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particulièrement par les procédures d'échange (istibdal/muâwada) (الاستبدال - المعاوضة) faisait des awqaf non pas des entités figées, mais au contraire, des biens faisant l'objet d'une circulation sur le marché immobilier et foncier, entraînant fréquemment un changement même dans la nature du bien waqf<sup>(1)</sup>. Selon Vandenberg, l'ingéniosité musulmane a su utiliser (le waqf) à des fonctions diverses selon des réformes qui ont allégé l'institution de ses complications, lui conservant son rôle primordial qui est d'exprimer l'élan de l'Islam vers la piété et la bienfaisance<sup>(2)</sup>.

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(1) Sur la question de possession, pouvoir et location des propriétés waqfs à Damas et à Alger au 19<sup>e</sup> siècle, Randi Deguilhem, in Colloque Le rôle des fondations pieuses dans l'Algérois (17<sup>e</sup>-19<sup>e</sup> siècles): facteurs socio-économiques, culturels et spirituels, juin 2002.

(2) Principes du droit musulman selon les rites d'Abou Hanifah et de Chafî'i, L. W. C. Van den Berg, p573.

De nombreux woukala sous-évaluaient volontairement le niveau des revenus des awqaf et surévaluaient les dépenses. À titre d'exemple, sur un revenu de la Grande mosquée évalué à 5 000 Fr. les dépenses s'élevaient à 3 000 Fr. et le reste était accaparé par le mufti responsable<sup>(1)</sup>. Aussi, sur une période de quinze mois (1834-1835), les revenus des awqaf s'élevaient à 98 158,99 Fr. alors que les dépenses étaient de 106 595,29 Fr. soit un déficit de 8 436,30 Fr.<sup>(2)</sup>.

Reste à dire à la fin de cette communication qu'en tant que phénomène généralisé, le ‘ana reflétait par son expansion et les modalités de son exploitation, une réalité sociale et économique et un climat intellectuel et spirituel, mais à côté de cet aspect positif, par la lourdeur des procédures et des traditions qui s'y rattachaient, les ‘anas traduisaient l'état d'ankylose et de déclin de la société algéroise à l'image des autres sociétés urbaines dans le monde musulman, un état qui n'a pas permis la mise en place de règles rigoureuses réorganisant le waqf et réformant les modalités de son exploitation. Cet état des choses a conduit des chercheurs à considérer que les awqaf ou habous avaient figé une partie non négligeable des propriétés foncières et ont entraîné une stagnation de leur rendement et n'ont été nullement un facteur de progrès économique<sup>(3)</sup>. D'autres ont déploré que les habous privés aient souvent été dilapidés, en plus du fait que cette masse de biens inaliénable et inaccessible gênaient considérablement les transactions<sup>(4)</sup>.

Mais en réalité, d'après les constatations basées sur les échantillons étudiés, nous pouvons affirmer que ce mode d'exploitation qui était le ‘ana représentait une solution adaptée aux réalités socioéconomiques. Ce qui nous permet de dire que la flexibilité des modalités de gestion illustrée

(1) Archives d'Outre-mer, Aix-en-Provence, F.80/1632, Note confidentielle adressée par le mufti maliki d'Alger au Chef de la Division et communiquée par lui au Ministre; Archives d'Outre-mer, Aix-en-Provence, F.80/1082, Rapport sur l'administration des corporations religieuses à M. l'intendant civil, Alger 1837, p. 2.

(2) Archives d'Outre-mer, Aix-en-Provence, F.80/1632, Note confidentielle adressée par le mufti maliki d'Alger au Chef de la Division et communiquée par lui au Ministre; Archives d'Outre-mer, Aix-en-Provence, F.80/1082, Rapport sur l'administration des corporations religieuses à M. l'intendant civil, Alger 1837, p. 2.

(3) L'expansion musulmane (7-11ème siècles), R. Mantran, PUF, Coll. Nouvelle Clio, Paris, 1979, p287.

(4) L'Islam maghrébin, introduction à l'étude générale de l'Islam, G.- H. Bousquet, 4ème éd., Alger, 1954, p190.

Dans cette situation, le waqf à Alger et ses environs devait faire face à l'hostilité des autorités françaises qui la considéraient le waqf par ses règles et procédures incompatible avec leurs normes économiques et comme un obstacle aux politiques de dépossession. Face à cet état des choses, les responsables des awqaf ont pour leur part adopté une attitude négative vis-à-vis de l'administration française. Ils voyaient dans la dissimulation des comptes réels des awqaf une forme de résistance, chose que les autorités françaises n'ont pas relevé considérant qu'il s'agissait simplement d'abus révélant un appareil administratif gangrené par la corruption et la fraude<sup>(1)</sup> en ne manquant pas d'accuser de nombreux woukala de détournement des ressources du waqf à leur profit, comme ce fut le cas du wakil du marabout de Sidi Abderrahmane accusé de louer des propriétés à vil prix contre des pots de vin<sup>(2)</sup>.

