



A Comparative Inspection of Pious Foundation in Iran and Germany Law

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Abstract

Pious foundation in Iran and Germany has lots of similarities. In Germany, foundations have the very same function as endowment has in Iran. Conceptually, endowment refers to a property which is designated for a specific purpose by the proprietor in a way that the main property must be preserved and its benefit must be spent. In both countries it is approved that endowment has its own autonomous legal personality and it can possess its own assets. In Germany, establishing a foundation with a legal personality, requires recognition by the competent public authority; whereas in Iran, based on Shia jurisprudence, a property is enough to be endowed by the proprietor for endowment so that the legal personality has been created. In Germany, any alteration or reformation in endowment is accomplished by the recognition of the competent public authority while in Iran, it is law by which the cases of alteration or reformation in endowment is determined. The essential difference between the management system of endowment in these two countries is that in Iran there is a centralized and confined construction by which the issues related to endowment is assigned to The Organization of Endowment and Charitable Affairs, whereas in Germany, this confinement and centralization cannot be seen because the supervision on pious foundations and charities is accomplished by the supervisory authorities of other organizations.

Keywords: Endowment; Foundation; Cease To Exist; Legal Personality

Introduction

Pious foundation in Iran is in accordance with Shia jurisprudence. In jurisprudence, endowment has a definition and specific conditions by which it is distinguished from other charitable affairs such as donation or giving possession of your own assets to person/s or public works. Accordingly, the canon and financial conditions of a property which is designated as an endowment for good affairs are totally different from the ones of a property which is designated to the same good affair but under another title. Although in most non-Islamic countries, charitable affairs have their own significant position and many public works are being carried out based on people's aids but there isn't an organization named as The Organization of Endowment and Charitable Affairs such as the one in Iran and other Islamic countries. However, similar organizations such as charitable foundations and nonprofit public-interest communities

have the same function in a different manner. Among non-Islamic countries, Federal Republic of Germany is one of the very few countries that in addition to communities and charitable organizations, has a foundation like The Organization of Endowment called Foundation (Stiftung). In the following, we are going to inspect comparatively the pious foundation in both countries, i.e. Iran and Germany considering their concepts, rules and management systems.

1. The concept and definition of endowment in Iran and Germany's law

Sections 80 to 88 of the German civil code (BGB) indicate the rules related to endowment. Although there is no explicit definition of the concept of endowment in these sections, but in Germany it means endowing personal assets voluntarily for spending its benefit on social or charitable affairs by a benefactor. Governing the endowed property, the benefactor establishes an autonomous foundation which is called the Organization of Endowment (Strachwitz, 2002).

In Iran civil code, there is also a distinguished section designated for the rules related to endowment which contains 37 articles (from 55 to 91). In this law, endowment is defined as: "To make an asset non-transferable and endow its benefit at charitable purposes." This definition has been exactly derived from Shia resources (Tusi, 1967, 1:286).

The purpose of an endowment is not only to be designated for charitable affairs or public utility but "it is right to endow at children, relatives, servants and others like these". There is a specific financial system in Germany based on which, the proprietor can endow his/her property at a family for a limited period of time or until its extinction. In this system, sometimes all members of the family are considered to be endowed at, and at times, some of them and even sometimes the sons are in the first priority and daughters are in the second priority. Under this circumstance, the endowment is supposed not to be sold or given to anyone and the beneficiary is only benefited from its benefit and transferring this right to the beneficiary devisees, apart from the rules governing heritage, has its own peculiar rules. (Strachwitz, 2002)

Therefore, it is accepted in Germany law that a set of properties might become an autonomous asset and starts its own juridical life. German jurists are simply approved that for establishing a socially beneficial foundation it is not necessary to transfer the property of the founder to the current beneficiary. The endowment or endowed property is not considered the assets of a particular person or legal personality but it is an autonomous foundation without a/some person/s being the proprietor/s. (Strachwitz, 2002)

In Iran jurisprudence and law, after an endowment has been taken place, the endowed property is out of benefactor's ownership and also without being others' properties, obtains its own autonomous legal personality. (The law of constitution and latitudes of the Organization of Endowment, article 3). Because of this reason, the article 61 of Iran civil code indicates that after the endowment takes place, the endower is not permitted to revoke the endowment nor to make any alteration in it.

