

**Hanafi School of *Transoxania*: An Analysis
through the Law of *Waqf* as Expounded by
Burkhan Ad-Din Mahmud Al-Bukhari (D.
616/1219)**

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Abstract: In article questions of formation of some legal laws in the ancient cities - Bukhara, Balkh, Samarkand are considered. These laws leaned on written sources and views to which various government dynasties adhered the IV-VII centuries. The big contribution to development of laws was made by al Mukhit al Burkhan and Ahmad Al Bukhari. Laws concerned fundamental questions of judicial system, rights of succession and sources of the income for social security in Muslim society. The author characterized positions and various points of view of participants of discussions - lawyers on matters of law of ownership of land, real estate and the rights of its donation. In article the contents of the summary legal land code consisting of 26 sections are opened, separate forms of ownership, belonging to mosques, madrasah, government and other organizations are considered. The author drew a conclusion that this collection of laws can be the historical source creating idea of bases of legal system in questions of landed and other property in the historical past.

Key words: laws, government, content, legal, points of view, period, study, development, view, education, historical.

The Hanafi law originated and developed in the second, third and fourth centuries AH in Iraq, but after the fourth to the eighth centuries it was elaborated mainly not in Iraq but further east in North-East Iran and Central Asia, then called Khorasan and Mawarannahr (Transoxania). The main centres were the cities of Balkh, Bukhara and Samarqand, before it reasserted itself in the near and Middle East and others. In this study, I will show within the framework of a specific legal institution of *waqf* and through a work hitherto understudied by modern scholarship, namely *al-Muhit al-Burhani* of Mahmud b. Ahmad al-Bukhari, that in the history of Hanafi law, this period represents the second major phase in the development of the legal system. Before going to the details, a brief introduction about *al-Muhit al-Burhani* (hereafter *al-Muhit*) shall be given. The author Burkhan ad-din al-Bukhari was a respected member of *Al-i Burhan*, the ruling family of Bukhara called *sadr al-sudur*, who were active between 495/1102 and 636/1238–9, not only in the sphere of politics but also as the main sponsors of learning in the city (Bartol'd V.V, 1963, Vol. VI, p. 9.); among their members were a number of scholars including our Burkhan ad-din al-Bukhari. *Al-Muhit* can be characterized using the late Norman Calder's terms as *mabsut*, i.e. the voluminous *fiqh* work, as opposed to the abridged works (*mukhtasars*). As the author records in the preface the book was based on the well-known authoritative Hanafi manuals of Shaibani, less known ones (*nawadir*) by the same author, as well as the views selected from the books that contain responses of Khorasanian and Transoxanian scholars (*mashayikh*). The latter consist of a number of books written or views held between the mid-fourth century and the early seventh century, i.e. just a few decades before the Mongol invasion. This is the period when the Khorasanian and Transoxanian imprint on Hanafi law appears most explicit (Omeljan Pritsak. *Al-i Burhan*, 1952, p. 81-133). Politically at this time various dynasties were active in the region and beyond,

including Samanids, Seljukids, Qarakhanids, Ghaznawids and Khwarazmshahs (Ömer Soner Hunkan, 2007, p. 523).

The sources of *al-Muhit* Although it is difficult to give a precise and detailed account of *al-Muhit*'s sources, it suffices to note that the author in his exposition of Hanafi law in all sections including the book of *waqf*, first gives authentic Hanafi views known as *zahir al-riwaya*, including the disputes, then presents less known views related from the founding figures, known as *nawadir*. After this he brings forward the elaborations of Transoxanian and Khorasanian scholars on the disputed matters and finally brings the views ascribed to certain individuals or groups of Transoxanian and Khorasanian origin on the matters not dealt within the main authoritative manuals. The latter are usually presented in the form of responses (*fatawa*) usually by named individuals. Since the majority of the Transoxanian and Khorasanian sources of *al-Muhit* are still in manuscript form or lost, *al-Muhit* gives an opportunity to trace the development of Hanafi law in this period and region (Burkhan ad-din Mahmud, 2003). Coming specifically to the law of *waqf*, I shall first give the sources of the Hanafi law of *waqf* as expounded by the author of *al-Muhit*; this will clarify what the three sources mentioned in the introduction actually refer to. Then I shall bring forward a few examples that will shed light on how the existing sources of the Hanafi law of *waqf* were utilized in order to formulate a contemporary rule of law. As is already known, the *zahir al-riwaya* or 'the well known authentic doctrine' in the later Hanafi tradition refers to the six books allegedly written by the third (youngest) founding figure, namely Muhammad b. al-Hasan al-Shaibani (Meron Y, 1969, № 30). The author of *al-Muhit* relates in a number of cases views from the *Book of Waqf* of *Kitāb al-Asl* and *al-Siyar al-Kabir* by Shaibani. Sarakhsi's commentary on the *Book of Waqf* (*Kitāb al-Waqf*) of Shaibani must be his great commentary, known as *al-Mabsut*. Although the *zahir al-riwaya* was confined to the immediate circle of Abu Hanifa, in the *waqf* section of *al-Muhit*, it

