

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

# AWQAF

Refereed Biannual Journal Specialized in Waqf and Charitable activities

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AWQAF is based on a conviction that waqf -as a concept and an experience- has a great developmental potential which entitles it to contribute effectively to the Muslim communities and cope with the challenges which confront the Umma. Waqf also reflects the history of Islamic world through its rich experience which embraces the various types of life and helps finding solutions for emerging problems. During the decline of the Umma, Waqf maintained a major part of the heritage of the Islamic civilization and caused it to continue and pass from one generation to another. Nowadays, the Islamic world is witnessing a governmental and popular orientation towards mobilizing its materialistic capacity and investing its genuine cultural components in a spirit of innovative thinking leading to comprehensive developmental models conducive to the values of justice and right.

Based on this conviction, AWQAF comes up with a keen interest to give waqf the actual prestige in terms of thinking at the Arab and Islamic levels. It centers on waqf as a specialty and attracts waqf interested people from all domains and adopts a scientific approach in dealing with waqf and relating it to comprehensive community development. Waqf is originally known to be a voluntary activity which requires AWQAF journal to approach the social domains directly related to community life, along with other relevant social and economic behaviors. This might bring about a controversy resulting from the society-state interaction and a balanced participation aiming to reach a decision touching the future of the community life and the role of NGO's.

### **Objectives of AWQAF:**

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- ❖ Intensifying the discussions on the actual potential of waqf in modern societies through emphasis on its modern instruments.
- ❖ Investing the current waqf projects and transforming them into an intellectual product in order to be exposed to specialists. This is hopefully expected to induce dynamism among researches and establish a link between theory and practice.
- ❖ Promoting reliance on the repertoire of Islamic civilization in terms of civil potential resulting from a deep and inherent tendency towards charitable deeds at the individual's and nation's levels.
- ❖ Strengthening ties between the waqf on the one hand, and voluntary work and NGO's on the other.
- ❖ Linking waqf to the areas of other social activities within an integrated framework to create a well-balanced society.
- ❖ Enriching the Arab library with articles and books on this newly approached topic, i.e. waqf and charitable activities.

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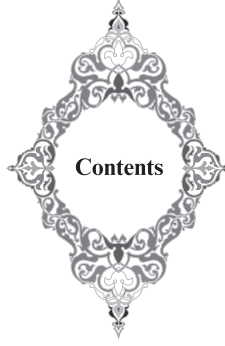
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## **Waqf and the Financial Crisis**

### **What Waqf Can Do to the Financial Crisis**

It sounds rather strange for a reader to find waqf pushed into the financial crisis and its aftermath which swept the world nearly a year ago, but such a feeling will soon vanish once the crisis is related in its cognitive and social perspectives and its direct relation to the forecasts of economists, to those economic studies which focus on the relation between human beings and the basic foundations of those studies. We can approach this crisis through the questions raised about the economic theories in a way that exceeds profits and losses of shares and real estate property to the postulations on which such theories are based. Consequently, we can understand what is going on in the light of the criticisms raised against them.

The twentieth century witnessed many regular financial crises, most remarkable of which, though not the most painful to the global economy, was that which took place in the thirties of the 20th century. Experts claim that what happened a year ago was exceptional if we take into consideration the globalization repercussions in terms of the close connection among the economies of countries and the fast means of communication which left their mark on the behaviour of economists.

The enormity of such recurrent crises may be estimated through the amount of suffering, misery and poverty of the third world despite the mammoth human material potentialities. How can poverty kill millions of Africans at a time their lands are among the most fertile and water resources are abundant? How can unemployment in the Islamic world take this ghastly rate at a time the number of graduates is high and the resources are innumerable. The rampancy of such phenomena highlights the developmental stumbling block which is essentially linked to the ability of an economy, devoid of ethics and principles of social

equity, to cope with the requirements of a just and sustainable development. As early as the 18th century and the emergence of economics as a science, the overdependence on the mechanisms of the market and opening the door for the narrow utilitarianism, the economic theories were connected with quantitative indexes which advocated the stacking of wealth as an aim in itself and escalated the encroachment of private monies to new levels, for example individual ambitions, collective ambitions and put new criteria for the individual income and gross domestic income. This attitude heightened the principle of 'quantity' regardless of the conclusions resulting from the increasing numbers and balances or their evaporation overnight. Thus the recent financial crisis was the result of the absence of a real economic activity based on production, industry and tangible commodities. Economic activities were revolving round gelatinous economy away from people's lives. It related to speculation activities whose main aim was to magnify numbers and rake in legendary profits without exerting any real efforts.

Islam, vis-à-vis to the theory of stacking, is establishing a unique economic theory whose basic principle is 'spending' which occur in 54 Suras of the Holy Quran. Let's consider this verse from Al Baqara Sura which establishes a relation between faith and the belief in the Unseen and spending, "*who believe in the Unseen, and perform the prayer, and expend of that We have provided them*". The Holy Quran goes ahead, elaborating on spending through an educational structural context which aims to promote the human soul and morale as set forth in the Qur'anic verse # 177 which highlights the qualities of good deeds (Berr ), "*It is not piety that you turn your faces to the east and to the west. Truly piety is this: to believe in Allah, and the Last Day, the angels, the Book, and the Prophets, to give of one's substance, however cherished, to kinsmen and orphans, the needy, the traveller, beggars , and to ransom the slave, to perform the prayer, to pay the alms. And they who fulfill their covenant when they have engaged in a covenant, and endure with fortitude misfortune, hardships and peril, these are they who are true in their faith, these are the truly God fearing*".

With this deep vision of spending, with all its psychological and behavioral reaches in human life as a platform, the civilizational institution of waqf came up with this economic and social innovation which has been developing and gaining more experience throughout history. This philosophy of waqf has established a different vision for the economic activity without rejecting or abrogating it. It imbued it with a social and human touch through inserting the personal initiative to help others as part of the economic equations. We are in fact before a ' social and economic safety valve' of the first class introduced by the Islamic civilization and developed by the Moslem Umma which upgraded the economic activity and



shifted it from the narrow utilitarian angle to the joint interests. Thus, we can say that waqf has checked the ghoul of the narrow utilitarianism and the economy which is devoid of all ethics. It is not surprising to see waqf, through its philosophy, reflect those dimensions set forth in the Holy Quran in connection with money and wealth. Islam holds money as a means not as an end. It does not stand against treasuring up wealth but it rejects the idea which makes this wealth an ultimate goal to which one should dedicate his life. Let's consider the Qur'anic verse # 34 from Al Tauba Sura, "*Those who treasure up gold and silver, and do not expend them in the way of Allah - give them the good tidings of a painful chastisement*". Islam fights usury (riba) because it indicates oppression and injustice and undervalues work and effort. On the other hand, Allah the Almighty augments the alms for those who spend and receive at the same time. This is clear in the Qur'anic verse # 276 in Al Baqara Sura, "*Allah blots out usury, but freewill He augments with interest. Allah loves not any guilty ingrate*".

The western academic attitude towards waqf, with its systematic methodology in the social structure, stands witness to the uniqueness of awqaf. Attempts are exerted to recover the importance of the social factor in economy and to reject narrow utilitarianism established by the inhuman capitalism which brought with it miseries to humanity. Within this framework, we come across theories such as 'social economy', 'non-utilitarian trend in social studies', and 'moral economy', all of which converge to criticize the prevailing economic theories and to find an exit for the current state which impinge on both the rich and the poor.

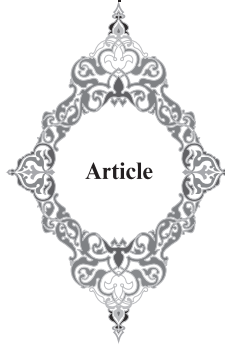
We believe that waqf institution represents an important part of a balanced Islamic vision for social equilibrium. It is involved in building an economy from a human perspective based on cooperation in the domains of piety and good deeds. It also imbues the economy with some ethics which makes it a way to exerting effort, not a way to extortion. Here, waqf, as an institution that maintains the social equilibrium, may become an important part of an Islamic economic integrated vision. This makes the responsibility of the waqf cadres for a continued development of this institution heavier in order to be able to add that humanitarian touch required by any economy.

Researches inculcated in this issue have approached three major questions: the first question deals with reviewing some of the waqf trends with cognitive significance. Mr. Saleh Al Huwais revises a fiqhi message related to the 19<sup>th</sup> century: 'Al Istikshaf an Taamul el Awqaf' by the scholar Mahmoud al Hamzawi of Damascus. In addition to its historical merits, this message introduces solid evidences on the role of faqihs in the Islamic societies and their methods in

dealing with novelties which have a direct bearing on waqf. It also negates the stereotype image which we often encounter in the historical writings claiming that the window for Ijtihad has been blocked and that the faqih have failed to perform their duties. Kamal Al Mansouri laid emphasis in his research on the 'Model of Islamic waqf Architecture - Architectural Theories and Good Services' on a very important aspect of the waqf experience in combining the beauty and solidity of the building on the one hand and the good services. The most important part of this research is connected with the efficiency of the contemporary service institutions and the importance of considering the importance of the waqf experience to cope with the shortcomings of modern architecture, especially at the level of the functional efficiency and the level of the services being rendered.

The third question being approached in this issue is related to analyzing the essential transformations the waqf system has been subject to, especially with the rise of the modern state whose authority expanded to embrace awqaf, and the status of the waqf institution in Moslem societies. In this context, Dr. Abdul Hameed Hannia in his article, 'Management of Awqaf Khairia in Tunisia during the Modern Epoch from Private Monopoly to Public Monopoly' shows the historical transformation in the management of awqaf from non-governmental management to central government management and the outcome reflected in changing the relations among the parties in the waqf institution and using waqf as a political tool. In the same context, Dr. Nasr Aref in his research, 'the Institutional Structure of Waqf in the Nile Valley Countries' analyzes the overall vision which formed the waqf-state relation and the attempts of the latter to put the waqf under its custody under the guise of 'reformation', which is a corrupt reformation as maintained by the researcher. Its main aim was to solicit wealth resources for the state, and thereby there will be an economic power in addition to the political power.

In the end, Raditya Sukmana and Mohammad Kholed present a practical model for benefiting from Sukuk Al Intifa'a in developing waqf cadres. These sukuk depend on time participation in service projects which could constitute a good source for extending assistance to waqf projects in diversifying their financing sources.



## **Waqf Management through Sukuk Al-intifa'a: A Generic Model**

**By: Dr. Raditya Sukmana  
Dr. Muhamad Kholid  
Dr. Kamal Abdelkarim Hassan**

For the last few decades, waqf has been discussed extensively as an important instrument in helping many people in need around the Muslim world. Nevertheless, depending continuously on the property received from waqifs (donators of waqf) can create sustainability problems in waqf contribution. Waqf institution should generate profits from projects through which it could finance the essential sectors. For that reason, this paper attempts to present a model which depicts the significant role of *Sukuk Al-intifa'a* in empowering waqf performance. Based on the *ijarah* concept, sukuk might produce a new source for funding waqf institutions that can generate its own income to support primary projects of waqf. The structure of this paper is as follows: after the introduction, we will be discussing the practices of the waqf institutions in some selected countries, followed by observing the features of sukuk. Next, the process of embedding sukuk al-intifa'a into waqf, which is the most important discussion in this paper, will be elaborated in detail. Later, some prerequisites that have to be fulfilled in order to implement the model will be discussed. Finally comes the

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(\*) Department of Islamic Economics, Airlangga University, Surabaya, Indonesia

(\*\*) Treasury & Financial Institutions - Kuwait Finance House (Bahrain)

(\*\*\*) CIFP Program, The International Centre for Education in Islamic Finance, Malaysia.

explanation of the authors' belief that this model will be an alternative model that could provide more benefit to the people in need.

**Keywords:** redistributive measure, waqf project, primary project, secondary project, sukuk al-intifa'a, BOT.

## 1.0 Introduction

Islam promotes justice to human being. In Qur'anic Sura 59, verses 7 says that "*...so that it be not a thing taken in turns among the rich of you*". It implies that Islam discourages a certain group of the rich to limit the benefit only to themselves, but they have to redistribute the wealth to the poor and the needy. The concept of *Sadaqa* provides a way for that purpose. One kind of obligatory sadaqa is Zakat, whereas waqf is voluntary in nature.

Waqf institution has long been recognized to have played a vital role in the history of the Muslim world. Some basic needs provided by waqf are education, health and shelter. In this context, waqf's characteristics are similar to those of Zakat in the sense that it redistributes the income from the rich to the poor. Yet, current waqf institution throughout the Muslim world has lost its effectiveness due to lack of proper management. Hence, waqf institutions need enhancement to revive their vital role. The institution can be revitalized by turning it into a productive waqf which will not only be a self-financing waqf, but it will also finance the primary project of the waqf (Sadeq, 2002).

A productive waqf needs investment to be put in place. There are some ways to finance waqf project, among others are output share, partnership share, lease bonds (sukuk ijarah), hukr share and muqaradah bond (sukuk muqaradah). There are some other sukuk, however, but this paper only focuses on how to finance waqf project through sukuk al-intifa'a. In discussing the operation of sukuk al-intifa'a, this paper also provides a generic model for financing waqf project using sukuk in general. However, there are some issues that should be addressed to successfully implement such sukuk and project. This paper highlights issues of the prerequisites and guidelines governing the operations of al-intifa'a waqf project. However, there are many factors that have to be caught up by waqf institution implementation of sukuk al-intifa'a to the waqf project would become one of the ways to revitalize waqf institution in the long run.

## **2.0 Literature Review**

### **2.1 Waqf Role in the Past and Present**

According to Rashid (2002), waqf has a long history in building the Muslim civilization. As he quotes Imam Syafi'i, it gradually developed with the help of the Prophetic tradition. Waqf has come to existence since the 7<sup>th</sup> and 8<sup>th</sup> centuries AD and many of them still exist today, though they were created more than 1000 years ago (Rashid, 2002).

According to Cizakca (2004), in the Ottoman Empire era, cash waqf, a new kind of waqf, has been approved by the court. This cash waqf took the form of a Trust Fund established with money to support services extended to mankind in the Name of Allah. A hundred years later, cash waqf became extremely popular all over Anatolia and the European provinces of the Empire. The gifted capital of the waqf "transferred" to the borrowers who, after a certain period, usually a year, returned it plus a certain "extra" amount, which was then spent on a variety of religious and social purposes such as health, education etc. The brief description above has shown a great waqf role in the past history of Muslim society. Yet, the great role of waqf institution had greatly deteriorated during the imperialistic era throughout Muslim countries.

Starting from the 20<sup>th</sup> century onwards, waqf institution had already been marginalized in the economic system even in the Muslim society. There were some factors that made such a situation exist, inter alia, the past history of colonialism in the Muslim world and mismanagement of waqf. We present the waqf experience and roles in some countries in order to better depict the waqf institution as it is now.

Although waqf in India had existed long time ago, yet it still has some problems especially in managing it. Inefficiency and dishonesty of the manager are some of the problems. One should notice that waqf property belongs to Allah the Almighty, hence mismanagement and irresponsible intervention constitute an abuse to the properties of Allah.

In Pakistan, the government enacted waqf in year 1959 in order to avoid mismanagement and moral hazard. Awqaf in Islamabad were managed by Awqaf Department that consisted of two wings, namely the mosque's wing and shrine's wing. It is known that these kinds of awqaf do not generate income. Therefore, the expenditure to operate waqf depended on the donations of good-doers. The expenditures of Awqaf were for paying the employees of the mosques and shrines, celebrating certain festivals, organizing competitions in Qur'an

recitations, feeding the poor and performing maintenance works to the mosques and shrines.

Islamic Relief, located in United Kingdom, has successfully managed waqf funds collected through cash waqf. This agency sells waqf shares which are worth £ 890 each. The shareholders, at their sole discretion, could decide on the areas to be funded by the money, although Islamic Relief would like it to be earmarked for general waqf<sup>(1)</sup>. For the last few years, Islamic Relief has been doing a great job by assisting many primary and secondary projects in many countries in the world. Kharan Water Project in Pakistan, Orphan Home's Reconstruction Project in Bosnia, Rehabilitation of Primary Education Infrastructure in Kandahar and Tsunami Response in Indonesia are some of the projects funded by Islamic Relief.

From the information above, we can come up with the point that at present waqf is mainly used for unproductive activities such as mosques, cemeteries, schools etc. Hence there is a high dependency of waqf institution on donations from the public in order to keep it running. A movement to make waqf institution self-sufficient is an important thing to ensure the development and continuity of any waqf institution. Though Islamic Relief has shown a good example of good waqf management, most of the waqf institutions have not been optimally managed. One way to solve the problem is through reforming the waqf administration; though this would not be sufficient. Relevant legislation should also be reformed through a strong political move. The role of a government is inevitably essential in developing waqf institution. Lastly, society and people in general should also be responsive to any such initiatives. By the cooperation of all elements, the problems would be significantly reduced or even removed.

## **2.2 Sukuk Al-intifa'a as an Islamic Finance Instrument**

In a straightforward definition, Sukuk (sing' Suk' meaning Islamic bond) is asset backed, with stable income, tradable and Shari'a compatible trust certificates. The difference between sukuk and conventional bonds is in the underlying assets. A bond is a debt and there is no such direct link between the debt and the asset financed by the debt. However, fund raised in sukuk has a link with the specific project. Raising money by issuing conventional bonds does not need an asset but, in Islamic finance, an asset should be identified first before issuing sukuk. The more money needed, the more assets to be found. The value of

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(1) In this type (general waqf), the waqif give the right to the Islamic Relief to decide the area to be assisted based on the priority (greater flexibility by the Islamic Relief when it comes to helping those most in need).

an asset should be equal to the nominal value stated in the sukuk (Tareq A, 2004). The closest concept of sukuk al-intifa'a in conventional form is time sharing bond. Sukuk Al Intifa'a is basically a derivative of sukuk al-ijarah that represents the ownership of a usufruct.

There are two types of certificates on ownership of usufruct: Firstly, certificate of existing assets. Assumption on this type is that the asset does already exist. The owner will then issue sukuk al-intifa'a using that asset as underlying asset. Since it is based on the Ijarah concept, the owner will receive a rent in the form of fund paid by the subscriber/sukuk holder. Secondly, certificates of usufructs to be made available in the future as per description. This type of certificate will be issued in order to finance the construction of the assets. Therefore, the subscribers become owners of the usufruct of these future assets. This type of sukuk has been applied early in the year 2000 in Makkah, namely King Abdul Aziz Waqf (KAAW) (Ahmed, 2004).

### **3.0 Sukuk Al-intifa'a in Practice: Lesson from Saudi Arabia**

The implementation of *Sukuk al Intifa'a* started from the early year of 2000 in Makkah. King Abdul Aziz Waqf (KAAW) in this case acts as a nazir. It is a body that does not only collect waqf properties from the waqif (the waqf payer), but it also manages those properties so that it can be used properly. KAAW leased one of the waqf properties, in this case a piece of land in the center of Makkah, to the Bin Ladin Group on a BOT (Build-Operate-Transfer) concession contract for 28 years. According to the contract, Bin Ladin Group should build shopping complexes, towers and a hotel for KAAW as a payment. Bin Ladin then subcontracted the construction projects of the tower to Munshaat, a real estate company based in Kuwait. With this project, Munshaat will finance the construction, operate it and transfer it back to Bin Ladin after 28 years. This building has spaces ranging from the low prices until royal suites. To be able to finance the project, Munshaat issued US\$ 390 million Sukuk Al-intifa'a (timeshare bond) for 24 years. This usufruct right will be divided into weekly time shares. Investors who bought those sukuk are able to rent a space for a specific time or sub-lease their space to others. Munshaat will then gain the profit from the rent rate difference between the rate received from sukuk holders and the rate paid to Bin Ladin Group. Munshaat estimates 26% rate of return on this investment (Ahmed, 2004).

## 4.0 Revitalization Waqf through Sukuk Al-intifa'a

### 4.1 Primary and Secondary Waqf Project towards Ummah Welfare

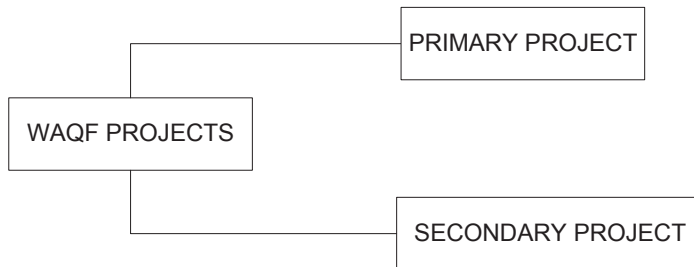


Figure 1 Type of Waqf Project

Waqf project is divided into two types: primary project and secondary project (Sadeq, 2002). The purpose of primary project is to provide needs of the waqf beneficiary. This type of waqf is a charity project in nature; it is more towards giving the basic needs to needy people and children. For instance: waqf on an orphanage will provide the essential needs such as food, shelter, and clothes. Waqf could also be channelled for educational purposes. Basic education should be provided to everybody especially for the poor. However, the best student may be given assistance to pursue higher level of education. Health care is also an important element in human life. Some medical treatments are very costly that cannot be afforded by the poor. The above reasons make the role of waqf inevitably important. Furthermore, there are many projects that can be in the form of primary projects. Those projects are, for example, water projects, sanitation projects and emergency projects. Those above projects are usually financed by using donation funds. Hence, they create dependency that will impede development and long term continuity of a primary project.

Although a primary project is a social project in nature, yet it has a potential to be a self-financed or even a profit-generating project. Good and creative management will be able to make cross-subsidy scenario among the people who use the primary project. It is important to create a self-financing waqf institution as it is a pre-requisite for best allocation of a resource. Muslim resources are limited; therefore a good allocation of a resource will be critical to be considered. Donation fund, in this scenario, that previously had been used to finance operational expenses can be used to create a new primary project or secondary project to support the existing primary project.



A secondary project is basically a waqf project whose aim is to provide financial support for the primary project. This second type is a profitable project in nature. The project can take the form of building hotels, shopping malls, lease of office building and other profitable projects. The profit gained from this project will be used to support primary project or it can also be accumulated in order to make another investment projects. Organizational structure, administration, operation and financial management of the above two waqf projects in the context of sukuk al-intifa'a will then be elaborated.

#### **4.2 Development of Secondary Project through BOT Scheme and Sukuk Al-intifa'a Finance**

There are some ways to finance investment waqf (secondary waqf project) such as mudharabah investment, musharakah investment and fund from issuing sukuk. Currently, there are some investment waqfs that have been financed through issuing sukuk musharakah. The stated projects were conducted to revitalize waqf assets in Singapore (Rahman, 2005). However, this paper focuses only on financing investment waqf through issuing sukuk, particularly, sukuk al-intifa'a. The investment waqf in this scenario is conducted through Building, Operation and Transfer (BOT) scheme and finance by issuing sukuk al-intifa'a. This paper argues, based on some reasons, that sukuk al-intifa'a constitutes a viable instrument to finance waqf project. Beside sukuk al-intifa'a is shari'a compliant as it is based on ijarah contract, the sukuk have some characteristics that make them a favorable financial instrument, and those characteristics are:

- 1 - Securitization of leases: the sukuk holder will have a benefit of using the assets or re-lease to another party (the latter is of course the holder who will receive a regular payment).
- 2 - Secondary Market tools /tradable: the sukuk holder is able to sell (tradable) it to other party (in the secondary Market) when he needs an urgent cash
- 3 - Changeability of the duration of the sukuk; that is the duration of the lease either can be changed or divided into some periods of lease. The flexibility of the duration gives a better cash flow management for waqf institution. Further discussion on this matter is elaborated on section 5.
- 4 - Optional transfer of the sukuk right to a particular following year

Without exaggerating the good characteristics of sukuk al-intifa'a, the shortcoming will be more on the supporting system such as underdevelopment of Islamic financial market in which the instrument is supposed to be traded efficiently.