Based on what has been said so far, the concept of endowment in German and Iranian law are quite close together; because both of them insist on the authenticity of properties and that these properties don't belong to anyone nor they cannot be owned by anyone. In Iran's law, of course, the endowed property itself becomes non-transformable, i.e. the benefactor cannot transfer it to anyone else nor make any kind of alteration in it, nor expel any of the beneficiaries afterwards, nor even make any new beneficiaries, nor appoint anyone to share with the beneficiaries, nor if there is no administrator specified, he/she appoints one afterwards or he/she interferes as the administrator.

But in Germany law, the set of endowed properties is a property in its juridical sense; i.e. being capable of obtaining financial rights and duties which are always changing, increasing or decreasing. Accordingly, the pious foundation has a dynamic life and a possibility of development.

2. The Rules Governing Endowment in Iran and Germany

As it has been said, foundations have many similarities to the pious foundation in Iran. Comparing the rules governing endowment in the juridical system of both countries help we know their similarities and differences better.

2-1. Establishment

According to section 80 of German civil code, the creation of a foundation with legal personality requires an endowment transaction and recognition of the foundation by the competent public authority of the Land in which the foundation is. A foundation's constitution (Stiftungsgeschäft) is to be recognized by authorities as having legal requirements such as the name of foundation, the seat of the foundation, the assets of the foundation, the composition of the foundation board, long-term, sustained and guaranteed purposes and does not endanger the common good. (Sections 80 and 81 of German civil code (BGB))

The procedure of recognition of a foundation may take some weeks and at this time, the supervisory organization inspect whether the given draft has followed the legal requirements or it needs more clarification. Although there is no minimum fund for establishing a foundation considered by law, but the authorities by whom the foundations is being supervised, depending on the intended purposes, may require a minimum fund.

In Germany law, foundations can have purposes in favor of the public interest or some private purposes, but the ones with private purposes do not obtain accommodations such as tax exemption. In the Fiscal Code of Germany (Abgabenordnung), tax exemption accrues to three kinds of purposes:

A) Public purposes and utilities such as promotion of knowledge and scientific studies, religions, health system, art and culture, and also promotion, preservation and taking care of historical monuments and so forth.

B) Charitable purposes take place in the form of aiding destitute people. Based on law, destitute is someone who is depended on others' aids. The need might be because of physical, psychological, emotional or financial impairment.

C) Religious purposes: according to clause 54 of the German fiscal code (AO), a foundation pursues religious purposes if its activities are directly in favor of propagation and promotion of a religious community which is a subset and follower of the public law, regardless to personal utilities. Activities like building sanctuary, seminary and managing churches' assets are included in tax exemption.

As it has been declared, creating a legal personality for endowment depends on the government's permission; whereas in Iran law there isn't such a condition and also the property that is endowed by proprietor and is currently possessed by the beneficiary is considered an autonomous foundation. The 56th article of Iran civil code indicates that an endowment takes place through being endowed by the benefactor and being accepted by the beneficiary and if the beneficiary is not limited in number or it is made for the benefit of the public then the acceptance of the judge is required. It has to be paid attention,

of course, that if the benefactor does not hand the substance of the endowment over to the possession of the foundation to which it has been bequeathed, the endowment is not yet complete. (Article 59)

In the event of the beneficiaries being limited in number, they themselves shall take delivery and if the beneficiaries are unlimited or the bequest is to be devoted to the public use, either the administrator or the judge shall take delivery. (Article 62)

This canon can be seen in Shia jurisprudence; the only difference is that most of jurists do not condition the acceptance of the judge for the endowment to be taken place, in case of its designation for public use (Ameli, 1990, 3:166; Khomeini, 2004, 3:111). Accordingly, there is no legal procedure, even the smallest ones, for such an endowment to be taken place.

It is noteworthy that accomplishing charitable and public-interest affairs in Iran does not only take place through endowment, but charities and foundations in favor of public interest play a vitally important role in accomplishing charitable affairs. The same legal procedures that is there in establishing foundations in Germany law and the proceeding applied supervision, can be seen in the law related to establishment, ceasing to exist and administration of charitable non-governmental foundations and the ones that work in this frame can be submitted to tax exemption.

Although these foundations are not judicially considered endowment but there is the possibility that some people endow their properties to them.

