



## Validity of Initial Endowment (Waqf) for the Fetus

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### Introduction

Regarding the fetus's eligibility to benefit from an endowment (waqf) and to be considered the beneficiary of a waqf (mawquf 'alayh), the legislator has not explicitly provided a specific rule and has merely stated the validity of waqf for an absent person when it is dependent on an existing beneficiary. The present study aims to examine the legal status of an initial waqf made directly for a fetus and seeks to answer the fundamental question of whether a fetus can independently and initially become a beneficiary of waqf or not.

Given the silence and ambiguity of the legislator in this regard, Article 167 of the Constitution requires reference to reliable Islamic sources and authoritative juristic opinions in order to determine the applicable rule and investigate the views of jurists regarding the validity or invalidity of an initial waqf for a fetus. Among Imami jurists, there are two different perspectives concerning whether a fetus can initially become the beneficiary of a waqf. The majority of jurists consider an initial waqf for a fetus invalid and regard a non-dependent waqf in favor of a fetus as void. Conversely, some jurists have challenged this view and

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attempted to establish the validity of an initial waqf for a fetus by rejecting the arguments presented by the opposing group.

### **Research Background**

Various comprehensive works have been written concerning the analysis of waqf contracts and their elements. In 1378 AH, Nader Riahi Samani published a comprehensive book entitled "*Waqf and the Evolution of Legislation Regarding Endowments.*" Khalil Qebleh-ye Khoei also discussed, to some extent, the issue of waqf for a fetus in his book "*Contemporary Issues*" published in 1393 AH by Samt Publications.

More specifically, an article entitled "*An Examination of the Jurisprudential and Legal Foundations of Waqf for a Fetus in Islamic Schools of Law and Civil Law*" by Reza Rahbar was published in Issue 20 of the Journal of Jurisprudence, Law and Criminal Sciences. Although its title is similar to the present research, it differs significantly in depth and scope because it mainly focuses on Sunni jurists' views regarding waqf for a fetus and does not provide extensive analysis or diverse arguments.

Furthermore, Mohammad Asadi and colleagues published an article entitled "*Civil Rights of the Fetus in the Family System*" in the fourth issue of the Journal of Jurisprudential-Legal Studies of Women and Family in 1398. Due to the general nature of the topic, that research examined both financial and non-financial rights of the fetus collectively and briefly addressed the fetus's right to benefit from waqf.

The distinction between previous studies and the present research lies in the fact that this study specifically examines the issue of initial waqf for a fetus and analyzes its jurisprudential foundations in order to determine its legal status without relying



on Article 167 of the Constitution. Therefore, this research represents an innovative contribution in this field.

### **Research Methodology**

This study employs a descriptive-analytical and inferential method. Data have been collected through library research, and the gathered information has been analyzed in order to answer the main research question: whether an initial waqf for a fetus is valid or invalid.

### **Research Findings**

As stated, the Civil Code does not contain an explicit ruling regarding an initial waqf for a fetus and has generally limited itself to regulating waqf for an absent person dependent on an existing beneficiary.

A large number of Shiite and Sunni jurists consider an initial waqf for a fetus invalid, relying on arguments such as:

- The fetus being considered non-existent in legal terms;
- Lack of legal capacity of the fetus;
- The impossibility of obtaining acceptance from the fetus as the beneficiary;
- The existence of scholarly consensus.

In contrast, another group of jurists has supported the validity of such waqf based on arguments including:

- The fetus's general capacity to acquire ownership;
- The proprietary nature of the waqf contract;
- The possibility of acceptance by the guardian or ruler on behalf of the fetus;
- The absence of a genuine consensus regarding invalidity.

Scholars such as Ibn Idris al-Hilli, Muhaqqiq al-Sabzawari, Sayyid Ali Tabatabai al-Haeri, Muhaqqiq al-Hilli, Sahib Jawahir, Allamah al-Hilli, Sheikh Tusi, Shahid al-Thani, and



Ibn Zuhra are among the supporters of the invalidity of initial waqf for a fetus.

This position has also been emphasized by contemporary authorities such as Imam Khomeini, Ayatollah Makarem Shirazi, and Ayatollah Khoei.

Among Sunni jurists, Shafi'i and Hanbali scholars generally support this view. Conversely, scholars such as Sayyid Kazim Tabatabai Yazdi (author of *Al-'Urwah al-Wuthqa*) and Ayatollah Sistani believe that an initial waqf for a fetus is valid and that there is no sufficient evidence to invalidate it. Among Sunni schools, Maliki jurists follow this approach.

Some contemporary legal scholars, including Dr. Emami, have also permitted waqf for a fetus, even in its initial form, based on the general wording of "civil rights" in Article 957 of the Civil Code.

### **Conclusion**

The legislator has not explicitly determined the legal status of initial waqf for a fetus. Therefore, due to legislative silence and based on Article 167 of the Constitution, reference to Islamic sources and authoritative jurisprudential opinions becomes necessary.

Reviewing the opinions of jurists and religious authorities reveals two opposing approaches. A group considers initial waqf for a fetus invalid, while another group considers it valid and effective. Supporters of validity attempt to weaken the arguments of invalidity and maintain that if these arguments are rejected, there remains no basis for declaring such waqf void.

This view has also been accepted by some contemporary legal scholars, and the apparent meaning of Article 957 of the Civil Code regarding "civil rights" may support such an interpretation.



However, considering the presented arguments, it can be concluded that the majority of jurists consider initial waqf for a fetus invalid based on reasons such as:

- The fetus's inability to independently acquire ownership;
- Lack of legal capacity;
- Inability to provide acceptance as a beneficiary;
- Juristic consensus.

The validity of making a testamentary disposition for a fetus cannot invalidate this conclusion because such comparison is legally inappropriate. Although the fetus is considered an existing entity in some respects, it cannot become an initial beneficiary of waqf due to the absence of the required legal capacity.

Therefore, even assuming that the fetus is considered existent, the issue of legal capacity remains decisive. Accordingly, it cannot be regarded as a valid initial beneficiary of waqf.

Although an examination of legal provisions suggests that the legislator may have intended to follow the majority jurisprudential opinion, due to the absence of an explicit rule, it is recommended that a separate legal provision be adopted specifically addressing initial waqf for a fetus rather than relying on Article 69 of the Civil Code.

### **Keywords**

Legal Capacity; Fetus; Civil Rights; Embryo; Beneficiary of Waqf; Endower.