



dans une sorte de cohésion de temps difficile où les pratiques singulières du habous ressemblent à des trahisons. N'est-il pas vrai que le choix porté sur un bénéficiaire cache l'exclusion de l'ayant\_droit légitime, celui qui aurait hérité en l'absence de dévolution ? Loin est le temps de la consolidation de la dynastie avec 'Ali Bâsha nécessitant de privilégier les filles et leurs descendants, afin de renforcer des liens que l'intransmissibilité du statut princier par les mères auraient distendus.

A la veille de l'indépendance du pays et de la proclamation de la République, l'institution habous n'est plus la manifestation de la solidarité d'un groupe qui monte, mais bien celle de soubresauts au relent de fin de règne.

Lamine bey prend le pouvoir dans des conditions assez troubles, après l'abdication forcée de son cousin et prédécesseur, Moncef. Il est père d'une nombreuse famille, et fait assez unique, nous lui connaissons qu'une seule femme, Jneina.<sup>(1)</sup> La monogamie est un facteur de stabilité de cette famille princière « pas comme les autres ». Les archives en cours de consultation, ainsi que l'enquête orale confirment Lamine bey dans l'image du bon père, soucieux de capitaliser pour ses enfants. En effet, de 1945 à 1957, les filles du bey et sa femme acquièrent des biens ruraux et urbains, par achats et échanges qu'elles se hâtent de constituer habous à leur profit durant leur vie, ensuite au profit de leurs descendances.<sup>(2)</sup> La conjoncture dans laquelle ces acquisitions se sont réalisées est doublement intéressante. Conjoncture d'après-guerre, vente de biens d'Italiens compromis avec les autorités fascistes, ont largement contribué à mettre sur le marché des propriétés urbaines et rurales que le bey s'est empressé d'acquérir au profit de son épouse et de ses filles. Sitôt acquises, ces terres situées à Mornagh, Mornaghia, Soukra, et Carthage sont l'objet de constitution habous à un moment où l'institution se perd dans le reste de la société.<sup>(3)</sup> La conjoncture politique interne mérite aussi que l'on s'y attarde : la famille beylicale est menacée, le discours nationaliste joue la carte de l'autochtonie ce qui implique le renouvellement de la classe politique. La stratégie sociale sur laquelle s'est appuyée la famille husaynite devient caduque : Femmes, enfants et biens circulent pendant les deux cents cinquante ans que dure la dynastie dans un jeu d'inclusion-exclusion selon le statut de l'époux. Une ascendance paternelle non princière éloigne l'in

dividu du cercle du pouvoir, un mariage avec une princesse l'y ramène. La communauté des biens soude la parenté, empêche que l'exclusion l'emporte sur l'inclusion.

Cette stratégie, vitale aux XVIII<sup>e</sup> et XIX<sup>e</sup> siècles, perd de son acuité quand le groupe ne jouit plus de sa caractéristique de milieu privilégié. Il s'enferme sur lui – même par la multiplication des mariages endogames,

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(1) Archives nationales, Série F, carton 5, dossier 67.

(2) Série F, Carton 5, dossiers 67, 68, 84, 111, 115.

(3) Blili, Leila, « Le habous, fait de structure ou effet de conjoncture », in Hassab...op.cit ; p286.



particulièrement imprévoyant. Ses revenus étant largement inférieurs à ses besoins, il n'hésite pas à demander des prêts pour lesquels il met en hypothèque les biens de sa femme, avec son accord, mais un accord probablement forcé. En 1919, elle présente une demande pour constituer habous des henshirs à Béja, al 'Alia, et la Hnâya, au profit de ses quatre filles, et les filles de sa fille défunte, le dévolutaire final étant al haramain.

N'ayant pas de garçons, 'Aisha sait que son époux héritera de la moitié de ses biens si elle venait à mourir avant lui. Elle ne se fait pas d'illusions sur la destinée de son patrimoine étant donné le train de vie dispendieux de son époux. Elle opère le choix de privilégier les filles et d'exclure le mari.

Cette option n'est pas du goût de Meimûn. Est-ce pour la punir qu'en 1927, il prend une deuxième épouse. Seulement, la deuxième épouse ne perçoit pas la dotation à laquelle elle a droit en tant que femme de prince, les autorités coloniales ne reconnaissant pas la polygamie. Meimûn répudie alors 'Aisha. En conséquence, elle perd la liste civile qui constitue la seule rentrée d'argent assurée grâce à son statut d'épouse de prince. Dorénavant, pour vivre, elle n'a plus que ses propres rentes qu'elle a sauvées de la perte. Elle meurt vers 1940,

Nous avons là un deuxième exemple de stratégie féminine en matière de habous. Tout comme Kmar la circassienne, 'Aisha Sonia n'est pas princesse de sang, bien que sa mère le fut. Avant son mariage, elle faisait partie de la famille beylicale, mais n'en avait ni les privilèges ni les contraintes : elle ne perçoit pas de liste civile, et n'a pas besoin de l'accord du souverain pour gérer ses biens. Son mariage avec le prince Meimûn lui donne ce statut princier qu'elle perd après sa répudiation. Cette valse statutaire affecte-t-elle réellement la vie quotidienne de 'Aisha ? Non, car dans ces milieux, ce sont les femmes qui gardent le foyer, elles sont souvent propriétaires de leurs logements, les répudiations ne les mettent pas hors de chez elles.

Dans sa constitution habous, cette princesse qui a eu des enfants, mais pas de garçons, a privilégié ses filles, excluant son époux et d'éventuels 'asab. Sa volonté était manifeste, se prémunir et prémunir ses filles des risques de paupérisation totale.

**Les filles de Lamine bey ou la capitalisation dans l'urgence.**

Le habous de kmar beya est intéressant dans la mesure où il montre les stratégies individuelles qui peuvent présider au choix des modes de transmission. Dans toutes les situations, le choix porté sur un bénéficiaire cache l'exclusion de l'ayant\_droit légitime, celui qui aurait hérité en l'absence de constitution habous. De ce fait, les femmes sont soumises à de fortes pressions, changeant souvent de bénéficiaires, les donations se faisant après maintes atermolements.

Au cours de cette période, l'enjeu social devient secondaire car les familles alliées aux beys entretiennent des relations suffisamment anciennes et solides dans ce milieu. L'enjeu est plutôt économique, l'endettement quasi général des membres de la famille husaynite attise les convoitises, nourrit des animosités entre proches parents, et donne de la famille princière une image d'un ordinaire affligeant.

#### **Habous et endettement : Habous de 'Aisha Sonia.**

Les archives attestent de l'anarchie financière de la plus part des comptes princiers. Les solutions apportées sont souvent plus graves que les maux qui les ont engendrés : recours aux prêts à des taux usuraires, hypothèques de première et seconde mains, ventes hâtives. La Direction des Finances contrôle toutes les transactions essayant de rationaliser, d'assainir, de gérer au mieux les patrimoines de personnes qui semblent irrémédiablement brouillés avec les comptes. Femmes et hommes partagent cette même incapacité à organiser leurs dépenses domestiques en fonction de leurs revenus. D'où un endettement quasi général, qui met souvent les femmes dans l'embarras car ce sont elles qui ont la responsabilité de leurs familles.<sup>(1)</sup>Certaines princesses sont soumises aux pressions de leurs époux, aux convoitises de son mari C'est le cas de Aisha Sounia qui constitue ses biens habous pour les soustraire aux convoitise de son époux.<sup>(2)</sup>

'Aisha Sounia, descendante d'un mamlûk du XIX<sup>e</sup> siècle et d'une princesse , est l'épouse infortunée de Meimûn bey (1867\_1931) , prince

(1) C'est le travail sur la série F qui nous autorise à ces conclusions .

(2) Archives nationales, série F, carton 5, dossier19..

disparition de celle-ci, aux enseignants de la Grande Mosquée Zitûna après prélèvement des sommes nécessaires à l'entretien de l'immeuble.

Si dans sa rédaction, le texte est conforme aux actes courants, il se distingue par un fait inhabituel - la signature devant le Consul de France - les habous étant toujours rédigés par des notaires et authentifiés par eux. Ce recours aux autorités françaises pour apposer leur sceau sur un document rédigé en arabe par deux notaires et traduit en français, cache la difficulté à mettre en place la procédure habituellement engagée. Celle-ci consiste à obtenir en premier lieu une amra, décret beylical, autorisant la constitution du habous, sur lequel s'appuie le notaire pour rédiger son acte. Nul besoin de passer par le Consulat français. Seul contrôle exigé, celui de la Direction des Finances qui n'intervient pas dans ces cas, contrairement aux actes de vente où l'avis de la commission de la liste civile est requis.

Pourquoi tel recours ? La suite des événements permet de reconstituer « l'affaire ». Par le choix qu'elle opère au profit de sa filleule, Kmar beya exclue d'autres ayants-droit, les héritiers de Nâçir bey. Ce choix n'affecte en rien les intérêts du bey du moment, Lahbib (1922- 1928), lui-même neveu de 'Ali bey, ancien époux de Kmar. Seulement la testatrice n'achève pas la donation, de sorte qu'à la mort de Lahbib, sa amra devient caduque, et Kmar doit en obtenir une autre du bey du moment, Ahmad ((1929\_1942).Celui- la est plus intéressé que son prédécesseur car, fils de Ali bey, il est héritier 'assab de Kmar, esclave, sans enfants. Il est presque certain que le renouvellement du décret lui fut refusé, ce qui l'a amené à tenter de valider sa donation auprès du Consulat français.

En juin 1942, accède au pouvoir Moncef bey, fils de Nâçir et filleul de Kmar, écarté par la donation. Le 2 janvier 1943, Kmar décède et Moncef bey intente un procès pour annuler le habous fait au profit de sa sœur Jneina, son époux Chadli Hayder, et la société de bienfaisance musulmane. Le Secrétaire général du Gouvernement tunisien reconnaît qu'il y a vice de forme.

Le dossier de Kmar beya aux archives se ferme avec sa mort, de sorte que nous ne connaissons pas l'issue de l'affaire. Peu de temps après, Moncef bey lui-même est contraint à abdiquer et à prendre le chemin de l'exil (mai 43).

Cette politique de conservation des biens s'oppose totalement aux dilapidations, et ventes hypothécaires qui ont caractérisé la gestion des autres membres de la famille beylicale. De ce fait, les possessions de cette sexagénaire, à la santé fragile comme le suggèrent ses dépenses médicales, sont convoités par son entourage.<sup>(1)</sup> A la mort de son dernier époux, Kmar beya perd sa position de première épouse. Son statut se dégrade, des indemnités de représentations lui sont retirées. Mais elle ne semble pas affectée financièrement puisqu'elle entreprend un voyage de santé dans la ville d'eau de Vichy, accompagnée de Chadli Hayder, époux de sa filleule.

A son retour, elle commence à mettre de l'ordre dans ses affaires. Elle a plus de soixante ans, l'heure des bilans est arrivée, d'autant qu'elle n'a pas d'enfants. Elle décide de constituer ses biens habous.

Nous comprenons qu'elle a constitué un habous avant 1928 sans savoir qui sont ses dévolutaires. Les sources nous apprennent qu'à cette date, elle demande au bey régnant Mohamed al Habib (1922\_1929) de l'autoriser à changer de dispositions relatives aux bénéficiaires de quatre titres fonciers, parmi lesquels figure sa maison de la Marsa et ses dépendances, toutes ses parts de inzâl grévant divers terrains de banlieue, ses parts dans le henshir al Mkhachbia, et des biens à Medjâz al bâb. L'accord est donné sans plus de précision.

Plu concis, un document habous, traduit en français et signé par la princesse devant le Consulat français le 10 septembre 1936. Elle constitue habous un domaine sis à Sfax, acheté en 1913, immatriculé en 1914, d'une valeur de 100.000 francs, à son profit durant sa vie, ensuite au profit de sa filleule Jneina fille de Nâcir bey et l'époux de celle-ci, Muhamad Châdli Haydar, à parts égales. A leur mort, la donation revient à leur postérité des deux sexes, ensuite à la postérité de leur postérité issue seulement du sexe masculin, à parts égales entre filles et garçons. A l'extinction complète des dévolutaires, le habous fera retour à la « société de bienfaisance musulmane » et en cas de

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(1) Nous n'avons pas encore réfléchi sur les héritiers légitimes de Kmar. Théoriquement, en tant qu'esclave, ses biens reviennent à son maître qui est dans ce cas de figure, son époux. Ce dernier étant décédé, c'est son fils et successeur qui en est l'héritier. D'ailleurs, c'est lui, Moncef bey qui intentera un procès à la mort de Kmar demandant l'annulation de ce habous.

est mariée à l'homme fort du moment. Car de toute évidence, et au moins jusqu'en 1881, date de l'installation du Protectorat, le moyen le plus court d'accès à la propriété demeure la proximité du pouvoir.

### **Habous et stratégies familiales.**

**Nous étudierons quelques exemples de habous constitués dans le cadre de stratégies familiales.**

#### **Premier exemple : Kmar la circassienne, veuve des Husaynites.**

Elle est née vers 1866 au Caucase, mais ne sait rien sur son enfance. Elle doit son titre de « veuve des Hussaynites » à ses mariages successifs avec trois beys régnants, Sadok (1859-1882), 'Ali (1882\_1902) et Nâçir (1902-1922). En fait, elle-même ne reconnaît que les deux derniers mariages.<sup>(1)</sup> Elle n'a pas d'enfants, mais un bon nombre de filleuls, cinq garçons et huit filles de 'Ali bey, quatre garçons et cinq filles de Nâçir bey. Elle décède le 2 janvier 1943. Nous sommes peu informés sur son rôle politique, quoique certaines sources laissent suggérer une forte influence sur son dernier époux.<sup>(2)</sup>

Elle possède quelques biens propres et des parts dans l'indivision avec ses cohéritiers. La fortune n'a rien de colossal car les temps ne le permettent plus, le Protectorat ayant mis de l'ordre dans les biens de la Couronne désormais distincts des biens de l'Etat. Aux princes et princesses de s'adapter aux temps nouveaux et de gérer au mieux leurs biens devenus inextensibles par la seule volonté du prince. Au désordre quasi général qui règne dans les économies domestiques de la majorité des membres de la famille, Kmar beya apporte à la gestion des ses affaires un soin particulier, veillant à l'enregistrement de ses propriétés, à l'acquittement de ses charges, au paiement de ses factures, et même semble - t - il, à la tenue de carnets de dépenses<sup>(3)</sup>.

(1) Archives nationales, Série F, Carton 5, Dossier 31.

(2) Fonds Quai d'Orsay, Série Tunisie 1917 – 1940, Bobine 1, Carton 2.

(3) Nous avons découvert trois carnets de dépenses datés de la fin du 19<sup>è</sup> siècle, et classés dans un dossier appartenant à une autre princesse Kmar dû à une erreur d'archivage, très courante en raison de très nombreuses homonymies. Nous les attribuons d'une manière quasi certaine à notre princesse.

Dans la seconde moitié du XIX<sup>e</sup> siècle et au cours du XX<sup>e</sup> siècle, les fortunes princières sont extrêmement réduites sous l'effet de la multiplication du nombre des ayants - droit, de l'imprévoyance, de l'endettement et de la gestion anarchique.

Une simple comparaison des biens répertoriés pour les princesses du XVIII<sup>e</sup> siècle telle que Fatma fille de Hussayn Bin Ali (1712 - 1774 environ), avec des biens plus tardifs, dénote un appauvrissement certain et un accès à la propriété de plus en plus difficile pour les femmes apparentées au pouvoir.<sup>(1)</sup>

Quand à la nature des biens qu'elles possèdent en propre \_et non dans l'indivision, fruit d'un héritage en cours de répartition par exemple, \_elle est composée le plus souvent d'olivettes, et de biens urbains tels que maisons, makhzens, hammams et magasins. Quelques unes possèdent des élevages ovins.<sup>(2)</sup> Il semblerait que lors des partages, les femmes choisissent les biens dont elles peuvent jouir directement ou par le biais des locations.

### **Quand les princesses constituent des habous.**

L'historiographie de la Tunisie retient l'exemple du célèbre habous de Aziza Othmana.<sup>(3)</sup> Les princesses que nous étudions n'ont ni sa fortune, ni son charisme. Elles vivent au XX<sup>e</sup> siècle à une époque où la monarchie est sous tutelle, où les fortunes constituées ne sont plus royales. Leurs motivations semblent plus triviales, celles de protéger des biens modestes de la déperdition, de soustraire leurs maigres possessions aux convoitises de leurs époux endettés. De ce fait, le recours à l'immobilisation des biens peut être entrevu comme un moyen de conserver des biens acquis pendant les périodes fastes, quand la jeune fille est encore sous la tutelle de son père, bey régnant, ou tant que l'esclave achetée sur le marché d'Istanbul

(1) Archives nationales, Série H, C 1, D 5, Document 47. Liste des biens constitués par cette princesse.

(2) Les épouses de Mhamed bey (1855-1859),

(3) Aziza Othmana, petite fille de Otman Dey, qui a gouverné entre 1598 et 1610. Sa descendante Aziza est à la tête d'une fortune colossale qu'elle a constitué habous en faveur d'institutions de bienfaisance. Elle est décédée en 1700.

la formation d'un réseau de parenté, tel une toile d'araignée qui constitue les familles proches du pouvoir dans lesquels l'essentiel des alliances vont se nouer.

Nous n'avons pas d'autres exemples de habous fait au profit exclusif des filles. Mais une enquête orale réalisée auprès de certains membres de la famille husaynite révèle que la pratique consistant à favoriser les filles par des constitutions en leur faveur et par l'institution du partage égal entre filles et garçons a perduré jusqu'à la période de Ahmad Bey (1929-1942). Celui-ci aurait entendu ses filles proclamer qu'à la mort de leur père elles seraient riches \_ sous-entendu qu'elles attendaient ce moment \_ a décidé de favoriser ses fils. Simple anecdote, néanmoins confirmée par les archives, qui font apparaître une volonté manifeste de ce bey de remembrer des biens vendus par des princesses au profit de ses fils. Rien de similaire pour ses filles<sup>(1)</sup>. Par contre, le dernier bey Lamine(1943-1957) revient à ce qui nous semble une tradition husaynite, celle de favoriser la constitution de biens pour les descendantes, et pour les épouses quand leur influence est grande.<sup>(2)</sup> Seulement, ses motivations sont différentes comme nous le verrons plus loin.

Retenons pour l'instant, et en attendant d'affiner l'analyse, le rôle social de la constitution habous. En privilégiant les filles, ou en nommant des ayants-droit normalement exclus par les règles d'héritage, on resserre le réseau social indispensable pour l'exercice du politique. Reste à savoir si cet enjeu, fondamental au moment de la mise en place des règles dynastiques et de l'établissement des relations avec la société locale, a continué à avoir la même importance au fur et à mesure que le temps passe, que la légitimité se consolide et que le réseau social s'étoffe.

Avant de passer à l'analyse de quelques constitutions habous, il convient de s'interroger sur la nature des biens et leur importance.

(1) Archives nationales, Série F, carton 5, dossiers 51 et 99.

(2) Archives nationales, Série F, carton 5, dossiers 68, 84, 110, 111, 115 (filles de Lamine bey), et 67 celui de sa femme Jneina.



Bâsha, et son frère ‘Othmân, maintenu dans une grande pauvreté.<sup>(1)</sup> A la première génération des ayants – droit, il y eut une forte concentration des biens au profit des trois filles de Ali bey dont deux meurent sans laisser de descendance, de sorte qu’une seule se retrouve à la tête de l’immense fortune. Comme cette fille Emna est mariée à son cousin germain, Mahmûd, le patrimoine demeure encore à l’intérieur de la famille du bey. C’est dans la deuxième génération, que l’usufruit de la fortune se scinde en autant d’héritiers que la princesse a d’enfants, et qu’une partie passe aux familles alliées par les mariages des petites filles du testataire.

Les historiographes se sont arrêtés sur cette pratique, assez exceptionnelle, à la fois par le privilège des filles et le partage égal entre les sexes. IBN ABÎ DHIYÂF, fin connaisseur des rouages de l’Etat, explique l’élimination des garçons par la volonté d’anéantir toute velléité d’insoumission ou de révolte en réduisant leurs richesses.<sup>(2)</sup> En effet, un prince pauvre n’a aucune chance de soulever les tribus ni de recruter des soldats. A l’évidence, et bien que plausible, cette explication demeure insuffisante.

Pour les hommes du pouvoir, la richesse n’est pas seulement économique, elle signifie aussi l’existence d’un réseau social sur lequel ils s’appuient. le fondement de la dynastie en question étant l’extranéité, ceci implique la formation d’une catégorie qui lui soit fidèle par les liens de parenté et de vassalité. Cette catégorie est celle des enfants issus de leurs filles et de leurs gendres mamlûks.

En privilégiant ses trois filles, Ali bey a concentré la fortune entre leurs mains. Par leurs mariages, et la descendance que l’une d’elles a assurée, les filles de Ali bey ont fourni la première trame de ce qui allait constituer le réseau social : des enfants de sang non princier mais liés au milieu du pouvoir par une filiation maternelle, et par une communauté de biens. C’est cette règle qui a fonctionné aux XVIII<sup>e</sup> et XIX<sup>e</sup> siècles et qui a permis

(1) Ibidem.

(2) IBN ABÎ DHIYÂF (Ahmad), 1963-1966 : Ithâ, tome 2, p. 211.



société par côté matrilineaire, où ce qui importe , c'est la reproduction des filles, par des hommes étrangers aux pays, réactivant à chaque alliance la règle de l'extranéité.

De ces unions entre princesses et mamlûks naissent des enfants dont le statut est à plusieurs égards ambigu car, enfants de princesses, vivant sinon dans les palais, du moins dans leur proximité, jouissant des faveurs dus à leur rang, ils perdent leurs privilèges à la mort de leurs mères et sont éloignés du cercle du pouvoir.

Le statut de prince ne comporte pas que des privilèges, il inclue des contraintes qui réduisent la liberté d'action de l'individu. Le bey du trône est institué chef suprême de la maison husaynite. Il a de ce fait droit de vie et de mort sur ses membres. Après les réformes de la seconde moitié du XIX<sup>è</sup> siècle, ce contrôle se transforme dans ses termes. Il n'est plus question de toucher à l'intégrité physique, mais en vertu du décret beylical Du 26 avril 1861, les princes et princesses de la famille ne peuvent pas conclure de mariage sans l'accord du chef de famille, ni aliéner leurs biens sans l'autorisation préalable du souverain.<sup>(1)</sup> A l'époque du Protectorat, le contrôle des transactions commerciales est en outre soumis au visa de la Direction des Finances, soucieuse de gérer au mieux les intérêts des membres de la dynastie au pouvoir, de plus en plus nombreux et endettés. Ces contraintes soumettent tous les membres de la famille beylicale aux stratégies du pouvoir.

### **Un acte fondateur : le Habous al dar al karîma**

Ali bey qui règne de 1759 à 1782 est le quatrième bey de la dynastie ; il est le véritable instigateur de ses règles sociales. Il a constitué une grande partie de ses biens en habous au profit de ses filles exclusivement, ensuite aux descendants de celles-ci, garçons et filles partageant des parts égales.<sup>(2)</sup> Cette constitution est fondamentale dans l'histoire de la dynastie, car elle exclue de la jouissance les princes dont son propre fils, le futur Hamûda

(1) Samara, Charles, Le bey de Tunis et sa cour. Brochure dactylographiée, Tunis, sans date.

(2) *Archives nationales*, Série H, carton 1, dossier 5 pièce 4.

Un travail en cours d'achèvement montre que, en dehors de quelques unions endogamiques, les hommes de la famille beylicale s'unissent à des esclaves achetées sur le marché d'Istanbul, et à défaut, s'unissent à des femmes d'extraction populaire.<sup>(1)</sup>

Le statut des princesses est donc déterminé à la fois par des liens biologiques que par des liens sociaux qui font d'une circassienne d'origine obscure, une princesse, et qui défendent à une princesse mariée en dehors de son milieu de transmettre son statut. Ces considérations nous renvoient à une réflexion sur les identités en mouvements, liées au changement du statut d'une femme au cours de sa vie.

Dans ces conditions, il est légitime de penser que le choix de l'époux de la fille est plus lourd d'implications que celui de l'épouse du garçon. En effet, s'il est possible de remédier à une mauvaise alliance pour un homme par la polygamie ou la répudiation, on ne casse jamais une alliance avec un homme, si des enfants sont issus de ce mariage.

L'enjeu que constitue les choix matrimoniaux des filles apparaît dans toute sa complexité au XIX<sup>e</sup> siècle où on voit apparaître des alliances presque exclusivement entre princesses et mamlûks. Ces derniers, esclaves blancs achetés dans les marchés stombouliotes, élevés dans les palais, constituent les gendres idéaux. Déracinés, élevés dans la fidélité exclusive de leurs maîtres, mariés à leurs filles, ils reproduisent un groupe social lié au pouvoir par des relations maternelles ou d'alliances, mais pas par des relations de sang.<sup>(2)</sup> Au moindre soupçon qui pèse sur eux, les mamlûks sont assassinés, leurs femmes et enfants regagnant le palais du père ou du frère. On assassine sans impunité un homme esclave sur lequel s'exerce le droit de vie ou de mort, bien plus facilement qu'un consanguin, même si les « mauvais cafés » versés aux frères aboutissent aux mêmes résultats.<sup>(3)</sup> Les exemples, nombreux, de ces « gendricides », donnent l'impression d'une

(1) Blili, Leila, Parenté..., déjà cité.

(2) Objet de la recherche en cours, parenté et pouvoir.

(3) Mzali, Mohamed salah, L'hérité dans la dynastie hussaynite

du pouvoir, aux XVIII<sup>è</sup> et XIX<sup>è</sup> siècles, la constitution habous est liée essentiellement à des enjeux sociaux, beaucoup plus qu'économiques. Par contre au XX<sup>è</sup> siècle, les conditions nouvelles induites par les autorités coloniales, la paupérisation de plusieurs membres de la famille beylicale, les risques de pertes irrémédiables des biens réduisent l'institution à un pis aller, celui de conserver le patrimoine souvent modeste de la disparition.

### **Naître princesse, devenir princesse**

On naît princesse quand le père est prince. On le devient quand on épouse un prince. On n'obtient pas ce statut par sa mère.

La qualité de princesse dépend en premier lieu d'un critère de naissance. Le fondateur de la dynastie, Hussayn bin 'Ali, turc assimilé, ne prétend à aucune noblesse, comme il ressort des discours de ses propres biographes, la seule vraie noblesse reconnue étant celle des chorfa-s, lignées descendants du Prophète.<sup>(1)</sup> Seulement, le pouvoir est producteur d'un discours de noblesse, de sorte que des familles ou des individus issus du commun, liés aux sphères politiques par des alliances matrimoniales, se voient, par une alchimie indéfinissable, octroyer cette qualité. Par l'illusion que développe les premiers écrits rhétoriques des biographes, naît la catégorie de princes et princesses. Une fois que la tradition est établie on ne s'interrogera pas sur l'origine de cette noblesse.

La catégorie des princes et princesses se définissent par des signes distinctifs sur lesquels nous nous arrêterons pas. Nous retiendrons deux points, le mode de transmission de leur statut, les privilèges et les contraintes qui lui sont inhérents.

Un prince transmet le statut à ses enfants, garçons et filles. Tandis que les garçons le transmettent à leur tour à leurs descendants, les filles ne peuvent le faire. Elles ont le statut mais ne le transmettent pas. L'union d'une fille du commun à un prince en fait une princesse.

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(1) Blili, Leila, les kulouglis au pouvoir

l'extranéité : se définir comme Turcs, se distinguer des locaux par un certain nombre de signes distinctifs réservés aux maîtres du pays.<sup>(1)</sup> Pour garder leurs distances à l'égard des populations locales, les hommes du pouvoir privilégient les mariages avec des étrangères, notamment des captives de la course méditerranéenne. C'est dans ce vivier de populations issues du pourtour de la mer intérieure que se réalisait l'essentiel des mariages à l'époque des deys, et plus tard sous les Mûradites. Nous supposons que ces principes ont fonctionné aux XVI<sup>e</sup> et XVII<sup>e</sup> siècles, bien qu'aucune étude systématique ne soit venue le confirmer, et que les Husaynites n'ont pas rompu avec cette tradition. Certes, la dynastie nouvelle qui s'installe est fondée par un kûlûgli, un natif du pays, de père turc et de mère autochtone. Mais sa propre identité biologique n'implique pas la montée de son groupe, et le pouvoir est toujours considéré comme turc.

Par ailleurs, la guerre civile qui éclate deux décennies après la prise du pouvoir par Husayn bin 'Ali renvoie à plus tard la réflexion sur les stratégies sociales. Sur le moment, cette guerre, provoquée par Ali Bâsha neveu de Husayn, montre le danger des liens du sang et crée une méfiance mutuelle entre les éléments mâles de la maison husaynite.<sup>(2)</sup>

C'est le retour au calme et à la légitimité à partir de 1756 qui fait envisager l'assise sociale de la nouvelle famille dynastique à travers les choix matrimoniaux de ses filles. La suspicion à l'égard des mâles de la famille n'a pas disparu, l'histoire de la dynastie étant ponctuée d'épisodes sanglants. Si on ne donne pas ses filles en mariage à leurs cousins, ou les marie-t-on ? Car les alliances des filles posent des questions fondamentales de transmission des biens et de leur partage, de transmissibilité du statut de princesses quand celles-ci sont mariées à des « roturiers ».

Le présent papier n'embrasse pas toutes ces questions. Il y fait allusion pour la compréhension de l'hypothèse centrale, que dans les milieux

(1) Blili, Leila, « Les Koulouglis, réalité biologique ou catégorie de classement », à paraître dans un ouvrage collectif intitulé *Les métissages hors d'Europe*.

(2) C'est une Idée qui court dans la chronique de IBN ABÎ DHIYÂF (Ahmad), 1963-1966 : *Ithâf 'ahl al-zamân bi-'akhbâr mulûki Tûnis wa 'ahd al-'amân*, (dorénavant cité *Ithâf*), 8 tomes, Tunis

Le premier volet de cette étude est de déterminer la pratique du habous dans la famille beylicale et de la confronter au reste de la société : par quoi les beys, leurs femmes et leurs filles se singularisent – ils dans leurs dévolutions ?

Le deuxième volet est de lier cette institution aux problèmes de transmissibilité du statut. Dans une société de type patrilinéaire ou le statut d'un individu est lié à celui de son père, que deviennent les enfants d'une baya mariée à un mamlûk, ce qui était une pratique courante chez les Husaynites ?:

Dans quelle mesure la constitution habous ordonnée au profit des filles est - elle un moyen de compenser l'intransmissibilité du statut princier ?

Comment cette pratique entretient - elle le lien social entre les enfants des princesses et le milieu de leurs mères, maintenant ainsi dans le cercle du pouvoir une catégorie sociale sur laquelle la dynastie husaynite va s'appuyer ?

Bien que l'état de la documentation, fragmentaire et ne portant pas sur toute la période husaynite 1705-1957, n'autorise pas une approche dans la longue durée, nous tenterons de vérifier ces quelques hypothèses en attendant l'achèvement de travaux plus importants.<sup>(1)</sup>

### **Règles dynastiques et transmissibilité du statut dans la maison husaynite.**

Le pouvoir nouveau qui s'installe en 1705 ne définit pas rapidement ses règles dynastiques ni ses règles sociales. La guerre civile qui éclate en 1728, et ses prolongements jusqu'en 1756 posent même des problèmes de survie de la famille au pouvoir.

Cependant, dans leurs rapports avec la société locale, les Husaynites gardent les traditions qui les ont précédées et qui ont été établies depuis que la Régence de Tunis est passée sous autorité ottomane, en 1574. Depuis cette date, tous les pouvoirs qui se sont succédé ont de commun le principe de

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(1) Deux thèses en cours, celle de Ben Tahar Jamel sur les biens du beylik, et la mienne sur parenté et pouvoir dans la Tunisie husaynite.

n'incluent les femmes qu'en cas de célibat ou de veuvage.<sup>(1)</sup> L'exhérédation des femmes ne procède donc pas d'une quelconque ségrégation sexuelle, mais d'une stratégie de conservation d'un bien dans la longue durée.

Si cette forme de dévolution est la plus répandue, il existe des prescriptions qui excluent des individus, en incluent d'autres sans autre logique que celle du constituant. De ce point de vue, les prescriptions du habous peuvent paraître comme une forme de testament permettant à un Musulman - fermement tenu par les prescriptions de la chari'a en matière d'héritage - d'exercer sa volonté, en incluant des héritiers non prévus ou en excluant ceux que le Coran prescrit. La législation musulmane, en inscrivant le cadre parental dans lequel se réalise la transmission, empêche l'individu de choisir librement ses héritiers et d'exercer son autorité en dehors de ces limites. La pratique habous laisse supposer une manipulation des règles sociales, et une grande variabilité des pratiques en matière d'héritage, de transfert de biens et de statuts sociaux. En définitive, le habous sert deux objectifs, le premier étant la manipulation des règles successorales, par l'exclusion des filles mariées, ce qui élimine le transfert des biens appartenant à un groupe patronymique vers les familles alliées. Socialement, cela consiste à exclure un gendre et ses descendants du cercle des ayants-droit sur un bien économique. Le deuxième objectif étant de favoriser des individus au détriment d'autres dans la jouissance d'un bien.

Cet angle de vue - inclusion dans cercle de la parenté et exclusion de l'appropriation des biens ou inclusion dans la jouissance d'un élément non normatif- paraît pertinent à soulever. Il permet de saisir le rôle de la femme dans la création du lien social, et montre en même temps le danger qu'elle représente par sa capacité de « détournement » des biens. De même définit -la représentation que se fait un individu de son champ social en choisissant d'inclure des personnes non prescrites.

Ces hypothèses, inspirées par l'analyse des pratiques des grandes familles tunisoises, méritent d'être confrontées à la sphère du pouvoir, pour saisir, outre les enjeux économiques et sociaux, toute la manipulation politique à laquelle peut donner lieu cette pratique.

(1) Hassab wa nassab, p 160 –161.

## Recherché



### **Habous et stratégie de pouvoir dans la Tunisie husaynite 18è – 20è siècles**

**Dr. Leila Blili-Temime**

L'institution habous a été étudiée en Tunisie essentiellement en relation avec la circulation des femmes et des biens dans un ensemble de grandes familles tunisoises, mettant l'accent sur les stratégies conservatoires.<sup>(1)</sup> Cette institution a en effet permis à plusieurs de ces familles de garder leurs biens dans l'indivision, pendant plusieurs générations, évitant le morcellement par le jeu de l'héritage et le passage d'une partie du patrimoine vers les groupes alliés. Cette pratique est d'autant plus salubre qu'en milieu urbain les pratiques endogamiques sont très limitées.<sup>(2)</sup>

Les stratégies sociales en matière de habous ont été définies dans l'ouvrage collectif *hassab wa nassab* essentiellement comme un moyen d'exclusion des filles : les résultats de l'enquête montrent que plus de quatre-vingt pour cent des actes de fondation favorisent les garçons, et

(1) Ferchiou, Sophie (dir), *Hassab wa nassab. Parenté et Alliance en Tunisie*, éditions du CNRS, 1992.

(2) Blili, Leila, *Histoire de Familles. Mariages, répudiations et vie quotidienne à Tunis. 1875-1930*. Editions Script, Tunis, 1999.

6. Calling for disseminating the waqf culture in a society through the scientific and da'wa media, and other culture and thought agencies in an attempt to create an understanding and approval of the importance of waqf and its honourable role in serving a society.
7. Calling for setting up well - studied projects, with clear - cut objectives, techniques and policies which guarantee the realization of the objectives and the methods to instruct the cadres on carrying out their duties.
8. Calling the Islamic waqf institutions to trim the charitable work so that the salaries of the CEOs be within the standard salaries.
9. Calling research centers and Islamic charitable organizations to translate the works which deal with the management of Western charitable organizations to benefit therefrom in developing the administrative legislations.



some comments, for example some Western charitable organizations do not respect the intents of the waqifs in the perpetuation and continuity of a charitable work. Some people in the Western charitable organization could be motivated by personal or political interest or tax evasion. Moreover, some Western charitable organizations pay high salaries to the managers.

16. It is possible for a Western charitable organization to benefit by the solutions put forward by the Islamic awqaf to handle those comments, for example respecting the waqifs' intents, and the motive should be religious and that the salaries should be reasonable and within the standard salaries.

### **Second: Recommendations and suggestions**

Reflecting on this study, we can come up with some of the recommendations and suggestions which are helpful both to the Western charitable organization and the Islamic charitable institution, which are as follows:

1. Urging the Islamic nation to create a governmental institutional unified entity to take charge of the awqaf, laying stress on the investment management of the waqf assets, besides facilitating the procedures of waqf and expediting them.
2. Calling for entrusting the Islamic waqf to an efficient CEO who is conversant with the shari'a and administrative aspects. He must also be a trustworthy person, showing a genuine interest in maintaining the waqf.
3. Calling the Islamic Ummah to activate the role of the waqf institutions in a society through setting legislations for waqf, its management, besides updating and developing the existing legislations.
4. Calling for creating bodies and agencies to support the waqf institution so that a convenient environment is created whose business is to exhort people to establish new awqaf.
5. Calling for setting up Islamic banks to secure the establishment of suitable resources to the Islamic waqf institutions.

example is that the administrative legal basis is an abstract and general basis which is related to a specific event and not related to a specific individual or individuals. The legal regulations are based on tradition and the formulation of the legal rule is subtle, and observing the necessities, excuses, special circumstances and openness to the legislative experiences of other nations and benefiting from them.

12. Liberality and flexibility in the Western charitable organizations should not be taken in the absolute sense, but rather they should be restricted as follows: There should be a true interest in the process of borrowing and that borrowing should be devoid of the faith and philosophies contradictory to those of the nation. Any borrowing of knowledge should not deviate from the civilizational project of the nation or its existing legislation.
13. Means of liberality and flexibility in the Western systems of awqaf and charitable activities open the door for the interaction of thoughts and cultures, the result of which is that the nation shall benefit from other nations according to the limits and restrictions.
14. The noble intents and the sublime objectives of the Muslim charitable organizations require an efficient management which keeps abreast with the new techniques and experiences so that it can take the awqaf towards advancement and progress as to achieve the waqifs' intents and purposes, besides preserving the waqf assets, augmenting the proceeds and soliciting new awqaf even if those techniques were borrowed from the West. They can be borrowed within the limits mentioned above, for example trying to establish an independent governmental body to take charge of control and strategic planning.
15. Despite the fact that the non - religious charitable work in the West was borrowed from Islamic waqf, this work has exceeded the original in terms of volume and management and the people's sentiment towards it. Nevertheless those Western institutions are not without

governmental recognition and to enjoy administrative facilities and tax exemption. This system combines two types of management : (1)The Charitable Operational Institution which provides direct services to the society in terms of education and treatment, and (2) The Investment Charitable Institution which extends funds directly to charitable societies. This institution advocates the decentralized system and exhibit an interest in strategic planning.

8. Administrative Management of Islamic Waqf is characterized by a good amount of liberality and flexibility for the following reasons: the interest of the management in the holistic stipulations, away from the minute details, in addition to the possibility of having several ways of interpreting them and observing the urgencies and necessities and the special circumstances. A fatwa may take a different meaning with the change of time and traditions and observing the purpose of a waqif away from the written conditions The essence of waqf regulations and management is that they should be reasonable.
9. Enjoying liberality and flexibility suggests that most of the jurisprudential issues are based on ijtiḥad and analogy, interest or approval among the jurists. It is a point whereon the jurists are at variance. Such differences stand witness to the flexibility and liberality of awqaf.
10. Liberality and flexibility are not taken in the absolute sense, but they are subject to restrictions and controls. A borrowed thing should be good and allowing for no objection to a clear - cut stipulation or a unanimity. It should also be in compliance with the Islamic shari'a and its basic principles. It should also be devoid of any perverted terms which carry any unfair connotations. A borrower should also refer to the original source in case there is a resource other than the resources of legalizing it so that the borrowed item can be verified and doing away with any perversion should be obliterated.
11. Western charitable organizations are also characterized by liberality and flexibility which can be attributed to many reasons, for

3. Western charitable systems are like the Islamic waqf in the general sense as it is embodied in doing Birr and Ihsan to others. The 'Trust' system agrees with the Islamic waqf in general and the Irsad system in particular. Irsad means that a ruler or anybody else apportions some proceeds of Baitulmal to some of its spending channels, based on the concept that Irsad is held as waqf by some jurists.
4. Western charitable organizations differ from the Islamic waqf in many ways as Trust is tinged with a sense of monopoly, an aspect which does not appear in waqf. As an example, we find that ownership in a trust is passed to a trustee, whereas the ownership in the waqf does not inure to the nazir. Moreover, the system of waqf differs from the Western systems in which the motive is to be brought nigh in nearness to Allah. The motive in a Trust is to evade taxes levied on the estates when passed to successors .
5. Management of modern awqaf is an adaptation to the concept of jurisdiction or Nazara on awqaf. It is also possible to adapt the management of numerous waqifs in the Waqf Funds to the question of the possibility of a waqif to assume the jurisdiction on waqf in case he is an individual. Failing to do this by all of them, they are given the opportunity to partner in the management indirectly through the general assembly of the Fund and having them represented in the board of directors. Here a Nazir may benefit by the modern Western applications in managing and investing a waqf which may be based on the rule ' the powers of a waqf Mutawelli are determined by the interest'.
6. The Islamic Waqf Administrative System has a special nature due to religious foundation. It deals with several parties, objectives and activities. It also combines the direct management and the investment management, besides combining the centralized and decentralized systems at the same time.
7. The Western Charitable Administrative System has a special nature represented in its independent entity which managed to snatch



billion. It should be mentioned here that those charitable organizations are not without some comments, including<sup>(1)</sup> : Some Western charitable organizations do not observe the waqifs' intents on charitable work, for example ignoring the waqif's intents in perpetuating a charitable work and its continuity; some people in the Western charitable organizations may be motivated by political or personal interests or tax evasion; some other organizations pay high salaries to their managers<sup>(2)</sup>.

## CONCLUSION

After this round in the management of the Islamic awqaf and Western charitable organizations, we can come up with the following results and recommendations:

### Results

This study leads us to come up with the following results, most important of which are the following:

1. Islamic waqf belongs to the system of Birr and Ihsan which constitute a common factor among the nations. Islam in this regard was a forerunner in regulating this system in an integrated form.
2. Western charitable systems are various, including the 'endowment' which means donation made by an individual or an institution or any permanent source of revenues in favour of a charity or service such as a hospital. There is the system of 'foundation' which means an organized entity to act, whether this includes commercial , governmental , educational or charitable activities. In a narrow sense, it deals with a charitable institution. There is also the 'Trust' system in which an owner passes the legal control to his property to a 'trustee' who takes charge of managing and investing it in favour of the beneficiaries specified by the owner.

(1) Development of the Waqf Institution in the light of the Western charitable organizations (P 163) by Osama Al Ashqar

(2) Pioneering waqf institutions by Osama Al Ashqar and al - Uthaim ( 20 , 60) , Foundations of Modern management: Ashoosh, P 30.

4. Takafuli (Solidaristic) purpose which is exemplified in establishing a non - profit institution to shelter the poor from among the children, orphans, widows, infirm people and people with low income. They are rehabilitated and given the training required for social and financial integration, in addition to building houses and complexes for them.
5. Economic purpose by providing money for the needy through financing micro and medium projects.
6. Maintaining the identity of the nation through keeping the museums and other touristic attractions.

These are some of the purposes of the waqifs, not all of them. They deserve our appreciation and respect. They also receive the support from the Western countries. It is noteworthy that some Asian countries support the charitable sector as a partner of the governmental and commercial sector in development. Charitable sector has its universities and research centers, hospitals, investment companies and schools through which it makes up for the weakness of the governmental sector and puts an end to the extortionate commercial sector on the other side.

**Second: Suitability of the Administrative System to Achieve the Waqifs' Wishes and Aspirations in the West:**

Western charitable organizations, with their advanced administrative systems and techniques, are suitable for achieving the waqifs' techniques and aspirations. This caused such organizations to be recognized by the governments. Subsequently the organization managed to get administrative facilities and tax exemptions. The massive funds of the organization take credit for that, citing the size of the properties in terms of the churches' furnishings, hospitals, universities and donations. Such funds amount to hundreds of billions of dollars; in 2002 the amount reached \$86 billion, at a percentage of 36% of the total assets which amounted to \$240



work with their hearts filled with happiness, seeing themselves undertake this self - motivated task. Following comes a clarification on the wishes and clarifications of the waqifs:

1. Religious purpose when individuals dedicate some of their monies to mosques, churches and missionary centers and the like. The amount of contributions in the USA in 2002 amounted to \$212 billion, including 38% for religious purposes, not to mention the budgets of World Council of Churches <sup>(1)</sup>.
2. Health aim which deals with preserving the human soul. This takes the form of building hospitals for treating the poor, or dedicate a building for a faculty of medicine, or establish an institution for building stadiums for young people and children; others may dedicate part of their monies to repair the existing sport facilities and equipping them, or dedicate some money to treat specific patients. Bill Gates, the CEO of Bill Gates Foundation, dedicated \$ 24 billion for vaccinating children in SE Asia for five years. Microsoft founder dedicated \$168 million to fight Malaria caused by mosquitoes which accounts for the death of about one million persons annually, mostly in Africa. The previous foundation has allocated an amount of \$83 million for fighting tuberculosis which causes the death of one person each 15 seconds<sup>(2)</sup>.
3. Educational Purposes through dedicating educational institutions of all types, such as schools, universities, academic libraries, research centers and furnishing them with books and equipment. USA non - profit universities include about 100 universities in which non - profit and voluntary work is taught. Mr. Carlos, the owner of a telecommunication company in Mexico said that he dreams of a prosperous Latin America with mobile phones for all so that he wanted to distribute this year 250,000 mobile phones to the poor boys in Central America and Mexico<sup>(3)</sup>.

(1) Facts and figures about Charitable work in the West (<http://shababelyom.alafdal.net/t14-topic>)

(2) Voluntary work in the West by Fawzia al Al Khalaiwi (<http://saaid.net/daeyat/fauzia/105/htm>)

(3) Ibid

required results, and commitment to hiring the efficient elements, commitment to continuity and striking a balance between the short term requirements and the long term requirements.

**Requirement 2: Suitability of the administrative system to achieve the purposes and objectives of the Western charitable organizations:**

The purposes of the Western charitable organizations are exemplified in their general objectives and in the waqif's conditions, which are known as 'the wishes and aspirations of a waqif'. Thus I'll concentrate in this requirement on the attitude of the waqf management towards the wishes and aspirations of waqifs. Before we set out on this, we should clarify on the meaning of 'the wishes and aspirations of a waqif' in terms of purposes and objectives. Nevertheless, this requirement will not approach the attitude of the management towards the objectives and purposes, neither will it approach the attitude of the management towards the Western charitable systems. Following is a clarification as follows:

**First: Meanings of waqifs' wishes and aspirations in the West:**

Charitable work for non - religious institutions in the West is believed to have derived from the Islamic waqf, but admittedly it exceeded its origin. Consequently most of the families in the West used to deduct more than 2% of their income to charitable organizations and societies. Moreover, businessmen and wealthy people began to vie with one another for dedicating part of their monies to charitable purposes<sup>(1)</sup>. This is due to the fact that Western societies highly approve the charitable and voluntary work undertaken by young people. In some countries, secondary education students are declined the graduation certificates unless they spend a definite time in volunteering. Moreover, admission in some universities is contingent on spending a number of hours in the voluntary work<sup>(2)</sup>.

It is noted in the West that individuals rush to involve in the charitable

(1) Role of Islamic waqf in economic development by Mohammad Al Jamal, P 41.

(2) Volunteering in the West and its role in progress and development (<http://medadcenter.com/articles/5305>)



tives. Moreover, the trust undertakes the process of updating the plans and programs through setting a five - year plan to accommodate to the changes and developments<sup>(1)</sup>. Strategic planning means ‘ a coordinated organizational and clear cut effort aiming to give a full description of the institution’s strategy, defining the responsibilities and implementing them. The official planning process should distinguish between the various roles which must be adopted by the different managers within the tasks of formulating and implementing the institution’s strategies<sup>(2)</sup>.

Thus an Islamic Waqf institution must benefit by the mechanisms of the strategic planning adopted by Western charitable organizations. This can be carried out by setting the strategic plans required for managing the existing awqaf which failed to generate profit long time ago. This is carried out through initiating commercial projects, together with defining the objectives thereof and the means for realizing them, instructing the staff on the means to carry out those objectives, and soliciting the means for financing them. It is also possible to consider the establishment of Islamic waqf banks<sup>(3)</sup>.

- Defining the activities scheduled for execution in the form of jobs with particular specifications and choosing the suitable cadres for each job in the light of their specialties and experiences who will be discharging their duties under a discreet management, which is known nowadays as an ‘organization’.
- Striking a balance, a connection and a harmony, besides removing duplicity and contradiction and observing the element of timing which requires timely decision - making which is known by the name ‘coordination’.
- Main commitments of the management which deals with the commitment to choose the suitable elements required for achieving the

(1) Principles of Management by Ali Sherif et al, P 149, Dalil el Idara al Istrategi wal Takhtit el Muassassi by Qasem Kanakri P6 , Waqf between Asala and Muasara by Sami Al Salahat, p172

(2) Islamic Waqf Development And Management by Munzir Qahf, P 76 and what follows.

(3) Islamic Waqf Development And Management by Munzir Qahf, P 76 and what follows.

munity development, besides finding support groups. There must always be regular reports to highlight the detailed achievements of the institution which are characterized by openness and transparency. It must also cooperate with the media institution, organize presentation exhibitions, publish the results of the scientific researches on the society and to achieve a partnership with both the private and governmental sectors<sup>(1)</sup>. It should also be noted that the Western charitable organizations follow the innovative method, which is a unique type of the waqf management which is more effective in management; the waqf institution utilizes its innovative leverage to identify the charitable opportunities and needs. It also introduces the activities and services which concern a society and acts towards developing them effectively<sup>(2)</sup>. Here an Islamic waqf institution must utilize all these innovative ideas which seek to market charitable work and boost its activities.

7. Setting the strategic plan which is required for managing the existing awqaf which fell into ruin long ago and no longer generate a profit. The negative outlook adopted by some people towards the strategic planning is faulty because it is regarded as a waste of time and effort, besides wasting good amounts of the charitable monies consumed through establishing planning workshops. Some also believe that planning in an institution restricts liberality and smooth movement. Modern studies have proved the efficacy of planning in realizing charitable institutions and their role in serving a society. Among the Western charitable organizations which laid emphasis on planning and gave it a priority in its activities is Wellcome Trust. This institution adopts the recognized planning principles adopted by the Western institutions which rely on meticulous identification of the institutions' missions. The next step is to go ahead towards declaring the objectives and the means for achieving such objec-

(1) Ibid P 75 and what follows ..Islamic Waqf and its Development and Management by Munzir Qahf, P 75 and what follows

(2) Ibid, 75 and what follows

5. Creating an independent governmental authority in charge of overseeing the awqaf. This is what a Western charitable organization does in respect of all forms of waqf which operate outside the governmental domain. The role of the state is not confined to enacting legislations and internal regulations, but rather to provide the means and methods for merging charitable work with the civil work, involving individual or institutional organizations<sup>(1)</sup>. They must also ensure that the work has already been carried out in line with relevant plan and the results were effective and successful<sup>(2)</sup>. Western charitable organizations adopted this technique for its advantages, for example maintain the distinctive role and the honourable services resulting from the communication and interaction between the civil and Ahli parties with the charitable work, including protecting the freedom of a Western a human being in adopting the charitable work and protecting the rights of the other parties to the charitable work<sup>(3)</sup>.

Applicable control systems in the Islamic countries need to be reviewed so that an independent governmental authority must be established to oversee the awqaf and to observe the plans set for that, in addition to observing the conditions of the waqifs as it is the case with the Western countries<sup>(4)</sup>.

6. Attending to waqf financiers and the interest in finding channels to solicit new awqaf. To this end, the institution must suggest the establishment of waqf projects to the well doers in order to assist in carrying out the socio - economic tasks necessary for the com-

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(1) Developing waqf institution in the light of the Western charitable experience by Osama Al Ashqar (150)

(2) Islamic waqf and its development , Management and Development by Munzir Qahf, P 75 and what follows

(3) Developing waqf institution in the light of the Western charitable experience by Osama Al Ashqar P150

(4) Islamic waqf and its development , Management and Development by Munzir Qahf, P 75 and what follows

ministry with the awqaf and get subsidies and tax exemption and other advantages for them<sup>(1)</sup>.

Creating administrative and organizational structure for the waqf institution to leverage the institution, maintain its assets and augment the proceeds. This structure must include the following:

1. The CEO of a waqf institution must be efficient , trustworthy, effective and understanding with respect to the objectives and the purposes of the institution. He must also have an indurated faith that his work is a qurba which brings him nearer to Allah. His salary must be reasonable, almost equal to a standard salary. The funds of this institution should not be a target sought by the corrupt and the mean. It should be mentioned in this regard that some Western charitable organizations were criticized for the payment of high salaries for their CEOs<sup>(2)</sup>.
2. An efficient board of directors for managing the waqf institution vested with experience and competence, including experts in the Islamic fiqh, economy, law, and investment. The board must separate between mosques and Da'wa activities on the one hand and the other awqaf. It must also observe the ultimate quality control<sup>(3)</sup> and approval with respect to the products of the institution and commitment to international criteria<sup>(4)</sup>.
3. Providing the convenient premises and up - to - date devices for managing the institution.
4. Establishing a board of trustees including experts in fiqh, economy, law and investment.

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(1) Islamic waqf and its development , Management and Development by Munzir Qahf, P 74 and what follows

(2) Pioneering Waqf Institutions by Osama Al Ashqar and Al Uthaim, 30

(3) Pioneering Waqf Institutions by Osama Al Ashqar and Al Uthaim, 195

(4) Ibid



one hand and the management of other awqaf in the Republic of the Sudan, Kuwait, Sharja and Dubai, but this is not enough. Modern managing techniques should have been followed in managing awqaf. Following is a survey of those techniques which go in line with the purposes of the waqifs and soliciting new awqaf:

**a. Creating new legislations for the management of the awqaf in the countries which do not have such legislations, besides developing the existent ones**

Western countries have felt an urgent need to issue new legislations in the countries which have no legislations, whereas the countries with legislations should develop them. Western countries showed an interest in those legislations in view of their merits, most important of which are the following:

- They constitute a criterion for dealing with all the staff. Moreover these legislations protect the board of trustees against the liability for the offenses committed by the staff. They also stand against personal interests and lay emphasis on the smoothness of administrative decisions and motivating the individuals<sup>(1)</sup>.

Thus the Islamic waqf institution is in need of creating legislations and internal regulations in those countries which lack this merit, besides developing those existent ones in view of their advantages. These legislations should define awqaf their management, organization and protect them, both the charitable and the Khairy. Looted awqaf and those whose uses have been manipulated apart from the waqifs' conditions should also be recovered. The process should also include the means for managing awqaf in general and investing them in particular, as recommended by the waqifs and in line with the shari'a purposes as it is the case with commercial companies. The legislations should also include the relation of the relevant

(1) Developing Islamic Waqf Institution in the Light of the Western Charitable Experience by Osama Al Ashqar

- f. Economic Purpose which refers to investing the waqf funds and to provide for the needy such as giving interest - free loans or dedicating shares or sukuk and the like.
- g. Mercy to animals, for example awqaf in favour of the old and weak animals, and the awqaf in favour of the birds of the Mekki Mosque (Haram) and the waqf on the birds in many cities.

Caring for Environment and infra structure, for example Rivers and waqf wells and the waqf on canals and rivers.

**Third: The suitability of the Administrative system to realize the purposes of Muslim waqifs:**

The honourable purposes and the sublime objectives of the Muslim waqifs stand in need of an efficient management which is competent enough to lead the Islamic waqf towards success and prosperity in order to achieve the purposes of the waqifs, while maintaining the assets and augmenting their proceeds. It should also be able to solicit new awqaf. Failing to comply with these things, the purposes of the waqifs will come to nothing and some potential waqifs could be frustrated and thereby shun the involvement in this activity.

Reflecting on the state of awqaf nowadays in many Islamic countries find them far away from the purposes they were established for. Many Islamic countries, up to the early 80s of the 20th century, remained stuck to the traditional management through which the Ministry of Awqaf took up the management of all awqaf without distinction between service or investment. It did not give the waqf what it deserves in terms of due attention. This caused awqaf to fall into oblivion, resulting in low rent or petty income which fell short of covering the funds for maintenance and construction. This caused awqaf to be demolished or looted. During the 80s of the 20th century, new waqf experiences came to existence and put a barrier between the management of mosques and D'awa activities on the

Mekka al Mukarrama and Al Medina el Munawara or Al Masjed el Aqsa. In the Holy Quran , we read the verse, ' the mosques of Allah shall be visited and maintained by such as believe in Allah and the Last Day'<sup>(1)</sup>. The Prophet (peace and Blessings of Allah be upon him) says that 'he who built a mosque seeking the Face of Allah, a similar one shall be built for him in Paradise'<sup>(2)</sup> or a waqf to facilitate pilgrimage to Mekka.

- b. Jihad Purpose when a person contributes to the military effort by assisting the warriors and their weaponry. In this sense the Prophet (PBAH) says 'He who prepared a warrior or a pilgrim or asked him to care for his family shall have the same reward without diminishing their rewards a jot ".
- c. Health Purposes which include self safety as this is exemplified in building a hospital for serving the poor or to buy a medical device in a hospital or a build a medical center, or dedicate a property to teach medical sciences. In the Holy Quran , we read the following verse: if any one slew a person unless it be for murder or for spreading mischief in the land – it would be as if he slew the whole people, and if any one saved a life it would be as if he saved the life of the whole people '( Al Maeda Sura 32).
- d. Educational Purposes with an aim to protect the generations from perversion and ungodliness, subversive principles, superstitions and fairy tales and the like. Here a waqif dedicates a school for teaching the Quran and shari'a or dedicates a university for providing beneficial learning or dedicates a library furnished with valuable resources.
- e. Solidaristic (Takafulli) Purpose which means building an institution or a shelter for the poor, the orphans, strangers, widows and needy divorcees. This may extend to include property whose proceeds may be directed to arrange for the marriage of needy young people, or to establish a wedding hall for organizing Islamic wedding festivals.

(1) Sahih el Bukhari , Kitabb el Salat '1/116; Sahuih Muslim uilding mosques:34/533 ,1/378

(2) Al Musannaf by Ibn Abi Shaiba, Kitab el Jihad n 19904 (10/365)

solutism and restriction. Likewise a waqif's condition is like the legislator's condition' which means that the concept and significance should be observed. A waqif is given the freedom in specifying the purposes of his waqf, but this should not be taken in the absolute system, as it should be subject to restrictions, including:

A waqf should be dedicated to a lawful purpose in which a Qurba to Allah (nearness to Allah) exists, therefore a waqf dedicated to an unlawful purpose is rejected as it is the case with night and gambling clubs. A waqf should not be contrary to a shari'a condition. In this sense' Ibn Abdien says that ' a waqif's conditions are reckoned with if in agreement with the shari'a<sup>(1)</sup> which means that a waqf should touch an interest and good for the nation. A waqf is invalid if directed to activities which bring no fruit to the nation.

#### **Second: Implications of the Waqifs' conditions in terms of purposes and aims**

The rule 'the waqif's condition is as effective as the Legislator's condition' includes giving the freedom in defining the waqif's purposes and wishes. He is entitled to choose the beneficiaries and to decide the portion of each one in the usufruct, in addition to the arrangements for spending on the waqf assets, appointing the nazir and other conditions, such as increase, decrease and preference which mean the changeability of the beneficiaries' shares, Ikhraj and takhsis and those which involve non - beneficiaries in the proceeds or excluding rightful beneficiaries from receiving their dues, or specifying a deserving person for the proceeds. Changeability and replacement include any amendment to the conditions of the waqf; Ibdal and Istibdal mean changing the waqf asset for another one. I would like to elaborate on the conditions related to the purposes and aims of waqf, as follows:

- a. Religious purpose when a person establishes a mosque or dedicates part of his monies to mosques such as the two Holy mosques in

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(1) Hashiat ibn Abdien 4/343



maxim which put the waqif's conditions on equal footing with the legislator's conditions<sup>(1)</sup>. With reference to the purposes of waqf, I shall confine myself to the purposes of the Muslim waqifs' aims apart from the general purposes of waqf. Thus the research will deal with the suitability of the administrative system to realize the purposes of the waqifs. Before embarking on this task, we should explain the aforementioned maxim 'a waqif's condition is as effective as the legislator's condition', in addition to the connotations of the waqif's conditions in terms of the purposes and aims.

**First: Implications of 'a waqif's condition is as effective as a legislator's condition'.**

Jurists are at variance concerning the meaning of this maxim so that the majority of the Hanafi, Maleky and Shafie jurists' attitudes are based on a Quranic verse or a Prophetic hadith which should be respected and observed. If a stipulation of a legislator should be observed and respected, then a correct condition put by the waqif should also be observed and respected. This similarity between the two sides is twofold: it should be observed in understanding the condition of the waqif and interpreting it as a legislator's condition. This clarifies their saying in both the concept and the significance. The second point is that it should be observed and respected because it is coming from a weighty and respectable and discreet source. This underlies their saying in respect of the necessity for implementing the condition<sup>(2)</sup>.

Ibn Taimia and his disciple ibn el Qayyem and the Hanbali jurists assume that a 'waqif's condition is as effective as the legislator's condition' should be confined to its concept and significance only and it is not necessary to put it into effect. In other word intention of the waqif shall be followed through his conditional wording; in the same way as the intention of a legislator shall be followed through generalities, peculiarities, ab-

(1) This maxim took different forms, all of which mean that a waqif's condition should be observed; Hashiat ibn Abdien, 4/366

(2) Sharh el Qawaid el Fiqhia by Ahmad Al Zarqa, p351 ; Fqhi Regulations encyclopedia, Borno, 5/28

mention the relevant governmental laws and by - laws. KAPF also created two formulas to activate the waqf, namely the ‘Waqf Funds’ and The ‘Waqf Projects’. These two formulas act in many areas according to the conditions of the waqifs and to realize the objectives of the social and economic development within the framework of the shari’a and legal restrictions<sup>(1)</sup>.

Third: Muslims have also created some legal institutions and situations from charitable, cultural, social societies, consumers’ cooperatives, unions, professional and sportive gatherings, clubs and other types having numerous and various social purposes<sup>(2)</sup>.

## **Theme 5**

### **Suitability of the Administrative System to Realize the purposes of waqf and the Western Charitable Organizations**

Zakat and taxes are known for their purposes and aims as defined by the legislator or the law maker. Conversely, Islamic awqaf and Western charitable organizations do not have such merits because this is responsibility of the waqif. The question which begs to be asked is ‘to what extent is the administrative system suited to those purposes and aims? To find an answer to this question, firstly I shall elaborate on the administrative system and its suitability to realize the purposes of the Islamic waqf, and secondly the suitability of the administrative system to realize the purposes and aims of the Western charitable organizations.

#### **Requirement 1:**

#### **Suitability of the Administrative System to Realize the purposes of the Islamic Waqf:**

The purposes of the Islamic waqf are represented in achieving the public good and averting evil. With reference to a waqif's conditions, there is that

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(1) Ibid

(2) Islamic waqf by Munzir Qahf, p 288 ; Modern Techniques in managing awqaf, P 13.



‘General Authority of Islamic Affairs and Awqaf ‘. This entity is an effective tool in guiding the efforts of the government and Ahli sectors in the area of waqf and activating its role in the society. Therefore, it was given wide administrative and executive powers in respect of those awqaf the conditions of whose waqifs are not known, in addition to the awqaf. As for the awqaf whose nazirs are appointed by the owners, the entity was given a control power only. The real waqf progress of this entity started in 1991 when the government issued decisions through which the Authority was give many advantages, such as dedicating agricultural, commercial, and residential lands to be invested in behalf of the awqaf. This can be taken as a type of Irsad, though it is treated as a waqf in the actual sense of the word. This Sudanese type is based on two principles: a. calling for new awqaf as part of pre - arranged special channels, and b. Investing and developing the existing waqf funds , in addition to the funds paid by the state to the Authority<sup>(1)</sup>.

#### **The Kuwaiti Experience:**

The Government of Kuwait established an independent entity for the management of awqaf under the name ‘Kuwait Awqaf Public Foundation’ pursuant to the Amiri decree #2571993/. This entity constitutes a new stage in the development of awqaf in the State of Kuwait. Admittedly it is an effective vehicle for coordinating the efforts and guiding the governmental and Ahli efforts for reviving waqf and activating its role for the general good of the society. Wide administrative and executive powers were given to this new entity in the area of waqf, for example calling for new waqf, managing all its affairs, investing its funds, spending their proceeds as recommended by the waqifs and in line with the shari’a purposes of the waqf, and contributing civilizationally, culturally and socially to the development of the society.

KAPF to that end set down an array of rules and regulations which serve the system of work and regulate its performance. They represent a basis which should be complied with in respect of accountability, not to

(1) Modern Techniques in Managing Awqaf by Munzir Qahf, P 13

Islamic Fiqh which is able to distinguish between the original and the alien. Such a process will purify the borrowed from all adulteries stuck to it, moreover it distinguishes between the amplitude of disposal with regard to private property, public funds and waqf funds. This attitude caused the concept of a charitable organization in the Islamic countries to acquire a great authority over its fixed assets donated by the people in order to create out of them perpetual assets. This applies also to those assets specified by the management of the institution or the charitable organization to be treated as fixed assets out of the general donations extended by the people through authorization or proxy to be used by the organization in establishing its fixed assets and charitable expenditures at the same time. Consequently the charitable organizations in our countries came as replicas of the those of the Western countries. Their powers are wide in disposing of the dedicated funds, whether these be fixed or outstanding assets without regard to the principle of perpetuation in the waqf funds without observing the waqif's conditions in utilizing the profit generated by the funds owned by the society<sup>(1)</sup>.

### **Second: Modern Experiences in managing Awqaf through Western Management**

As a result of some comments on the techniques inherited in managing and investing the Islamic waqf funds and the discussions about the modern applications about important economic ideas derived from the principles inculcated in the Islamic shari'a in economic development if well managed and invested, modern waqf agencies began to feel the need for reviewing the management techniques. All this caused modern experiences to emerge in the Islamic countries. This research will be emphasizing two experiences in Sudan and the State of Kuwait.

#### **First: Sudan and the management of Awqaf:**

The Sudanese experience started in 1986 with establishing an independent entity taking charge of the awqaf affairs under the name

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(1) Modern techniques in Waqf Management, Munzir waqf, P 9 - 10.

In the Maleky school of thought there is a similar stipulation which reads as follows,' Once the acquisition and waqf are created, there is a juridical personality which must be protected through the law in terms of its entity and rights; and it also resorts to the law to fulfill its obligations towards the others. It is represented by the waqif or its successors, or the nazir appointed by the ruler<sup>(1)</sup>.

If we compare between acquiring both the Western charitable organizations and the juridical personality, we find a great difference between both of them in connection with the original. This shows that the French law has benefited from the Maleky school of thought in the Western charitable organization acquiring the juridical personality from the early Islamic epoch, definitely in the 7th century B.C. The West did not know the juridical personality except in the 19th century AD. Naturally it is the latter who benefits from the former.

## **Requirement 2: Benefit of the Islamic Waqf System from the Western charitable organizations**

**Following is an idea showing how the Islamic waqf system benefited from the Western charitable organizations**

### **First: Corporation:**

As a result of the legal contact between the Muslims and the Western countries, some of the Islamic countries applied the system of Corporation, i.e. ( independent charitable institution ) advocated by Western countries without introducing any change to it. Independence in this formula means the independence of the institution of the personalities of the waqifs, nazirs, managers and others. An institution here has a juridical personality with its independent financial zemma referred to in the Islamic shari'a regardless of the fact that the jurisprudence did not elaborate on this principle.

Given that this formula was borrowed from the West, it had another original source, i.e. Islamic fiqh. Therefore it should be sifted through the

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(1) Ibid

### **Third: Disposal by the waqf manager is contingent on the interest:**

The French law stipulates that ‘the rents of Baitul Mal and other charitable properties and businesses have their special laws<sup>(1)</sup>. Thus such funds are pinned on the interest.

In the Maleky school of thought, there is a similar stipulation which goes as follows, ‘the management of a sultan regarding Baitul Mal is pinned on the interest. Many other things are taken from the same Maleky school, for example,’ if a nazir rented an asset without any personal interest, then the standard rent is irrevocable even with an increase added by a person on the lease. If the asset was rented for less than the standard rent, then this contract is revoked, but in case of exceeding the standard rent, the contract is irrevocable’<sup>(2)</sup>.

If we compare the French rules with the jurisprudential rules we find a great similarity between them.

This shows that the French law has benefited from the Maleki school of thought in formulating the legal rule because it is the latter who benefits from the former.

### **Fourth: Charitable Waqf and the Juridical Personality:**

The French law stipulates that ‘whenever a waqif wants to establish a charitable institution, he has to do this by his own money, provided that it should implement the objectives set therefor. Thereafter there is an application submitted for the juridical personality from the administrative point of view. Then it is given the gift which is enough for its viability in the future, following which this juridical personality is eligible to accept the gift<sup>(3)</sup>.

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(1) Legislative comparisons constitute the application of the civil and criminal law according to the Imam Malek by Al Meniawi, 2/493

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(2) Ibid

(3) Legislative comparisons between civil laws and Islamic legislation by Sayyed Abdulla Ali, 4/1630

The Maleky school of thought defined the waqf as ‘ giving a benefit of something as long as it exists within the property of the settlor ’. It is also dedicated to person already existing or likely to exist, intelligent or non - intelligent, rich or poor<sup>(1)</sup>. As for the objectives , they are conveying the benefit to the beneficiary, or even to the settlor posthumously, or building a public or a private hospital.

Through the aforementioned definitions, we find a great similarity in their purposes which indicates that the French Law has benefited from the Maleky school of thought in defining the waqf and its purposes, simply because it is the latter who benefits from the former.

### **Second: Definition of a Western Trust and its applications**

A trust, as we mentioned before, is a donation made by an individual or institution, taking the form of monies or property or any permanent source of income in favour of a charitable society, a college, a hospital or any other institution. Its applications are divided into three types: Investment trust, charitable trust and Investment - charitable trust.

This definition is close to that of the Islamic Irsad because the Irsad in some jurisprudential applications may come from any other source apart from the ruler, in which there is liberality and flexibility and changing the direction according to the interest. In this respect this differs from the waqf which is governed by the waqif's conditions without introducing any change to it unless it contradicts with the shari'a regulations, or there is a weighty interest according to the jurists' outlooks. Moreover, Irsad is similar to self - dedication advocated by the Malekis and their attitude towards the possibility of waqf of Manfa'a (utility)<sup>(2)</sup>. This shows that Western trust has benefited from the Maleky school of thought in formulating the definition of a trust because it is the latter that benefits from the former.

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(1) Ibid

(2) See Al Irsad and its Modern Applications by Abu Ghudda

civilizational project of the Ummah which expresses its identity and character. The Japanese, for example, do not accept the ideas unless they internalize and assimilate them after which they convert them into a Japanese material<sup>(1)</sup>.

4. Borrowing should not go beyond the existing legislation of the Ummah, neither to reject it because a strange or an aboriginal thing cannot cancel a legislative stipulation <sup>(2)</sup>.

### **Fourth Theme**

#### **Civilizational Interaction between Islamic Awqaf and Western Charitable Organizations**

The elements of liberality and flexibility of both the awqaf and the Western charitable organizations we dealt with previously, open the door for thought reaction, taking into account the benefit to be generated by each nation from the other. Following is a survey of the benefits of each party from the other in respect of waqf and its management:

##### **Requirement 1:**

##### **Benefit of the Western charitable organizations from the Islamic Waqf System and its Management**

1. Definition of the Western waqf organization and its purposes

The French law defined the charitable waqf as follows: 'allocating a part of the capital on an ongoing basis for a general or special charitable work<sup>(3)</sup>. As for its objectives, it is directed to a general charitable work, for example building a hospital, a school, or a special charitable work, such as a sadaqa (free offering) for the rest of the soul of a dead person. Here the benefit returns to the the person himself.

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(1) This indicates the book "Are the Japanese Westerners?" published in 199

(2) Lessons in the principles of Law by Al Sharqawi, P 69

(3) Legislative comparisons between the civil and the Islamic legislation by Sayyed Abdullah Ali Husain, 4/1629



economic traditions. Thereafter, a comparison is drawn between them<sup>(1)</sup>. Comparison here means putting the legislative laws of a state vis - à - vis those legislations of other countries and showing their similarities and differences. This process brings with it liberality and flexibility<sup>(2)</sup>.

### **Second: Dimensions of amplitude and flexibility in the administrative system of the Western charitable organization**

The world of today has become a small and borderless village where other cultures, sciences and legislations spread easily in the various countries. Nevertheless the nations put restrictions on borrowing those legislations after integrating them in their legislative systems. Among those borders are the following:

1. Borrowing must be of value to the borrowing party. Therefore the process of borrowing should not be made haphazardly without study or consideration, and just for mere imitation. This action requires careful study to define the needs and to secure the mechanisms for achieving them.
2. The borrowed part should be devoid of the beliefs and philosophies contradictory to those of the Ummah. A nation should not accept any borrowing prejudicial to its identity and beliefs. This is a vested right for the Ummah which has the full right to maintain its identity and beliefs. For example, the USA rejected at first the idea of a Trust imported from Britain because it was an extraordinary idea coming from outside and regarded it as unoriginal and strange to the American values. Nevertheless, this attitude has changed with the advent of the 20th century and the Trust proved its instrumentality if promoting the society, resulting in enacting laws and legislations for it.
3. Scientific borrowing should not go beyond the independent

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(1) Legislation between Making and Formulating by Al Bahadle and al Aboudi, p 57.

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(2) Fiqhi formulation by Al Roomi, p318

so clear - cut and elaborate that he who applies it is falling under heavy restrictions. (b) a flexible formulation in which the law allows for options and reconsideration so that he who applies it may follow what is convenient for him. This means that formulation should be changeable and open for interpretation according to the change of time and place, away from ambiguity or inaccuracy. The best way to combine accuracy and flexibility is that a legislator should make amends in the questions which develop hastily out of those stagnant ones so as to move from what is narrow and stagnant to what is more flexible and the wider. In this way , a judge may be guided when judging an issue without following it in spirit and letter. He applies this to the cases brought in before him and he reaches different settlements according to the difference in each case with its complexities. Swiss litigation is the most conspicuous in view of utilizing the flexible criteria, leaving an ample opportunity to the jurisprudence and judiciary to involve in explaining the law as required by the circumstances.

#### **Factor 4: Observing necessities, excuses and exceptional circumstances**

Among the basic principles of law is observing the necessities, excuses and circumstances. Wellcome Trust, being one of the Western charitable organizations., is known to have observed the exceptional circumstances in management. It updates its plans through preparing a five - year plan to accommodate the changeable and exceptional circumstances<sup>(1)</sup>. This brought about an amplitude in legislation rules and managing charitable programmes in particular. New rules were added to the old ones and thereby more flexibility was given to them and to their liability to handle emergency conditions.

#### **Factor 5: Openness to other legislative experiences and benefiting therefrom**

The West is known to be open to the experiences of other nations in the area of legislation, when enacting its laws, through reviewing and sifting them in the hope benefiting from the experiences of other nations., especially from those countries which have similar legal, social and

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(1) Ibid, p127 ; Pioneering waqf institutions by Osama Al Ashqar and al Othaim, p102

organizations. The conventions were the main source for all old laws and they continued to hold their previous prestige at the beginning of the emergence of legislations. Thereafter, their position receded so that the convention and the written law became treated on the same footing, as maintained by the German jurist Savigni<sup>(1)</sup>. With the progress of time and the development of laws in the area of legislation, the status of conventions began to weaken and lost its primary position and came second to the legislation in respect of the legal laws. Consequently, the approval of a convention became pinned on certain conditions, for example it should not be contradictory to the existing legislation, which caused it to be weaker. A convention was not able to revoke a legislation except for one time, with the exception of the commercial conventions which were based on the conventions agreed upon by the merchants. They also excluded the rules relevant to the public order so that it was not possible for conventions to revoke them. This applies to the commanding stipulations, but as for the explanatory stipulations complementary to the legislation, it was possible for conventions to ignore.

Despite the weakness of conventions if compared to the law, their presence remained imperative and necessary because they constituted a reserve and complementary source to the legislation. Unless there is an applicable legislative stipulation, a judge may resort to conventions in issuing his awards. In case there is a gap in legislation which stands in need of organization, conventions will fill in this gap. In this sense, it is an assisting element to the legislation. This state of affairs caused the legislative laws to expand and acquire more liberality and flexibility in dealing with the conventions and changing circumstances.

### **Factor 1: Flexible formulating of the legal rule:**

Law makers divided the legal rules, according to their formulation, into two divisions<sup>(2)</sup>: (a) a stagnant formulation in which the formulation is

(1) Principles of Law by Al Sudda, P 141 ; Principles of the Islamic Fiqh by Mohammad Shalabi, P322

(2) An Approach to Law by Kira, p 183; Legislation between Making and Formulating by Al Bahadle and al Aboudi, p 43.

4. Seeing if there is for the borrowed legislations an original source they were borrowed from as it is the case with the French Law which was borrowed from the Maleki school of thought. Here the borrowed material must be returned to the original source for reassurance. If we want to borrow from the others whose legislation was derived from another source, this material should be sifted through checking with the original source so as to distinguish between the original and the borrowed in order to purify the borrowed from the adulteries stuck to it.

## **Requirement 2**

### **Dimensions of liberality and flexibility in the Western charitable organizations**

#### **First: the legal rule is a legal and abstract rule:**

The administrative and legal rule in the Western charitable organizations, like the rest of the legal rules, is of a general and abstract nature, i.e. a rule which is not related to a specific event or events, neither is it related to a special person or people. Events and persons in those rules are governed by the description and conditions. Very close to this is the abstraction of the legal rule. They are not created to be applied to a specific event, neither to a specific person. The principle of generalization and abstraction in the legal rule is the element which distinguishes it from the judicial rule and the administrative decision. Both are characterized by generality and abstraction because they are issued in connection with specific persons and events.

The principles of generalization and abstraction allow for a good amount of liberality and flexibility in those rules because one rule could embrace several persons and events having the same qualities and conditions falling under this rule.

#### **Factor 2: Building the rules on conventions**

Conventions used to occupy a unique place in the Western positive legislations, including the administrative laws of the charitable

there is a unanimity. It is not allowable to borrow what is vicious and abominable and contradicts with the shari'a stipulations or the books which deal with deadly sins such as usury, theft, graft and the like from among those held a taboo as stipulated in the Holy Book , 'For He commands them what is just and forbids them what is evil.' (Al Aaraf, 157); There is also the Prophetic tradition , ' Wisdom is the goal of the faithful, it is his wherever he finds it'<sup>(1)</sup>.