2-2. Alteration and modification

According to article 81 of BGB (German civil code), an endowment must have a charter containing the name, seat, objects, assets and composition of the foundation board. If the endowment transaction does not satisfy, at least, three of these requirements, there must have been some necessary modifications. Section 83 of German civil law indicates that under this circumstance, there must be a new charter or before its recognition by the competent public authority, additions shall be made. However, the public authority might make some alterations in the charter as much as it necessitates, albeit, without making alterations in the essential intended purposes; of course, all members of the board must be apprised. Based on section 87, moreover, if the objects of the foundation have become impossible to fulfill, or if they endanger the common good, the competent public authority may give the foundation another intended purpose or terminate it. When the objects are altered, the intention of the founder should be taken into account, and in particular, it should be ensured that the income of the foundation assets is maintained for the group of persons that it was meant to benefit, as intended by the founder (section 87 of BGB).

In Shia jurisprudence and Iran law, making alteration in an endowment is much more difficult. It is typically believed that, essentially, an endowment cannot be altered under any possible circumstances at all. Because of that, at the end of most endowments' documents, this verse of The Holy Quran is written that: "Then whoever changes the bequest after hearing it, the sin shall be on those who make the change" (Sura Baqara, Verse 181).

In Iran's law when the endowment takes place in the proper form, no one, even the endower, is not permitted to make any alterations in it nor appoint anyone to share with the beneficiaries, nor if in the text of agreement, the administrator is not specified, may he appoint an administrator (Iran civil code, article 61).

As it has been represented, in Germany, the competent authorities are able to make alterations in the purpose of endowment in case it is against the public utility, but in Iran, only if an endowment is for an unlawful purpose, it is null and void (Iran civil code, article 66). And basically, there would not be the possibility of making any alterations.

Moreover, the validity of an endowment which may result to the detriment of the endower's creditors, is dependent on the permission of the creditors (Iran civil code, article 65).

However, there are some circumstances in Shia jurisprudence and Iran law under which making alterations in the endowment is permitted. In article 8 of the law of constitution and latitudes of The Organization of Endowment, this organization is allowed to spend the income of the endowments on the closest cases to the endower's intention, in case it is impossible for the income to be spent on the endower's exact opinion. Moreover, if the income of the endowed property is more than the required amount, it may be spent on the closest case to the endower's intention and if there wasn't any close case, it ought to be spent on other charitable affairs. Also in cases where the administrator is shown to be dishonest to the endowment, the judge can co-opt an administration (Iran civil code, article 79). If the administrator's trespass or wastage toward the endowed property itself or its benefits, or even her negligence or nonfeasance in the duties which had been entrusted, is proved, he/she will be dethroned by the court's verdict.

2-3. Ceasing to exist of an endowment

According to section 81 of German civil code, until the foundation is recognized as having legal personality, the founder has a right to revoke the endowment. If an application has been made for recognition by the competent public authority, the revocation may be declared only to that public authority. The heir of the founder or the founder himself is not entitled to revoke the endowment if the founder made the application to the competent public authority or if the endowment was recorded in a notary.

As it has been said, it is indicated in section 87 of the very same law that if the objects of the foundation have become impossible to fulfill, or if they endanger the common good, the competent public authority may give the foundation another intended purpose or terminate it, however, the substance of the endowment cannot be sold out or bestowed and it cannot be inherited (Strachwitz, 2002).

The local tax organization is the supervisor of charitable organizations including foundations. For recording and obtaining the title of charity, foundations need the acceptance of the local tax organizations. Moreover, after recording, the local tax organization supervises the activities of foundations annually, and in case of any violation of intended purposes mentioned in the charter, the charity title is divested and the previous tax would be caught (<http://thechanger.org>).

According to section 88 of BGB, when the foundation ceases to exist, the property devolves in the persons specified in the constitution. If no persons entitled, the property devolves on the treasury of the Land in which the foundation had its seat, or another person entitled to receive under the law of this Land.

On the contrary to German law system in which the recognition of ceasing to exist or alteration of the endowment is assigned to the competent public authority, in Iran law and Shia jurisprudence the circumstances under which ceasing to exist of the endowment is permitted are determined. Opposite to German law in which temporary endowment is simply approved, and accordingly, the proprietor endows his/her property for a limited duration of time (Strachwitz, 2002), in Iran, there is no such an endowment and it seems the temporary endowment is not officially recognized as being juridical. This is while Shia jurisprudents do not have a unified law on this issue and after disputing it subtly and delicately, each has accepted a different idea.