Malgré les précautions prises pour le respect des conditions d'exploitation des awqaf et préserver leur nature, il existait de nombreux dépassements dans la gestion et l'exploitation que révèlent les fluctuations des revenus et l'attitude des individus en charge des awqaf. À cet effet, les revenus des institutions du waqf ont fait l'objet de détournements de la part des fonctionnaires qui en avaient la charge à la fin de l'époque ottomane et durant les premières années de l'occupation française. Ce fait a été exprimé par le mufti malékite Mustapha ben Mohamed dans une lettre au gouverneur de l'Algérie le Général Clauzel datée du 29 août 1835, il y précisa que l'administrateur des awqaf des Haramayn Bouderba avait détourné sur une période de quatre à son profit 275000 Fr.<sup>(3)</sup>.

Cette situation a été également constatée par les services de l'administration française qui ont accusé les woukala des awqaf du détournement de revenus, ce qui les aurait fait reculer au cours des premières années d'occupation de 71703 Fr. en 1830 à 19003 Fr. en 1831, 11047 Fr. en 1832 et 6480 Fr. en 1833<sup>(4)</sup>.

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(1) Les édifices religieux de l'ancien Alger, Albert Devoulx, in «Revue africaine», 1862-1863-1870, Typo. Bastide, Alger, 1870, p42; Procès-verbaux et rapports de la Commission d'Afrique, T2.

(2) Tableau des établissements français en Algérie, 1837; Contribution à l'étude des habous publics algériens, Gérard Busson de Janssens, p67.

(3) Contribution à l'étude des habous publics algériens, Gérard Busson de Janssens, p65 et suiv.

(4) Tableau des établissements français en Algérie, 1837, p. 220-221 (d'après Contribution à l'étude des habous publics algériens, Gérard Busson de Janssens, p66).

En tant que modalité d'exploitation des awqaf ahli et khaïri, le ‘ana était une source importante de revenus nécessaires au fonctionnement de l'appareil administratif, de l'activité économique et de la dynamique sociale et culturelle. Sur le plan administratif, le waqf reposait sur un appareil administratif<sup>(1)</sup> qui était constitué essentiellement du mufti (المفتى), du cadi (القاضي), du wakil (الوكيل) supplété par les khodjas (الخوجة), chaouchs (شواش) et personnels du culte et d'enseignement comme les imams de la prière du vendredi (الأئمة), les hazzabin (الهزابون), les muezzins (المؤذنون), les lecteurs du Coran ( القراء ) , les lecteurs du ouerd (قراء الورد), les cheikhs al-Hadhra (شيخ الحضره), les Oudoul (العدول) et même des tolbas (طلبة) et des pauvres et voyageurs qui avaient trouvé dans le waqf un dernier recours.

Les personnes en charge des awqaf recevaient une part importante de ces revenus, c'est le cas du mufti hanéfite, du mufti malékite, des nadhers, des woukala, des chaouchs, des hazzabin, des muezzins, des tolbas et des imams. Le mufti hanéfite recevait une somme annuelle de 360 Fr. Le cadi avait droit à une rémunération fixée par le constituant et à défaut par l'usage général qui la fixait au dixième des revenus bruts<sup>(2)</sup>.

5. L'autorité française ne s'est pas intéressée à connaître la réalité des awqaf et la possibilité de les exploiter pour le développement de la vie économique et sociale. Ils ont vu dans le waqf un élément concurrent pour leur projet colonial car théoriquement insaisissable et mis hors du circuit du commerce. L'autorité française a ainsi accéléré le processus de démantèlement et de liquidation des awqaf. Le décret de Clauzel (7 décembre 1830) inaugurerait des actions administratives et juridiques pour la liquidation des awqaf malgré les protestations de nombreux notables et oulémas algériens comme Mohamed ben Mahmoud ben al-Annabi, Mustapha ben al-Kebabti et Hamdan ben Othman Khodja<sup>(3)</sup>. Malgré les règles juridiques qui font du waqf une entité imprescriptible, insaisissable et inaliénable, l'administration française a ainsi mis en place un arsenal de lois et règlements qui lui a permis d'atteindre son objectif avant le dernier quart du 19<sup>ème</sup> siècle.

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(1) Cet appareil comprenait plusieurs échelons allant du cadi et mufti aux agents et chaouchs. Le cadi était le principal superviseur du waqf, le wakil en était le gestionnaire, le khodja assurait le suivi des comptes, les chouachs assuraient les tâches quotidiennes.

(2) Les habous ou waqf, J. Luccioni, p77.

(3) La propriété en Afrique du Nord, P. Berthault, p13.