2. In borrowing, the borrower must observe congruity with the universalities of the Islamic shari'a which do not contradict their general purposes. Fundamentalists said that the particulars should be compared to the universalities. In this regard Al Ghazali says through Al Shafie ( after extending his recommendation to the Mujtahed in the ability to deduce) that he should observe the universal rules and give them precedence over the particulars<sup>(2)</sup> . For this reason Al waqf el Ahli in Egypt was cancelled because it was used against the rules of inheritance which decline women this right.
3. Borrowing must be free from the terms which imply immoral connotations which contradict the Islamic shari'a stipulations. One can identify this through delving in the history of the those terms and their surrounding conditions. Mohammad Asad says, ' We have always to remind a European citizen, when talking about democracy and freedom or the like, that he uses those terms embedded in his memory through the present and the past of the West which are out of place as far as the historical imaginations are concerned' <sup>(3)</sup>. In the Holy Book , we read the following verse , ' O ye of faith! say not to the Prophet words of ambiguous import, but words of respect; and hearken to him. To those without faith there is a grievous punishment.' (Al Baqara 104).

(1) Al Musannaf by Ibn Abi Shaiba ; n 36831 , Sunan ibn Majah n 4169 (2/1395, Sunan al Tarmathi(2678 (4/51).

(2) Al Mankhool by Al Ghazali (P 466)' Irshad el Fuhoul by Al Sha:hkd (P842)

(3) Islam Methodology in ruling by Mohammad Asad,p 46.

showing reverence to his Creator and a move for obeying Him. Worship may be detached from bringing interests and averting abuses, and in this case a reward is given for obedience and acquiescence, away from doing it for bringing an interest or averting a disobedience. Here the reward is given for obedience only without meaning to bring an interest or averting an abuse; it is just for obedience.

Admittedly, a waqf and its management are not among the worshipping practices whose meaning is not known, but rather it is one of the regulations whose meaning is clear, with its aims known. In case you find out the reason for any of its regulations, you can compare it with any of its sub - branches. This causes the regulations of waqf to expand and multiply. In this respect, ibn Qudama said through Imam ibn Hanbal, 'Analogy is invalid unless it is made about something understood<sup>(1)</sup>. Ibn al Sammani said , 'Some regulations are understood and some others are not understood; in this case analogy is feasible for the understandable and analogy is not feasible for those whose meanings are not understood<sup>(2)</sup> . This causes waqf regulations to be flexible because a rule is attached to the cause in case of being present or absent<sup>(3)</sup>.

### **Second: Liberality and flexibility dimensions in the awqaf administrative system:**

Borrowing from other sources is not wide open for the Muslims, but it is rather half open and under strict control by the Muslim jurists and should be approached with maximal caution. This can be attributed to the fact the sciences of others are not neutral because they are falling under certain factors connected with the thoughts and ideas of others. In order to benefit by the learning of others, one must observe the following:

1. In borrowing, one must choose the good and the beneficial which does not contradict with a clear - cut shari'a stipulation over which

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(1) Kashfel Qina'a by Al Bahooti - 2/478

(2) Qawati el Addilla by Ibn el Samaani, 2/99

(3) Usoul el Sarkhasi, 2/182



his death in case they want to induce a change in the waqf whenever it is deemed necessary for the general good even if this appears to be in contradiction with the words in the waqf deed. This rule was mentioned by Al Wanshareesi<sup>(1)</sup>, The original was taken from a reply made by Abil Hasan Al Qabesi to a fatwa, saying that, 'He whoever dedicated a book and provided that borrowing another book should not be given except after returning the book previously borrowed and the student was in need of several books of different types, does this mean that he should not be given more than one book? Al Qabesi said that if the student was honest there is no harm in giving him what he requested. If this student was not known, he is given one book only. This is also acceptable in case of a likely loss. At the surface of the words of Abi Omran, we suggest that we should not deviate from the condition of a waqif. The hidden meaning of this is that we have to observe the intention of a waqif, not his words. In some cases some of the dedicated books are kept within the walls of a school, not to be taken out of it. It was the custom thereafter to be taken out subject to the approval and in the presence of teachers. It is likely that they did this for themselves and for the others.

**Factor 6: The essence of the Islamic waqf regulations and management is that they should be reasonable:**

Al Ezz ibn Abdul Salam divided the shari'a regulations into two divisions <sup>(2)</sup>: those whose benefit has been known and those whose benefit has not been known. The first is that whose benefit was made clear to us or that which acts as a barrier against abuse on the one hand, and that which brings a harm or which might bring a benefit and is believed to be of a reasonable meaning ; the other one is that which is doubtful in respect of bringing a benefit or averting a detriment. This is known as ' al Taabudi '. In this Taabudi type there is acquiescence and servility whose benefits and reasons are not known. A Mutabbid does not do this work except for

(1) Al Miyar el Muarrab wal Jamie el Mughrrab by Al Wanshareesi. (7/340)

(2) Qawaid el Ahkam : Al Ezz (1/22) Ahkam El Shariyya between Taabbud and maqulolia by Omar Abdul Aziz (P51)

shari'a is to observe the interests of the people in this world and the world to come. It embodies justice, mercy, interests and wisdom. Each question which goes beyond justice to injustice, from mercy to pitilessness, from the good to the detriment, from wisdom to absurdity –all these constitute a break away from the shari'a and they were foisted into the shari'a through misinterpretation<sup>(1)</sup>. In this chapter more than a hundred evidence were mentioned for its consideration, for example what ibn Dawood mentioned through Abu Huraira that 'a person asked the Prophet (PBAH) about foreplay for a fasting Muslim to which he allowed it whereas he forbade it for another person. The first was an old man and the other was a young man<sup>(2)</sup>. This shows a difference in the same fatwa concerning one issue. An addition to this issue is what came through ibn Abbas concerning the penitence of a murderer. Ibn Abi Shaiba said that a man came to ibn Abbas, asking him 'Is there a penitence for a man who killed a Muslim'? He said 'No, but to hell'. When he left, his companions said, 'this is not the way you used to give fatawa, so what is the reason for that?' He answered them, saying that 'I thought that he came with anger filling his heart and that he was meaning to kill a Muslim. They sent somebody to verify the story and found out that the saying was true<sup>(3)</sup>. Thus we see how the same fatwa has changed according to the condition of a person. Among the other examples in the area of awqaf is the jurisdiction over awqaf has shifted from the individual jurisdiction to the governmental collective jurisdiction.

This factor caused the Islamic shari'a regulations to expand in general and the awqaf and their management in particular. New regulations were added to the old ones and this brought flexibility and ability to accommodate the changeable conditions.

#### **Factor 5: Observing the intention away from words:**

Among the major rules which add to the liberality and flexibility of awqaf is observing the intention of a waqif away from the word. Some of the late Maleki jurists gave weight to the intention of a waqif after

(1) I'lam el Muwaqieen an Rabbul Alamin by Ibn el Qayyem (2/2)

(2) Sunan Abi Dawood, Book of Fasting, Book on hatred to youngmen n 2387. Al Albani said correct and approved.

(3) Al Musannaf by Ibn Abi Shaiba, Kitab al Diyyat n 38326, 14/249.



### **Factor 3: Observing the necessities, excuses and special circumstances**

Islamic shari'a used to observe the necessities, excuses, and special circumstances and set regulations which cope with such situations. To evidence this, we find the Quranic verse 'our Lord! Lay not on us a burden like that which thou didst lay on those before us' (Al Baqara 268) and the other verse 'He commands them what is just and forbids them what is evil; He allows them as lawful what is good and pure, and prohibits them from what is bad and impure: He leases them from their heavy burdens and from the yokes that are upon them (Al Aaraf 157); and the other version 'Allah intends every facility for you, He does not want to put you in difficulties'(Al Baqara 185).' Among the jurisprudential maxims is 'With difficulty comes facility' and 'necessitas vincit legem'. Among the other examples is waqf Istibdal (replacement) as the Hanbali school of thought assumes that this is not permissible and it is possible in time of need. To consolidate this fact we mention Omar ibn el Khattab who wrote to Ibn Mas'oud to convert the mosque in Kufa to a market for exercises and to put the market in the same place of the mosque, which he did. Thus that replacement was for a need and not for a necessity <sup>(1)</sup>.

This factor caused the shari'a regulations in general and those of the waqf and its management in particular to be more copious because it added additional regulations to the original ones and assisted in conferring that flexibility on the regulations and their liability to deal with any special circumstances.

### **Factor 4: Changeability of a fatwa with the change of time, conditions and traditions**

Among the major holistic principles of the Islamic shari'a is the changeability of a fatwa with the change of time, conditions and traditions. In this respect, Ibn el Qayyem says that this a 'very important part, and if ignored it will constitute a misunderstanding of the shari'a which might bring with it difficulties and burdens. It is known that the honourable shari'a is at the top of the interests of the people and the determinant in

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(1) Al Insaf by Al Mawardi 7/102 and what follows

Consequently, we find that most of the jurisprudential questions concerning awqaf and their management were built on Ijtihad (discretionary science) based on reasoning or analogy or on the general good or approval. These questions caused jurists to be at variance. Therefore commitment to them is optional and cannot be obligatory unless approved unanimously by the jurists, or adopted by a ruler in a compulsory legislation in accordance with technical specifications. Among the controversial points in this regard is the point concerning the appointment of a nazir, his duties and responsibilities, and the limits of a nazir's powers to dispose of the waqf property, all of which manifest the liberality and flexibility of awqaf.

### **Factor 2: Liability of the shari'a stipulations to multi - Interpretations**

Most of the shari'a stipulations related the awqaf and their management were based on assumption or various interpretations. They may denote several meanings, for example jurists differed over the ownership of waqf and if it should remain the property of a waqif or to pass to the beneficiary, or to pass to the property of Allah the Almighty<sup>(1)</sup>. The reason for such a difference in understanding the concept of Habs which occurs in the Prophetic tradition 'if you wish you can withhold it and offer it as a sadaqa<sup>(2)</sup>'. The difference was about the possibility of passing the property to the ownership of Allah the Almighty, or to the beneficiaries or remain in owner's hand without the power to dispose thereof. This accounts for the appearance of many schools with different attitudes. Moreover, this caused the process of approval among the jurists wider until some said that such a difference is a mercy as maintained by Rabi'atul Rai. Some of the jurists classified a book and called it Kitab el Ikhtilaf ( Book of the Difference) and presented it to Imam Ahmad ibn Hanbal which gave it the name 'Kitab el Si'aa<sup>(3)</sup> ( Book of the Liberality).

(1) See A; Inaya ala el Hidayah – Hamish fath el Qadeer by al Baberti(5/40) ;Aqdel Jawaher al Thamina by ibn Shas; Mughniel Muhtaj by Al Khatees el Sherbini (2/377) ; Kashaf el Qina'a by al Bahouti (4/254)

(2) Sahih el Bukhari: Kitab El Shurout (3/185) Sahih Muslim : Kitab el Wasiyya :15/1632 - 3/1255

(3) Al Khulasa fi Asbab Ikhtilaf el Fuqaha'a by Ali bin Nayef Al Shahoud :P 2



### **THIRD THEME**

#### **Limits of Liberality and Flexibility in Waqf and Western Charitable Organizations**

The management of the Islamic waqf and Western charitable organizations are characterized by liberality, flexibility and preparedness for coping with human development and the changeability of time and place. This, no doubt, causes the management of both applicable everywhere and at any time, besides the ability to receive what is new and believed to be in the interest of the awqaf and the institutions.

##### **Requirement 1: Limits of liberality and flexibility in the administrative system of the Islamic awqaf**

Before embarking on this point, we shall try to elaborate on the limits of liberality and flexibility in that system, as follows:

##### **Factor 1: Shari'a stipulations are interested in holistic regulations**

The shari'a stipulations which came with waqf and its management in general were limited and they came in the form of holistic principles, without approaching the details and fragments. For example we read the Quranic verse, 'Help you one another to piety and Godfearing ; do not help each other to sin and enmity' (al Maeda 2). This Quranic verse includes all exhortations towards Birr and Ihsan under which many things fall, for example donations made to charitable agencies and interest - free loans (Al Qardh el Hasan). In another location, we come across the Quranic verse 'and their affair being counsel between them' (Shura 38), and we have the Prophetic hadith 'if a human being dies, his work will be cut off except for three things: An ongoing charity, a beneficial learning or a goodly son praying for him<sup>(1)</sup>. The limitedness of those stipulations and their appearance this way is attributed to the fact that their applications differ with the difference to time, place and circumstances.

(1) Sahih Muslim – Al Wasia, 14/1631 ,3/1255

decentralized system does not strip the governmental agencies of their rights in exercising their control and follow up.

4. Some Western charitable organizations work under independent governmental control. Modern studies in the West have shown that the Western charitable organizations which act under independent governmental control get precedence over the other type which practices under a direct governmental intervention through setting legislations and regulations. They resort to the judiciary once these legislations are violated as it the case in the USA. The first type is more appropriate for controlling the Western charitable organizations, not to mention the efficiency of this type in utilizing the experiences and information for the developing and upgrading such organizations. This can be seen through the activities of Charity Commission in the UK .
5. Western charitable organizations and interest in planning. Western Charitable organizations are interested in strategic planning in view of their role in realizing the objectives of the organization and its function in serving the society. Strategic planning means 'an organized and clear cut effort aiming to fully describe the strategy of the institution, besides deciding and distributing the responsibilities and implementing them. The process of the official planning should distinguish between the various roles to be implemented by the managers within the process of formulating and implementing the strategies of the institution<sup>(1)</sup>. From among the Western charitable organizations which laid emphasis on this planning is Wellcome Trust which advocates the applicable planning principles in the Western charitable organizations which depend on accurate identification of the institution's mission and out of this they hasten to implement those objectives. They also update their plans and programmes through setting a five - year plan to adapt to the developments and changes<sup>(2)</sup>.

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(1) Principles of Management by Ali Sherif e al (p149) / Dalil el Idara el Istratigia wal Takhtit el Muassassi by Qasem Kanakri P 6 / Waqf bain el Asala wal MUasara by Sami Al Salahat (172:

(2) Ibid:P 127 and what follows and Pioneering waqf institutions by Osama Al Ashqar and Uthaim(102)



## **Second: Special nature of the Western Charitable organizations**

It is possible to get acquainted with the special nature of the Western charitable organizations through getting acquainted with the pioneering Western organizations. In this requirement, only the major points shall be dealt with.

1. Western charitable organizations have an independent entity which managed to snatch the governmental recognition of their entities and their funds allocated to charitable work. This was pushed to extreme when the governments considered giving it the name Third Sector. It also managed to get administrative facilities and tax exemption. This was thanks to the massive funds exemplified in churches, hospitals, schools, universities and donations which amounted to billions of dollars. In 2003 the amounts reached \$86 billion, i.e. 36% of the total assets of that year which amounted to \$240 billion.
2. Western charitable organizations combine two types of management: the first is the operational charitable organization which extends assistance directly to the public; the second type is the granting investment charitable organization which grants funds to charitable agencies through direct spending, or in cooperation with other charitable organizations. The first type is bigger than the second type so that its percentage in the UK is 47%(1) .
3. Modern trends of Western charitable organizations tend to advocate the administrative decentralization system due to the defects resulting from the use of administrative centralization system, for example delay in processing the transactions of the people, waste of time and exhausting the administrative system in undue activities. This impinged on the development of the economic sectors in the governorates and territories. On the other hand, implementing the

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(1) See Development of Islamic Waqf Experience in the light of the Western Experience by Osama Al Ashqar, P 165

and commitment to development, assessing and measuring the performance of the staff.

3. Task of Administration is to complete the works through the work force, materials, machinery, funds and good use of the works steps, all of which, if mixed together, will cause objectives to be fulfilled in the shortest time with the least effort, minimal cost and optimal efficiency.

#### **4- The major functions of management:**

- Planning which means defining the objectives of the project and the means to realize them, the means to instruct the work force on carrying out their duties.
- Organization which means deciding the activities to be performed to achieve the set objectives in the forms of functions with clear - cut specifications, choosing the individuals suited to each job in the light of their qualifications and experiences which guarantee a good performance of their works cooperatively under a discreet management.
- Guidance which means empowering the cadres to improve their work through instructing and motivating them to avoid any deviation from the achievement of objectives.
- Coordination which means achieving balance, linkage and harmony, removing contradictions and duplicity and observing the element of time which requires the issuance of a decision in the proper time.
- Control which means ensuring that the work has been completed according to the set plan and the results were realized efficiently.
- Major commitments of management which represents picking up the various elements deemed suitable for realizing the sought objectives through using the means suitable elements, besides commitment to continuity and striking a balance between the short term and long term requirements.



to realize efficiently the desired conclusions through utilizing the available resources amid surrounding circumstances<sup>(1)</sup>. From the above mentioned, we can say the following:

1. Administrative activity which covers two main areas with difference in formation and aim. They are
  - General management exemplified in the governmental management which extends services to a society and achieves the comprehensive development for the whole sectors and departments belonging to ministries and authorities which are in charge of bringing welfare to a society.
  - Business Administration which deals with the for - profit economic projects through adding a value to their productive areas, services and transactions. To the afore mentioned two areas , other administrative areas are added, namely Management of private authorities and organizations, management of the public sector, management of the cooperative societies and management of the international organizations<sup>(2)</sup>.
2. Management of charitable organization pursue the following:
  - Saving time and effort in doing a work.
  - controlling costs and mitigating expenditures and rationalizing consumption of materials
  - Achieving balanced development and general welfare.
  - linking and coordinating efforts to achieve the goals.
  - Improving the performance of a charitable organization. This depends on many principles , for example planning, developing the academic and scientific strategy, ability to manage risks, taking appropriate measures, continuous improvement, pursuing institutional difference, discreet management, training and developing the staff's potentials, using modern technology and IT, control over the performance

(1) Principles of General Management by Ibrahim Shehab, p31

(2) Principles and Functions of Management by Mohammad Al Mohammadi Al Madhi, P 18

representative to act on their behalf due to the massive works which need technical efforts. This caused the capital to be considered as the property of the company, enjoying independence and security in case the members are at variance. Moreover this protects the private funds of the owners against risks once a company fails to fulfill its obligations<sup>(1)</sup>.

### **Requirement 2: Nature of the administrative system of the Western charitable organizations:**

Before we set off on this task, it is pertinent to explain the meaning of management in the West. Thus this theme will approach two requirements: Concept of management in the West and the special nature of the administrative system of the Western charitable organizations.

#### **First: Management concept in the West**

Early Westerners and some specialists mentioned different definitions for management. Fredrick Taylor said that the 'art of management is the true knowledge of what you expect people to do, then to ensure that those people are carrying out this task most efficiently and with the least expenses<sup>(2)</sup>. Henry Fayol defined management as it is 'forecasting, planning, organization and giving orders, coordinating and supervising<sup>(3)</sup>. Some modern scientists defined management as 'all the operations which target the execution of the general policy<sup>(4)</sup>. In other words, this means that 'management is a specialized activity including science and art and aims to direct human efforts according to the academic knowledge and materialistic potentials<sup>(5)</sup>. Al Madhi defined management as a 'human purposeful activity, deriving its concepts from different sciences in order

(1) Al Waseet by Al Sanhoury 5/288

(2) Usoul el Qanun by Al Sudda, 468 ([http://www.iefpedia.com/vb/showthread.php?=280\\_](http://www.iefpedia.com/vb/showthread.php?=280_)

(3) Islamic Management by Waheeba Muqaddam

(4) Very close to this definition is what al Allaq mentioned, for example 'forecast, plan, leadership, coordination and supervision or utilizing all functions and directing them towards achieving a definite goal. Therefore, modern management is the spark which activates the details of a project - Al Mujam Al Shamel for the terminology of administrative sciences, accountancy, financing and banking by Bashir al Allaq, P 306

(5) This definition was adopted by the scholars of management in the West due to its universal nature including civil, economic, military and judicial areas. It was adopted by Al Tamawi in his book 'principles of Management, P21



of the caliph Hisham ibn Abdul Malek in Egypt. He created a system for the waqf, with a diwan separate from other dawaween (diwans) and put it under his supervision. The intervention into the affairs of waqf increased in managing the waqf funds during the Fatimid epoch as these funds were put under the control of the chief judge and a special institution called Baitmal el Awqaf was established. During the Ottoman epoch, the awqaf had administrative forms under the control of the state. Several rules and regulations were issued to oversee the waqf affairs and they are still applicable till today<sup>(1)</sup>. In the middle of the 19th century, the waqf funds were put under the control of the Turkish Ministry of Awqaf<sup>(2)</sup> and many contemporary countries followed this example. Western charitable institutions are almost decentralized, for example Carnegie, Rockefeller and others.