certainly includes two famous *waqf* treatises of the third/ninth century, namely *waqf* books of al-Hilal and al-Khassaf, which were extensively used in *al-Muhit*. As to the *nawadir*, or ‘the less known views of founding figures’, the author of *al-Muhit* names two books with this title, namely the *Nawadir* of al-Hisham and *Nawadir* of Ibn Sama’a (Murteza Bedir, 2010, p.193). Beginning with Abu al-Layth al-Samarqandi’s book, better known as *Fatawa Abī al-Layth*, the author of *al-Muhit* frequently cites views of his fellow-countrymen when there is no view related in a specific matter from the first zone of authorities, or when there exists disagreement among them. Along with *Fatawa Abī al-Layth*, he cites books, including his uncle, al-Sadr al-Shahid’s *al-Waqi’at* and *al-Fatawa al-Asghar*, *Fatawa* of Samarqandians, *Fatawa al-Fadli*, *Fatawa al-Nasafi*, Kashshi’s *Majmu’ al-Nawazil*, al-Natifi’s *al-Waqi’at*, and *al-Ajnas*. The names of Abu Bakr al-Iskaf (d. 336/947), his disciple Abu Bakr al-‘Amash (fourth/tenth century), his disciple Abu Ja’far al-Hinduwani (d. 362/973), Abu al-Qasim al-Samarqandi (d. 342/953), Abd al-‘Aziz al-Hulwani (d. 448/1050), al-Sarakhsi (d.483/1090), Qadikhan (d. 592/1196), etc. appear among the authorities of the second zone. The author of *al-Muhit* refers to the scholars in this zone as *mashayikh* or the masters [6]. The authority of *mashayikh* takes effect where the authority of the second zone ends. While the latter have an absolute authority in formulating the legal bases of the *waqf* law, the authority of the former is limited to the stated opinions in the first zone. The relation of *mashayikh* to the *ashab* seems to be one of subordination. However, from the standpoint of which rule governs the contemporary legal situation, the *mashayikh* appear to be the sole authority in formulating the law, in the sense that the law that is applicable to the current cases is determined by their deliberation. This was especially true when the circumstances changed, excluding the transmitted law of the founding figures as irrelevant, or when the latter disagreed. In this case the *mashayikh* act as an absolute authority, even though they always formulate their responses

within the juridical framework set by the founding figures ((Murteza Bedir, 2010).

Mashayikh of Balkh, *Mashayikh* of Bukhara and *Mashayikh* of Samarqand. All other individuals were subsumed in one of these groups. In the *al-Muhit* the law is ultimately defined by a group of *mashayikh*; Burhan al-Sahari'a is one of them. The first zone of jurists, i.e. the founding figures and their immediate circle, always supplies the basics of law upon which the preferences of *mashayikh* are grounded. However, if the basics are not supplied by these first jurists then the basics of any matter are determined by the *mashayikh* themselves. Below I will relate a number of examples in which the first zone of jurists laid down the basics of law and the second zone of jurists played the role of choosing which one of the views related will constitute the law. Then, I will give a few examples of how the jurists of the second zone continued to explore law through analogy or other forms of juristic reasoning, based on the already established principles (Burkhan ad-din Mahmud, 2003, Vol.I, p. 45).