BOT scheme gives advantage for the waqf institution as the owner of the asset i.e. land on which the building/other assets will be developed without financing it. Further BOT scheme provides assurance of preservation ownership of the waqf asset remains on the waqf institution. This assurance is important since, according to Imam Shafii, once an asset is endowed then it is owned by Allah, the Almighty. However, there are also some disadvantages of using BOT scheme as a way to develop investment waqf. BOT scheme requires developer to build the waqf asset followed by operating the developed asset and transferring the asset back to the waqf institution upon the completion of the tenure duration. Under this scheme, waqf institution will get back the developed waqf asset i.e. office building, after developer operating it for the duration of BOT contract i.e. 25 years. In this situation, waqf institution is exposed to some risks. Some of the risks associated with this condition are:

- 1 - The developed asset may have been obsolete by the time it is transferred from the developer to the waqf institution.
- 2 - The developed asset may be in an improper condition.
- 3 - Change in environment that cannot be foreseen at the time of development of the investment waqf. Example for such situation is where the project could have a high demand at the period of leasing, however by the time the asset transferred to the waqf institution the situation has changed into unfavorable situation for the business related to the investment waqf.

In principle, a long term business perspective in entering BOT contract will reduce the waqf institution risk. Based on the above possible risk that may be faced by waqf institution, the institution should anticipate it. There are some preventive actions that should be done, those are, first, waqf institution should foresee future situation i.e. business and economic environment related to the investment project and second, waqf institution should ensure an agreement with the developer on preservation of the developed waqf asset to avoid improper condition of the asset at the time it is transferred to waqf institution.

## **5.0 Implementation of Sukuk Al-intifa'a in Investment Waqf**

### **5.1 Prerequisite of the Implementation Sukuk Al-intifa'a in Investment Waqf**

There are several important prerequisites that must be fulfilled in order for Sukuk Al Inifa'a to play a significant role in supporting the waqf management.

- 1 - Rules and regulations on Sukuk. Sukuk in nature are very different from the conventional bond, although the objective is similar; that is, to raise

funds. The difference is in the underlying asset, which is needed in the Sukuk whilst not in the conventional bond.

- 2 - A comprehensive law on waqf. Waqf law should explain the nature of waqf, rights and obligations of the parties involved, namely the waqif, nazir, beneficiaries and others.
- 3 - The institution which manages the waqf. The majority of previous studies support the idea that management of waqf should be attended by a non-governmental institution. This argument is due to the fact that governments in many of the Muslim countries are corrupt and inefficient (Rashid, 2002). This fact discourages a waqif to make donation to waqf institution. In this paper, we argue that waqf institution should be an independent body appointed by the government. However, a government could not intervene with the management. In the case of Indonesia, a good example would be the institution of Zakat (BAZNAS<sup>(2)</sup>). It is an independent body created by government whose main task is to collect and distribute Zakat in Indonesia. Government cannot intervene with the management of BAZNAS. Although this body is not under any ministry, the director is directly appointed by the President of Indonesia for specific number of years and he/she can be re-elected. The same thing applies in the case of waqf institution. The director shall be appointed directly by the President. This institution can be a separate institution or it is an expansion of BAZNAS. This issue needs further study with regard to advantages and disadvantages of merging or separating these two institutions.
- 4 - Government support, especially on the non-direct policy for the development of waqf for instance a reduction on the rate or even an exemption of tax for the waqif;
- 5 - Waqf information system management should be well established to support implementation of waqf development model presented in this paper. The model needs a detailed identification of the party involved especially on the beneficiaries. The detailed identification will be very helpful to implement cross-subsidy scenario among beneficiaries who use primary project towards self-financing primary project;
- 6 - Development of Islamic financial market. Developing the Islamic financial market will attract investors to invest in the derived sukuk al-intifa'a as the development of the market will increase liquidity of Islamic financial instrument.

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(2) BAZNAS stands for Badan Amil Zakat Nasional.

## 5.2 Guidelines Governing the Operations of Al-intifa’a Waqf Project

This section provides a guideline for waqf institution in organizing, administering and operating investment waqf under BOT scheme and financing by sukuk Al-intifa’a. This proposed model is a generic model for investment waqf using BOT scheme and sukuk al-intifa’a. This model can be adjusted for another kind of sukuk. However in this paper we emphasize the use of sukuk al-intifa’a as the financial instrument to finance the project.

### 5.2.1 Organization Structure of Investment Waqf

Our model of investment waqf is based on model developed by Mohsin (2005). According to him, Islamic Endowment Corporation (IEC) is a national independent waqf body formed by government and responsible to the president. IEC’s main roles are to administer, maintain, generate and develop new and existing waqf. Two important divisions, namely Waqf Financing Corp (WFC) and Waqf Developer Corp (WDC), should be established to cater for the body duties. Each division has its own arm by which the division manages the development of waqf projects. WDC appoints Developer Company to develop waqf project while WFC creates SPV to finance the project. There is close coordination among WDC, WFC, Developer Company and SPV prior, during, and after development of waqf project.

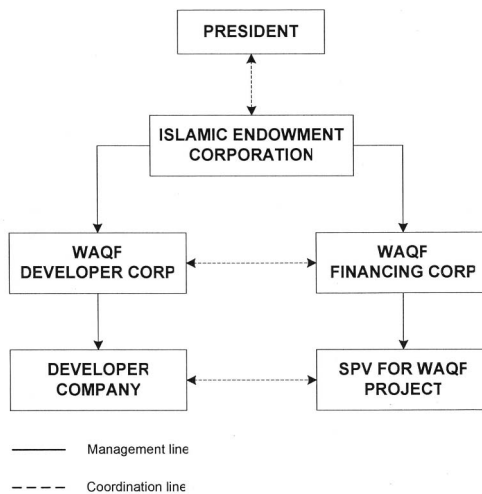


Figure 2 Organization Structure of Investment Waqf

### **5.2.2 Generic Model of Investment Waqf**

Generic model of investment waqf shows the way Islamic Endowment Corporation (IEC) maintains and develops waqf asset toward a self-financing waqf institution. Through its two divisions, IEC manages the primary project as well as secondary projects (1a&1b)<sup>(3)</sup>. Below is the elaboration on function, duties and coordination of the divisions in supporting IEC.

WFC's main functions/duties are mainly raising, collecting and allocating funds for operational expenses, maintenance and development of waqf projects. Having this massive responsibility, the appointed manager of WFC should fulfill some criteria such as amanah (honesty) and a good management background. Also, he has to be able to find new sources of funds in order to maintain the waqf property and further to develop it. Manager should have a capability in allocating a fund to be distributed to primary project and secondary project.

In operation, WFC collects funds from three resources namely, endowment fund, profit from current waqf project and investment fund. All of the funds collected are then put in the pool fund that serves as an internal fund (3). Endowment fund is a donation fund in nature; it may in the form of cash waqf, government grant or individual grant, etc (2). WFC also receives profit generated by waqf project which is mainly sourced from the secondary project (13a & 13b). The pool of funds from profit and endowment is used to finance operation and maintenance expense of current primary project, to finance development of new primary waqf and to finance (partially) secondary projects (4a&4b). The third source of fund for WFC is investment fund which is raised from investors who invest in waqf project through participating in musharakah, mudharabah, ijarah etc (7). Investment fund is mainly used to finance secondary project. However, in the next section, this paper emphasizes the use of sukuk al-intifa'a as derivative of ijarah financing to finance investment waqf.

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(3) See Figure 3

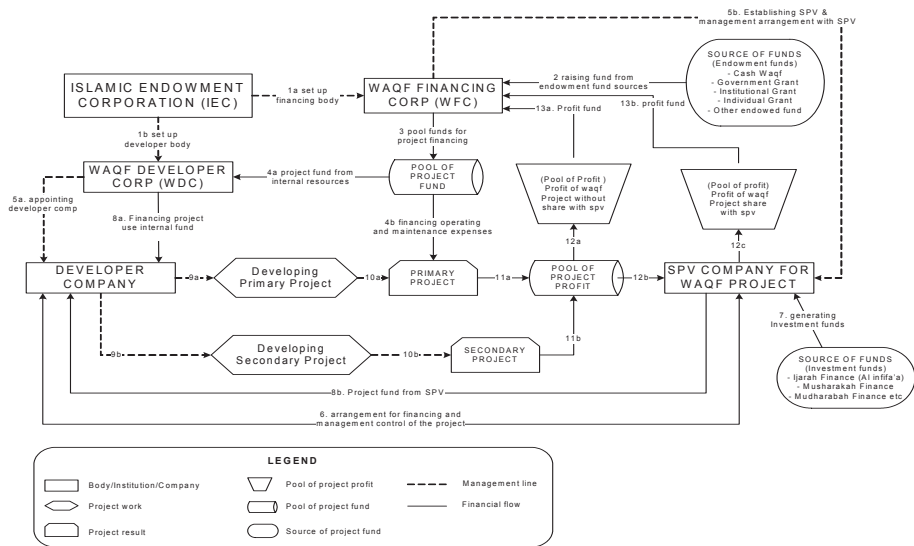


Figure 3 Generic Model of Investment Waqf

In financing secondary project, WFC does not collect funds directly from the investor, but rather it creates a Special Purpose Vehicle (SPV) (5b). SPV is a company created to raise funds from investor to finance the secondary project and might be also the operator of the secondary project financed by the SPV itself. Hence, a new SPV will be established when there is a new project. If there is a new project; Developer Company and SPV will make arrangements to finance and to transfer the management control from Developer Corporation to SPV upon the completion of the project (6). Thus after the completion of the project, SPV becomes the operator of the project. However, this arrangement is not compulsory. IEC may become the operator of the project. The arrangement varies according to agreement between IEC and SPV. Based on the financial agreement with Developer Company, SPV will then raise fund from investors to finance the project (7). The fund collected from the investors is used to finance secondary project (8b). However, WDC may also request WFC to use internal fund to fully finance primary project or partially finance secondary project (8a). In the case WFC contributes to financing secondary project, profit of the secondary project is divided between WFC and SPV (12a&12b).

The existing waqf properties also need to be maintained in order to function properly. In order to enhance the above waqf asset, IEC establishes Waqf Development Corporation whose main functions are to provide maintenance service for the existing primary project as well as developing new waqf project. In

addition to that, WDC should be able to create a profitable project or secondary project to support primary project. When WDC needs to develop a new waqf project, WDC appoints Developer Company to develop the stated waqf project (5a). Developer Company then develops waqf project as requested by WDC (9a&9b). Once the WDC has finished developing the project, SPV or IEC will then manage it (10a&10b). Therefore the role of WDF is mainly on the construction and maintenance physically.

The secondary project that has been developed will generate profit which, in turn, will support the financing of primary project (11b). On the other hand, though it is not compulsory in nature, some primary waqf projects with a good management may generate profit as we have elaborated in section 4.1 (11a). All profits gained from those two projects are then transferred to WFC to be pooled with other funds in a pool of fund. This pool of fund is the internal financial source for WFC to finance maintenance expenses, operating expenses and development of new waqf project. In sum, this model provides an alternative to manage waqf institution towards self-financing institution in order to ensure continuous development of the waqf institution.

### **5.2.3 The Operations of Al-intifa'a Waqf Project in Investment Waqf**

This section will mainly discuss the utilization of sukuk al-intifa'a as financial instrument to finance a secondary project that will support primary project. Waqf institution in our scenario is represented by Islamic Endowment Corporation (IEC). IEC requires Waqf Development Corporation (WDC) to make a list of underdeveloped assets (i.e. land or building) and seek a suitable secondary project for the asset (i.e. office building, shopping complex, hotel etc) (1a). After finding a suitable project, WDC submits a proposal for the development of the project to the IEC. IEC then requires Waqf Development Financing (WDF) to support WDC in revitalizing waqf asset (1b). WFC responds by setting up Special Purpose Vehicle (SPV) (1c). WDC and WFC then make coordination on how to finance the project.

There are three schemes that might be used to finance the project. First, the project is fully financed with sukuk al-intifa'a issuances. Second, similar to the first one, however there is an option to prolong the period of tenure above "the normal" period. Third, the project is partially financed through issuing sukuk al-intifa'a while the balance is financed by using internal fund. Sources of the internal fund are profits of the other projects and endowment fund in the pool of fund.

After choosing the scheme of financing, WDC enters Built Operation and Transfer (BOT) contract with Developer Company (2) and then followed by leasing the contract project to SPV which later on will operate the project (3). The underlying asset for the leased is the BOT contract between Developer Company and WDC. Developer Company under this contract will develop and then transfer the completed project to the SPV. However, the contract period will depend on the finance scheme used in financing the project. BOT period of a project is shorter under the first scheme than the second scheme. Under the second scheme the contract is prolonged to compensate periodical income received by Waqf Finance Corporation (WFC).