#### **7- Islamic Awqaf acquire juridical personality on establishment:**

Islamic fiqh was the forerunner of the contemporary positive laws in deciding the juridical personality of the waqf. Once a waqf is correctly established with all its prerequisites, the acquisition of a juridical personality is ipso facto apart from the zemma of the waqif, beneficiary and the nazir. Such a zemma implies that waqf has its rights and obligations; it has to its account what it has earned and against its account what it has merited. Consequently, contracts are entered into between it and the people in terms of sale, leasing, Istibdal and others<sup>(3)</sup>. The meaning of a juridical personality in the current positive laws is that an institution or a company should have a legal personality independent of the zemmas of its owners or partners, with all its particular rights and obligations. Its liability is restricted to its funds only<sup>(4)</sup>. This concept of the juridical personality appeared in the 19th century following the Industrial Revolution and the legal developments the companies and institutions were subject to. Mammoth and important works were entrusted to those institutions and required the solidarity of the members and partners and appointing a

(1) Ahkam el Waqf fil Shari'a al Islamia, Al Kubaisi. 1/39 . Management of awqaf: Centralized and Decentralized by Hasan Al Rifaie, 3/172

(2) Islamic Waqf and its Development by Munzir Qahf, P 31 and what follows

(3) Al Waqf el Islami and its Development by Munzir Qahf, P 31 and what follows

(4) Al Al Haq and Al Zemma by Al Khafif, PP 96 - 102 –Al Sharikat by Al Khafif, PP22 - 24

a waqf institution is based on the existence of a central institution taking charge of investing waqf monies in general, then creating different waqf projects according to the activity picked by the institution.

### **5- Direct and investment waqf management combined**

Means of managing Islamic awqaf combine the direct management and the investment management. An example of the direct management is managing the mosques and the zawaya; then there is the social management as it is the case in managing orphanages, schools, libraries and hospitals. This type needs specialized cadres, but mosques need a da'awi staff anchored in shari'a sciences and the ability to teach and preach. Schools need experts in education and educational management; hospitals need specialists in medical sciences. An investment management, investment is carried out in connection with the waqf institutions and the purposes they are created for, for example real estate property, planes, cars, farms, factories etc..<sup>(1)</sup>. On the other hand, the management of a Western institutions may be direct or non - profit investment. They are specialized in one domain<sup>(2)</sup>. We have Getty waqf which is specialized in historical traces of waqf, Another waqf is Boys and Girls of America; Rolex waqf which is specialized in watch making.

### **6 - Centralized and decentralized management combined:**

Management of Islamic awqaf combine both the centralized and the decentralized management. At the beginning the decentralized system prevailed because it got the form of self management in which the waqif himself was the manager or that the management was entrusted to a specific person who should comply with the waqif's conditions whenever possible and once this occurs in the waqf deed. Later the management system shifted to another form, i.e. the centralized system because both the government and the judiciary became part of it and having control over it. The first to adopt this attitude was Tauba ibn Numair (D 129 H) who was the judge at the time

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(1) Islami waqf and its development, and management by Munzir Qahf

(2) Pioneering waqf institutions: Abdul Aziz al Ashqar and Abdul Aziz Al Ghunaim, P 45 and what follows



exemplified in bringing welfare to the citizens, in the case of awqaf there are more objectives which bring with them more responsibilities, for example maintaining the waqf assets with the same potential, generating the best revenues to be spent in the charitable purposes specified by the waqif, preserving the beneficiaries' rights with the delivery thereof, observing the waqifs' conditions and extending free services to the society.

### **3 - Islamic awqaf management deals with numerous parties**

Small and individual projects are known to be managed by the owner of the project but the major projects are managed by a body representing the owners of the project who are in touch with the activities of the managing staff through the general assembly of the owners or the shareholders. In this case the managing staff acts for the good of the shareholders and it is responsible to them. The management of awqaf is something different because there are no exclusive owners for the waqf but it belongs to Allah, taking the form of a general right for the society. Management in awqaf, as we said earlier, is embodied in the nazir who acts in behalf of the party having the original jurisdiction. Consequently, there are several parties involved in the waqf, mainly the nazir, the beneficiaries and the party having the original jurisdiction.

### **4- Islamic Waqf Management deals with various activities**

Economic projects often have one commercial, industrial or agricultural activity, each of which is directed to investing the available funds to generate profit to the owners. In the case of waqf, activities are multiple and most of them require investing and generation of profit. In view of the variety of the activities, naturally the means of investing them do vary. These activities may include leasing, building, agriculture, portfolios. It follows that the variation of the projects brings with it a variation in the investment means. In addition to this, we have the management which takes charge of spending the waqf proceeds in the various channels. Here there are more than one management to perform all those duties in the light of the activities at stake. In view of this fact, the organizational structure of

## **Second: The Special Nature of the Administrative System of the Islamic Awqaf:**

It is possible to get acquainted with the special nature of the Islamic awqaf through the applications the awqaf were subject to in the Islamic countries in the past. In this requirement, the major points of this nature are going to be highlighted:

### **1- Islamic Management of Awqaf is Religious:**

This religious aspect is exemplified in two things: the first is that it is a means which brings somebody nigh in nearness to his Creator, whereas the property is passed to Allah. Those in charge of caring for it consider their work as Qurba to Allah. This aspect could be taken as an approach to self control in the management of awqaf.

The second point is that the management of Islamic awqaf, while performing its duties and responsibilities, observes the shari'a rules and regulations which, in turn, leads to formulating the waqf Ijtihad - based regulations so that they become compatible with the shari'a purposes in general and the disciplined interest in particular. Consequently, the process of practicing those activities in a waqf institution is deemed lawful as long as it seeks to attain its purposes. Thus the products and services utilized by a waqf institution, such as leasing, building, agriculture, Istibdal. Hikr, Irsad, Rules of Jurisdiction and Nazara, are all lawful. Similarly, the rules and regulations set for a waqf institution are lawful. Management of some Western institutions have a materialistic nature because the establishment of such an institution may be a means for tax evasion.

### **2- Management of Islamic Awqaf deals with numerous and various objectives**

Once the major objective of a commercial institution is to get optimal profit for the owners of that institution, then this is taken as sign of a competent management round which all administrative jobs cluster. And if the objective of a governmental institution is to achieve the general interest

If they fail to carry out this duty directly, they may carry out this responsibility indirectly through the general assembly of the fund and to be represented in the board of directors by some of the other waqifs who are elected by the other waqifs. If the waqf jurisdiction was vested in the Mawqoof Alaihem (beneficiaries), this may be approved and to have them represented in the management of waqf through the general assembly of the fund.

- c. The management of numerous waqifs (as it is the case in the waqf sukuk) may be adapted in case of having numerous waqifs (collective waqf). In this case, several awqaf are combined under one management, either for one purpose or for several purposes. Al Sarkhasi says 'if everyone offered half a waqf offering to the poor and the wali appointed one man for that, then this is acceptable'. This is confirmed by saying that all have become on sadaqa (free offering) with the multiplicity of the well - doers (mutasadiqeen)<sup>(1)</sup>. This means that the fragmentation of waqf resources is approved for facilitation's sake and the paucity of liquidity in the hands of many people nowadays.
- d. It is possible for a nazir to benefit from the modern Western applications in managing and investing awqaf as stipulated by the jurists in the sense that the disposition of waqf is contingent on the interest. In Al Ashbah wal Nazaer, we read that 'the acts of a judge in respect of the funds of the orphans, estates and awqaf are pinned on the interest, and unless he observes this , his acts are faulty'<sup>(2)</sup>. A Mutawelli is allowed to benefit by anything useful. In Al Isaaf , we read that 'he is not empowered to build houses in a waqf land for rent because the land is meant for cultivation. If it is adjacent to the houses in the area and the people are interested in renting them, then building houses is allowable if the rent is an addition to the proceeds of the agriculture. In this case, utilizing it is more profitable to the poor'<sup>(3)</sup>.

(1) Al Mabsoot by Al Sarkhasi, 12/38 - 39

(2) Al Ashbah wal Nazaer, Ibn Nujaim: P125

(3) Al Isaaf fi Ahkam el Awqaf by Al Tarabulsi, P58

### **Third Function:**

Distributing the proceeds to the deserving agencies as specified by the waqif in the waqf deed.

### **Fourth Function:**

All the above measures should be put under the control of the relevant governmental agencies. Jurists maintain that the jurisdiction over waqf, in case the waqifs are not able to assume this responsibility, should pass to the judge or the ruler. This shows that waqf management is under the control of a competent governmental agency.

### **3 - Jurisprudential adaptation of Islamic Awqaf:**

Modern waqf management stands in need of shari'a origination or jurisprudential adaptation through resorting to the rules and regulations of the fiqh principles, thereafter shifting such regulations to the novel issues. This item includes the management of modern awqaf in general and adapting the management of the numerous waqifs in each of the waqf funds, waqf sukuk and adapting the benefits acquired by a nazir from the modern Western applications to managing and investing awqaf.

- a. It is possible to adapt the management of modern awqaf in general through the concept known as jurisdiction or Nazara. By jurisdiction, we mean the authority in charge of caring for the waqf through keeping their assets, investing them, augmenting their properties, and spending their proceeds as recommended by the waqif. The person having these powers is called 'nazir' or 'Mutawelli'. This power or jurisdiction is vested in the waqif or his guardian or al Mawqoof Alaih or the judge on behalf of the ruler<sup>(1)</sup>.
- b. Management of numerous waqifs can be adapted (as it is the case with waqf funds) as stipulated by the jurists who maintain that a waqif may take charge of the waqf jurisdiction in case he acts singly.

(1) See Al Hasfaki: Al Durr el Mukhtar; Al Haskafi 4/379 ;Al Issaf fi Ahkam el Awqaf by Al Tarabulsi P49; Mawaheb el Jalil by Al Hattab 6/37; Al Muhathab by Al Shirazi 1/445; Mughni al Muhtaj by Al Khateeb el Sherbini 2/319; Al Insaf by Al Mawardi 7/66

Among the precautionary measures in terms of accountancy which must receive the attention of a Nazir is to withhold an amount out of the proceeds on an annual basis for emergency or to use it whenever a need arises for repair even if the current state of the asset does not require that. In *Al Ashbah wal Nazair* Ibn Nujaim says that in case construction is carried out in a certain year and an amount was deducted from all the beneficiaries or part of them, the deducted amount shall not be a debt on the waqf because if an amount is cut off, it will never take the form of a debt on the waqf. In *Al Thakheera*, we read that, 'if a nazir pays them in case there is a need for construction, he shall answer for that' <sup>(1)</sup>.

Ibn Nujaim elaborated on this point about when a Nazir is allowed to cut off an amount from the proceeds which can be directed to maintenance. Due to the importance of the text, I preferred to copy it as it is. He said that 'a waqif if he provided for the priority of construction and the remainder shall go to the beneficiaries, as it is the case with Cairo awqaf, here, a Nazir is entitled to withhold an amount deemed required for the future even if the asset does not presently need construction as maintained by the jurists. Therefore, he must differentiate between the condition of preferring construction annually or ignoring it. With this ignorance, construction takes precedence in time of need and no saving is made whenever there is no need. With conditioning, need comes first and saving for it is carried out after which the remainder shall be distributed. A waqif had assigned the remainder to the poor. Thus if the waqif provided for giving them in time of need, then saving will be carried out when there is no need. Consequently, a Nazir reserves an amount for construction and it should not be said that there is no need for it because in this case, as it occurs in *Al Nawazel*, something unexpected could happen to the mosque and the house is unproductive' <sup>(2)</sup>.

### **Second Function:**

Investing through risk free activities which guarantee good revenues to beneficiaries, for example leasing of waqf assets, re - building ramshackle assets and leasing them to those who rebuilt them for the standard rents (Khulu) or the modern system of BOT.

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(1) Ibid

(2) ' Ibid

serve and attain their goals, whether these be Nazirs, trustees, judges, boards of directors, general assemblies or ministries of awqaf<sup>(1)</sup>. In other words 'being in charge of waqf and managing its affairs in terms of maintenance, investment and spending the proceeds in the proper channels<sup>(2)</sup>.

The major functions of awqaf as elicited from the foregoing definitions are as follows:

1. Maintaining the waqf assets and their types. This is carried out through maintaining them and doing whatever is necessary to achieve this end in terms expenditures, provisions and reserve. Jurists are in agreement on the role of a Nazir in respect of construction and maintenance works regardless of the waqif's attitude in this respect<sup>(3)</sup>. In dealing with this specific point, Al Nawawi said that the 'duty of a Nazir includes construction, leasing, collection of the proceeds and distributing it to beneficiaries, keeping the assets and the usufruct<sup>(4)</sup>. In Al Isaaf , we read that the first duty of a Nazir with respect to the proceeds of waqf is 'construction and the caretaking remuneration ( even if not provided)<sup>(5)</sup>. The author of Al Insaaf elaborated on this point, saying that ' the duties of a Nazir are as follows :keeping the waqf, construction, leasing, cultivation, litigation, collecting the proceeds.... till he says exerting sincere efforts in developing it and spending the proceeds in the specified channels, for example construction, repair, and payment to beneficiaries<sup>(6)</sup>. Ibn Abdien says that 'spending on construction shall take priority over paying to beneficiaries<sup>(7)</sup>. Ibn Nujaim says that 'even construction and beneficiaries share equally, but this condition held is null and construction should prevail<sup>(8)</sup>.

(1) Masail fi fiqh el waqf: research by IDB,P 3.

(2) Foundations of Awqaf Management by Mohammad Abdul Halim, KAPF

(3) Hashiat Ibn Abdien (4/366)Al Isaaf fi Ahkam el Awqaf by Al Tarabulsi, P56; As'hal el madarek by Al Keshnawi (3/108);Rawdatul Talibeen by Al Nawawi (5/348); Mughni al Muhtaj by Al Sherbini (2/394); Al Insaf by Al Mawardi (7/67)

(4) Rawdatul Talibeen by Al Nawawi 95/348)

(5) Al Isaaf fi Ahkam el Awqaf by Al Tarabulsi,p56

(6) Al Insaf by Al Mawardi (7/67)

(7) Hashiat Ibn Abdien (4/367

(8) Al Ashbah wal Nazair by Ibn Nujaim, 201



in the area of finance, ruling or judiciary. In the Holy Quran, we find a Sura which indicates the management of political matters such as Shura (consultation), justice, and allegiance. There are other Suras which indicate matters connected with finance, distribution of spoils, Zakat, collection of jizya (tribute) and other relevant issues. Moreover, there are some Prophetic traditions which dealt with the Islamic management, for example 'Al Kharaj by Abi Yousef (D 182 H), the book on Sharh el Siyar by Al Imam Mohammad bin Hasan Al Sheebani (D 189 H), Kitab el Amwal by Abi Obaid (D 224 H), Kitab Al Ahkam El Sultania by Al Mawardi (D 450 H), Kitab Nizam al Hukouma Al Nabawiyya (known as Al Tarateeb el Idariyya by Sheikh Abdul Hai Al Kittani (D 1382 H).

Given that Muslim leaders are known to have implemented the administrative jobs in the area of politics, finance and judiciary during the earlier periods of Islam, jurists did not coin a terminological definition of Islamic management. Nevertheless, some contemporary researchers defined it as 'utilizing all Islamic principles and shari'a rules, instructions and ethical concepts for attaining optimal products in a minimal time, with consummate perfection so that man's work becomes a worship to the Face of Allah the Almighty'<sup>(1)</sup>. In other words, this means 'that type of management carried out by the leaders and statesmen endued with knowledge and faith which enabled them to perform efficiently their duties, however different their capacities and responsibilities might be'<sup>(2)</sup>.

#### **Definition of Islamic Awqaf management:**

Ancient jurists did not give an all - inclusive definition of Islamic Awqaf Management, neither did they give a definition thereof in the epochs which followed. Some modern researchers defined it as 'those administrative cadres in charge of waqf, managing its affairs, maintaining them and enabling them to

(1) Definition of Dr. Al Nahawi and Islamic Management< Al Manhaj wal Mumarasa ; Hizam Al Mutairi: borrowed from Islamic Management, Simplified approach; Waheeba Muqaddam (<http://www.iefpedia.com/vb/showthread.php?t=280>)

(2) Islamic Management: Method and Practise by Hezam Al Mutairi: A simplified approach by Waheeba Muqaddam (<http://www.iefpedia.com/vb/showthread.php?t=2b0>)

## **SECOND THEME**

### **Nature of the Administrative System of waqf and the Western Charitable Organizations**

Management in the world of finance and business is a necessity for each institution involving a collective effort aiming to achieve specific aims. An institution which does not adopt the scientific principles of management will never achieve its aims.

This theme will cover the nature of the administrative system of the Islamic waqf and the Western charitable organizations.

#### **Requirement 1: Nature of the administrative system of the Islamic waqf:**

This requirement will include an interpretation of the concept of managing Islamic awqaf and the special nature of the administrative system. Following comes a clarification of this:

##### **First: Concept of the Islamic Management:**

This embraces the meaning of the term management and the definition of waqf management in terms of terminology and its jurisprudential adaptation.

1. Management in language: This term indicates that something is surrounding something else, which indicates also moving something round something else. It also indicates managing the affairs and this extends to reach the term 'manager' who takes charge of managing something, for example the manager of a company which is a modern term<sup>(1)</sup>.

##### **2. Definition of Islamic Management in Terminology:**

Before embarking on this point, we should define 'Islamic Management' in general.

##### **a. Definition of Islamic Management:**

Muslims showed an early interest in Islamic management because it constitutes an important part of the Islamic civilization, whether this be

(1) Mukhtar Al Sihah, Al Mujaam el waseet, Item 'dor'

## Table of the Differences between Western Charitable Organizations and the Islamic Waqf System

S	Element	Western Charitable Organizations	Islamic Waqf
1	Rise	The Trust appeared in England in the 12th century, whereas other systems appeared earlier. As for their status quo, they appeared in England in the 17th century and in the USA in the 18th century.	It appeared in the Arabian Peninsula and it was based on a religious factor
2	Source	The origin of trust is based on traditions.	It appeared through the Quran verses and the Prophetic Sunnah
3	Main Motive	As for the Trust: Tax evasion imposed on the estates.  As for the other organizations. it was religious at the beginning then changed into materialistic motives, for example to address the resentment of the work force against the amassing of wealth in the hands of a limited number of businessmen, in addition to evading taxes and the tax exemption in case donation are directed charitable works.	The motive is to attain Allah's good pleasure and to be brought nearer to Him.
4	Property	In Trust, ownership is passed to a trustee who takes charge of managing it.	Waqf ownership does not pass to the Nazir, but it passes to Allah.
5	Shari'a Problems	A trust, in some of its forms, integrates a shari'a problem embodied in Monopoly	Waqf does not include any shari'a problems and it is void of monopoly.

the poor and the needy<sup>(1)</sup>, to benefit by the trust came to existence. Other systems which fall under the naming Endowment and Foundation<sup>(2)</sup> were created long time ago for religious reasons, whereas the roots of the current status quo started in England and took their primitive form starting from 1601. Thereafter they slightly increased in 1736; in 1880 they got more remarkable forms. In the USA, those charitable organizations began to appear near the end of the 18th century. The first among those foundations were Benjamin Franklin's Foundation which appeared in 1791, James Smith in 1846, Jude Bebody in 1867, Carnegie in 1896, Rockefeller in 1902, Ford in 1936, MacArthur in 1970, and Johnson in 1972. This process continued until they reached millions, including Bill Gates (2000) the most famous worldwide charitable foundation whose funds amounted to \$29 billion<sup>(3)</sup> in 2006. The reasons for the rise of those foundations can be attributed to the following<sup>(4)</sup>: The amassing of mammoth wealth made available through the hard efforts of the workers in the hands of a limited number of businessmen after the Industrial Revolution in the West. This state of affairs triggered resentment among the people so that we saw that number of the early foundations. After World War II and the rise of communism in Russia which posed a threat to businessmen, industries and politicians through instigating workers against businessmen, those wealthy people rushed to donate scores of millions and establish charitable organizations which used to help the poor and marginalized categories. In addition, high taxes were imposed on business facilities, while tax exemption was offered in case donations went to charitable activities. This expansion in establishing such institutions and the donations thereto caused the role of the USA to feature after the WWII and the cold war between capitalism and communism. During this period, Both the USA and Russia sought to control the biggest part of the globe. To achieve this goal, charitable work and aid witnessed a considerable increase. Following comes a table showing the differences between a Western charitable organization and the Islamic waqf.

