (raqabah) of the property does not belong to a person, how can he dispose of it by endowing it? Omar bin Al-Khattab (r.a) was the owner of the title (raqabah) of what the Prophet (saw) ordered him to put it aside as it is in the hadiths above, because he (r.a): **“acquired a land at Khaibar. He came to the Prophet (saw) and sought his advice in regard to it. Omar said to the Prophet (saw): “O Messenger of Allah, I have got a land from Khaybar, and I have nothing that is more precious to me than that. What do you command me to do with it? That is, he (may Allah be pleased with him) possessed that land and it became his land, that is he owned the land title itself, then he came to ask the Prophet (saw) about how to deal with it. Therefore, it is clear from the hadeeth that indicates the legality of the endowment that the endower must be the owner of the thing itself. The Messenger (saw) says as it is in the hadiths above:**

«إِنْ شِئْتَ حَبَسْتَ أَصْلَهَا...»، «تَصَدَّقْ بِأَصْلِهِ...»، «إِنْ شِئْتَ حَبَسْتَ أَصْلَهَا...»

“If you want you can put aside the original land ...”, “Give the original land in Sadaqah...”, “If you want you can put aside the original land ...”, and the title of the Kharajiyah land belongs to the Bayt Al-Mal of the Muslims, so its title is not possessed by its owner for the owner only possesses its benefit, and since its owner does not own its title because it is confined to the Bayt Al-Mal, so how then can he confine its title?

4- This is what we outweigh and adopt due to the applicability of the Shari’ evidence on it; that is, it is not permissible to endow the Kharajiyah land, but it is permissible to sell, donate, and give charity to them or their price and all the works that are permissible according to Shariah, except as we have said the endowment (Waqf), which requires the ownership of the land title (raqabah) itself, and the title of the Kharajiyah land is owned by the Bayt Al-Mal.

Third: As for your question (Are there Shari’ rules other than the endowment (Waqf) that differentiate the disposition of the ‘Ushriyyah land and the Kharajiyah land?). The answer to that is that we have not found any other differences related to the disposition of the Kharajiyah and Ushriyyah land except for the two things mentioned above, i.e. what is obligatory on the Ushriyyah land of Zakat and on the Kharajiyah land of Kharaj, and the second issue is the permissibility of Waqf in the Ushriyyah land and non-permissibility of Waqf in the Kharajiyah land.

This is the most correct for us and what we adopt, and Allah Ta’ala Knows Best and He is All-Wise.

Your brother,

Ata Bin Khalil Abu Al-Rashtah

21st Rabii’ II 1441 AH

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The link to the answer from the Ameer’s Facebook page: