

Penal Protection of Waqf Real Estate Properties – A Study of Various Crimes

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Abstract:

The waqf (endowment) is considered a means of drawing closer to God Almighty, and its manifestations have expanded to include endowment institutions that have witnessed significant development, which required the Algerian legislator to enact laws regulating the management of these endowment properties and ensuring their protection. This is stipulated in Article 52 of the 1996 constitutional amendment.

The penal protection of endowment properties refers to confronting all acts of infringement that may affect them, whether by third parties or by natural causes, where the monitoring process has been entrusted to the endowment agent. This study aims to delve into the laws enacted by the legislator to protect endowment institutions and properties, and to draw attention to the need to strengthen penalties for perpetrators of crimes against endowments, by listing the various crimes committed against endowment properties, and to reach the necessity of allocating special laws for the protection of endowment real estate properties.

Keywords : Endowment properties; penal protection; crime; criminal policy.

Introduction:

The Islamic waqf is considered a means of drawing closer to God, as endowment properties represent charitable projects and righteous deeds that benefit people in this life, while their owner is rewarded in the hereafter. Therefore, they require an authority to preserve them or an administration to supervise them, manage them, and exploit them in a beneficial manner.

Referring to the period during which the country was colonized, it is clear that there was significant marginalization of the legal systems governing endowments, as endowment rights were ignored and many traditional endowments were dismantled.

This led to the decline of the role of endowments in society and the loss of many endowment properties that were devoted to charitable and social work. Moreover, the absence of clear legislation protecting endowment property contributed to the spread of corruption and the exploitation of these properties, which had negative effects on the social and economic conditions in the country.

Accordingly, after independence, it became necessary to reconsider the legislation related to waqf in order to restore the status of these properties and enhance their role in community development. This required the Algerian legislator to organize laws governing the management of these endowment properties and to ensure their penal protection, following the explicit recognition in Article 52 of the 1996 constitutional amendment of endowment properties and the properties of charitable associations, and the necessity of protecting them by law.

Penal protection of endowment real estate refers to confronting all acts of infringement that may affect them, whether by third parties or by natural causes, with the monitoring process entrusted to the endowment agent in accordance with Article 11 of Executive Decree No. 98/381, which specifies the conditions for managing, administering, and protecting endowment properties.

The importance of this topic lies in studying the policy adopted by the legislator to protect endowment real estate, especially given its positive impact on social development, state financing, preservation, and allocation to legitimate purposes.

This study also aims to delve into the laws enacted by the legislator to protect endowment institutions and real estate properties, and to highlight the need to strengthen penalties against perpetrators of crimes affecting endowments.

In order to study this topic, the following problem is raised: To what extent has the penal policy established to protect endowment properties in Algeria been successful?

This research paper attempts to answer this question by highlighting the role of the Algerian legislator in protecting endowment properties through the examination of the provisions of the Code of Criminal Procedure and other laws related to endowments. To achieve this objective, the paper is divided into two variables: the first entitled the concept of penal protection of endowment real estate property, and the second entitled criminal prevention methods against various forms of infringement on endowment real estate property, by addressing the different crimes affecting such property. This is done by following the analytical and inductive approach.

1. The Concept of Penal Protection of Endowment Real Estate Property

The Algerian legislator has criminalized all acts that violate endowment properties, given their devotional nature and particular importance. Since most disputes relate to endowed real estate, the legislator has provided them with special legal protection based on the provisions of the Penal Code and the Endowment Law.

Penal protection is manifested in special legal procedures aimed at safeguarding waqf assets, granting these properties a distinctive procedural advantage. This means that, in some cases, exceptions to procedural laws may be applied to ensure adequate protection for these properties, emphasizing their importance and vital role in society. Accordingly, it is necessary to address the type of property covered by penal protection, then examine the crime of infringement on real estate property.