(1) The idea of A Trust :Hosni El Masri, PP 29 - 37

(2) Website: ([www.pnn.org](http://www.pnn.org))

(3) Islamic Waqf System and similar systems in the West by Mohammad Abdul Halim, p 9

(4) Ibid

2. Property in the Trust System: Property in the Trust system passes to a trustee as shown in the definition; in the Waqf system property does not pass to a Nazir, but rather it remains the property of the waqif as maintained by some jurists, or it passes to the property of the beneficiaries as other jurists maintain; or it becomes the property of Allah as a third group says<sup>(1)</sup>.
3. The Islamic waqf system differs from the Western charitable organizations in respect of its rise and incentive. It is known that the rise of the Islamic waqf came to existence in response to a religious factor during the early days of Islam as per Divine verses which were referred to in the part about the concept and legality of the Islamic waqf. The chief motive for waqf in Islam is to be brought nigh in nearness to Allah and to attain His good pleasure. Allah never accepts anything not purely dedicated to His Exalted Face, for example dedication to get a materialistic benefit or seeking a worldly purpose through which winning more followers or seeking good reputation may be the ultimate end.

Western Charitable organizations<sup>(2)</sup> such as the trust appeared in Europe in England during the Middle Ages. The motive underlying this appearance was to evade the heavy taxes imposed by the princes on the feudal estates when passed to successors after the demise of the devisor. As early as the 12th century, an owner of an estate used to choose one of his reliable and trustworthy friends to confer on him the right of the legal ownership over his property, along with an undertaking to deliver the proceeds of such a property to the successors of the owner according to the conditions of the contract known as the 'Benefits Contract'. Nevertheless, during the reign of King Henry VIII (1536) Benefits Contracts were issued through which tax evasion was made impossible. This brought forth the Trust Contract which made the trustee a legal real owner of the property. In order to manifest goodwill, charitable trust, which involved non - successors, especially

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(1) Islamic Waqf System and similar systems in the West by Mohammad Abdul Halim, p11

(2) Islamic Waqf System and similar systems in the West by Mohammad Abdul Halim, p 9

of waqf are available in Irsad, without the least violation thereof. The Imam who dedicates something out of Baitul Mal is held as a representative of the Muslims, or rather a waqf official, vested with the power to dispose of the waqf assets. In this sense, Al Sawi says, 'If I say the Sultan's waqf in behalf of charities, this is correct though the Sultans are not the owners of what they had dedicated. A sultan, in this case, acts as a representative of the Muslims, which implies that he is equal to a waqif's representative<sup>(1)</sup>. Al Sherbini also said that, if the governor exempted a waqf made by the Imam out of Baitul Mal, this is correct, whether it goes to a specific purpose or a public agency '<sup>(2)</sup>.

**Similarities of Irsad and Western Trust can be put down as follows:**

- a. Irsad means earmarking funds to a definite agency and we find the same in the trust.
- b. In Irsad, the asset is under the control of a Nazir, but in the Trust the asset is under the control of a trustee.
- c. In Irsad, the corpus is invested and the same is done with the Trust.
- d. The proceeds in al Irsad go to the beneficiaries and the proceeds in a Trust also go to the beneficiaries

**Second: Differences between of Irsad and Western Trust can be put down as follows:**

Given that similarities are plentiful between the Western Charitable organizations, there are still some differences which can be put down as follows:

1. Western Trust in some of its aspects includes some sort of monopoly as seen in its definition. This side keeps it aloof from the concepts of birr and Ihsan, whereas Islamic waqf stands apart from this sense of monopoly.

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(1) Belughat Al Salek by Al Sawi, (2/297).

(2) See Al Enaya ala el Hidayah : Hamish Fath el Qadeer by Al Babarti (5/40). Aqd el Jawher el Thamina by Inm Shas (3/927) Mughni el Muhtaj by Al Khateeb el Sherbini (2/377). Kasf el Qina'a by el Bahooti (4/254).

5. Western Trust System is very close to Irsad system: In the case of a trust, the owner of a property passes his asset to a specific person called trustee, in which case the contract emanating from utilizing the asset and investing it will be for the benefit of the beneficiaries. If there are no beneficiaries, the proceeds and the benefit shall be dedicated to purposes specified by the law<sup>(1)</sup>. Terminologically speaking, Irsad means that the Imam ( the governor) dedicates the proceeds of lands that belong to Baitul Mal to some of the relevant channels of spending<sup>(2)</sup>, for example the proceeds of a property or governmental farms go to the benefit of mosques or salaries of the Imams and the Muezzins<sup>(3)</sup>. This is applicable if Irsad is viewed as a waqf as it is the case with the majority of Maleki and Shafie jurists. Hanafi and Hanbali jurists; on the other hand, consider Irsad as something different from waqf because the major conditions of the waqif are not there, for example a waqf should be the property of somebody and once this condition is fulfilled, it cannot be held as a waqf. Irsad does not have this condition. In this sense, Ibn Abdien says, 'Irsad from a governor is not a waqf at all, but rather it is specifying something from Baitul Mal to some of its beneficiaries<sup>(4)</sup>. Al Rehaibani said that 'the first to dedicate the lands of Baitul Mal to charitable purposes was Noor Al Shaheed of Damascus, then Salahuddin Yusef of Egypt. When they asked for a fatwa from Ibn Asroon he approved that, justifying this as being Irsad and appropriation from Baitul Mal in behalf of its beneficiaries so that they can easily reach it because it is a real waqf in which the asset (Al Mawqoof) should be the property of the waqif. Here Al Sultan (governor) is not the owner of the waqf<sup>(5)</sup>. Jurists came to the conclusion that Irsad is a waqf because the conditions and pillars

(1) Al Irsad and its Applications in the light of the Trust by Omar Kamel, P 2 .

(2) See Al Fatawa el Mahdiya (2/647); Hashiat el Jamal ala Minhaj el Talebeen (3/577); Kuwait Fiqh Encyclopedia (3/107), Glossary of Terms by Nazih Hammad, P 50.

(3) Glossary of Terms by Nazih Hammad, P 50.

(4) Hashiat Ibn Abdien: Al Durr el Mukhtar, Sharh Tanweer el Absar (3/376,543).

(5) Mataleb Uli El Nuha fi Sharh Ghayatul Muntaha by Al Rehaibani (4/332).

beneficiaries specified by the owner.<sup>(1)</sup> According to the beneficiaries<sup>(2)</sup>, a trust is divided into Special Trust and General Trust<sup>(3)</sup>.

1. Special Trust: It is the Trust created in behalf of an individual or several individuals designated by the real owner, for example his successors. In this sense it is like Al Waqf Al Ahli.
2. General Trust or Charitable Trust: The aim of this Trust is to bring benefit to the society as a whole or to a great number of individuals, for example education or alleviation of poverty.

### **Third Requirement:**

#### **Western Charitable Organizations and Islamic Waqf: Similarities and differences<sup>(4)</sup>**

1. Many of the Western charitable organizations are similar to the Islamic waqf in terms of the meaning of each one of them. Both seek Birr and Ihsan to others, i.e. doing what is beneficial to others through which they become better, for example spending on education and providing food for the poor and the needy.
2. The Western endowment system agrees with the Islamic waqf system in the following aspects:
3. The Western Trust system agrees with the Islamic waqf system as to who manages the institution. A trust is managed by a trustee, whereas a waqf is managed by a Nazir or a Mutawelli.
4. Western charitable organizations agree with the Islamic waqf System in the main component, i.e. the beneficiary or (Al Mawqoof Alaih). A contract is inchoate in case there is no money to be invested on a perpetual basis, with its proceeds going to beneficiaries nominated by the waqif.

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(1) See the idea of Trust and the Joint Investment Contract in Al Qiyam Al Manqoola by Hosni Al Masri, PP39 - 42

(2) Website ([www.askoxford.com](http://www.askoxford.com))

(3) See the idea of Trust and the Joint Investment Contract in Al Qiyam Al Manqoola by Hosni Al Masri, pp44 - 47.

(4) Islamic Waqf System and similar systems in the West by Mohammad Abdul Halim, PP 4.





### **First: Endowment:**

Linguistically speaking, this term means<sup>(1)</sup> waqf, gift or grant which involves a donation touching money, property or any other source made by an individual or an institution in behalf of a charitable society, college, hospital or any other entity<sup>(2)</sup>. In short, it is an asset which is maintained ad infinitum, whereas the proceeds go to a charitable purpose<sup>(3)</sup>.

### **Second: Foundation:**

This term means 'institution' which indicates an organizational entity taking up a business, whether it is commercial, governmental, educational or charitable<sup>(4)</sup>. In a narrow sense this term indicates a charitable society which is an organizational entity based on waqf to support a charitable society<sup>(5)</sup>. The term 'institution' has another definition, for example a fund for fund raising for charitable, religious, educational or research works, etc., or a society which extends financial aid to colleges, schools, hospitals and other charitable organizations<sup>(6)</sup>.

### **Third: Trust**

In Arabic<sup>(7)</sup>, this term means 'waqf', confidence, credit, investment fund, money held in trust, or a merger of two companies with similar activities for forming a cartel or syndicate. It also means a business connected with money, movable or immovable property whose owner passes its ownership to a 'trustee' who takes charge of managing and investing it in behalf of the

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(1) See 'Terminology of Administrative, Financing and Banking' by Bashir Al Allaq, Elias Modern Dictionary, p810, Development of Waqf Institution by Osama al Ashqar, p14.

(2) Website ([www.answers.com](http://www.answers.com))

(3) Website ([www.hef.on.ca](http://www.hef.on.ca))

(4) See Development of Islamic Waqf Experience in the light of the Western Experience by Osama Al Ashqar, P 15.

(5) Website ([www.investoword.com](http://www.investoword.com))

(6) Website ([answers.com](http://answers.com))

(7) See 'Terminology of Administrative, Financing and Baking' by Bashir Al Allaq, p 538 ; Banking, Financing and Investment Terminology by Farouk Al Taji, P 623

1. Al Waqf el Khairy indicates that waqf whose proceeds go to charitable purposes in general
2. Al waqf el Ahli indicates that waqf whose proceeds go to the posterity and relatives of the waqif or other designated beneficiaries, including awqaf in behalf of one self.
3. Al waqf el Mushtarak indicates that mixture of al Khairy and al Ahli waqf.

### **Requirement 2:**

Places of worship such as churches, cloisters and oratories were the sole forms of awqaf in the West up to the turn of the 13th century AD. During that time, some types of Khairy awqaf reared up their heads in Germany. The first sign of this rise of the Khairy awqaf in the Western legal systems appeared in the 17th century when charitable work was defined as 'any work carried out by a single individual or a group of individuals to extend a public service or extend an assistance in this domain'. This law brought with it tax exemption. This definition came before the concept of a 'juridical personality' was known, taking into account that this concept of this personality appeared in the 19th century. When awqaf acquired the juridical personality, it became known as a 'non-profit and a non-governmental foundation' and its activities centered on public charitable deeds falling under issues pertaining to health, scientific or religious domains. In North America, this institution expanded so that it had two types: Public Foundation which is financed by donors, whereas the second type was the Private Foundation whose affairs and financing is undertaken by an individual, a family or a limited number of individuals<sup>(1)</sup>. Charitable work in the West developed and out of it various systems emerged under different names, for example Voluntary Sector, Non-Profit sector, Independent Sector, Third Sector and Social Economy. Following comes some detailed description of each:

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(1) Islamic Waqf (abridged) Munzir Qahf p 23 and what follows.

Waqf, as maintained by the consensus of the jurists, is a lawful transaction, and further a means which brings a human being nigh in nearness to his Creator<sup>(1)</sup>. In the Holy Book, we read the following verse, **'By no means shall you attain righteousness unless you give freely of that which you love'** (Al Imran' 92 ). It was narrated by Ibn Omar, may Allah be pleased with them, that Omar acquired a piece of land in Khaibar after which he came to the Prophet (PBH) , asking for his view. He said: O Prophet, I have acquired a unique piece of land in Khaibar, and I do not know what to do with it. What do you suggest? The Prophet replied ' If you wish, you can withhold its corpus and offer it as a charity, which Omar did, but in this case it becomes unsalable, inalienable and unbequeathable. He offered it as a charity in behalf of the poor, the kinsmen, those in debt, those in bondage, in the way of Allah, the wayfarer and the guest and there is no fault in the Nazir if he feeds a friend therefrom if this friend is not interested in amassing money<sup>(2)</sup>. In this context, we'll indicate the Prophetic tradition' 'If a human being dies, his work will be cut off except three things: an ongoing charity, a beneficial learning or a goodly son praying for him<sup>(3)</sup>'. Jaber, may Allah be pleased with him said, 'I have known nobody in al Muhajireen (who left Mekka with the Prophet) and al Ansar ( residents of Al Medina el Munawara), but dedicated something on an ongoing basis; something which could not be sold, disposed of or bequeathed<sup>(4)</sup>. Ibn Qudama in this context said , 'There is a unanimity among the Prophet's companions (may Allah be pleased with them) as to the approval of waqf so that nobody denied it<sup>(5)</sup>.

Waqf, in the light of its relevant spending channel, is divided into Khairy, Ahli, Mushtarak or joint<sup>(6)</sup>.

(1) Al Mughnii by Ibn Qudama - 5/579

(2) Al Ikhtiar by Al Mosuli 3/40 - Hashiat el Dusouki 4/75 – Mah el Jalil by Ulaish 4/34 – Mawaheb el Jalil by al Hattab – Mughni el Muhtaj by al Sherbini 2/376 – Al Mughni by ibn Qudama –Kuwai Encyclopedia 44/110.

(3) Sahih el Bukhari , Kitab el Shurout fil waqf,3/185

(4) Sahih Muslim Kitab el Wasiyya,14/1631

(5) Ahkam el Awqaf by Al Khassaf,P 8

(6) Al Mughni by Ibn Qudama , 5/599

**'And Allah is with the good - doers'** (Al Ankaboot 69). In another location, we read the following Quranic verse 'And Allah loves the good - doers' (Al Baqara 195). Muslim children must be indoctrinated into cherishing such qualities as maintained by Al Matriddi , 'A believer must teach giving and good - doing to his children in the same way he teaches them faith'<sup>(1)</sup> . This is the valuable quality undertaken by good doing people throughout the ages. It is noteworthy in this context to point out that Islam was a forerunner in this domain of organizing such a quality in a uniquely integrated form which combined individual good - doing and institutional good - doing and pointing out what is mandatory and what is optional. This was carried out through different mechanisms, for example Zakat and Waqf, and other voluntary charities. History and status quo stand witness to the roles of such mechanisms in alleviating poverty and spreading social solidarity spirit and consolidating social welfare. Nowadays there is a dire need to activate such mechanisms in the Islamic world which stands face to face with globalization which dwarfs the role of the state and advocates the system of the free market capitalism which proved a failure in achieving social equality. This fact puts greater weight on the NGOs to undertake the responsibility for achieving social equality through the special mechanisms of Ihsan, mainly those with ongoing nature, especially waqf which is based on donating money which are invested to generate proceeds to be appropriated to charitable purposes<sup>(2)</sup>.

### **Second: Concept of Islamic Waqf:**

Linguistically speaking, waqf means Habs, i.e. retention, withholding or immobilizing. Waqf is singular which is pluralized by awqaf as it is familiar with other Arabic words<sup>(3)</sup>. Once it occurs, it means that I have dedicated that thing in the way of Allah. Terminologically speaking, waqf means 'withholding an asset and releasing its proceeds or usufruct'.

(1) Mahasen el Islam : Abu Abdullah Al Bukhari

(2) Nizam el Waqf el Islami and similar systems: Moh'd abdul Halim Omar

(3) Lisan el Arab: Ibn Manzoor, Mufam Maqayees el Lughah; Ibn Farris : Al Misbah el Munir: Al Fayoumi

and the Western charitable organizations. In this research, I'll lay emphasis on the concept of the Islamic waqf system and that of the Western charitable organizations, along with highlighting the similarities and differences.

### **Requirement 1: Essence of the Islamic waqf system**

Islamic waqf belongs to the system of **Birr** and **Ihsan** in the Islamic Fiqh (jurisprudence), therefore this requires elaborating the concept of this system before indulging in dealing with the essence of the waqf system.

#### **First: Concept of Birr and Ihsan in the Islamic Jurisprudence:**

Linguistically speaking , Birr is derived from the verb which indicates charity and good doing<sup>(1)</sup>. Both the linguistic and the terminological meanings are almost identical because they embrace charity or good doing presented to others, whether this takes the form of money or benefit. It also refers to liberality in being charitable to people<sup>(2)</sup>.

Ihsan is derived from the verb which refers to every pleasing and desired element and this could be twofold when it refers to a human being conferring a pleasing element on others as it occurs the Quranic verse '**Surely Allah bids to justice and good doing and giving to kinsmen, and He forbids indecency, and insolence**'. (Al Nahl Sura, verse 90); the second refers to good doing in itself as it occurs in the Quranic verse '**If you do good, it is for your own souls**' ((Al Isra'a 7). Ugliness( which is a contemptible quality)<sup>(3)</sup> is the opposite of Ihsan whose terminological connotations indicate doing good things to others so that a beneficiary becomes happier, for example offering money to the poor or food to the hungry<sup>(4)</sup>.

Birr and Ihsan are among the major Islamic qualities and the humanitarian characteristics recommended by Islam. For this reason , Allah the Almighty multiplies the rewards of good doers as this occurs in the Quranic verse

(1) Mujam Maqayees el Lugha by Ibn Farris , Al Kulliat, Al Misbah el Munir, Al Fayyoumi.

(2) See Al Kulliat by Al Kaabari (1/398), Mujam Lughatul Fuqaha'a by Qalagi ang Qnaibi, P 105

(3) Maqayees el Lugha: Al Mufradat fi Gharib el Quran , Al Asfahani, p235

(4) Al Kulliat by Abul Baqaa Al Kaabari 1/65

In order to find replies for such questions and others, we have referred to a good number of jurisprudential (fiqhi) references which feature the most popular schools of Islamic thought (Mathaheb), for example Al Shafie, Al Hanafi, Al Maleki and Al Hanbali, in addition to the books of exegesis which approached the major problems of awqaf and the similar systems, interpretation of the Prophetic tradition and the modern references which approached the major problems of awqaf and the similar systems. In conducting this research, I have adopted the inductive, descriptive, analytical and comparative systems. The research was divided into an introduction, five themes, and a conclusion. In the introduction, I have talked about the importance of the research, its sources and divisions; in the first theme, I have approached the essence of the Islamic waqf system and the Western charitable organizations and their similarities and differences; in the second theme, I have approached the nature of the administrative system of waqf with its major problems, together with those of the similar systems; in the third theme, I have approached the dimensions of liberality and flexibility in the administrative systems of both the waqf and the Western charitable organizations; in the fourth theme, I have approached the civilizational interaction between the two systems and in the fifth theme, I have approached the suitability of the administrative system to achieve the intents of waqf and the Western charitable organizations. In the conclusion, I put forward the major conclusions, along with some recommendations.

May Allah the Almighty accept this effort and multiply my reward on the day when neither wealth nor sons shall profit.

## **FIRST THEME**

### **Essence of the Waqf System and the Western Charitable Organizations: Similarities and Differences**

The Islamic waqf system is characterized by that ability to create a state of social and economic equilibrium in case it is well managed and utilized, and benefiting from the successful and pioneering international experiences involved in charitable work in view of the great similarity between the waqf

## Introduction

Praise belongs to Allah, the Lord of all beings, who made justice and Ihsan (good doing) heavenly bids as per the Quranic Verse, '**Allah commands Justice and good doing**', and peace and blessings be upon our Prophet Mohammad who was sent as a mercy to the whole world, and on his kinsmen and followers to the Day of Resurrection.

