Permissibility of Establishing Waqf Bank in Islamic Law

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Abstract. This paper looks at the permissibility of establishment of a waqf (a non-profit social bank) in Islamic law. Considering the needs of the poor majority in all Muslim nations, unattended to by current banking system, it explores and extends the views of Muslim jurists regarding the validity of cash waqf to the permissibility of waqf bank. Cash waqf donations and proceeds can be used to form the capital of the bank. The principles of waqf and its perpetuity and the protection of the cash waqf can also apply to the capital of the bank. The structure of this bank and its functions has to be in conformity with waqf principles too.

Keywords: waqf, cash waqf, waqf bank, Islamic law, permissibly

1. Introduction

The conceptual paper is the revised version of a research report (2006-2008) exploring, in Islamic law, the permissibility of a would-be waqf bank in Muslim Countries. The proposal is for the establishment of an interest free, not-for-profit, and social bank dedicated mainly to the social welfare, provision of micro financing, and economic development of the poor and under privileged, as alternative to the existing privately owned micro financers (Yemen, Bahrain, Bangladesh and other models), and the non-profit VakifBank of Turkey, the latter being substantially owned by charitable foundations, ‘set up during the Ottoman Empire period’, to manage their ‘cash revenues and expenditures’ [24].

The idea of a waqf social bank is attractive. A conventional bank earns by collecting deposits, granting loans, providing liquidity, and transferring funds and payment system [17], selling insurance and investment products, and stock broking [8]. They also charge transaction fees on financial or overdraft services, and earn interest on lending. Islamic banks do earn the same but avoid usury, uncertainty (gharar), gambling, and investment in prohibited (haram) businesses. A waqf bank would do the same, and also comply with rules of waqf. It then can be a very good source of income to waqf institutions. However, several questions arise as to the viability of such a bank. Should the capital of waqf bank be waqf? Can cash be the subject of waqf in Islamic law? Who should own and manage waqf bank and how it should operate? For this, the permissibility of cash waqf and a waqf bank as well as its business and structure are briefly explored.

2. The Permissibility of Cash Waqf

Classical jurists are divided on the validity of cash waqf, probably due to perpetual nature of waqf assets, which is not apparent to some in cash. Others did find it, if cash is used for loans or investment [21].

The classical jurists differed on gold and silver coins as the object of waqf. Imam Abu Hanifah and Abu Yusuf [22], a view in Maliki School, the majority of Shafi’s, and a view of Imam Ibn Hanbal consider cash not a valid object of waqf [25]. On the other hand, Imam al-Zuhri [12] and Imam Zufar [7; 10], among founders of juristic thought, permitted cash waqf. The majority of later Maliki jurists, late pre-modern Hanafi jurists allowed cash waqf. Similarly, in Hanbali School Ibn Taymiyah [23] considered the permissibility of cash waqf a preferred view in the school. The Shafi’i School is less inclined to allow cash waqf [21], despite

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a report from Imam Shafi‘i to the contrary [1]. Al-Mawardi [1] restricted the view of Imam to the donation of benefits or income, where the coins are rented. He reported two views: one for the permissibility of it, and another about its invalidity. The view of Imam Shafi‘i, as understood from al-Mawardi [1] description, is not restrictive. It is presumed, al-Mawardi [1] may have attempted such restriction based on his own criterion of waqf objects: anything of uninterrupted existence and capable of utilisation. Coins in his view may not exist uninterruptedly unless used for rental. Such a criterion is not necessary while a different principle in the school i.e. capable of recurrent benefit or use [14; 26] can make the objective of waqf achievable.

The Hanafi jurist Imam Zufar considered cash capable of meeting the criterion of perpetuity, when the donated cash is used in mudarabah trade and the income is distributed among the beneficiaries [7; 10; 27]. Ibn Abidin and others [10] however have brought the permissibility of cash waqf under the ruling of Imam Muhammad who allowed moveable properties as waqf, if that is the practice of the community. Ibn Abidin [10] admitted the practice of cash waqf in Roman and non-Roman Territories during the Ottoman Empire [10; 13]. This view of Ibn Abidin [10], however, may not be able to justify cash waqf when such a practice is about to start. Tamartashi allowed cash waqf unqualified, and Hskafi [5] thought that this is due to the decision of courts [10]. Ibn Abidin [10] in an unrelated passage, however, viewed coins as non-specific replaceable property. If loaned or lost, recovery and restitution of the coins are made in similar units. Through this substitution of one unit with another, money exists forever [3; 10]. One therefore can understand Hanafi view to propose the perpetuity of coins, and hence the perpetuity of waqf. This true about the Maliki and Hanbali schools too. The Malikies report from Imam Malik the permissibility of cash waqf for purposes of loans [20]. Ibn Taymiyah [23], from Hanbali School, on the authority of Abu al-Barakat, allowed cash waqf for lending or investment (tanmiyah).