Abu Hanifa's Opposition to Waqf

It is stated in *zahir al-riwaya* that, according to Abu Hanifa, a pious endowment is only legal and valid if the endower ties his act of endowment to 'the aftermath of his death' by way of bequest; if he does not do this, the act of endowment will be null and void. According to his two disciples, namely Abu Yusuf and Muhammad, this is not a requirement for a *waqf* to be valid. The question for the jurists of the second zone is to interpret away the implication of Abu Hanifa's view, which seems to be an obvious opposition to the durability of the institution of *waqf*. This implication was even more serious, especially if we recall that the *waqf* institutions from the third/ninth century onwards provided the main source of income for social services in Muslim

society, including education and judicial systems that had a direct bearing on the learned classes. Since the *waqf* was seen as indispensable, the entire law of *waqf* in the Hanafi legal system is based on the opinions of Abu Hanifa's two disciples, whereas his own opposition is somehow accommodated into the system by way of interpretation. In order to show that Abu Hanifa was not against the idea of *waqf*, an interpretative strategy was employed. Thus, it is stated that a *waqf* was defined by Abu Hanifa as 'sequestering the substance to oneself and giving away its yields to the poor and needy (*habastu al-'ayn 'ala al-milki wa-tasaddaqtu bi-thamaratihi 'ala al-masakin*)'. Abu Yusuf and Muhammad defined it as 'Removing its substance from one's possession to the possession of God and making it sequestered in His possession and its yields to His servants (Christopher Melchert, 1997, p. 244).

Perpetuity

A similar example of reducing the differences among the first zone of jurists can be seen in another matter. As is well known, one of the essential requirements of classical law is that a *waqf* must be perpetual. However, it seems that there is no unanimity regarding the application of this perpetuity condition. Already Abu Hanifa reads an endowment act as a non-binding declaration and states that if the endower does not refer to the aftermath of his death the property goes back to the inheritors after his death. According to Muhammad, perpetuity is a necessary condition; if, for example, one merely declares: 'I endow my land (*waqaftu ardi*)', i.e. without adding a phrase that suggests perpetuity (either explicitly or implicitly by way of enumerating the poor and needy as the final beneficiaries), this is not sufficient to constitute a binding perpetual *waqf*. The reason for this is that the endowment would either go to the poor, in which case being perpetual constitutes validity, or to the rich, which does not constitute a valid *waqf* owing to the lack of perpetuity.

Thus, the author of *al-Muhit* continues, there exists a doubt that hinders validating a *waqf*. Khassaf, Hilal and Basrian Hanafis all agree with Muhammad. However, Abu Yusuf thinks that the mere utterance of the words expressing *waqf* (endowment) is a sufficient reason to establish a *waqf*. When the endower dies before making it perpetual, the property returns to the inheritors. According to some jurists of the second zone, says the author of *al-Muhit*, Abu Yusuf's disagreement is not real; he is also of the view that a *waqf* must be perpetual, but, according to these latter jurists, these two imams disagree over what constitutes perpetuity. To Abu Yusuf the mere utterance of *waqf* phrases conventionally means 'endowment to the poor and needy' which in turn amounts to perpetuation, whereas Muhammad stipulates an explicit declaration of a phrase that denotes perpetuity. However, two great authorities, namely Tahawi and Sarakhsi, think that the disagreement between Abu Yusuf and Muhammad is real and state that if the phrase of perpetuity is not expressed, according to Abu Yusuf, the *waqf* becomes valid until the death of the endower; once he dies it returns to the inheritors (Burkhan ad-din Mahmud ibn as-Sadr as-Sa'id Toj ad-din Ahmad ibn as-Sadr al-Kabir 'Abd al-'Aziz ibn 'Umar ibn Moza al-Bukhari, Manuscript).

Bukhari relates a few more quotations from the first zone jurists favouring the view that perpetuation is also a necessary condition for a *waqf* to be valid and binding. After presenting the disagreement among the first zone of the Hanafi jurists, he adds that the *mashayikh* of Balkh opted for Abu Yusuf's view, and then quotes Sadr al-Shahid who says 'We do prefer this view. After this declaration, the subsequent development of the law of *waqf* was to be based on Abu Yusuf's view. There is here a clear tendency to validate, as far as possible, any act of endowment that has occurred. Although the *mashayikh* favour Abu Yusuf's view, which validates any phrase of endowment even if no phrase of perpetuity is included, the author of *al-Muhit* tries to circumscribe the implications of Abu Yusuf's view as to the validation