Most of the jurisprudents assume that being permanent is one of the very conditions of the validity of an endowment (Najfi, 1986, 176), but a few of them, based on a narration which says: "the endowment must be treated as the endower has conditioned it" (Koleini, 1987, 7:37) claimed that if the

endower conditions it as being temporal, his intention must be taken into account and it cannot be permanent (Tabatabaei, 1951, 200).

Albeit, if the endower announces his/her endowment as being conditional, such an endowment has so many proponents among jurists; For example, he/she conditions the endowment at being frugal with maintenance and preservation of the endowed property. In this case, the validity of endowment goes on so far as its maintenance and preservation would be frugal and afterwards, the property would be sold out and the obtained wealth would be spent on charitable affairs, too. Sharif Mortaza (965-1044 AD) says: "one of the specifications of Shia Jurisprudence is that if an asset is endowed, the endower can condition if it was needed, it would be able to be sold and the money can be used" (Alam al Huda, 1979, 104). Most of jurists have approved this idea but there isn't any approval with such a kind of endowment in Iran law.

Except the mentioned issue that ceasing to exist of the endowment depends on the proprietor's will, some of endowments are inadvertently and unintentionally temporal, without the endower's will; For instance, the endower endows a property at one of his children and conditions the continuation of the endowment afterwards to an illegal utilization in which case, practically, the endowment would have its very validity so far as to the end of his child's life and the endowment would be invalidated after the child's death.

Iran law has determined some circumstances under which ceasing to exist of the endowment is permitted; which are related to external situations out of the endower's control; i.e. however the property is endowed permanently, but the legislator, considering the occurrence of some circumstances, cease to exist of the endowment. According to articles 88 and 89 of Iran civil code, whenever part of an estate becomes damaged or liable to damage in such a way that exploitation is rendered impossible, and no one can be found to undertake it, that portion shall be sold. It is also declared in article 349 of Iran civil code that if there is an argument among the beneficiaries because of the endowed property in such a way that there is a fear of discord, demolition of the endowed property or even bloodshed, selling out the property is permitted.

Shia jurists have mentioned other conditions of permission of selling out the endowed property or ceasing to exist of the endowment in their books but most of these conditions are seriously controversial among others. For instance, Sharif Morteza believes that if the endowment is specified, and the beneficiaries are in a strongly severe need to the money of the endowed asset, selling out the endowed property and sharing it among the beneficiaries is permitted (Alam al Huda, 1979, 104). Most of other jurists haven't approved this canon and have considered it against the very basic principles of endowment.

3. The System of Governing Endowment

Looking at rules and administrative constitution of Germany, it can be concluded that this country does not have a centralized and unified structure about endowment; but rules and supervision on pious foundations and charitable affairs through the organizations designated for supervising other organizations is mostly because of controlling the observance of intended purposes mentioned in the charter. Some of the players who play a major role related to foundations are:

a) Local courts: these courts are one of the subsets of judicature which are in each area. One of the duties of these courts is supervising the constitution of organizations and approving them judicially which in case of their approval, it will end up in recording the foundation. The importance of these courts is that

pious foundations need to be recorded by them and also other public foundations aren't considered as an exception to this rule (<http://www.auswaertigesamt.de>).

b) Federal Ministry of Financial Affairs: This ministry is responsible for accomplishing all aspects of financial and tax policy of the country. All charitable organizations, including foundations, in order to be recorded and achieve the title of charity, need to be approved by the local tax office which is a subset of The Ministry of Financial Affairs. After being recorded, the local tax office supervises the activities of that organization annually and in case of any violation of the intended purposes in the constitution, the foundation will be untitled from being a charity and the previous years' tax will be caught.

Charitable organizations, in addition to the advantages that all non-governmental organizations can possess, have the possibility of obtaining a rebate in tax for the proceeding endowers who are trying to help the endowment after it has been taken place. Because of this rule, the beneficent would have a stronger tendency toward aiding these organizations.