1.1. Type of Property Subject to Penal Protection

There are two opinions in this regard. The first holds that the protection intended in Article 386 of the Penal Code applies only to movable property and therefore does not include designated real estate. However, a decision of the Supreme Court issued on 17/10/2000 by the

Misdemeanors and Violations Chamber clarifies that the protection provided in the aforementioned article includes designated real estate that has a temporary nature for a specific purpose.

In contrast to the first view, the second view considers that the protection stipulated in Article 386 includes real estate by allocation, as they are originally movable property and can be removed from their owner. As for immovable property by nature, characterized by its permanence and impossibility of transfer or separation from its location, any infringement upon it falls under the jurisdiction of civil courts and does not fall within the scope of application of the aforementioned article.

This view is based on the interpretation that the Algerian legislator, when drafting Article 386, aimed to fill the legal gap left by Article 350 of the Penal Code, which is limited to criminalizing the misappropriation of movable property, leading to the absence of legal protection for real estate by allocation. Accordingly, this view justifies including such real estate within the scope of penal protection under Article 386 to enhance their legal protection and prevent exploitation of legislative loopholes.

Thus, real estate ownership, according to the provisions of Algerian civil law, includes ownership of the corpus and usufruct rights. This ownership grants its holder three main powers: the right of use, the right of exploitation, and the right of disposal. On the other hand, the Algerian Constitution classifies real estate ownership into three types: private ownership, national ownership, and endowment ownership. Based on this classification, the subject and nature of ownership are determined according to the category to which it belongs. Within the framework of this study, the focus is on national endowment ownership as the type related to the property subject to protection, due to its importance in the legal and social system and its role in promoting the public interest.

Referring to Article 23 of Law No. 90-25 on land orientation, it is clear that the criminal protection provided in the Penal Code extends to include endowment property. This is evident from the interpretation of this article, which confirms that endowment property constitutes a distinct and independent category from public and private ownership. This special classification highlights the unique role of endowment property in the legal system, which necessitates its inclusion under criminal protection to ensure its preservation against any infringement or violation.

The criminal protection stipulated in the Penal Code, which includes various types of property, also encompasses endowment property as an independent category from public and private ownership. According to Article 31 of the Land Orientation Law, endowment property is defined as real estate that its owner has voluntarily dedicated.

By reviewing the legal provisions in the Penal Code related to the protection of real estate of all types, it becomes clear that this protection extends to endowment property, reflecting the legislator's awareness of its importance and distinctive role. Accordingly, it has been subjected to the same criminal regulations established for the protection of real estate, while taking into account its special nature as an independent category of ownership.

1.2. Basis for Criminalizing Infringement on Endowments

The Algerian legislator addressed the crime of infringement on endowments in Law No. 91-10, granting endowment property a clear legal framework and defining its legal status and general rules for its regulation, emphasizing the importance of its protection. Article 36 of this law limits the crime of infringement on endowments to cases of unlawful exploitation of these properties, such as committing acts of fraud, forgery, or concealing documents related to the endowment. This provision highlights the legislator's commitment to preserving the sanctity of endowments and ensuring their protection against any violations.

However, it is noted that the wording of the article is general and does not specify the penalties for the crime of infringement on endowments, but rather refers the sanctions to the provisions of the Penal Code. Upon reviewing the latter, it appears that the penalties prescribed for these crimes are not mentioned under the same descriptions provided in Law No. 91-10, except for the crime of forgery. Other crimes related to infringement on endowments are classified under "abuse of office," which raises issues regarding the clarity and adequacy of the prescribed penalties to ensure the necessary legal protection of endowments and prevent infringements against them.

The crime of infringement on endowment real estate, like other crimes, is based on three essential elements. The legal element is represented by the legal text that defines the act constituting the crime and specifies the penalties for its perpetrator. According to Article 386 of the Algerian Penal Code, anyone who unlawfully seizes real estate belonging to another through stealth or fraud shall be punished by imprisonment ranging from one to five years, in addition to a fine ranging from 2,000 to 20,000 Algerian dinars. The legislator also provided for aggravated penalties in specific cases, increasing the punishment to imprisonment ranging from two to ten years, along with a fine ranging from 10,000 to 30,000 Algerian dinars, if the act is committed at night, through threats of violence, or by aggravated means such as climbing or breaking, or if multiple persons participated in the crime, or if a visible or concealed weapon was used. This legal framework reflects the Algerian legislator's firm intention to combat crimes of infringement on endowment real estate and to ensure their protection through clear and deterrent penalties.