A Western scholar viewed the practice of cash waqf in Ottoman Empire usurious piety [6]. However, this may seem so if one comes up with a scheme requiring a fixed percentage through bai‘ al wafa; otherwise the view of Imam Zufar in the sense of mudarabah is not even close to usury.

Contemporary jurists agree with the rule on permissibility of cash waqf [3; 4; 11], for the purpose of loans [11] and investment in bank and bonds [9; 15; 21]. Ammar [2] extended the rule from coins to currency and other liquid assets such as company shares, certificates and bonds.

Dunya [21] listed the significances of cash waqf as: (a) compare to immovable property many have cash. (b) Cash waqf is the best way for a joint waqf (waqf mushtrak/waqf juma‘i), thus attracting finance for the development of diverse and big projects. (c) Cash waqf can be invested in diverse economic activities, and therefore greater revenue can be expected. (d) It can be for any objective, and any social purposes. (e) The chances for the growth of this waqf are higher. Maiman [15] added that it is easily lequifisable compare to realty. Ammar [2] further listed the benefits of cash waqf. They are: (i) currency as the replacement of coins is the medium for exchange of goods. (ii) Currency is replaceable with similar (i.e. it is a mal mithli). (iii) Cash waqf enables every one to donate as waqf, whereby the poor and needy can benefit from the abundance of resources. (iv) Cash waqf is capable of creating more economic stimulus, and it can be a welfare fund used to sponsor many educational, social and health projects.

To sum, the coins of the old, the paper currency of today, or any other form of liquid asset, under modern banking practice, can be the object of waqf [2; 16]. For the purpose of loans and investment, currency will be more useful to a bank, while other forms may end up non-liquefiable, unless prudent deeds of waqf are in place, empowering the bank to use certificates of shares, sukuk and others as currency.

3. The Permissibility of Waqf Bank in Islamic Law

Waqf Bank is not against Shariah principles. There is no primary text in Islamic law prohibiting the establishment of waqf bank, and almost all waqf issues are rational (ijithadi). The permissibility of cash waqf can be extended to waqf bank; and the need of waqf, its beneficiaries, and the general interest of the society or public interest (maslahah amah) demand the validity of waqf bank. That is a waqf bank can be permissible on groud of its operation and its utility.
Cash waqf is allowed for loans to the needy, and investment through mudarabah, mu’malah, and ijarah. If broaden the idea, it can be used by a waqf bank. Thus, the permissibility of a waqf bank and its operation will be supported by permissibility of cash waqf. It can operate as follow.

First, the bank can disburse the cash, dedicated for loans, to the indebted, for marriage, and welfare project. Once settled by borrowers it can be loaned to another. The cash can be perpetual, provided compensations for losses and market fluctuations are planned and paid. Second, the waqf bank can invest the waqf capital in any permissible transaction capable of generating income if he mudarabah of Hanafis [7; 10; 27] can be boroadered to fund management, and the rental of coins by Shaﬁ’is [1] and Ibn Taymiyah’s concept of tanmiyah (growth/investment) are used to guide the waqf bank. As a rule productive waqf must be kept invested and income generating which can better by doing the business of banking. The contemporary Islamic banking practice provides evidence of successful cash investment methods.

The bank will use cash waqf for its capital according to fiqhi principles in its operations (both loans and investment). Therefore, the core characteristic of waqf i.e. perpetuity of the object or the capability of recurrent use and benefit, would apply to both the cash waqf and waqf bank alike.

The permissibility of waqf bank is also supported by its utility. Muslims and the society need a compatiionate bank, a gape left by other banks. Society will own the bank and not the very few rich. Poor will have access to wealth. The bank will also benefit waqf, and its beneficiaries. The ban can be a true pro poor redistributive national wealth management tool for micro and macro economic planning of a nation.

The waqf bank can provide capital adaquacy to waqf institutions. It can attract a large sum of cash, both waqf and non-waqf. As an intermediary, it will mobilise demand and time deposits to borrowers when applied for, to earn profits. The bank will also earn by providing various banking services. Once established, it can make hundreds of millions annually. These profits plus deposits can finance the development of waqf properties. The developed waqf properties then can generate more income. Thus, the bank can help waqf, its beneficiaries, the poor, and contribute to the GDP of a nation.

A waqf bank will provide liquidity for waqf institutions. Productive waqf properties are overwhelmely fixed assets. Their assets are not tradable and therefore cannot be collateralised to obtain development financing. Some institutions are weak in development of their properties, delivering intended benefits to the beneficiaries, and effective aid to the poor. Even if not so, additional proposals for attracting more funds are needed to make waqf have wider welfare utility.

A waqf bank can protect cash waqf. Since substantial portion of the capital of a waqf bank will come from waqf funds, the principles of perpetuity will apply to it. The bank will avert risky ventures. The bank will be subject to further restrictions from the National Central Bank for maintenance of its capital including the various transactions in which its capital is used.