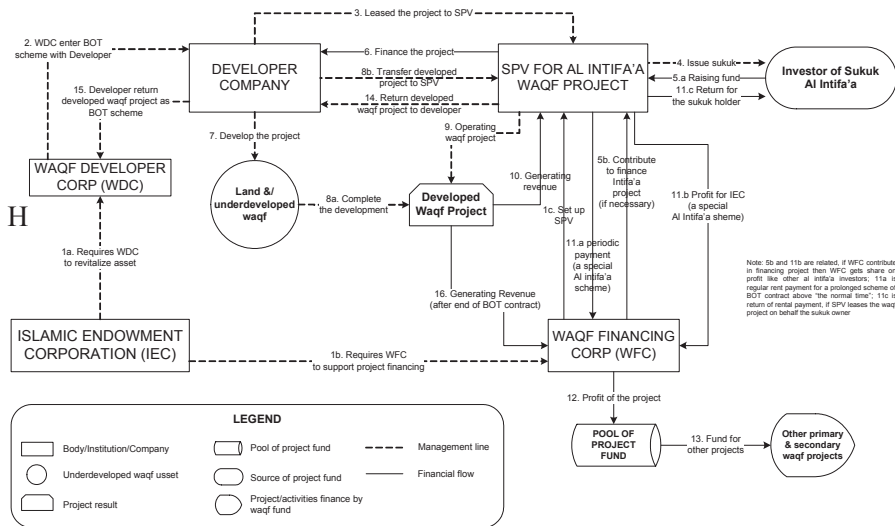


Figure 4 The Operations of Al-intifa'a Waqf Project in Investment Waqf

Here is the example for the above scenarios. BOT contract between WDC and Developer Company for a particular secondary project is 25 years. This is "the normal" period for the contract. However, under the second scheme, WDC may require the BOT contract to be prolonged above "the normal" period, for example, 30-35 years. In return, WFC receives compensation in the form of periodical payment i.e. monthly or yearly from operator of the project (SPV) who leases the project from Developer Company. In the first scenario, WFC does not receive any income from the secondary project until the project has been returned back to IEC 25 years later (period of BOT contract). However, IEC will receive the secondary project sooner to be operated to generate income. On the other hand, second scheme will take longer time for IEC to get the right to operate the



secondary project i.e. 30-35 years (5 - 10 years longer). However, this scenario offers periodical payment from SPV to WFC. The payment is an income for WFC. The income can be used to finance operation and maintenance expense of primary project or it can also be used to prepare human resources for primary project like doctors and teachers.

After signing the lease contract with Developer Company, SPV then issues sukuk al-intifa'a to finance the project (4). Investors subscribe to the sukuk that represent ownership of right to use the asset for a period of time. Investor has right to use the stated asset in the sukuk during a specific time for a specific period. However, investor may sub-lease the sukuk to other party who want to utilize the asset. This is one of the reasons that explain liquidity of sukuk al intifa'a.

SPV receives fund from subscribers to finance development of secondary project (5a). However, WFC may also contribute to finance the secondary project through buying sukuk al-intifa'a or through other investment scheme like musharakah or mudharabah (5b). SPV pool the investment fund and then finance the development of the secondary project (6). Developer starts to develop the project and after the completion of the project developer will transfer the project to the SPV (7,8a&8b). The completed secondary project is now under SPV's management. SPV operates the project from the time the project completed until the time when BOT contract expires (9). The secondary project continuously generates revenue for SPV (10). The revenue then is shared by SPV, WFC and sukuk holders according to these conditions:

- 1 - The revenue will be paid partly to WFC every particular period i.e. monthly or yearly (11a). SPV makes periodical payment to WFC since SPV has chosen the second scheme of financing in which the project was fully financed through issuing sukuk al-intifa'a. However, the parties has chosen the option to prolong period of operating the project above "the normal" time. "The normal time" in the example is 25 years.
- 2 - The revenue will be shared by SPV and WFC according to contribution of the parties in the project (11b). The contribution of WFC in the project is through buying sukuk al-intifa'a or with any other permissible investment contract (5b). However, WFC does not use the asset, therefore WFC requires SPV to sub-lease it to other party to generate income. This income is then transferred to WFC after SPV deducts management fees for managing WFC's asset.

3 - SPV pays return to the sukuk holders in case they do not use the property and left the property to SPV which sub-leased it to other party on behalf the sukuk holders (11c).

The return received by the WFC is pooled in a pool of project fund (12). This pool of fund is sourced of internal fund that is used by WFC to finance primary project as well as invest in the future secondary project. This process is continued until the end of BOT contract. SPV returns the asset to Developer Company at the end of BOT contract (14). Developer Company is then returned the asset back to the WDC who gave the BOT contract (15). The secondary project now is wholly owned by IEC and it continuously generates income for WFC. In conclusion, this paper has demonstrated a model by which waqf institution receives perpetual benefit from revitalizing waqf asset through sukuk al-intifa'a.

## **6.0 Conclusion**

One of the Islamic concepts with regard to economy is the redistribution of wealth. Besides Zakat, waqf has gained more popularity especially in the recent conditions of Muslim umma. It assists many of the poor, orphans and others for their basic needs. The role of waqf could have increased significantly had the waqf been properly managed. Corruption and self-enrichment have been the image in the Muslim countries. This situation discourages the waqif to make donation.

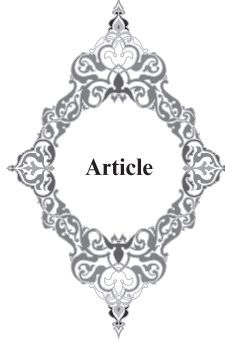
Other problems that can create slow development in waqf performance is excessive dependency on the properties provided by the waqif. Primary projects that provide basic needs such as education, medical treatment, etc., shall not be continuously funded by the waqif. Secondary project, which is profitable in nature, should be established in order to finance the primary project. The manager of this secondary project should be able to create projects that could generate income, as well as he/she should have capability in raising fund.

The role of sukuk al-intifa'a as a financial instrument is important and can fit in the context of fund raising for the secondary project mentioned above. The purpose of this paper is mainly to depict a proposed model for the role of sukuk al-intifa'a in supporting waqf management. To be able to implement this model, some certain prerequisites should be fulfilled in advance. The authors believe that this model can be an alternative for the better performance of waqf.

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## **The Institutional Structure of Waqf in the Nile Valley Countries**

**By: Dr. Nasr M. Aref<sup>(\*)</sup>**

### **Introduction**

It is not fair, tout-à-fait, that institutionalism, theoretically and practically, ab antiquo or nowadays, in reality and vision has been one of the divisive political issues among Moslems since the emergence of the state as a political entity till today. The intellectual affluence which pervaded the community failed to create a corresponding institutional thought. Moreover, the umma's (State) historical progress also failed to reflect a remarkable institutional maturity which might characterize it. Thus, a key issue related to institutionalism implies a reasonable amount of internal contradiction. Is it not possible to view the civilization prosperity at the thought, community or political levels as inseparable from those mechanisms, motives and other agents which push it forward? Doesn't the civilization progress of any nation be the product of collective work carried out through a complicated network of relations? Doesn't the cognitive essence of institutionalism be a network of stable, effective and consistent relations? Has history ever witnessed a nation making such a progress similar to that achieved by Islam, while detached from a systematic network of institutions?

The researcher here is bound to reformulate the proposal of this research through conducting a delicate differentiation between the historical fact and the assimilation of this fact; or between what happened in the Islamic history and

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(\*) Professor of political science and Head of Islamic studies Department, Zayed University.

what reached us from this history or what we sought to know through it. No fair researcher can claim that contemporary modernizers managed to draw a full image of the Islamic history, with its civilization and its social and institutional activities. On the contrary, some specific aspects were stressed on, others were not given due attention, and others were exaggerated at the expense of others. Consequently, the image looked terribly distorted; for example the jurisprudential dimension was given much importance at the expense of the applied dimension. Similarly, the state was glorified and inflated at the expense of the society; the military activity was given priority over civilizational activity; the elite received preference over the masses and their role and politics ranked above economics and sociology. The individual was given a key role at the expense of the institution, society and community. There has been a concentration on events and their consequences, not on the causes and outputs making them and the primary preceded steps.

With this as springboard, the requirements of an academic research can begin with a set of presuppositions which essentially constitute the cognitive context on which this research is based, its laws and regulations which will determine its statements and steps. Thereafter, we move on towards the conclusion. Such presuppositions can be put down as follows:

- 1 - The Islamic heritage as a whole, and the political one in particular, has hardly been properly approached and studied either systematically or academically; even those parts which were known and published were influenced by non-academic factors, such as the interest of investigators, publishers, and readers' ideological and sectarian alignment factors. Generally speaking, a part of this heritage was salvaged and others were ignored<sup>(1)</sup>. Therefore, we cannot reach reliable scientific generalizations about the historical experience of the Islamic communities with its institutional, administrative and organizational dimensions. Therefore, our study in the domain of generalization will be limited to the information included in those available resources.

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(1) A study published in 1994 unveiled 18% of the Islamic political heritage resources which contemporaries acquired. Since the publication of this book, other resources were found which lessened this ratio. Reviewing this study shows that modernizers deal with the Islamic heritage on an eclectic level, not on an academic one, which concentrates on the attitude of editors and publishers, not on the historical facts or ethics of research. See Nasr M. Aref: *Fi Masader al-Turath al-Siyasi al-Islami: Dirasah fi Ishkaliyat al-Ta'mim Qabl al-Istiqrā' wal-Ta'asol*; Introduction by Mona Abul Fadhl, *al-Manhagiah al-Islamiyah* - 7 Herndon - Virginia - Higher Institute of Islamic Thought 1994.

## 2 - Encroachment of Fiqh (jurisprudence) on Reality.

The Islamic historical experience is believed to be more of a jurisprudential nature than being a community movement. Although Fiqh is the legal framework which reacts and responds with reality, yet this argument does not vindicate the absence or the paucity of writings which handled waqf as a real experience, a community movement and an institution which spanned most, if not all aspects of the social life over history, and the massive works which estimate waqf and deal with its theoretical and jurisprudential aspects. Casting a look at the Arabic library, we find it nearly void of any hereditary or contemporary works on waqf and its community movement while there are numerous researches dealing with waqf as legal jurisprudent subject. Save the two studies by Dr. Mohammad Mohammad Amin and Dr. Ibrahim al-Bayoumi Ghanim<sup>(2)</sup>, we rarely find any studies approaching waqf as institutional movement and social experience in the Islamic societies.

Drawing a comparison between Arabic contemporary studies on waqf and English studies, we find that throughout the 20<sup>th</sup> century, no Arabic studies went beyond the domains of Fiqh and Law with the exception of the two above mentioned studies by Dr. Amin and Dr. Ghanim.

Dr M M Amin study presents new facts of the status of waqf and its management during the Mamluki era. The second of Dr I B Ghanim recounts the relation between waqf and the overall political movement at the level of the government and the Egyptian society since the era of Mohammad Ali till now. The study goes step or steps forward in the methodology of studying waqf in the Arabic review of literature.

By the end of the 19<sup>th</sup> century and the beginning of the 20<sup>th</sup> till now an intellectual argument has started on the benefits of waqf, its importance, problems, means of organizing, activating and revoking it or getting rid of it in addition to a stress on its jurisprudential and legal aspects:

- 1 - Mohammad Qadri Pasha<sup>(3)</sup> published his book in 1948 “*Al Adl Wal Insaf Lil Qadha’ ala Mushkilat Al Awqaf*,

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(2) Mohammad Mohammad Amin ‘ *Awqaf wal-Hayat al-Igtimai’yah fi Misr’* 648-923 H (1250-1517) - a historical documentary study - Cairo-Dar Al Nahdha Al Arabia 1980. Ibrahim Al Bayoumi Ghanim: *al-Awqaf wal Siyasah Fi Misr-* Cairo - Dar Al Shorouq. 1998.

(3) Mohammad Qadri Pasha classified his book in the format of legal articles, with 646 article dealing with the various aspects of waqf. See Mohammad Qadri’, *Ibid*, Cairo, Amiriya Printing Press - Egypt -the Protected, Bulaq 1311-1894.