The subject '**Waqf and Similar Western Charitable Organizations: Towards a Humanitarian Civilizational Partnership**' is one of the important subjects of this age because it constitutes a source for financing places of worship, universities, scientific research, schools, libraries, hospitals and social welfare, including providing for the poor and the needy, extending assistance to the wayfarers, victims of family disintegration and caring for the people with special needs, the blind and the disabled.

It is recognized that awqaf are among the institutions which received due attention from the Muslims throughout their history in response to the instructions made by the Prophet (peace and blessings of Allah be upon him) which laid stress on urging Muslims to dedicate. Nevertheless, we found that awqaf witnessed a decline and recession which brought with them poor proceeds. This state of affairs can be attributed to the inefficiency of the nazirs (waqf administrators), in addition to the negligence on the part of the governmental authorities, not to mention the complicated bureaucracy. Consequently we found out that there had been encroachment and looting exercised by governments and people in many countries, in addition to the lukewarm sentiments among the people towards dedication (establishing awqaf). Conversely, we find that Western charitable organizations received the utmost attention which reflected itself in that wonderful growth and remarkable sensitivity, especially among the rich. Naturally the results were more abundant proceeds and better fruits. The question which yields itself to be asked here is 'What are the reasons underlying this phenomenon? Is it possible to benefit by the administrative measures adopted by the Western charitable organizations? Is there that liberality and flexibility in both the waqf and the Western charitable organizations which allow for borrowing one system from the other?

intents of the waqifs (dedicators), augment the proceeds and solicit new awqaf. Among the merits of such a management is creating an independent governmental authority to take charge of the awqaf and resort to strategic planning. The western charitable systems, on the other hand, may benefit from the solutions put forward by the Islamic awqaf to handle the criticisms raised against them, for example observing the waqifs' intents, encouraging the religious factor in any initiative and seeing to it that the benefits of the waqf cadres should be fair and within the standard wages.

### الملخص:

توصلت الدراسة في البحث إلى أن (الترست) في النظام الخيري الغربي يتفق مع (الإرصاد) في نظام الوقف الإسلامي؛ فهما ينتميان إلى منظومة واحدة، وهي: (البر والإحسان)، لكن هذا الاتفاق لا ينفي وجود فوارق بين النظامين، ومن ذلك: أن بعض صور (الترست) تتضمن الاحتكار، وأن الملكية فيها تنتقل إلى (الأمين)، وأن الدافع فيها: التهرب من الضرائب التي تفرض على التركات عند انتقالها للورثة.

كما توصلت الدراسة إلى أن للإدارة في كل من النظامين إيجابيات وسلبيات، لكنها ليست ثابتة فيهما، وهي تتصف بالسعة والمرونة، فمعظم المسائل الوقفية كانت اجتهادية؛ لأنها بنيت على مصادر أصولية مختلف فيها، مثل: المصلحة. وهذا مما يفتح المجال واسعاً لاستفادة كل نظام من الآخر؛ لكن وفق الضوابط التي وضعها كل نظام للاقتباس من الآخر. فيمكن لنظام الوقف الاستفادة مما لدى النظام الخيري الغربي من إدارة كفوؤ تواكب الأساليب الحديثة، حتى تتمكن من تحقيق مقاصد الواقفين، وتحافظ على الأصول الموقوفة، وتعظم الربح فيها، وتستحدث أوقافاً جديدة. ومن صور تلك الإدارة: إيجاد هيئة حكومية مستقلة مختصة بالرقابة على الأوقاف، والتخطيط الاستراتيجي. كما يمكن للنظام الغربي الاستفادة من الحلول التي تطرحها الأوقاف الإسلامية لمعالجة الانتقادات الموجهة إليه، ومن هذه الحلول: احترام رغبات الواقفين، وأن يكون الدافع للعمل الخيري دينياً، وأن تكون رواتب المديرين معقولة، قريبة من أجره المثل.



# Researches



## **ISLAMIC WAQF AND SIMILAR WESTERN CHARITABLE ORGANIZATIONS TOWARDS A HUMANITARIAN CIVILIZATIONAL PARTNERSHIP**

**Prof. Mohammad Othman Shubair**

### **ABSTRACT:**

This study came to the conclusion that Trust in the western charitable organizations is in agreement with the Islamic Irsad in the waqf system because they both belong to one system, i.e., Birr and good doing. This agreement, however, is not without some points of difference, for example we find that some forms of Trust include monopoly which appears clearly when a property is passed to a trustee who strives to evade the payment of taxes imposed on an estate in case it passes to the inheritors.

Furthermore, the study showed that both systems have their negative and positive aspects, though of a relative nature in both, which are characterized by liberality and flexibility. Most of the jurisprudential issues were based on Ijtihad (discretionary science) in the light of the controversial resources, for example the 'interests'. This fact leaves the door wide open for each system to benefit from the other according to relevant restrictions set by each party in this regard. The waqf system may benefit from the advanced management being utilized in the western charitable systems in order to realize the

**Dr. Ibrahim Abdel Baqi**, in a book review, introduces the book of Dr. Mohammad bin Saad Al Henayyen entitled 'Welaya and Institutional Nazara on Waqf - A jurisprudential study'

**Editing staff**

of Jerusalem). The research lays stress on the historical framework and the social, religious and economic dimensions of those awqaf. This is carried out through analyzing one of the main documents known as 'Minutes of the laws and deeds of al Maghareba awqaf' which was issued during the 4th quarter of the 20th century.

In the French division of the Journal, Dr. Leila Blili-Temime, deals with the strategies of waqf which were adopted by the princesses of Husaini epoch in Tunisia during the 18th and the 19th centuries and the changes in the movement of that waqf touching the strategy used to be based on the search for social status into an economic plan to keep wealth far away from the control of the French imperialistic power.

**Prof. Mohammad Othman Shubair**, in his translated-into-English research, analyses the similarities and differences between the Islamic waqf and European charitable system in which he calls for a humanitarian and civilizational partnership between both of them. To reach this end, he highlighted the means of flexibility and liberality in the two experiences so that each one may benefit from the other through cultural and conceptual interaction. The researcher lays emphasis on the development of the Western experience in terms of management rules and tools of investment, and the relation with the other sectors. He calls for benefiting from such applications, provided that shari'a regulations should be observed and waqf should be able to maintain its originality and fundamental principles, together with opening the door before waqf to develop its modern experience.

In the Articles section, **Prof. Masoud Sabri** surveys the Ottoman waqf experience through the 'Theory of Shari'a Maqased (intentions)' showing how the theory of the Islamic waqf, through its Ottoman experience, realized the interests and averted dishonest practices. Consequently, this experience was one of those practical models which shaped one of the pillars of transactions which prevailed during the Islamic civilization. The researcher brings up examples of Ottoman awqaf which observe the shari'a intents (maqased), whether this be directing the attention to religion, human soul, posterity, mind and money or through realizing the necessary intents connected with needs and improvement.

pave the way before a genuine renaissance in which science constitutes one of the pillars of its development, irrespective of the fact that it benefited from its neighbours.

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Here we review the first research in this issue of Awqaf Journal during the Ottoman epoch, whether this be in the capital or in the provinces. Researchers **Mr. Mahmoud Said Ashqar and Dr. Zuhair Ghanayem** deal with the process of collecting the waqf proceeds and means of utilizing them in the Holy city of Jerusalem during the Ottoman epoch till the beginning of the Ottoman Regulations. The research indicates the types of waqf transactions and means of exploiting the waqf assets and the process of distributing the proceeds to the beneficiaries.

Within the same context, **Prof. Suhail Saban** deals with one type of waqf governance during the Ottoman epoch, in addition to specifying the administrative and accountancy control over the distribution of Awqaf al Haramain and the Holy city of Jerusalem. These are the awqaf which were established to meet the needs of the holy places. Moreover, the researcher tracks their records in the Ottoman archive or in what has come to be known as 'al Surre records' which mean the inkind monies which are carried and spent on the social categories in Mekka al Mukarrama, Al Medina el Munawara and Jerusalem on the pilgrims and the residents of those places as early as the appropriation of this type of waqf from the late 16th century till the First World War.

**Mr. Mohammad Ahmad Malaka**, in his research entitled 'Waqf on the poor, the commons and wayfarers during the Ottoman era' reviews how waqf was used as a tool by the Ottoman state for social justice. It was implemented by the Ottomans to handle the problem of poverty and reduce the economic and social gap between the citizens of the caliphate.

**Prof. Nacereddine Saeedoni** analyses the institutional dimensions of the waqf of Ruwaq al Maghareba at al Azhar Al Sherif Mosque at the beginning of the 20th century, (other examples were found in the holy city

(Umma) nation which do not fall in their historical detail, but in the methods on which they were based, especially in connection with the means of dealing with the economic and social challenges they confronted. The outcome of the Ottoman archive may bring forth a host of economic, social and cultural experiences which go beyond the frontiers of the Ottoman geographical current boundaries (Turkey), but extend to cover most of the Arab countries within an important historical epoch which spanned five centuries during which the Islamic world witnessed bizarre internal and external challenges. They require re-consideration and thorough reading through scientific tools and investigation away from vainglorious claims or foregoing criticism.

**The Third fact** is that the Ottoman archive constitutes an integral part of the Islamic nation's memory, including most of its provinces. It is regarded as the third international documentary archive because it includes 150 million documents, now being numbered to be handed over to the researchers. At the same time this archive includes thousands of records and deeds which are related directly to awqaf. These deeds and records show the outcome of the Ottoman bureaucracy in connection with the financial issues, the specific elements of the capital and the lands, in addition to the various Islamic countries.

Among the historical innovations of waqf is that it managed, as a social system, to create the opportunities of development and to revert them to products for applicable utilization which allow for addition. Moreover, it guaranteed their sustainability through unique formulation. The Ottoman archive is an example of those opportunities which may be transformed into a scientific basis which supports development as it is the case with the relevant scientific projects which are established in the Western countries to which all means and capabilities are directed. The point which must be thoroughly observed here is that this requirement does not seek to establish a new research center as it is the current state in the scientific arena in the Islamic world, but rather it concerns the process of developing the agenda of the waqf institutions so that part of their efforts should go to develop scientific projects. The aim of such an effort is to catalyze the nation's memory and

Medina el Munawara. In view of the growing importance of the waqf, more specialized departments were created, for example 'the inspectorate of Awqaf al Haramain' and 'Awqaf Al Haramain Accountancy'.

Academic studies related to the Ottoman era are of the opinion that the Ottoman experience in the area of waqf was rich in respect of accurate documentation of the waqf institutions. This was based on the role played by the administrative bureaucracy which created a rich waqf archive in terms of the volume and variation, not to mention the historical and academic value. These studies strive to confirm a host of facts which must be taken into due account by modern waqf institutions, especially those which strive to disseminate awareness in the area of waqf and develop relevant academic works. Next to this come more advanced stages exemplified in assimilating the historical experience of the waqf formulas and linking them with the requirements of the sustainable development of the Islamic world in the 21st century, which fall in the following:

**The first fact** is related to the Ottoman archives in matters relevant to waqf and how they constitute a wealth which must be maximally utilized. It goes without saying that researchers and academicians are plentiful in the Arab and Islamic countries, but what is required here exceeds individual efforts which embrace sincere efforts for search and exploration. Nevertheless, such efforts do not guarantee sustainability nor do they rise to confront the requirements of a collective academic research. Therefore, it is imperative for the waqf institutions and to create specialized research centers to deal with the Ottoman archives to bring to light this academic legacy and put its records and documents at the disposal of academic researches and studies which go in line with the nature of a dignified research process. In this way it will become possible to furnish the waqf library with specific analyses it stands in need of.

**The second fact** is connected with the modern developmental challenges in the Islamic world which require solutions apart from those which have adopted throughout decades and to search for new ones. Such solutions must be contingent on the visions which internalize the experiences of the

## Editorial



### **WAQF IN THE OTTOMAN ARCHIVES: A MEMORY THAT DESERVES INVESTIGATION**

Waqf Management witnessed a remarkable development during the Ottoman caliphate in a way that reflects that great role assumed by waqf. This fact applies to the Ottoman capital as well as the other minor provinces falling under its jurisdiction. Within this context, a bureaucratically administrative system was developed, based on the concept of the sociologist Max Weber. This concept observed the expansion and development of waqf, in addition to documenting the details of its assets, their proceeds, development of assets, and the encroachment befalling them. Administrative plans were adopted to directly get in control of the awqaf, starting with the nazir (minister –in-status), through to the senior scribe and the ticketer. In the 19th century, a major department for waqf was created under the name 'Nazara of Hamayouni Awqaf'. This Department, through its limbs, was in charge of the various Ottoman provinces in the area of waqf. As early as the 16th century AD, special administrative departments were created similar to 'Awqaf al Haramain ' which took charge of the awqaf in Mekka el Mukarrama and Al

<b>* Waqf on the poor and the wayfarers during the Ottoman epoch</b> (Mohammad Ahmad Malaka).....	88
<b>* Awaqf Ruaq al Magareba (Lobby of the Moroccans) at AL Azhar splendid mosque, together with a reading in awqaf deeds of Ruwaq al Magharebs ( 1336 H / 1918AD)</b> (Prof. Nacereddine Saidouni).....	128

## Articles

<b>* Observing al Maqased (intentions) in the Ottoman awqaf</b> ( Prof. Masoud Sabri ) .....	161
---	-----

## Book Review

<b>* Institutional Welaya and Nazara on Waqf (a Jurisprudential study)</b> Mohammad Said al Hunayyen: Presentation by Dr. Ibrahim Abdel Baqi.....	181
---	-----

## News

<b>KAPF organizes the 25th Waqf Forum : Quarter a century in the service of waqf 1993 - 2018.....</b>	181
<b>* Waqf International Conference in Qatar.....</b>	188
<b>* Guinean President inaugurates the Regional Waqf Conferenc..</b>	189
<b>* Saudi – Malaysian Experience Forum.....</b>	190
<b>* Modern Versions .....</b>	192
<b>* Organizing the 9th Waqf Jurisprudential Issues Forum in the Hashemite Kingdom of Jordan .....</b>	194



# Contents



## Editorial

- \* Waqf in the Ottoman Archives: A memory that Deserves Investigation.....8**

## Researches in English

- \* Islamic waqf and similar Western charitable institutions: Towards a humanitarian civilizational partnership**  
( Prof. Mohammad Othman Shubair ).....14

## Researches in French

- \* Habous et stratégie de pouvoir dans la Tunisie husaynite 18è – 20è siècles**  
( Dr. Leila Blili-Temime ).....80

## Researches in Arabic

- \* Means of exploiting waqf and collecting it in the Ottoman Jerusalem till the Regulations (922 – 1266 H /1516 – 1850 AD).**  
( Mahmoud Said Ashqar – Dr. Zuhair Ghanayem ).....13
- \* Restrictions of distributing al Surre as it appears in the Ottoman Archive ( 999 – 1100 H / 1591 – 1689)**  
( Prof. Suhail Saban ).....48

### **An Invitation to All Researchers and Those Interested**

AWQAF Journal naturally would aspire to accommodate all the topics that have a direct or indirect relationship to Waqf such as charitable activities, volunteer work, community and development organizations, and reaches out to researchers and those interested in general to interact with it; in order to meet the challenges that obstruct the march of our societies and peoples.

The journal is pleased to invite writers and researchers to contribute to one of the three languages (Arabic, English and French) to the material related to the objectives of the journal and Waqf horizons in the different sections such as studies, book reviews and academic dissertations abstracts and coverage of seminars and deliberations of the ideas published.

Materials intended for publication in AWQAF Journal should observe by the following:

- The material should not have been published in any journal (electronic or printed)
- The material should abide by the rules of academic research conventions related to documenting the references and sources, together with conducting an academic handling.
- A research should fall in (4000 to 10,000) words, to which a summary of 150 words in both Arabic and a foreign language should be attached. Researches meant for publication shall undergo a secret academic refereeing.
- A researcher should attach the form of Work Originality to his research.
- An article should fall in 2000 - 4000 words.
- The Journal receives book's presentations and here priority is given to modern publications. The revision should fall in 500 to 1000 words. The presentation should include the main points about the book, for example the author, publisher, year, version, along with laying stress on the presentation, analysis through scientific method, interest in the essence of the book and its chapters, and assessing it in the light of other relevant works.
- The Journal receives coverages of seminars and conferences, provided that a report should mention the organizing body, the subject of the seminar, place and date of the seminar, the major axes, survey of the researches submitted with their main ideas. There should be a stress on the recommendations of the seminar, together with indicating the activities conducted on the sidelines of the seminar( if any).
- Materials sent to the Journal are not returnable if published or not.
- The Journal is authorized to re-publish the material wholly or separately, either in the original language or translated. This is carried out without referring to the researcher for permission. The researcher is entitled to publish his work in a book or any other form after it appears in the Journal on condition that a note concerning its previous publication should be indicated.
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### **Project of AWQAF journal**

AWQAF Project 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 Muslim nation. The history of Islamic world countries also reflects on Waqf rich experience in devising a societal involvement which encompasses almost all diverse walks of life and helps primarily in developing solutions for emerging human difficulties. During the decline of the Muslim nation, Waqf provided shelter and support for a significant share of the innovations that Islamic civilization was famed for and assured them to pass from one generation to another.

Nowadays, the Islamic world is witnessing a governmental and popular orientation towards mobilizing its material competencies and investing its genuine perceptions that culture makers' cherish in a spirit of scholarly innovation to arrive at fully comprehensive developmental models deeply rooted into the values of righteousness, virtue and justice.

Based on this conviction, AWQAF Journal embarks upon achieving a mission that would enable Waqf to assume the real and befitting standing in the Arab and Islamic arena of thought. It therefore seeks to emphasize Waqf as a discipline and entice those remotely or greatly interested in Waqf, uphold a scientific trend towards developing Waqf literature and link it to comprehensive social development considerations.

Since Waqf originally relates to voluntary activity, such claims would require that AWQAF Journal attaches its contents to the social work lively activities closely related to private community issues and volunteer engagements, relevant intermingling concerns associated with state-society interaction while allowing balanced participation between the making of community future and NGOs role.

#### **AWQAF Journal Objectives**

- Reviving the culture of Waqf through familiarizing the reader with its history, developmental role, jurisprudence, and achievements which Islamic civilization grew into until recent times.
- Intensifying the discussions on the scientific potentials of Waqf in modern societies through emphasis on its modern structures.
- Investing in current Waqf projects and transforming them into an intellectual and culture-based product to be deliberated among specialists. This is hopefully expected to induce interaction among researchers and establish a linkage between theory and practice of the tradition of Waqf.
- Promoting reliance on the civilizational repertoire in terms of social potential resulting from a deeply rooted and inherent tendency towards charitable deeds at the individuals and nation's behavior levels.
- Strengthening ties between the Waqf school of thought, voluntary work and NGOs.
- Linking Waqf to other areas of social activities within an integrated framework to create a well-balanced society.
- Enriching the Arab library on this newly emerging topic, i.e. Waqf and Charitable Activities.

Abu Hurairah (may Allah be pleased with him) reported, The Messenger of Allah (peace be upon him) said: "When a man dies, his deeds come to an end except for three things: Sadaqah Jariyah (ongoing charity); a knowledge which is beneficial, or a virtuous descendant who prays for him (for the deceased)."

[Narrated by Muslim]

The views and opinions expressed in this journal are those of the authors and  
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36



## Editorial

- \* Waqf in the Ottoman Archives: A memory that Deserves Investigation

## Researches in English

- \* Islamic waqf and similar western charitable institutions: Towards a humanitarian civilizational partnership  
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- \* Awaqf of Ruaq al Magareba (Lobby of the Moroccans) at AL Azhar splendid mosque, together with a reading in awqaf deeds of Ruwaq al Magharebs ( 1336 H / 1918AD)  
(Prof. Nacereddine Saidouni).

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36

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