The establishment of waqf bank as a social bank is the need of the twenty first century. Looking at the unsustainable development patterns, the growth of neoliberal economic order, and the individualistic tendency of present generations, current banking systems including Islamic prove themselves to be unable to assist the major sections of societies. The gap between the rich is going wider, inequality of income, the concentration of wealth in a small 20% of the global population, the high level of poverty in Muslim and other developing countries and the increase in the number of old people in advanced socieity makes the need for a social bank urgent more than ever. The proposed waqf bank can help the state in provision of decent living standards to its citizens including shelter, education, healthcare, employment and the like.

In brief, a waqf bank can be permitted based on the permissibility of cash waqf and its uses, the need and interest of society, as well as the need of waqf and its beneficiaries. The above reasons alone may persuade the permissibility of waqf bank. The structure of it needs to be studied too.

4. The Structure of a Waqf Bank

A waqf bank should be licensed upon incorporation in accordance to the requirement set by the Central Bank and the existing laws. Mainly they are the Islamic Banking Act, the Banking and Financial Institutions Act, and the Companies Act, and other regulations. The Bank must have owners, capital, objectives and internal rules of governance. The intended waqf bank can easily meet these requirements.
The ownership of the bank can be solely controlled by the waqf institutions, or these institutions and other parties jointly. The founders of the bank can also invite public and private sector to take part with understanding that the bank can purchase their shares as and when it can afford it. The framework of the bank can be a cooperative if it is owned by various institutions of waqf, or a corporation regardless of whether the bank is owned by one or many waqf institutions, or by waqf and others.

Subject to the minimum capital required by Central Bank, the bank could initially raise its capital through benevolent loans and investments from governmental, semi-governmental, and corporate bodies, and waqf funds, either cash waqf or proceeds of other waqf properties. As mentioned by Dunya [21] and Ammar [2] cash waqf may be individual or group donations dedicated for one or more causes through a specific project or otherwise. If there is will on part of all waqf institutions, self-capitalisation of waqf bank by these institutions from their liquid assets could be possible. Waqf institutions can also raise hundreds of millions through cash waqf. If invested prudently the income together with its principle can be used as capital for Waqf Bank later. For instance it is now established that waqf institutions are asking the public to donate RM10. If this amount is promoted aggressively, and have a pool of 2 million donors for five years who can contribute the same amount on monthly basis, there will be enough cash waqf funds to establish a waqf bank. In case the waqf bank is established early as a joint venture between waqf intuitions and corporate world the institutions of waqf will be able to purchase all subscribers shares in the waqf bank, and thus will make waqf bank a 100% waqf property. The joint venture with non-waqf entities should be legally a problem, as the normal rules of perpetuity applicable to fixed waqf assets will not apply to cash waqf.

Among its objectives, waqf bank can accept all types of deposits, from any willing individual or body. The bank would have to invest the funds and share profits with investors. It could raise cash waqf and collect zakat. It can invest and use all the deposits and reserved funds, and distribute the generated net profits on investors and the bank. The profits of the bank, along with zakat, can be distributed on welfare projects, and microfinancing according to Islamic law. The bank can finance various development and commercial projects including waqf properties. It can impose minimum fees and charges to compensate for expenses and currency depreciations. The investment of cash for loans will be on short term. Productive waqfs can be for short or long term provided a good management practice dictates it.

The bank as a manager of waqf funds will have to invest according to the special characteristic of waqf properties to safeguard its capital and increase income. It would have the duty to retain the principal, distribute its income, minimize investment risk, take contingency measures for depreciation and other risks, and apply for tax exemption. It must give priority to projects that is in line with maqasid Sharia, beneficial to local population, and in the interest of beneficiaries. Investment methods, which involve relatively higher risk, can be avoided [21]. The bank could reserve a portion of income for contingencies and invest them to generate income for seek of increasing the reserved funds. The bank can also be able to liquidate some of the waqf properties as and when it is considered profitable.

Waqf bank would be required to maintain its capital. Several measures against misappropriation and mismanagement of the funds will be in place. The restrictions imposed by the founders of the waqf, the principles of Islamic law, aherence to the best practice, and banking regulation will enable the waqf bank to maintain its capital. It will be required to have and maintain reserve fund including statutory reserves, and to have minimum liquid assets. The bank will be subjected to annual audit.

The bank will be subject to the supervision of the Sharia Advisory Board, shareholders, and the Central Bank. All these bodies will scrutinise the performance of the bank and therefore the dismissal of negligent and incompetent individuals will be easy. It will be easy to hire and fire fund managers.

5. Summary

The waqf bank can be the bank of the poor and underprivileged. It can be permissible in Islam based on validity of cash waqf and the need of waqf, its beneficiaries as well as the society. It can maintain the waqf capital due to its business model and internal as well as external supervision. It is therefore viable legally and practically.
The institutions of waqf have the unrealized potential to establish a Waqf Bank. If there is favourable political will institution of waqf throgh waqf bank contribute to society greatly.

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7. References