- 2 - The contribution of Aziz Bey Khanki “ *Rasa'il in Awqaf*” published in 1907, and The “ *Qadhaya al-Mahakim fi Masail al-Waqf*” published in 1908<sup>(4)</sup>,
- 3 - The contributions of Sheikh Mohammad Bakheet Al Muteeie in his replies to the minister of Awqaf in 1927<sup>(5)</sup>,
- 4 - Sheikh Mohammad Abu Zahra and his discussion of the law for organizing waqf in 1943<sup>(6)</sup>,
- 5 - Finally the study of Mohammad Salam Madkoor about the waqf from the jurisprudential and practical aspects published in 1957<sup>(7)</sup>,

There has been a tradition taking waqf as a Fiqhi and legal issue, leaving no space for sociologists, economists or politicians to approach it. Frequently waqf was viewed by some people as a religious and legal institution branded with corruption and backwardness. Therefore, analyzing waqf modern review of literature gives solid evidence that this institution belongs to history in terms of time, taking fiqh and law as a subject and behavioral corruption at the administrative and financial levels. This image has been consolidated through cinema and theatre in the hearts of the people.

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- (4) Aziz Bey Khanki published 6 messages in Al Muqattam Magazine in which he criticized the waqf system. See Aziz Khanki', op cit - Cairo - Al Akhbar Printing Press 1907; followed up the court verdicts (especially the appeal court since its establishment in 1884 to 1906), then all that was issued from 1907 - 1908. He also translated the verdicts of the mixed court of appeal since its establishment from 1876-1906, then the verdicts issued by the sharia court from 1900-1907. He also gathered all these verdicts in a book. There were 565 verdicts dealing with all waqf problems at that time. See Aziz Khanki: Qadaya Al Mahakem, op cit. Cairo - Al Akhbar Printing Press, 1908.
  - (5) Sheikh Mohammad Bakheet Al Muteeie, the Mufti of Egypt, made a lecture on Thursday, 8 Shaaban 1345 H, corresponding to 10/2/1927 entitled “ *Fi Nizam al-Waqf*” in which he replied to the lecture made Mohammad Ali Pasha, the minister of Awqaf entitled “ *Hal al-Waqf min al-Deen? (Is Waqf from Religion?)*”. The lecture of Al Muteeie centred on citing authorities and referrals on the validity of waqf and its Islamic nature. See Mohammad Bakheet Al Muteeie; ibid - Cairo, Salafi Printing Press, 1346 H - 1927 D.
  - (6) Mohammad Abu Zahra “ *Mashroo' Tanzeem al-Waqf (Project of Organizing waqf)*” - Law & Economy Journal - Egypt, year 13 - issues 6-7, (Thul Qida- Thul Hejja 1326 H - November - December 1943 in which he discussed the law submitted to the Parliament about waqf.
  - (7) Mohammad Salam Madkoor: “ *Mougaz al-Waqf min al-Nahiyah al-Fiqhiyah wa al-Tatbiqiyah (Summary of Waqf from Fiqhi and Practical Aspects)*” Cairo, 1957; Muawadh Mohammad Mostafa Sarhan: “ *Al-Waqf fi Nizamih al-Gadeed (waqf in its new system)*- Cairo, Ramsis Printing Press, 1366 H - 1947 D. Here waqf is approached from legal and jurisprudential perspectives



English waqf review of literature, on the other hand, has taken a different approach. It emphasized the community experience of waqf on both the historical and modern dimensions. The interest in the legal and jurisprudential aspects remarkably receded if compared to the actual movement of the waqf institutions, their mechanism and the social and political effects. Reviewing such literature, this study came to the conclusion that this literature covered a wide spectrum of community aspects of waqf:

- 1) The dialectics of relation between waqf, the rulers and the society<sup>(8)</sup>;
- 2) The socio-economic aspects of waqf;
- 3) The relation between waqf, architecture and city planning<sup>(9)</sup>;
- 4) The effect of Islamic waqf system on establishing and developing charitable societies and civil society organizations in the west, ad hoc the Anglo-Saxon countries<sup>(10)</sup>;
- 5) The status of waqf during the colonial period and the effect of colonialism on waqf<sup>(11)</sup>.

These aspects which manifested the interest of foreign review of literature in waqf reflect the difference between the legal perspective which pervaded most of the Arabic review of literature on the one hand and the political and social perspective which most of the English literature manifested. Consequently, we can imagine the difficulty of studying the institutional problems of waqf in the Arab World due to the fact that no tradition has yet been established to assess waqf as a social, economic and political phenomenon.

- 3 - The encroachment of the ideal approach on the realistic analysis of development of the history of waqf as a social institution. When we deal

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(8) Miriam Hoexter, *Endowments, Rules and Community: waqf Al Haramayn in Ottoman Algiers*, studies in Islamic law and society Vol 6 (Leiden; Boston, MA; Brill, 1998).

(9) Richard Van Leeuwen: *waqf's and Urban Structures: the case of Ottoman Damascus*, studies in Islamic Law and Society; V.II (Leiden; Boston, MA: Brill, 1991) and Doris Behrens-Abou Seif, *Egypt's Adjustment to Ottoman Rule: Institutions, Waqf and Architecture in Cairo*, 16th and 17th centuries, Islamic History and Civilization Studies and Texts; V.7 (Leiden; New York: Brill 1994).

(10) Keith Christopherson, "Waqf: American Laws of Endowments," M.A. Thesis, McGill University, (1998) and Monica M. Gaudiosi, "Waqf on the Development of the Trust in England," University of Pennsylvania Law Review, Vol. 136 (1988).

(11) Randi Deguilhem, "History of Awqaf and Case Studies from Damascus in Late Ottoman and French Mandatory Times," PHD Thesis, New York University, (1986) and Yitzhak Reiter, *Islamic Endowments in Jerusalem under British Mandate* (London; Portland, OR: F. Cass, 1996).

with waqf, we usually highlight the Islamic civilization and boast of its achievements, enumerate the types of awqaf, their expansion and interest in humanitarian or charitable issues. There had been no sufficient emphasis on analyzing that institution and other sub-institutions and systems in a way that basically stresses the historical development and the social forces which formulated or influenced them, in addition to their social, political and economic mechanisms. Waqf, in this respect, is not a special case because the studies which dealt with the Islamic history had emphasized specific phenomena and ignored others. Among those which were neglected were the economic and social institutions formed, developed and maintained by the society. Therefore, we can claim without disregarding that the Islamic history was introduced as a history of states not societies.

- 4 - The Islamic discourse was preoccupied with trying to find a reply to all questions related to legacy and history, save the question 'How?'. "Contemporary Islamic research has been for a long time and is still preoccupied with what had taken place: Why?, Where?, When and Who? But the question 'How' received no attention. Consequently studying institutions, social and administrative systems and their overtures and different complications fell to the ground. Hence it can be emphasized that Waqf in general falls under the question 'Why' because it is a social activity with a dynamic nature which deals with a society in its developing movement and variety of problems. Thus, the study of the institutional and administrative dimensions of waqf still constitutes a fertile domain for further research and study bristled with difficulties and caution.

After such introductory remarks, the researcher can approach the institutional and administrative dimensions of waqf in an area which represents the heart in the Islamic world where all experiences, cultures and Islamic schools of thought merged. Here we shall have a model case which sums up the Islamic experience whose historical boundaries remarkably differ from the current geographical boundaries of what is known today as the Nile Valley, or specifically the land of Egypt. Historically speaking, this territory used to include, Al Hejaz (Saudi Arabia) and Bilad el Sham (Syria).

## **First - The State and The Society: Nature of Relation and the Status and the Role of Waqf**

The best way to approach the issue of waqf and its problems is to approach it from the angle of relation between the state and the society<sup>(12)</sup>

This assumption was based on the fact that waqf revolved or moved round the various axes of this relation that was sometimes in favour of the society at the expense of the state. During other periods, attempts were made to mobilize the authority of the state at the expense of the society. Generally speaking, waqf was one of the standing forces which controlled the relation between the society and the state, or it is an issue of conflict between them. This problem will be analyzed and clarified in the following points:

### ***1) Types of Relation between Society and the State:***

The interest in the state-society relation, being one of the most important techniques in political analysis, constituted a first transformation towards studying the political systems and their major issues. This approach was linked to the end of the behavioral stage in politics and the beginning of the post-behavioral stage. Though this transformation is rather new in its existence or its utilization, it reflects, in its essence, the real political phenomenon throughout the ages. In politics there are subjects which can be studied only through adopting this approach of transformation. There are extended political experiences throughout history which cannot be understood except through the state-society relation. Moreover it can be claimed that the issue of waqf in general cannot be decoded to recognize its indications and penetrate its secrets unless we deal with it as a principal part in the state-society relation.

The emergence of this theory was associated with the name of Joel Migdal<sup>(13)</sup> who saw that the state and society clash throughout history to control the behavior of individuals in order to identify and dominate their criteria. They also clash to control the institutions and social regulations, even the total network of social relations in which each party seeks to have the upper hand, or to act as referral and to monopolize legitimacy. Consequently, this state-society clash has created four types of states and societies.

- ***First***, we have the strong state and strong society;

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(12) 12 This theoretical approach was suggested for the first time by the Dr. Ghanim, Op cit.

(13) 13 Joel Migdal, *Strong Societies and Weak States: State-Society Relations and State Capabilities in the Third World* (Princeton, NJ, Princeton University Press 1988)

- **Second:** the strong state and weak society;
- **Third:** the weak state and the strong society;
- **fourth:** the weak state and the weak society.

These types in general are ideal or models which may not appear in reality, but the various political systems, past and present, may get nearer to one of them in a way that allows it to be included in it without being conformed with it.

## ***2- State And Society in Islamic system of ruling***

Casting a look at the Moslems' political experience throughout history, we find gets very close to being identical to the model of the weak state and the strong society because the concept of politics in Islam makes the state the custodian of the public affairs to an extent which may not intersect with the interests of the individuals except in limited points at a diverged intervals of time. At the same time, we find the civilization weight rests with the society which created, developed and circulated the concept of waqf to maintain its independence and sustainability regardless of the state's weakness or strength, justice or despotism, effectiveness or corruption. This statement can be validated; i.e. the assumption based on the weak state and the strong society from the following historical and theoretical facts:

**First:** The state has never acquired in its history the basic components of power which the society usually acquires. A state has never assumed the role of the farmer or the merchant or the manufacturer. This means that the state has never acquired what is now known as the "public sector". It left all the numerous economic activities to the individuals at a time the state's functions were limited to four ones, e.g. defense, internal security, judiciary, settlement of disputes and supervising commercial and economic activities. Therefore, there was a department (Diwan) for soldiers, a second for foreign policy, a third for Kharaj (taxation), a fourth for judiciary, and a fifth for accountancy and so forth. There had never been a department for agriculture, industry or commerce.

**Second:** the state and the society throughout the Islamic political experience adopted two different historical attitudes. The power of the state did not mean the power of the society and vice versa. Reflecting on the Mongol experience with the Islamic World and the Ottoman experience in Egypt substantiate this fact. For the first time in history we find a state defeated and disappeared with its capital and symbols, and then the society manages to defeat those who defeated the state. The Mongol power managed to rout the Islamic countries in the east until the capital of the Caliphate was destroyed. On the other hand, the society managed to defeat it on the cultural, civilization and religious levels. It also

managed to convert the Mongols into Moslems and thereby to become a welcome addition to the Islamic Nation. Consequently, the Ottoman army which defeated the Mamluki state found itself helpless in front of the civilizational progress of the Egyptian people whose line of development and progress did not go with the Mamluki state. The Ottoman invaders bowed before the ethos of the Egyptian people so much so that the Ottoman borrowed the experiences of those people to build their capital. The existence of such experts and technicians was the result of a powerful society with its institutions and network.

**Third:** On the same level, the numerous Islamic states failed to convert their societies to their own religious sects. The Fatimids failed to convert Egypt into a Shiite state in the same way as the Ottomans failed to impose the Hanafi school of thought. The question of sects remained in the hands of the society and at its discretion.