of *waqf*, as there is a disagreement among the second zone jurists over the true meaning of Abu Yusuf's words. 'Mashayikh of Balkh' in this case probably refers to Abu al-Layth al-Samarqandi and his masters who all lived in or around the fourth/tenth century and whose views he collected in his famous *Fatawa Abī al-Layth*; the 'we' in the words of Sadr al-Shahid probably refers to the *Mashayikh* of Bukhara, who lived in the fifth/eleventh century. The author of *al-Muhit* tends to prefer the view of the Bukharans probably due to the fact that he, as was pointed out before, belongs to a large family of Al-i Burhan who were active not only as judges or muftis but also as a political and economic power in the city of Bukhara during the late fifth/eleventh and throughout the sixth/twelfth centuries (Burkhan ad-din Mahmud, 2003, Vol 8, p. 145).

Endowment of Moveable Things

The Endowment means in an original sense the endowment of non-moveable properties such as a house, a land, or a store, as the endowment is inherently associated with perpetuity. The validity of the endowment of moveable things is therefore challenged on the ground that a moveable thing intrinsically carries the meaning of temporariness. Abu Yusuf does not allow it, even if it becomes a custom ('*urf*) among people. However, Muhammad accepts the possibility of endowing a moveable property when this becomes a custom among people, i.e. when they need it. Thus endowing a cow to the caravansary so that her milk is to be distributed to wayfarers or a book to a library to be read is valid, according to him. The masters of the second zone, including Sarakhsi, choose Muhammad's view; this can be seen again as a sign of their using every opportunity to set up *waqfs*. After presenting views of the first and second zone jurists, the author of *al-Muhit* turns to another jurist of Hanafi circles of the first zone, namely Zufar, a disciple of Abu Hanifa, who goes even further than Muhammad and admits the validity of the

endowment of any movables including money, food etc. without even resorting to the aid of the custom. A certain disciple of Zufar, al-Ansari, relates that endowing money to the poor so that it brings profit through a *mudaraba* partnership is valid. If Zufar's view was not in favour of expanding the opportunities for *waqfs*, no one would notice it. The author of *al-Muhit* relates a few examples of endowment of movables that were popular in his time, one of which is interesting: the people of Nihawand endow wheat seeds with the stipulation that they are to be permanently given to the poor peasants so that they cultivate them and return the amount they borrow. A clear tendency towards validating all sorts of *waqfs* is present in *al-Muhit*. In the XII-XIII *Transoxanian* debate on cash *waqfs* the proponents extensively used this tendency of validating all sorts of *waqfs*, which was present in the views of the *mashayikh*. However, the opponents, aware of this tendency of the juristic tradition, formulated their opposition to the cash *waqfs* not on the basis of the invalidity of the endowment of the movables, but on the technique used in loans, namely *mu'amala shar'iyya* (Bedir M, 2005, № 56 p. 27-84).

The Stipulations of the Endower

The law of *waqf* allows a great deal of leeway for the endower to formulate the operation of a *waqf* after its foundation. The well-known maxim says that 'The stipulation of a *waqif* is like the explicit word of revelation (*nass*), which means that it has the binding strength of revelation (Islam Ansiklopedisi, 1997, Vol. XVI). Thus it is primarily his right to identify the beneficiaries of his endowment; he has the priority to appoint the trustee etc. A question in this respect arises as to whether he can identify himself as the sole beneficiary or one of the beneficiaries of his own endowment. According to Muhammad and Hilal, this is not a valid act of endowment; hence there is no *waqf* at all if he counts himself

among the beneficiaries. However, Abu Yusuf regards this type of endowment as legal and valid. The author of *al-Muhit*, after presenting this controversy between these two first zone authorities, concludes that the *Mashayikh* of Balkh preferred the opinion of Abu Yusuf and consequently the *fatwa* is given in accordance with this. According to him, the reason behind this preference is that legalizing the endowers' right to put themselves among the beneficiaries will stimulate and promote *waqf* establishment; after all the Prophet said that 'One's spending on himself is a charity,' which is interpreted as endowed charity (Al-Muhit, VII). The primacy of the endower can be seen in another example: the trusteeship or guardianship of *waqf*, i.e. the right to be in charge of disposing a *waqf*. According to Hilal and Khassaf, if a man endows his land without identifying himself or another person as the trustee, the *waqf* is valid and the endower has priority in undertaking the trusteeship of *waqf*. Hilal adds that 'someone' argued that if the endower does not identify the trustee then he has no power. The *mashayikh* identified this 'someone' as Muhammad due to the fact that, according to Muhammad's principle, delivery of the endowed property is a requirement for the validity of *waqf*. Once he delivers without identifying the trustee, his link with the *waqf* stops, hence he no longer has power regarding this endowment. However, the first view, which recognizes his power in this endowment, emphasizes his proximity to the endowed property, finding an analogy in the case of manumitted slave whose guardianship lies with the manometer. A case from *Fatawa Abī al-Layth* raises the question of whether an endower has the right to dismiss the trustee: according to Abu Yusuf's view he has the power even if he does not stipulate this right at the time of establishing the *waqf*. Muhammad, on the other hand, thinks that he has no power if he does not stipulate it at the beginning. Although the author of *al-Muhit* does not make it clear which view in this case is preferable according to the *mashayikh*, the rest of the chapter favours the view of Abu Yusuf,

