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Chapter XIV

Waqf, Foundations, and Similar Institutions around the World (Eleventh–Twentieth Century)

The conclusive character of our present meeting allows me to embrace in a global overview the main points of our research since the beginning of the GDRI program (2012–2016) and assess the way our work changed the vision we had of our topic. A global object emerges, of which the waqf is merely the Muslim embodiment: religious mortmain foundations, which we find in a variety of societies under various religious denominations. This firm setting of the waqf into a global context obliges us to better define the concepts at play and allows us to import to the field of waqf studies a set of questions massively developed in other fields about similar objects but rarely evoked as foreground features when Islam is being considered.

1. Universality of Religious Mortmain

We did not adhere to a cultural area but progressively enlarged our scope to include institutions similar to the waqf outside the Islamic world. We unveiled an almost universal practice of religious mortmain, at least as important as it was in the Islamic world, in Christian Europe, in China, in Japan, and probably in other places still to be researched; possibly a universal object in all societies in which individual ownership of resources is a common feature. The perceived universality of the object makes it necessary to describe its essential features in such a way as to make it univocally recognizable. Meanwhile, any conclusion as to its universal character must remain provisional. In our view, four main features describe it.

- (1) Mortmain is the first and most basic common feature. The assets are exempted from the legal rules which normally govern the transmission of commodities of their kind. In principle, they cannot be sold, mortgaged, alienated, or in fact confiscated. They are exempted from usual inheritance rules, the will of their founder being their only law.
- (2) The support of transcendental entities. The breach of common laws implicit

in mortmain is backed by a reference to transcendental entities which are supposed to become the owner of the assets. This ascription to divinity renders acceptable any kind of loss incurred in the transaction by worldly parties. This transcendental reference draws a clear conceptual difference between this kind of mortmain and civil mortmain, such as municipal common land, Spanish *mayorazgo*, or Italian *fideicommissum*. Such a difference nevertheless tends to become blurred when we descend to social behaviors supported by the institution, in the sense that worldly parties used all kinds of mortmain assets they had access to along the same lines and for the same purposes, as if they were a unique pool of resources. In many cases, moreover, the public interest of the collectivity tends to become a substitute of the deity, a fact which, in turn, laicizes the institution.

(3) A complex organization. God cannot manage the assets of the foundation by himself, nor can those who directly embody his presence in this world. In practice, apparent beneficiaries must always rely on laymen to do the job and content themselves with cashing a rent. This means that the social world governed by the foundation is in no way limited to founders and apparent beneficiaries. It also involves the administrators in charge of the management of the assets and the persons who materially make them produce an income, such as shopkeepers who rent shops or farmers who rent land. Any assessment of the institution must take this fact into account. A huge proportion of the gross income of the foundation remains in the hands of these operators. Within this global frame, specific cases open a wide range of organizational schemes which can be arranged into a continuum from an almost complete control of the management by the beneficiary up to an almost absolute lack of the same. Each foundation must be set where it belongs in this continuum to fully appreciate its meaning.

(4) An intricate mixture of personal, collective, lay, and religious interests. In many foundations the founder and his/her descendant retains a measure of control on the assets the ownership of which they apparently resign to a transcendental entity. Either they postpone the real transmission to a distant future or it is put as a condition that their descendants retain a degree of involvement in the management of the assets and benefits: at the very least, the descendants permanently gain honorability and prestige from the foundation created by their forebears. Historiography devoted much attention to this implication of personal interests in foundations and demonstrated that religious mortmain plays an important part in elite-making and elite sustainability processes in all studied societies. In many cases, practically the whole benefits of the foundation revert to the founders' family. It would be nevertheless erroneous to reduce foundations to their lay side. All of them, by construction, have social and religious ends; many of them devote huge resources to such ends. The main conclusion to be drawn from all the instances

described in our studies is that there exists no clear-cut distinction between charities and trust for the benefit of individuals. This is quite different a situation from that of present day foundations, as established, for instance, by modern British law. This lack of distinction is a major character of the foundations of former times.

In light of the above, religious foundations are, by construction, complex objects which combine religious and lay purposes; a feature which makes them difficult to understand nowadays, and made them, in past times, highly unstable nests of tensions, a feature which turns the history of each of them into a dynamic narrative in spite of their alleged insistence on stability.