The material element of the crime consists of the conduct that violates the law and forms the basis of the crime, represented in a tangible act committed by the offender, resulting in harm to others, whether directly or indirectly, whether the offender is a principal or an accomplice. Based on the aforementioned article and supported by a Supreme Court decision issued in 1989, the establishment of the crime of infringement on property requires the following elements:

- Seizure of real estate belonging to another: This act must be carried out through the use of force and without the consent of the owner.
- Commission of the act secretly or through fraud: The seizure must occur without the knowledge or consent of the owner, and this condition extends not only to the original owner but also to persons responsible for managing or supervising the endowment property.

Based on the above, the material element of the crime of infringement on endowments consists of two essential components combining the criminal act and its surrounding

circumstances, reflecting the seriousness of this type of crime and the necessity of providing legal protection for endowments.

The moral element in the crime of infringement on endowments is represented by criminal intent, meaning the offender's awareness of the elements of the crime and their will to commit it. For this element to be established, the offender must have a clear intention to seize or possess another's property, with knowledge that the property is in the possession of the claimant. The offender must also be capable of bearing criminal responsibility, meaning they possess full will to commit the criminal act. Thus, the moral element is a fundamental factor in determining criminal liability, as it reflects the offender's intent and level of awareness of their actions.

2. Criminal Prevention Methods for Various Types of Infringement on Endowment Real Estate Property

The manifestations of penal protection of endowment real estate property are multiple, whether those stipulated in the Penal Code or the Endowment Law. These manifestations can be classified into two main types: the first type is represented by penal protection targeting endowment documents and contracts. This protection relates to crimes associated with manipulation or forgery of documents and contracts related to endowments, thereby ensuring the preservation of endowments and protecting them from any legal or criminal violations. The second type is represented by penal protection concerning the endowment property itself. This protection includes crimes related to actual infringement on endowment assets, such as encroachment on endowed land or buildings. This protection reflects the legislator's commitment to ensuring the protection and continuity of endowments. In the following, some of these manifestations will be addressed in more detail.

2.1. Penal protection of endowment contracts, documents, and records

Endowment contracts and documents are considered fundamental elements that ensure the safety and security of endowment property. Therefore, the Algerian legislator has been keen to establish specific penal protection for these documents, with the aim of preserving endowment rights and ensuring that they are not subject to any violations. This protection includes several aspects that guarantee the safeguarding of rights associated with endowments.

2.1.a. The crime of forgery

The law strictly punishes any form of forgery in endowment documents, such as drafting forged contracts or altering original documents through unlawful means. These penalties reflect the legal protection of endowments, ensuring that the authority and competence of those responsible for managing endowments are not undermined. Forgery leads to the loss of legal value and credibility of official endowment documents, threatening the stability of the endowment system and exposing it to manipulation.

The legal basis for the crime of forgery in endowment documents is found in Article 36 of the Endowment Law, which imposes legal sanctions on anyone who exploits endowment property in a concealed or fraudulent manner, or conceals or forges endowment contracts or any related documents or records. This provision relies on the Penal Code, which defines criminal acts and

associated penalties, thereby providing a legal framework to protect endowments and ensure the integrity of their documentation.