Hilal and Khassaf, who all give a greater role to the endowers. However, leaving a dispute unresolved by a preference of the *mashayikh*, a phenomenon that we sometimes come across in *al-Muhit*, may have another reason: it gives later jurists or judges latitude to form their preferences in actual circumstances. After all the law is a matter of interpretation.

Endowing to Oneself

A person's endowment to himself is unacceptable, though there are among the first zone those who allow it; Abu Bakr al-Iskaf of the *Mashayikh* of Balkh made a distinction between endowing to oneself and endowing to others while stipulating that the endower himself will benefit from its yields. This peculiar distinction seems to have resulted from the fact that one's endowing to oneself is nonsense. According to Abu Bakr al-Iskaf, the *waqf* is valid but will not be of benefit. It becomes a *waqf* for the poor and needy. In other words the stipulation is regarded as null and void, whereas the *waqf* itself is seen as legal. This is according to the view of Abu Yusuf, who validates all acts of endowment containing the word *waqf* or similar phrases. Endowing one's property to one's family, i.e. one's children and children's children and so on, is valid. However, when one's lineage becomes extinct, one of the two views related from Abu Yusuf states that the *waqf* property should return to the inheritors, while Muhammad says that it will go to the poor; this is also the other view of Abu Yusuf. In other words according to this latter view, all *dhurri/ahli waqfs* are in the end a *khayri waqf*. If this is not assumed, then no *ahli waqf* would be conceived as valid.

Examples of the *Mashayikh*, Introducing New Rules Restoration and Repair of *Waqf* Property

The first priority of a trustee in distributing the yields of a *waqf* should be the maintenance and repair of the *waqf* property if needed. The authority of a trustee in the operation of a *waqf* also involves any change in the *waqf* property, if the change is for the benefit of *waqf*. If, for example, the *waqf* land is adjacent to the houses of a town or a city and the trustee wants to build apartments to rent out, he can, since this will clearly contribute to the growth of *waqf* profits. However, there is a dispute among the *mashayikh* as to whether a trustee can spend the yields specified for the poor and needy for the restoration of the *waqf* property if the restoration is not necessary. One group of *mashayikh* thinks that he has the power to do so because it will augment the yield of the *waqf*, based on an analogy with building apartments in the previous case; others oppose this idea on the ground that the yield once produced becomes the property of the poor and needy. A trustee cannot spend it without their authorization. They argue that the analogy with building apartments is not valid, because that involved the replacement of the source of income with a better one. However, the author of *al-Muhit* thinks this argument against the analogy with building apartments is weak. If we follow this logic, we would not allow building apartments; just as there is no need to change the source of income in the case of building apartments, there is no need to spend money for the unnecessary restoration here. In other words, according to him the analogy is sound.

Leasing Period of a *Waqf* Property

The most secure way of getting regular income from a *waqf* property was to rent it out, which was the usual pattern in the administration of *waqfs* throughout history. There is however a