2. A Complex Relationship with the State

This mixed character of religious, social, and personal interest is also one of the main factors which govern the relations between the State and the foundations.

(1) The power to control. States, by construction, do not cooperate well with the foundations because the latter are, in fact, an intrusion of religious jurisdictions in the civil sphere, indeed, a massive intrusion at times. All societies assigned a right to the State, if not a duty, to care for the expression of religious beliefs in the civil sphere and even to care for the purity of religious practice. Foundations were especially vulnerable on such grounds. The soft point of their defense came from the mixed worldly and religious interests they embodied. Whatever the way you twist a religious or philosophical set of beliefs, at least in a monotheistic context, you cannot fully integrate the defense of private interest to the doctrinal ends of the same. States took full advantage of such a flaw.

(2) The need for a favorable legal context. Foundations and, more generally, mortmain cannot flourish outside a favorable legal context. This does not refer in particular to favorable regulations, but rather to tribunals prone to further their interest by interpreting the law in favorable terms, and/or to judges who themselves draw benefits from their own foundations and consequently refuse to act against the institution even when it goes against the law. Some 20 years ago, I personally demonstrated this point through the study of a Spanish mayoralazgo over three centuries (cf. "Familles, majorats, réseaux de pouvoir. Extrémadure, XVe–XVIIIe siècles," in *Réseaux, familles et pouvoirs dans le monde ibérique à la fin de l'Ancien Régime*, ed. Jean-Pierre Dedieu and Juan Luis Castellano [Paris: CNRS Editions, 1998], 111–145). I also demonstrated how a main factor of disorder derived from the necessity to ceaselessly invest new resources into the mortmain to keep it afloat in spite of its organizational rigidity and rapid decay or obsolescence of the original assets. Studies presented in the present symposium

brilliantly show that such external interventions were also needed to compress the protests of disgruntled heirs and would-be beneficiaries.

(3) Colonialism and liberalism. Colonial expansion was not in itself an unsettling factor for religious foundations in colonial territories. But liberal colonialism deprived the Islamic waqf of the favorable external context they needed, liberal in the sense of conveying individualism and a high degree of separation between public and private spheres. Liberal individualism reduced the external pressure which kept foundations together. It demanded a clear-cut separation between charities and private family institutions. Usually, it did not directly challenge the waqf, although in French colonial Algeria and French mandate Syria, the Islamic family waqf were abrogated. It just let it go where the natural path of its own mechanism led it when nothing was done to correct such an evolution. The colonial state even posed as a defender of the purity of religion, to be purged of its worldly elements. In Europe, the action of the State against mortmain and especially against religious mortmain was far more aggressive without any colonial motivation. But the same processes were at play and the defense of the institution was notably weak because one of the most highly interested parties, the churches, did not dare to move, largely on doctrinal grounds.

3. Suggested Further Studies

We must follow up with more details concerning the interesting paths opened by the papers on non-Islamic areas, complementing them with research on some neglected geographical areas and evaluating the real degree of possible assimilation between what would be observed there and what we classically know as being part of the object under study.

I should recommend promoting detailed case studies with two complementary purposes: (a) to set each foundation along the two axes (organization and purpose) we defined here above; and (b) to insert the foundations, as far as possible, in broader contexts and strategies, be they intended to increase family assets or to further public good.

I should also recommend promoting as far as possible longitudinal studies of the same foundations over time so as to describe the mechanism through which they maintained themselves afloat over a specific period with the following specific interests: (a) economic factors such as the amount of new investment needed to pay for the progressive obsolescence of the original assets; and (b) political externalities. I suggest that a good analytical database is a necessary tool for studying this point and the previous one.

Further ahead, we shall have to raise the fundamental issue of the simultaneous

reproduction of similar institutions in societies in other seemingly unconnected ways. Waqf, foundations, and trusts are not the only instances of such a phenomenon. A comparison of Chinese and Spanish modes of governance in the eighteenth century reveals striking and basic similarities. Waqf might in such a way contribute to a real world history, situated at a far deeper level than all the “connected” and “intercultural” histories which are nowadays so fashionable.

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