As for the material element of the crime of forgery, it requires the availability of several essential elements:

- **Subject of forgery:** It is represented in a document containing a false statement regarding a specific fact. In the context of endowments, it includes contracts, documents, or records related to endowment property, and it must be written, whether handwritten or typed.
- **Alteration of truth:** This consists of modifying the facts contained in the document in a false manner. Forgery is established when the truth is altered partially or entirely in the content of contracts, documents, or records. This alteration may also include attributing the document to an entity that did not issue it or to persons who did not sign it, thereby casting doubt on its authenticity.
- **Methods of forgery:** These include the means by which the content of the document is altered, such as modifying texts or manipulating original information. This may involve falsifying signatures, changing dates, or making unlawful alterations to the original content.
- **Damage resulting from forgery:** Damage is the core element of the crime of forgery, as it is established when a right or interest protected by law is harmed. In the absence of such damage, the act may not constitute a crime even if other elements are present. The damage need not be severe; it is sufficient that there is a negative impact on the affected person. This damage may be material, such as financial loss, or moral, such as harm to reputation or honor.
- There is no doubt that focusing on the element of damage reflects the great importance of protecting legal rights and interests, and emphasizes the necessity of an effective legal system to combat forgery and preserve the integrity of documents and contracts, particularly those related to endowments. Based on the above, the material element of the crime of forgery related to endowment real estate property is clearly established, highlighting the need to maintain the authenticity of related documents and contracts to ensure the stability of the endowment system.

From this analysis, it becomes clear that the crime of forgery in endowment documents requires clear material elements, including the alteration of facts in documents related to endowment property, with the necessity of actual damage to the protected interest, whether material or moral.

Forgery in documents is an intentional crime, requiring the offender's will to alter the truth, with knowledge that the alteration concerns a document related to endowment property. For example, if a person requests another to forge a document containing specific data, and the accused records different data, this constitutes forgery. Forgery may also occur when a person records data in a document and attributes it to another entity, including information contrary to the truth.

The emphasis on criminal intent in forgery reflects the importance of awareness and will in committing criminal acts, as criminal intent is a fundamental element in

determining criminal responsibility. This intent contributes to assessing the seriousness of the act and underscores the need to protect legal rights, especially those related to endowment property.

It should be noted that criminal intent is divided into two main types:

- **General intent:** This is the common element present in all crimes, including forgery. It requires that the offender be aware of their actions and have full will and awareness of violating the law. It is sufficient that the offender intends to commit the criminal act without the need for a specific motive.
- **Specific intent:** This type is limited to crimes involving greater seriousness or requiring a particular intention to achieve a specific result. It requires a specific criminal motive, such as harming endowment rights, altering facts related to endowment property for personal gain, or causing harm to others.
- This distinction shows that specific criminal intent increases the seriousness of forgery and reflects the offender's awareness of harming legal rights and interests, particularly those related to endowment property.
- The Algerian legislator has established strict penalties for forgery of official documents, varying according to the offender's status and the nature of the forged document. Legal provisions distinguish between misdemeanors and felonies in this context, reflecting the legislator's intent to punish offenders based on the gravity of the act.
- If the forgery concerns endowment contracts or documents, Articles 214 and 216 of the Algerian Penal Code provide severe penalties. If the offender is a public official, the punishment is life imprisonment. If the offender is an ordinary person, the penalty ranges from 10 to 20 years of imprisonment, along with a fine ranging from 100,000 to 2,000,000 Algerian dinars.
- If the forgery concerns private documents, Article 220 of the Penal Code provides for imprisonment from one to five years and a fine ranging from 20,000 to 100,000 Algerian dinars, in addition to supplementary penalties such as deprivation of certain rights or a ban on residence.
- This distinction reflects the legislator's strict approach to forgery in official endowment documents due to their serious impact, while still ensuring protection for private documents.

2.1.b. The crime of concealment

The crime of concealing endowment contracts, documents, or records is considered a serious threat to society due to its significant negative consequences. Article 36 of the Endowment Law considers any concealed or fraudulent exploitation of endowment property, including concealment or forgery of related documents, a punishable offense under the Penal Code. Like other crimes, concealment requires three elements. The material element consists of hiding documents related to endowment property. It is important to distinguish between concealment under Article 36 of the Endowment Law and Article 387 of the Penal Code. The latter requires that the concealed item originate from a prior crime, whereas concealment related to endowment property concerns documents regardless of their origin.