restrictive rule as to the duration of renting a *waqf* property, owing to the fact that a long duration would lead to ownership claims by those who lease the *waqf* properties, especially in times of instability. The law as expounded by the first zone of jurists does not ban long periods of leasing; indeed other Muslim schools of law are more liberal in this respect. Thus, in Hanafi law, especially in the *mashayikh* period, there emerged a tendency to lease *waqf* land for up to one year. They argue that long-term leasing would jeopardize the institution of the *waqf*, it is clear that the concept of *istihsan* was used here in order to protect the *waqf* property from *mala fide* acts. However, this is not economic, reducing potential leasers' appetite. Economic necessities seemed to have imposed the need to find ways of escaping this restriction. One solution developed by the Transoxanian jurists was writing in the *waqf* deed (*sakk*) some such provision as 'One person rented this land from another for thirty (or whatever number wished) contracts, each one of which is for one year. Thus the first contract is binding and the rest of the contracts are revocable. This achieves on the one hand leasing for longer than one year but on the other hand it preserves the right to annul the lease contract and revoke the *waqf* property when the need arises. If the endower of a *waqf*, however, stipulates in the *waqf* deed that this is not to be leased longer than one year, the administrator or the judge cannot rent it out for longer than one year, even if it is for the sole benefit of the *waqf*. The author of *al-Muhit* then adds that the jurists of his land are in disagreement as to the maximum periods for *waqf* properties. Some argue that a land can be rented out for up to three years, whereas a house, a store, or anything other than the lands can be rented only for one year. Abu al-Layth makes no distinction, and allows for up to three years' lease. A certain Abu Ali al-Nasafi goes further and states that it is not appropriate to rent the *waqf* property longer than three years; but if the administrator allows it then the contract is valid and binding. Bukhari adds that if this is the case then there is no need for the stratagem

mentioned above. Thus, it seems the author tries to show that there is in fact no unanimity as to the leasing period of *waqf* property; the law should be formulated according to the exigencies of time and place. He only stresses the maintenance of the *waqf* as well as the prevention of malpractice or the loss of the *waqfs*. Thus, the system as expounded by Bukhari seemed to leave the gate open for, or even instigated such later legal Transoxanian practices as *ijaratayn* or *ijara-i muqata'a*.

Mashayikh Changing the Law

If an administrator of a *waqf* accommodates someone in the *waqf* property free of charge, according to Hilal no obligation arises. However, the author of *al-Muhit* says that the later jurists, meaning the *mashayikh*, oblige the lodger to pay 'the standard price (*ajr al-mathal*)', however much it is, in order to save the *waqf* properties from the malpractice of the wrongdoers. Similarly when a person lives in the *waqf* property without the permission of the administrator, or rents it for a price substantially less than the standard price, he is obliged to pay the standard price however much it is. Thus, the *fatwa* is given in accordance with the view of the later jurists.

Mashayikh Using Analogies

Can an administrator lease the *waqf* property to himself, his sons, or his slaves? The rule in the level of the first zone jurists is not clear; Khassaf says that according to the principle of Abu Hanifa the administrator has no right to do this. According to Abu Yusuf, he can lease it to his son or his father but not to himself or his slaves. This disagreement seems to be inferential, rather than actual, i.e. it is inferred by way of analogy to the precedents already known in *zahir al-riwaya*. The jurists of the second zone, therefore, disagree, giving rise to three

views. The first precedent upon which the analogy is based is that of the authorized representative (*wakil*), who principally has no right to lease the client's property to himself. So the administrator, too, has no right to lease *waqf* property to himself or his immediate relatives. Others argue that an administrator of a *waqf* is like the guardian (*wasi*), who, according to Abu Hanifa, has a right to lease to himself the property of the one who is in his custody, if it is to the sole benefit of the latter. Yet a third view makes an analogy with the entrepreneur (*mudarib*) in venture capital, who has a general and unrestricted right to dispose of the property of partnership, including leasing to himself or his sons. A *mudarib*'s right was recognized by all. Hence there is no disagreement among the first zone jurists. Consequently according to this last analogy an administrator of a *waqf* has a free hand in the disposition of the *waqf* property. However, some of the *mashayikh* oppose the idea of comparing the administrator of a *waqf* with the *mudarib* and *wasi* on the grounds that the authority of these two is general whereas the former's is not, for he is bound to act according to the will of the founder of a *waqf*. Thus this matter shows that since there is no clear law related from the first-zone jurists, the *mashayikh* acted independently finding a legal solution through analogical reasoning. Guardianship, agency and venture-capital partnership were already established institutions of law, giving a chance for the contemporary jurists to draw analogies. It should however be noted that the precedents which induced analogical reasoning were solved by the founding figures of the first zone. This is because once an opinion finds a basis in legal tradition it can be taken as a ground for analogy; otherwise it is not a requirement that the case that forms the ground for an analogy must have been pronounced by the jurists of the first zone. A final note regarding this example is that, as already mentioned above, Abu Hanifa usually appears in a *waqf* discussion due to the fact that his views outside *waqf* law constitute a precedent with which the *waqf* case can be compared. It is not the case that he himself is

engaged in the *waqf* discussion, as he is against the idea of *waqf* as defined by the later Hanafi legal thought.