### ***3- The Role of Waqf in the Relation between the State and the Society in the Islamic System of Ruling.***

It is no exaggeration to confirm here that waqf was the main source of the society's power. Without Waqf and its foundations, the Islamic society would not have been so powerful vis-à-vis the state. It represented the undepletable financial source of autonomy for the entire civilizational activities and the humanitarian and social services for a society. The establishment of waqf on the cognitive level on the basis of 'collective duty' (*Fardh Kifaya*) conferred upon this institution the elements of efficiency, creativity and diversity of the society. It also embodied the realization of the entire religious purposes because 'collective duties', as maintained by Al Imam Al Sayouti, "...issues embracing religious and temporal interests" deemed essential for leading a normal life. Therefore, law-makers highlighted and recommended them without charging a specific person with the responsibility of doing a specific job. This makes it different from an 'individual duty' (*Fardh Ain*). In case of collective a duty a task once carried out by anyone, exempts anyone from being taken to task for not doing it. A duty once ignored by those capable of performing it will cause those people to fall under religious liability. Likewise, a person will be taken to task if he was close to it but never heard of it because he should have followed the developments. This differs according to the size of a country and it could spread to all countries, in which case it takes the form of a duty for them<sup>(14)</sup>. Al Sayouti enumerated the 'collective

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(14) Jalaluddin Abdulrahman bin Abi Bakr Al Sayouti: *Al Ashbah Wal Naza'er in the Shafii Fiqh* (Cairo, Dar Ihya'a Al Kutub Al Arabia (PP 439-444).

duties', starting with jihad till he enumerated crafts and professions necessary for the flourishing and sustainability of the society. With this concept of collective duty as a spring board, waqf was established to ease burden and stress of the Umma. Thus it extended from Jihad (holy war) and conscripting armies until it reached dogs, drinking facilities and stables of retired horses.

Based on the aforementioned sayings, waqf was the practical action to all problems, needs and developments which might confront the society and effect its historical movement. This fact represented the historical question of waqf which made it a power to be reckoned with. It also encouraged the state to think of possessing, reducing or eliminating it.

Being a concept based on collective duty and a society-biased institution already established by society individuals, and that even a ruler when establishing a waqf, he does that as an individual apart from any political implications, all these factors combined together made waqf a tool and a means utilized by the society to realize collective duties and remove the feeling of uneasiness and perplexity from among the society individuals.

This means that waqf was the society source of power in confronting the state and investing that power whenever required. This theoretical and practical case created a new type of conflict between the society and the state which took the form of a permanent expansion on the part of the society to fill in the gaps left over by the state when it grew weak. During the various historical epochs, we always notice that expanding power of society at the expense of the state by performing the duties originally undertaken by the state. It is enough to mention here there were Awqaf to build ports, manning them with soldiers and preparing them to resist enemies<sup>(15)</sup>, though this task was conferred upon the state according the Islamic model of ruling. There were also Awqaf to maintain internal security which took the form of police. Moreover, there were awqaf to guide the ships, for example light houses. These were originally tasks ascribed to the state, but the society intervened automatically when it sensed the failure of the state to carry out such duties. Consequently, the state, whenever it felt its power, turned its attention to capture awqaf, reduce them or annex them to it and put them under its bureaucratic system. This was the only means to restore its role and dignity and to bring the society under its control to maintain political stability, regardless of legitimacy and efficiency of this political system. The experience of Mohammad Ali Pasha - Egypt's ruler- with waqf is a good example

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(15) See *the waqf deed of Burj Al Amir Jalban - known as Burj Ezzuldin- in Tripoli port- Lebanon in Awqaf - Sample issue, November 2000, PP 164- 169.*

of this trend. There were also other experiences during the Fatimid and Mamluki epochs which reflect the validity of this assumption. On the other hand, the king of Morocco views the Ministry of Awqaf as a sovereign ministry because it was through awqaf that the concept of 'Makhzan' (store house) was established and made the state in control of the society. This clarifies the nature of the society-state relation which was pervaded by the struggle to dominate waqf, especially on the part of the state.

### **Second - waqf and Awqaf Incorporating and Incorporated Institutions**

Researchers in Islamic politics used to differentiate between two types of institutions: the first is called 'incorporating institutions', i.e., the institutions tasked with setting up other institutions. Institutions such as "*Ahl el Hal Wal Aqd*" and "*Ahl Al Shoora*" are among those incorporating institutions<sup>(16)</sup> because they took charge of setting up the institutions of the political system, e.g succession, ministries and the like.

Based on this differentiation between incorporating institutions and what they set up in terms of institutions, waqf can be approached from the same angle and through the same methodology. Here we find that waqf, as a social institutional and legal process through which a private property is converted into a permanent means for converting a private property or public institutions represents in itself a corporation which incorporates other corporations covering the social, cultural, political and servicing areas.

Here we should differentiate between waqf as a jurisprudential formula and a legal process through which we withhold an asset and release its proceeds on the one hand, and between awqaf, or those institutions which live on those proceeds. In other words, each waqf has other awqaf which provide for it and benefit from its proceeds, for example when someone dedicates an orchard to an orphanage. In this case, the orchard is the waqf and the orphanage is one of the awqaf. Thus the study of waqf requires the study of the legal and jurisprudential dimensions for the process of dedication in order to give it a perpetual nature which goes beyond the ownership of individuals, in which case it cannot be sold, bequeathed or disposed of, neither a beneficiary can be changed. On the other hand, the study of awqaf will be a social, institutional and political study of those activities and

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(16) Saif Eddin A. Ismail: *al-Tagded al-Siyasi wal Khibrah al-Islamiyah: Nizarah fi al-waqi' al-Arabi al-mo'asir* supervised by Houriyah Megahed - PhD dissertation, Cairo University, Faculty of Economics and Political Science, 1987, PP 537-549.

social functions related to this waqf. Thus we have two unique issues. Arab thought was preoccupied with waqf with the exception of the two studies of Dr. Amin and Dr. Ghanim<sup>(17)</sup>, whereas western thinkers concentrated on awqaf as we indicated earlier.

Here we find that the differentiation between **waqf** as an **incorporating** institution and **awqaf** as an **incorporated** institution assists in re-defining the problem and reformulating the relevant questions. Historical flaws in this regard were mostly related to “Awqaf” not to “waqf”. Waqf, as a concept, a jurisprudential formula and a legal system introduced a rich financial basis to activate the society on the one hand, and address its needs on the other. Corruption, mismanagement and wastage of the economic resources of the society may be imputed to the management of awqaf not to the waqf itself. With the exception of those problems which resulted from abusing the Istibdal (replacement) provision, as one of the ten conditions of waqf, we rarely find historical problems related to waqf, but we find that the entire problems were associated with awqaf, for example unfair distribution of proceeds, failure to carry out the functions related to a specific institution, or wasting or appropriating their resources. All this shows that waqf, as an incorporating institution is a concept which transcends history and the limitations of time and place. On the other side, we find that the institutional and administrative forms linked with Awqaf as incorporated institutions (established by waqf) are social experiences limited by time, place and the particularity of the human being. They must be studied in the light of their particularity and realistic data, not in the light of their legal or jurisprudential framework, theoretical or epistemological foundations. Having a look at the waqf experiences and the resulting awqaf in the west, we find that the images of awqaf and their institutional forms, means of managing and investing them remarkably differ from those similar institutions in the Islamic world because waqf concept was copied as an incorporated institution, away from awqaf, their forms and historical manifestations of the concept. In the United States, for example, there is the greatest number of awqaf in the world. The waqf of Harvard University, for example, is US\$ 16 billion and the concept of the Administrator (Nazir) has never been known. There is only the

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(17) Amin: *Awqaf wal hayat al-igtimaiyah fi Misr*, a documentary study, op cit., and *Al-awqaf wal Siyasa fi Misr* by Dr. Ghanim. Op cit. Each entitled his study using the term al-Awqaf not waqf. The former studied al-Awqaf wal hayat al-Igtimaiya fi Asr al-Mamaleek, the latter studied al-Awqaf wal Hayat al-Siyasiyyat al-Hadithah. Each one of them used 'Awqaf' not waqf. Both studies regarded those institutions as social activities subject to the laws and regulations of the society.



board of trustees whose members are elected and renewed through regular elections. The Islamic world should exert sincere efforts to renew all that is related to waqf in terms of management, organization, incorporation and quality instead of wasting the efforts in discussing the importance of waqf, its legality, its Islamic origin and historical background, etc.

### **Third - Individual and Institution: The Role of the Individual in the Islamic History**

Although historical Islamic jurisprudence knew the juridical personality or what has been known as “De Jure Zemina”(Constructive Receivable)<sup>(18)</sup>, especially in connection with waqf, Awqaf were part of the arbitration process because they should pay taxes to the state, in addition to performing other obligations. Yet the concept of the juridical personality remained restricted and had never had that spacious social, institutional and economic connotation. Islamic jurisprudence was mostly based on the idea that the social agents are normal human beings. Therefore, most of the jurisprudential awards, as maintained by Dr. Ali Guma’a Mohammad<sup>(19)</sup> addressed the normal personalities, i.e. the individuals who are regarded by those awards as being the subjects, parties and beneficiaries. This state of affairs caused the importance of juridical personality to recede remarkably.

This jurisprudential conclusion caused great complications on different levels, for example an Islamic institutional thinking did not develop in tandem with the legal or jurisprudential thought. Thus the essence of the problem in the history of Islamic systems, including waqf, is the lack of development in the institutional and administrative dimensions which go with the development in the Islamic society in various community aspects. Reflecting on this historical case characterized by unripe thinking or lack of institutional organization may be attributed to the following reasons:

- 1 - The early seeds of Islam were associated with the consultative rule established by the Prophet (PBBH) and the Wise Caliphs. During that period the seeds of political, social and economic institutions began to sprout and institutions such as Nuqaba’a and *Ahl Al Shura* had come into existence. The concept of the Companions (*Sahabah*) of the Prophet

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(18) Ghanim, Ibid, PP 58-61

(19) Ali Guma’a Mohammad, Al Madkhal (Cairo, Higher Institute of Islamic Thought, 1996

(PBBH) may represent in itself an institutional concept. At that time the institution of *Ahl El Hal Wal Aqd* appeared. Speculating on the transition of power from Abu Baker to Omar, and from Omar to Uthman and from Uthman to Ali (May Allah be pleased with them all) we find that such transition of power was carried out in an institutional way, either in identifying a group from which a candidate is selected or identifying a group which nominates one, or the matter is reverted to the Prophet's companions. Generally speaking, the transition of power was carried out in a quasi-institutional way if taken by the modern sense. However, when Mu'awiya Ibn Abi Sufyan seized power and converted it into a monarchy, the embryonic attempts to establish institutions were aborted and the concept of 'Shura' (consultation) was transformed into a formality related to the process of ruling not its foundations, and with the output of the political system, not with its input. Here the emphasis was laid on the individual or the normal person and the interest in institutions or a juridical personality retreated to a secondary position. Consequently, the jurisprudence meant originally for arranging the Moslems' affairs started to deviate from the right tract by responding to real facts. The result was an emphasis on the natural person and ignoring the juridical personality.

In the light of the aforementioned conclusions, the Islamic history<sup>(20)</sup> began to focus on the lives of important people, ignoring the institutions and the administrative and political systems. History is always made by an individual since Harun Al Rasheed till Jamal Abdul Nasser, passing through Salahuddin, Qutuz, Mohammad Al Fatih, Sulaiman Al Qanumi and others. Historians often ignore social activities which created the individual or made his victories and achievements. It is illogical to imagine that Salahuddin, the individual, routed the crusaders because he himself was a by-product of social institutions and activities. Indeed, the real victorious was the Umma with its institutions and activities. Since the transition from the Caliphate system based on consultation, liberty, justice and equality turned into the Omayyad royal system based on the individuality and tribalism, we see that glorification of the individual's role in a legendary way appeared because such qualities constituted the basic prerequisites for acquiring legitimacy.

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(20) It is easy to say that history books laid great emphasis on rulers, leaders, ministers and statesmen, more than social activities. Those books which dealt with society, for example as Al Aghami by *Al Asfahani* talked about the lower classes. This means that the middle class was not given due attention which makes it necessary to study and attention.

2 - The Islamic political thought emphasized the individual and much attention was given to him whenever a need for a reformation arises<sup>(21)</sup>. All attention was given to the individual ruler to convince him of adopting a reform. Therefore, the good or decline of the nation was associated with the weakness or the strength of the one individual, i.e the ruler.

Moreover, it is not strange, therefore, to link the status of waqf with the waqf administrator (Nazir), linking its prosperity with his honesty, efficiency and eligibility and vice-versa. Both cases reflect one thing; i.e. an individual is the hub of the political and social life. Even when an institution exists it will belong to the individual and its destiny is pinned on the morality, mentality and psychological state of the Nazir. It was not possible for an institutional or organizational thought to develop or to create an effective institutional infrastructure which neatly harmonizes with the philosophy and objectives of waqf. This caused Awqaf to suffer due to the consecutive crises which came as a result of the absence of the institutional dimension and the hegemony of personal interests which tampered with Awqaf proceeds, functions, assets and their social role.