The moral element consists of intentional conduct aimed at appropriation. The offender must know that the property is linked to a prior crime and must intend to conceal the truth. Without such knowledge and intent, criminal liability does not arise.

According to Articles 387 and 388 of the Penal Code, penalties for concealment vary between ordinary and aggravated forms. The basic penalty includes imprisonment from one to five years and a fine. In aggravated cases, the penalty corresponds to that of the original crime. If the original crime is punishable by death, the concealment penalty becomes life imprisonment, in addition to a fine and possible deprivation of rights.

2.2. Penal protection of endowment real estate property itself

This protection concerns the endowed property directly and includes crimes such as the destruction, damage, or desecration of places of worship, and the exploitation of endowment property through concealed or fraudulent means.

2.2.a. The crime of exploiting endowment property in a concealed or fraudulent manner

Article 36 of the Endowment Law, in conjunction with Article 18, limits the beneficiary's right to the fruits of the property without causing damage. If the property is exploited fraudulently, this constitutes an offense punishable under the Penal Code. Criminal intent consists of the offender's will to commit the act with knowledge of the nature of the property and deliberate concealment or manipulation. The same penalties provided in Article 386 of the Penal Code apply.

2.2.b. The crime of destruction, damage, and desecration of places of worship

Freedom of worship and the protection of places of worship are legally safeguarded. The Algerian legislator criminalizes any harm to such places under Article 08 of the Endowment Law.

The material element consists of acts such as destruction, damage, or desecration. Desecration includes pollution or acts that insult religion. The crime applies to all places of worship, including mosques, churches, and others.

Intent is required, meaning the offender must knowingly and deliberately commit the act. According to Article 160 bis 3 of the Penal Code, the penalties include:

- Imprisonment from one to five years.
- A fine ranging from 20,000 to 100,000 Algerian dinars.

These penalties reflect the legislator's determination to protect religious places and maintain their status in society, ensuring social stability and peaceful coexistence.

Conclusion:

By studying this topic, it can be concluded that the penal protection of endowment real estate property is considered part of the protection established for real estate property in general. It is noted that the Algerian legislator has limited the penal protection of endowment property to Article 386 of the Penal Code, which addresses infringement on real estate property. It is also observed that the legislator has increased the financial fines prescribed for this type of crime related to real estate in general, in order to correspond to their material value. However, it should be noted that the sanctity and value of endowment property exceed that of ordinary real estate property, and therefore cannot be confined solely to financial value.

This study has reached a number of conclusions, the most important of which are:

- The Algerian legislator has focused in Article 386 of the Penal Code on the presence of the offender's intent to dispossess another of their property and appear as the owner, and has considered stealth and fraud as elements of the crime, whereas it would have been more appropriate to consider them as aggravating circumstances.
- It is evident that the legislator has placed the importance of endowment property at the same level as real estate property by not providing for specific and stricter penalties for endowment property that would act as a deterrent.
- The Algerian legislator treats forgery in official documents related to endowment property as a felony, while forgery in private documents is considered a misdemeanor.
- The absence of explicit and clear legal provisions specifically protecting endowment real estate in the Algerian Penal Code.
- The Algerian legislator has not given sufficient attention to the role of endowments in social solidarity and economic aspects.
- The limited legal specification of certain acts that may affect endowment property in all forms of infringement, and the reliance on mentioning them in scattered legal provisions.

Accordingly, the following proposals have been made:

- Adding a provision to Law No. 91-10 related to endowments stating that endowment law has a special legal regime, in order to distinguish it from public and private property.
- It would be preferable to amend Article 386 of the Penal Code by replacing the phrase "owned by another" with "in the possession of another," since possession is the basis for the transfer of ownership.
- Reconsidering the shortcomings related to the legal definition of certain acts that may affect endowment property in all forms of infringement, instead of merely referring to them in scattered legal provisions.

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