Mashayikh Employing Istihsan: Waqf as a Corporate Personality?

Islamic law does not principally recognize a fictive legal capacity, i.e. only real persons can undertake obligations. This poses problems especially for the institution of a *waqf*, which exists independent of a real owner. For example, when a *waqf* needs repairs and the administrator has no means to pay for it, can he borrow from others on behalf of the *waqf*, which will be repaid by its yields? According to Hilal, he cannot borrow, for a *waqf* has no ground or capacity (*dhimma*) to take on obligations. Although the poor and needy, who are the beneficiaries of a *waqf*, have the personal capacity, they are too many to be prosecuted in case of litigation. However, in a *fatwa* related from the *Fatawa Abu al-Layth*, the jurist Abu Ja'far commented on the view of Hilal as follows: This is true in analogy (*qiyas*), but when the necessity arises we leave aside the analogy. For example, if all the crops of a *waqf* land are eaten by grasshoppers and the administrator needs the crops as expenditure or the ruler demands from him the levy of the land, he has the right to borrow, the reason being that an analogy can be set aside when there is necessity. Nevertheless, he is better off doing that with the permission of a judge, as the latter has the general power over people. This is more effective in eliminating doubt regarding the establishment of obligation.

The author of *al-Muhit* commenting on this view states that as far as the poor beneficiaries of the *waqf* are concerned this is understandable, for, the administrator borrows what the beneficiaries need for their expenses. Although they are not the owners of the *waqf* property, they are still the owners of its yield, so the administrator therefore can borrow so that he repays the debt from the yields.

However, as far as the tax-levy is concerned Abu Ja'far's statement is problematic, because if there are crops on the land, he can pay the tax from them; but if there is nothing, then he cannot borrow to pay: he will later repay it from the yields of the *waqf*. The *waqf* yields are the property of the poor and needy and the essence of *waqf* property belongs to nobody. Having said that, in order to eliminate the troublesome point that he thinks exists within the words of Abu Ja'far the author of *al-Muhit* imagines a fictive case through which he validates Abu Ja'far's *fatwa*, 'If the case is understood in a certain way, his logic would be correct; this is the case where the administrator is unable to deliver the tax-levy imposed, though there are crops on the land.' In other words, if this is the case then he can borrow so that he repays from the yield of the *waqf*. The author of *al-Muhit* then adds two more *fatwas*, one from Sadr al-Shahid, who endorses Abu Ja'far's position, but who makes the permission of a judge a requirement (in Abu Ja'far's case it was only a recommendation). The other *fatwa* is from the *Waqi'at* of al-Natifi who states that if a *qadi* permits it, there is no disagreement (probably among the *mashayikh*, he means) that he has the right to borrow. If, however, he borrows without the permission of the *qadi* then there is reason for dispute. Although no corporate personality is accepted in theory, the *fatwas* in fact accepted a possibility of *waqf*'s impersonal capacity to take obligations. It is important to note that Abu Ja'far, who seemed to be the first scholar to introduce this *fatwa*, resorted to *istihsan* in this case.

Mashayikh Extending the Principles to New Cases, Again through Qiyas and Istihsan

In the case of an endower or one of his relatives becoming poor after he endowed his property, the jurists distinguish the founder of a *waqf* from his relatives. As to the relatives of the founder who later