The procedure of recordation a charitable organization is as it follows:

First, the constitution must be subtly and delicately formed and all the activities of the foundation must be noted. Then, it must be approved by the local tax office and the constitution must be notarized. Finally, the constitution and other related documents will be sent off to the local court and the foundation will be recorded and it may obtain a recordation number (<https://en.wikipedia.org>).

c) German Central Institute for Social Issues (DZI): This institute has a supervisory role on charitable organizations and on the other hand, has a mediatory and simplifying role by introducing the preponderant organizations to the beneficent. Constitutionally, this institute considered a center of collecting and researching about social issues related to jobs and more specifically, social welfare in jobs (<http://www.efc.be>).

d) The Association of German Foundations (Stiftungen): This nonprofit association is a simplifier for German foundations (<https://www.gls.de>). This association has assigned itself to aid German foundations efficiently in achievement of the intended purposes and activities. It includes efforts for improving the general situation of the law related to foundations and their tax rules and also providing a friendly atmosphere in foundations. Moreover, it practically influences the procedure of governmental decision making through keeping in touch with public authorities and proposing them with novel advices.

In Europe, this association, cooperates with other national associations of foundations and also the European Foundation Center (EFC). Constitutionally, the key purpose of this association is to support nonprofit foundations and public associations and in order to do this it has put some activities such as promoting research programs, technical education, international communication programs, consulting foundations and so on, on its agenda (<https://www.gls.de>).

Iran legislator, opposite to Germany, has established an organization for running the affairs related to endowments and has set some rules for its constitution and latitude.

Based on what has been published in the website of The Organization of Endowment and Charitable Affairs, this organization is responsible for rehabilitation and administration of endowments and other issues related to charitable affairs and public utility all across the country and also

administration and supervision on religious places, mosques, promotion and propagation of Islamic doctrines and beneficence. The Organization of Endowment also pursues the intended purposes mentioned above through its headquarters and offices in different provinces and cities. Constitutionally, it is related to the Ministry of Culture and Islamic Guidance.

According to article 1 of the law of constitution and latitude of The Organization of Endowment and Charitable Affairs, administrating the affairs related to a public and nonrestrictive endowment without any administrator and also a private and restrictive endowment is due to this organization's interest. It can determine a person or a group of people to whom it fully trust as the board of administration to administrate the endowment. (Article 5)

Based on article 14 of the very same law, investigation for collecting and spending benefits of endowments, issuing quittance, comparing the expenses with the constitution of the endowment, recognition of administration, supervisor and beneficiary is on Inspection Branch of the Organization; unless the endowment is with specified administration and in case there isn't any fear of his/her abuse or wastage.

The Organization's Offices, moreover, are bound to accomplish recording and updating the comprehensive information of the endowments such as the complete characteristics of the endowment, the endowed estates, the currently possessor/s, the intentions of the endower/s, the way the benefit is being spent and financial events of the endowment, in a bank which is called the comprehensive information bank of the endowments. (Article 24 of the same law)

Based on article 48, the only foundations that are able to use tax exemption which is noted in the direct tax law, are ones on which the Organization is supervising.

Summary and Conclusion

Although there are some differences in law and legal structure of Iran and Germany, but the Pious Foundation in both countries are much alike. The foundations in Germany have the same function as the endowment has in Iran. Endowment in both countries, conceptually, is used for a property which is designated by the proprietor for a specific intention in a way that the property itself must be preserved and its income or benefit must be spent. These intentions are mostly for the benefit of community but it is possible to be for the benefit of one or some particular person/s. It is approved, in both countries that endowment has its own autonomous legal personality and it can have its own assets. In Germany, establishing a foundation with a legal personality requires being recognized by the competent public authority; it is while in Iran it is enough for a property to be endowed by the proprietor to have its own legal personality. This canon is issued from Shia jurisprudent.

In both juridical systems, there are some conditions under which an endowment can be altered or ceased to exist, however, it might be accomplished with more difficulties according to Iran law. In Germany law the alteration or being ceased to exit of an endowment is based on the recognition of the competent public authority, but in Iran it is the law by which the cases of alteration or being ceased to exist are defined and confined. The essential difference between the management systems of both countries is that in Iran there can be seen a centralized and unified structure in which the issues related to endowment is assigned to an organization called The Organization of Endowment and Charitable Affairs and for which there has been considered a constitution and latitude. This is while in Germany, this centralization and unification cannot be seen, but the supervision on foundations and charities is

accomplished by some supervisory foundations of other organizations and it is mostly in order to control the accomplishment of the intended purposes mentioned in the constitution.

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