#### **Fourth - Institutional Administrative Structure of waqf**

Analyzing the institutional administrative structure of waqf requires a multi-dimensional approach in order to present an accurate description of this structure and to identify its major characteristics and properties in order to give an intellectual image of this institution, and specify its points of weakness and defects which disrupted its historical progress<sup>(22)</sup>.

Approaching the internal administrative structure of waqf institutions is the easiest point in this respect because the administrative formation of the various waqf institutions embraced a set of major functions which could conduct them even if these institutions operated individually or failed to fulfill their duties or justify their existence. This state of affairs relating to the society forced awqaf to create a complete administrative staff to run their affairs in the context of the self-operation of awqaf under the control of the administrator. This new system

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(21) Most books dealing with Islamic heritage deal with the political phenomenon through reforming the ruler either being a caliph, sultan or emir. The point here is that an interest in the institution did not match the interest in the individual even if sometimes viewing an individual as an institution, which in this sense means a system of social, political and cultural activities.

(22) Ghanim: op cit, p 89.

included a set of supervisory, financial, legal and technical jobs<sup>(23)</sup>. With the multiplicity of the waqf institutions on vast geographical and historical areas, researchers classified the administrative system of awqaf in two sets of jobs,<sup>(24)</sup> as follow:

***A set of administrative jobs which include:***

- **First:** *Al Mubasher* (Performer) is the official in charge of attending to waqf affairs. He should be able to read, write and has knowledge of book-keeping, in addition to being a pious and just scholar;
- **Second:** the job of a '*Shad*' or '*al-Mashad*' who is the observer, supervisor or inspector. He should be sincere, hard working, modest, honest and powerful;
- **Third:** '*Al Jabi*' who should be an honest person, religious and could collect the proceeds, rent, installments and other waqf dues;
- **Fourth:** *Al-'Sairafi*' (Cashier) who receives the funds and makes waqf payments;
- **Fifth:** *Al-'Shahid*' (attesting & subscribing witness) whose job is to sign as witness the financial transactions of awqaf and acts as a financial auditor responsible for the process of receiving and spending money.

***A set of technical jobs which includes*** the technical jobs required for each waqf independently, as an engineer, a builder or any other craftsman.

Regarding the institutional infrastructure of waqf and in spite of the multiplicity of types and names of waqf institutions, its development was influenced by two principal factors:

- 1) The organization of the waqf institution,
- 2) Its relation with the state on the other.

In the light of these two factors or parameters, we find that the waqf institution went through three stages:

***1) The stage of Decentralized Autonomy.***

It is the stage in which waqf followed the self-management format away from the state's intervention. It was characterized by two traits: autonomy and decentralization which were considered by Dr. Ghanim as the major features of the historical formation of waqf in Egypt<sup>(25)</sup>. This stage does not mean a specific historical stage, but rather a case which may appear in a historical period then

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(23) Ghanim, op cit, p 84.

(24) Amin: op cit, pp 304-319.

(25) Ghanim: op cit, p 89

disappears in another. A good example of this stage is the period which preceded the formation of the first Diwan of waqf in Egypt during the Caliphate of Hisham Bin Abdul Malek (118 H / 736 AD) when the Umayyad judge Tawbah Ibn Nimr was tasked with establishing the Diwan. It should be noticed here that the Diwan was under the control of the judiciary, then it broke away from the judiciary and forked into many departments, for example *Diwan Al Ahbas*, Diwan Al Ahbas Al Sultania etc<sup>(26)</sup>. In case the Diwan of Awqaf falls under the control of the judge or the oversight of the judiciary does not mean at all the absence of the condition of autonomy and decentralization. Taking control of awqaf by a judge means that the waqf is outside the state's authority and it is a lawful contractual issue whose parties (Waqifs and beneficiaries) determine its scope. The administrator should observe these conditions and implement them because a judiciary in Islam does not fall under the state's intervention in the modern sense. The fact that waqf belonged to judiciary confirms its autonomy, besides being considered as a confirmation of the nature of contract whose implementation is entrusted to a judge.

## ***2) Stage of Centralized Autonomy***

This is the stage in which an independent Diwan of Awqaf was established to maintain the autonomy of each single waqf but it centrally managed them such as resorting to judges to appoint Administrators and getting the approval on leasing, monopolizing or implementing 'Istibdal' (replacement) conditions in general for or against waqf. This case appeared in different periods during the Fatimid and Mamluki epochs. Several attempts were made to control waqf, reform it or put it at the disposal of the state's and the ruler's objectives. At the time of Mohammad Ali Pasha there was an embodiment of this stage when he established a general Diwan for waqf in 1251 H/ 1835 AD. This came in the context of a set of decisions which brought an end to most awqaf except those related to mosques. The establishment of Thurri waqf was also prohibited. This tradition initiated by Mohammad Ali remained in effect till the reign of Abbas I who tried to introduce reforms to the policies of Mohammad Ali which caused injury to awqaf and strongly caused them to recede and deteriorate<sup>(27)</sup>. During this stage of autonomy with decentralization, awqaf had their own budgets while falling under a central authority. Nevertheless, they maintained autonomy in realizing their objectives and spending on their beneficiaries.

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(26) Ghanim, op cit, p 85

(27) Ghanim, op cit, pp 383 - 390.

### **3) Loss of Centralized Autonomy**

This stage started with July 23, 1952 Revolution and extended to Sudan, Somalia, Djibouti and the rest of the Arab and Islamic countries<sup>(28)</sup>.

During this period Awqaf became the property of the state and dealt with them as if they had been their real owner. The proceeds of awqaf became a part of the state's budget and expenditures became part of the state's expenses. In other words the philosophy of waqf came to an end while its manifestations and forms survived. The state collects the proceeds and adds them to its budget as part of the national income. At the same time certain amounts are earmarked through the state's budget to spend on the purposes for which a waqf has been made. Consequently, the relation between the Waqif and the beneficiary was cut off and the state became the most corrupt of the Administrators throughout the Islamic history.

## **Fifth - Structural Problems of Waqf Institution**

Waqf problems are so numerous that we rarely find a domain without a problem which hindered the progress of this institution throughout its history, or posed an excuse for seizing it. In the following lines, we shall put down the major structural problems of the waqf institution:

### **1 - Problems Emanating from the Waqifs' (creators of the Embodiment/ mort main's) themselves**

This problem is created by using waqf as a means for realizing objectives outside the philosophy of waqf, for example using the *Ahli waqf* to deprive some inheritors of their rights, to distribute the legacy in a way contradictory to fiqh regulations or for tax evasion as it was the case during the Mamluki era<sup>(29)</sup>

### **2 - Problems Emanating from the waqf Fiqhi Rules:**

An example of this is the lack of a consensus on the perpetuation of waqf and getting it out of the Waqif's (mortmain's) property. Shafiis and Hanbalis

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(28) Zuhair Othman Ali Noor, *Awqaf in Sudan and list of Waqifs-Khartoum*. 'University of Khartoum' 1996. *The transactions of a seminar on investing waqf property held in Jeddah* from 20/3/1404-2/4/1404 AH (24/12/83-5/1/1984) edited by Hassan Abdullah al-Ameen, Islamic Institute for Research & Training, 1984. a paper on Sudan submitted by Dr. Abdul Malek Al J'ali Sudan's representative and another paper from Djibouti, and third from Somalia by Mohammad Noor Abdulrahman.

(29) Behrens Abouseif, *Egypt's adjustment to Ottoman rule: institutions, waqf and architecture in Cairo, 16th & 17th centuries*, P 149.

agreed on the perpetuation of waqf and getting it out of the owner's property. On the other hand, Hanifis and Malikis maintain that waqf is similar to a 'simple loan' or '*Ariya*' which can be revoked<sup>(30)</sup>. This allows for the dissolution of waqf after its consummation. Moreover, the Waqif's condition related to the personality of the Administrator and restricting it to the Waqif's (mortmain's) descendants brought forth inefficient Nazirs who failed to properly manage the waqf.

### 3 - Problems Emanating from the Ten Conditions of Waqf.

This specifically relates to the issue of *Istibdal* (replacement) which sanctions the sale or replacement of a waqf asset. This condition opened the door wide to seize awqaf and transform them into private property. The Mamluki Sultans exploited this condition to dissolve awqaf and seize them when they failed to pass resolutions authorizing the state to seize the waqf due to the opposition of Faqihs and judges who rejected this trend deemed contradictory to shari'a. Therefore, the authorities resorted to replacement as a ploy to put hand on awqaf. This process was carried out through witnesses who either testified that a specific waqf was injurious to a neighbour or a passer-by or that it should be sold in the interest of the good of the public. In this case, a judge approves of the sale<sup>(31)</sup>.

When the Ottomans invaded Egypt, they wanted to show that their faith was stronger than that of the Mamlukis. To this purpose they issued '*Qanun Nama*' which held *Istibdal* (replacement) null and void.<sup>(32)</sup>

### 4 - Problems Emanating from the Administrator's Post:

The appointment of an Administrator was vested in the Waqif (*mortmain*) and whom he regarded as guardians or trustees. This process created a successive line of trustees, each of whom appointing the trustee who would succeed him and so forth<sup>(33)</sup>. This was carried out as a facsimile of the heir apparent case in the Islamic caliphate and the monarchy in the Islamic state which took a curved slanting line until a state expires and another one appears following the same

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(30) Mohammad Ibrahim Jannati- *Fiqh al-Waqf ala Dhawa' al-Mathahib al-Islamiyah*, op cit, Awqaf Journal Zero issue, Nov.2000, PP 29-31.

(31) Amin, *Awqaf and Social Life in Egypt*, op cit, pp 322-346. See also Jamal Al Kholi: *Istibdal and Seizure of Awqaf, A documentary study*, Alexandria, Dar Al Thaqafa Al Elmia (2000).

(32) Amin: op cit, PP. 322-346. Jamal Al Kholi, Ibid..

(33) Salim Heraiz: *Waqf Dirasat Wa Abhath* edited and revised by Fadi Salim Heraiz - University of Lebanon - legal studies dept, 12. (Beirut 1994) PP 131-136.

deteriorating line. Thus the appointment of an Administrator was in the hands of the trustees who could be ineligible to carry out such a responsibility.

#### **5 - Problems emanating from the Lack of Clear Policy on the Accountability of the Waqf Administrators and Chargé d'affaires.**

The accountability was left to the beneficiaries who had the right to resort to the courts of law. The Administrators of waqf had also the same right to resort to the law to invalidate the claim of beneficiaries. In this way, the Administrator was able to defend himself against the beneficiaries through submitting a statement of account to the judge, in addition to a document to evidence the beneficiaries' intransigence.<sup>(34)</sup> This means that there were no regular measures to supervise the Administrators' task and subjugate them to. Putting judiciary under surveillance in that way made the role of judge contingent upon calling him by the beneficiaries. Sheikh Abu Zahra said in this respect that that Shari'a judiciary has not regular measures for holding anybody accountable as accountability is confined to those cases in which Administrators (Nazirs) request permission to act, for example getting a loan or Istibdal for necessity. In most cases the Nazirs were prepared to avoid being put under suspicion or losing their rights<sup>(35)</sup>. There were no other departments for exercising any supervisory activities. This was one of the most dangerous problems to which waqf was exposed to and caused it to suffer from corruption, loss, dissolution and seizure.

#### **6 - Problems Emanating from Utilizing Waqf Assets**

There were several means for seizing the waqf or alienating it to a private property, for example:

- 1) Renting for long periods through big prepayment as 'Khulu' (purchase of lease). This type was common during the region of Sultan Al Ghouri who used to lease the waqf for big amounts of money and thereby giving wide powers to the lessee, including the right of inheritance (caste system) of such assets to his children. This took place at a time waqf deeds provided that renting should not exceed 3 years, but practically the term of lease reached 90 years<sup>(36)</sup>.

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(34) Ibid, p 165.

(35) Abu Zahra: Mashroua' Tanzeem al-Waqf,p.391.

(36) Behrens- Abouseif, Egypt's Adjustment to Ottoman Rule: Institutions, waqf and Architecture in Cairo, 16th & 17th centuries, P 154.