become poor, according to all *mashayikh* they are preferably entitled to benefit from the endowment, but the administrator of the *waqf* has the right to refuse them. Regarding the founder himself, Hilal states that he will never be a beneficiary of his own endowment. It should be recalled that in principle counting oneself among the beneficiaries of one's endowment invalidates a *waqf* according to Hilal. Abu Yusuf's view is ambiguous in this respect, but a stipulation that the founder will benefit from his endowment is at least regarded as acceptable in his view. Nevertheless, the *mashayikh* re-ask the question of whether or not he can be one of the beneficiaries of his own endowment if he becomes poor. Two jurists of the Balkh *Mashayikh* disagreed on this matter; Abu Bakr al-Iskaf states that he cannot benefit from his own endowment, because this is nothing but counting himself as a beneficiary of his own endowment. Abu Bakr, however, is not in principle against the idea of endowing to oneself. He states that there is a distinction between this case where the endower counts himself among the beneficiaries at the time of founding the *waqf* and previous cases where the endower, upon becoming poor, is included among the beneficiaries of his own endowment. He thinks that in the former case, since the founder is the owner of the property at the time of founding the *waqf*, he has the right to retain some part of his property to himself. In the latter case however he is no longer the owner, so he can only benefit from it if we assume him to be the beneficiary of his own charity, which is exactly what is prohibited. Another Balkhi scholar, Abu Ja'far al-Hinduwni, on the other hand, allows the founder to be a beneficiary of his own endowment if he becomes poor, simply because he is one of the poor and needy to whom the *waqf* is endowed. The ambiguity in designating himself as the beneficiary at the beginning of *waqf* formation is not present after his link to his property is cut. Abu Ja'far finds an analogical case taken from *al-Siyar al-Kabir* of Shaibani which read as follows:

If the commander declares at the beginning of a war saying that ‘if I kill this enemy his spoil becomes mine’, then he kills him, he will not be entitled to the spoil, because his statement is formulated in a wrong way. However, if he phrases it as ‘whoever kills an enemy his spoils belong to him’, then the commander himself kills an enemy, he is entitled to get the spoil. A wrong formulation at the beginning disallows entitlement, while an initial declaration intended for others can be a ground for an entitlement at the end.

Headings Introduced by *Mashayikh*

In *al-Muhit* we find a few headings apparently introduced by the *mashayikh*, as there are no quotations under these headings from the first zone of the jurists, i.e. under these headings he only cites the views or *fatwas* of the *mashayikh*. Out of twenty-six headings, almost the whole of the following six chapters was composed by the views or *fatwas* related not from the first zone but from the second zone of the jurists:

18th chapter: A group of beneficiaries all or a few of whom lose the specification/separate qualification stipulated by the founder.

19th chapter: Issues related to court records.

20th chapter: Mosques.

21th chapter: Issues related to caravanserais, cemeteries, khans, basins, roads and irrigation.

22th chapter: Issues related to trees in cemeteries and other *waqf* lands.

23th chapter: *Waqfs* no longer needed by the specified beneficiaries or the beneficiaries become extinct, and using the yields for other causes (Radtke B, 1986, p. 536-567).

The *Fatawa* Literature as a Source for Social History

In *al-Muhit* a number of *waqf* deeds were preserved. M. Khadr already published with French translations two of the *waqf* deeds of the Qarakhanid ruler Ibrahim Tamghaç Bughra Khan, one for a *madrassa* and the other for a hospital, both dating 458/1066. These deeds contain important historical records; however, this is not usual in *fiqh* and *fatwa* works as they usually do not name the parties involved in a case, nor specify actual historical settings. Despite this fact, *al-Muhit*-like *fatwa* books can be described as a kind of historical source, as they include many *fatwas* asked for not at some remote time in history in Iraq, but in contemporary Transoxania. For example, there is an interesting *fatwa* in *al-Muhit*, related from the *Fatawa* of Abul al-Layth (d. 378/989), which is about a *madrassa*. The *fatwa* reads as follows: ‘If a man endows his land to the followers of a certain *madrassa* and does not name the beneficiaries as the students, this is to be understood as students, as this is what is conventionally meant in this situation. So no one other than students can live in this *madrassa*. This *fatwa* does not name the city or the *madrassa*, nor does it give any idea which *madrassa* is at stake, but it still shows that in the Samanid territory, the idea of a *madrassa* as a separate educational institution exists as early as the second half of the tenth century, almost a century before the *Nizamiya Madrasa* of Baghdad (Reşat Genç, 1981, p. 370).

Conclusion

It is clear that *al-Muhit* is a part of a special genre of legal writing that constitutes a bridge between the original Hanafi legal doctrine and its interpretation through *fatawa* literature. It is neither a *fatwa* book nor a textbook; it is even different from the voluminous *mabsut* books that emphasize, along with other things, the justification of law through scripture. On the contrary, the main concern of this genre is to explore

the law in *fatwas* and relate it to established legal doctrine, hence legal change.

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