- 2) Turning the lands into feudal estates through distributing these lands to Mamluks to collect the rent in favour of waqf and then it is turned into a private property.<sup>(37)</sup>

Turning waqf institution into feudal estates, monopolies and long term leaseholds caused damage to waqf assets. The result was damage and loss with the passing of time or exposition to looting. Sometimes, in case of long term lease, a waqf asset was re-leased and the original lessee would get great advantages from the difference between the old and new rents<sup>(38)</sup>.

### **7 - Problems Emanating from the State:**

The rulers were keen to seize the waqf whether this was for the ruler himself as it is the case with the Mamluki Sultans who seized the waqf through the approval of the judges of the time. A Waqif (mort main) was sometimes forced to acknowledge that all his property and Awqaf had originally come from the Sultan's wealth. Then he had to accept transferring all such property to the sons of the Sultan.<sup>(39)</sup>

The seizure of Awqaf made the ruler stronger and the society the weaker as the case of Mohammad Ali Pasha who seized all Awqaf except those related to mosques following the protest of clergymen against such a policy.<sup>(40)</sup>

### **8 - Problems Emanating from Foreign Occupation**

There had been interventions into the waqf affairs in order to divert it from contributing to the national movement or seizing it.<sup>(41)</sup> Agencies in charge of waqf were forced to assign it in favour of foreign authorities. This policy was applied by the French occupation in Tunisia after 1881 when the society in charge of Awqaf was forced to relinquish not less than 2000 hectares of Awqaf to the French occupation forces<sup>(42)</sup>.

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(37) Amin: op cit, pp 57-59., also Heraiz: op cit op cit 200-203.

(38) Amin: op cit, pp 180 and 356-361.

(39) Amin, op cit, p 351.

(40) Abdul Rahman Al Jabarti- *Ajaib Al Athar Fil Tarajim Wal Akhbar*- Cairo - Sharqiyah Printing Press, 1322 H / 1904 A.D, Vol 4, P 141 quoted from Ghanim, op cit, p174.

(41) Mohammad Bin Abdul Aziz Bin Abdullah: *Al Waqf Fi al-Fikr al-Islami*, Vol 2, (Morocco- Ministry of Awqaf and Islamic Affairs, 1996, pp 311-322.

(42) Ahmad Qassem: *waqf in Tunisia in 18th and 19th centuries*. Randi Caroline Deguilhem.: waqf in the *Islamic World: A social and Political tool*. Introduction by Andre Raymon (Damascus-French Institute for Arab Studies, 1999) P.17.

In short, a cluster of legal, administrative, institutional, political and moral problems concurred to create this state of waqf degeneration and deterioration which may be attributed to moral backwardness in its work and narrow-minded management. Such people looked as if they had been living in primitive ages, inexperienced and void of training, especially in conjunction with investing waqf monies<sup>(43)</sup>.

The image of waqf was degenerated and pervaded by no sense of responsibility, void of any Surveillance or inspection; dominated by many powers intent on looting and capturing it commencing by politicians, administrators, judges and the elite.<sup>(44)</sup> The accumulation and continuation of this status created a state of public indignation against waqf system which Sheikh Abu Zahra attributed to the fact that “everything connected with waqf was found to be corrupt: beneficiaries became inert, doing nothing and the potentials of a country have been wasted. The assets are receding and the funds are lost. Replacement (Istibdal) monies are stacked in treasuries yielding benefits to none. Moreover, they found it a system which persuaded its managers and directors to deviate from the right path into state of errors and dishonesty. It also sowed the seeds of disputes due to the struggle over administration or the conflict between beneficiaries and Administrators”<sup>(45)</sup>.

### **Sixth - Reform in Reverse: Attempts at Reform or Disruption**

The so called study for reforming waqf from the philosophical perspective of waqf and its cognitive bases undoubtedly indicates that most of these attempts were essentially attempts to disrupt it. This is attributed to the fact that reformation was baseless and depended on factors other than those which constitute the major pillars of waqf. The purposes underlying these attempts were far from reforming, reviving and glorifying waqf role as an independent community institution which embodies a genius concept for striking a balance between the state and the community, or safeguarding this community against the encroachment of the state and to maintain the Islamic civilization even when states collapse or weaken. Following are some reform or disruption attempts experienced by waqf:

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(43) Monzer Kahf: *Awqaf in Moslem Countries and Communities* - paper presented at the International Seminar on Awqaf and Economic Development, Kuala Lumpur 2-4 March 1998 (Jeddah: Islamic Research and Training Institute, 1998), p 3.

(44) Reiter, *Islamic Endowments in Jerusalem under the British Mandate*.

(45) Sheikh Abu Zahra: op cit, p.392.

## 1 - Reform through Organization

It is the attempt initiated by Tawbah Bin Nimr who became judge in Egypt during the reign of Hisham Ibn Abdul Malek (118 AH/736AD). When he came to Egypt, he found out that Egyptian Awqaf, for all their great numbers, were in the hands of beneficiaries or Administrators as provided by the Waqifs. Therefore, Judge Tawbah established the *Diwan for Ahdas* under the direct control of the judge<sup>(46)</sup>. This Diwan was based on the concept of organizing, registering and maintaining awqaf, far from being a central management in the modern sense. The concept of the Diwan at that time was limited to registering the items of waqf. Such an attempt was a reformation bid in the proper sense of the word because it created a quasi-central authority for registration and up-keeping without abolishing the autonomy of waqf. The Awqaf were put under the control of the judge which was a specific addition to the waqf institution. The process of annexing waqf to the judiciary is the recognition of the autonomy of waqf and its association to the society, not to the state. The seeds of accountancy and control concepts appeared for the first time and if developed and continued, waqf would have never reached such a deplorable condition in the following epochs.

## 2 - Reform through Codification or Legal Reform:

These were the attempts which emerged with the Ottoman conquest of Egypt and the interest to maintain the autonomy of waqf and keep it away from the state's dominance. The duty of supervising waqf was transferred from a Shafii judge to a Hanafi one after the Ottomans had come to Egypt, but the new judge did not perform any change to the legal structure. Moreover he kept in effect the four schools of thought in all matters related to waqf and jurists were left free to implement the principles of their own religious order. Later, the Ottoman issued "*Qanun Nama*"<sup>(47)</sup>. On the same lines, other attempts to reform waqf in Egypt by the end of the 19<sup>th</sup> century and the beginning of the 20<sup>th</sup> century emerged, most outstanding of which was the attempt of Mohammad Qadri Pasha who presented a comprehensive legal project to reform waqf in his book "*Qanun Al Adl Wal Insaf Lil Qadha'a Ala Mushkilat Al Awqaf*"<sup>(48)</sup> in which he put 646 legal articles dealing with all awqaf issues. This was an attempt to present a reformatory vision from a specific perspective. Later, a legislative project was submitted to the Egyptian Parliament with its two divisions: House of Representatives and House of

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(46) Amin., op cit, P.48.

(47) Behrens Abouseif, *Egypt's Adjustment to Ottoman Rule: Institutions, waqf and Architecture in Cairo, 16th and 17th centuries*, p 148.

(48) Qadri: op cit.

Senates in 1926. Sheikh Abu Zahra thoroughly studied the law and criticized it in his lengthy study<sup>(49)</sup>. He viewed the project as inadequate and deficient in many respects. For example the law stipulates that Administrators are accountable and should be taken to task without hinting at the ministry's staffers who are in charge of questioning the Administrators. Moreover, the law gives freedom to the judge to dismiss waqf Administrator without verifying his dishonesty or inefficiency. Finally, Abu Zahra rejected the idea of applying this law to the existing awqaf based on a non-retrospect basis, i.e. the law would not apply to the cases which preceded its issuance.

There were other two attempts which originated from the waqf philosophy itself and sought to reform it within its cognitive context and its social objectives and purposes<sup>(50)</sup>. The other two attempts were more of disruption than reformation as we shall see in the following context:

### **3 - Corrupt Reformation Attempts**

The early beginnings of these attempts started in 363 AH/974AD during the Fatimid State rule in Egypt when the Caliph Al Muez LiDeen Ellah Al Fatimi ordered all waqf funds to be transferred to Baitul Mal (Islamic treasury) and never to be distributed to beneficiaries on a decentralized basis and added that waqf proceeds should be collected in a central way and be deposited in Baitul Mal. Beneficiaries were requested to submit documents indicating their right to the proceeds.<sup>(51)</sup>

This behavior transferred waqf proceeds to the state's account and, on the other level, deprived beneficiaries of their entitlements because it was not easy for any of them to produce a document manifesting his rights to waqf proceeds. On the other hand, it was extremely difficult to reach Baitul Mal especially by the citizens of Upper Egypt. Mohammad Ali Pasha implemented the same procedures to subjugate waqf to the state's authority. This was a partial reform of waqf institutions at the management level. At the same time it created a deep and wide corruption in the general sense. If this type of reform aimed to put an end to a limited corruption at the Administrator's level, it had entered waqf as a whole in a cycle of major political corruption at the level of top administration and ministries. Consequently, it was a reform in form not in spirit; it was a reform in some parts and a corruption in other parts though corruption here was far greater in size and effect.

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(49) Abu Zahra: op cit.

(50) The description above does not apply to the draft law submitted in 1926 to the Parliament. It is a model of the reform attempts outside the philosophy of waqf and detached from its known format and social objectives. (The Editor).

(51) Amin: op cit, P52.

#### **4 - Attempts of Degenerative Reform exemplified in Annexing Awqaf as a whole to the State's Property.**

Through these attempts all awqaf became the property of the state and consequently their proceeds became part of the state's national income. Spending out of these channels embraced eligible persons and beneficiaries. This attempt which came with 23 July, 1952 Revolution in Egypt and we saw the socialist laws reach the other part of the Nile Valley and thereafter to the rest of the Arab countries. This attempt left no traces of waqf other than those unfair implications in the subconscious of the people. The reality and the philosophy of waqf came to nothing and the lands were distributed under the Agrarian Reform Law to the emerging military officers. The same thing happened to the property of the Egyptian feudal landlords, imperialism stooges and members of the former royal family. The waqf channels of spending, attending to poor classes and providing services to them became part of the state's policy. Thus waqf became an integral part of the state.

It is not an exaggeration to brand this type of reform with corruption because it disrupted the objectives, nature and function of waqf. It is pertinent here to recall one example about the Shandaweeli Guesthouse waqf cited by Dr. Ghanim<sup>(52)</sup> which was seized by the state. It was a waqf for hosting wayfarers and visitors. These are social and psychological duties and responsibilities which cannot be performed in a bureaucratic way by public officials. The result was the loss of waqf which was taken up by the state and the loss of jobs which no longer existed.

Finally, the history of waqf institution reflects an idealistic natural style of the relation between the society and the state: a relation characterized by a long struggle because the state sought without despair to dominate the sources of the society's power to bankrupt, weaken and subjugate it to secure its continuity even through ignoring legitimacy and legality. The state at all times was able to dominate waqf and nothing stopped it or failed to do so when it sought to maintain its legitimacy. But when the government wanted to maintain and respect the existing legitimacy, it shunned any illegal measures against waqf or the awqaf belonging to it. The ruler was not to violate the boundaries of this legitimacy in order to dominate waqf which can be done by other means such as Istibdal (replacement), monopoly or long term lease etc.. When the religious and Shari'a foundations become weaker and the regime thought of adopting political means outside Islamic means to stabilize its rule, it was easy to seize waqf or put away with it. Thus we find the attitude of Mohammad Ali Pasha towards waqf completely different from his predecessors because he sought to establish a modern state which derived its legitimacy from building a modern society

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(52) Ghanim op cit, pp 324-332.

and state in the European style. He was not in need of any traditional Shari'a sources and consequently, he fought and stamped out the traditional social powers like the Mamlukis, traders, and nobles and marginalized Al Azhar's role. Acting against Shari'a was not a question to be taken into account for Mohammad Ali because this would not affect the legitimacy of his rule. Putting an end to all awqaf, except those related to the mosques, is an embodiment of the separation between religion and politics. Religion belongs to the mosque but other affairs belong to the state which could have nothing to do with religion. This reflected a secular vision of waqf which confined waqf to serving places of worship only. The 23<sup>rd</sup> July Revolution and what came with it does not need more clarification because it was a step far ahead of Mohammad Ali's experience in the state-society relation of legitimacy.

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