Outre l'activité économique, les awqaf rendaient des services sociaux à la population locale citons ceux des aqueducs (saouaki et hanaia) (السوقى), des citernes (saharidj) (الصهاريج), des puits et des fontaines. La dépense des revenus des awqaf khairi permettait de soulager les peines des pauvres, des nécessiteux et des voyageurs. Les dépenses destinées aux pauvres s'élevaient annuellement dans la ville d'Alger, d'après les estimations de Pichon et de Bernadet entre 15 000 et 18 000 Fr. atteignant certaines années 20 000 Fr.<sup>(1)</sup>. La journée du jeudi et le soir du vendredi, le wakil des awqaf de Sidi Abderrahmane distribuait les aumônes aux nécessiteux. Une autre partie des dépenses des awqaf publics revenait aux institutions religieuses et éducatives sous la forme de salaires et de montants destinés à l'ameublement, à la fourniture de l'huile d'éclairage, de la cire, des tapis de prière, des nattes et d'exemplaires du Coran et du Hadith<sup>(2)</sup>.

4. Les revenus des awqaf khairi et ahli dont de nombreux étaient exploités par le biais de la location ('ana) avaient un rôle important dans le maintien des services sociaux et assuraient la subsistance et l'éducation de nombreux individus. Ces awqaf offraient de nombreux emplois et fournissaient grâce leurs revenus financiers des aides aux pauvres et nécessiteux tout en préservant les droits des bénéficiaires.

Durant les premières années d'occupation (1837), les fondations du waqf disposaient encore de revenus considérables: 122 503 pour les Haramayn; 12 000 pour la Grande mosquée; 6000 pour Sidi Abderrahmane; 5000 pour les Andalous; 13 639 pour Soboul al-Khaïrat<sup>(3)</sup>. La plus grande part de ces revenus couvrait les salaires, les aides et les aumônes et la somme envoyée au Haramayn.

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(1) Archives nationales de Paris, F80/1082, Extrait du rapport de l'inspecteur chef du service des documents et contributions diverses sur la situation et l'organisation définitives de cette administration (1834).

(2) Le père Blackley cite dans son mémoire sur les quatre mois qu'il a passé à Alger (Londres, 1859, p. 30), que le revenu de la zaouïa du marabout Wali Dada en 1831 s'élevait à 403,5 piastres en plus d'un surplus de 187 piastres réparti entre: l'imam (24,5), le khatib (24), le lecteur du Coran (18), l'achat de l'huile d'éclairage (96), les travaux de nettoyage (30) et les nattes (12). D'après:

تاریخ الجزائر الثقافی، أبو القاسم سعد الله، ج4، دار الغرب الإسلامي، بيروت، 1998، ص395.

(3) Archives d'Outre-mer, Aix-en-Provence, F.80/1673, Notice de Leydeker et lettres de Blondel 22/4/1837. D'après : L'état intellectuel et moral de l'Algérie, M. Emerit, in « Revue d'Histoire Moderne et Contemporaine », 1-3, 1954, p200.

2. Les nécessités économiques et les besoins sociaux et de subsistance, ainsi que l'intérêt personnel influençaient directement les avis des juristes des différents rites religieux, comme le démontrent les nombreuses fatwas et les modalités développées pour exploiter les awqaf. Nous citons ici un exemple qui illustre le fait que bien que les habitants d'Alger à l'époque ottomane suivissent, dans leur majorité, le rite malékite, ils constituaient très souvent leurs awqaf selon le rite hanéfite; ils entendaient ainsi bénéficier des divers avantages qu'accordaient au fondateur les règles de l'hanaïsme au détriment des awqaf malékites<sup>(1)</sup>. Ils se basaient sur des fatwas rendant licite cette pratique. L'exemple en question est la fatwa sur la constitution en habous, par El-Arbi Ben Gharnout, de sa maison et de la moitié de son jardin, situés dans les fahs d'Alger, au milieu du mois de safar 1105 de l'hégire/1596. Ce contrat du habous a pris la forme d'une réponse à une question sur la possibilité de faire bénéficier des revenus du habous les pauvres des deux lieux saints, mais seulement en cas de déshérence (conformément au rite hanéfite) : «Si les faits sont tels que cités, il lui est permis d'établir le habous selon sa volonté. Ibn Malek a écrit dans son "Charh Majmaâ el-Bahraïn", qu'il est possible au premier propriétaire du waqf d'en bénéficier, le prophète lui-même mangeait de son aumône, c'est-à-dire de son waqf. Il a aussi précisé dans « El-Bourhan » qu'il peut bénéficier des revenus de son aumône, ainsi que ses descendants jusqu'à déshérence... C'est aussi l'avis de Abi Youcef, Ahmed, Abi Lila, Ibn Chebraouih, Ez-Ziri, le chafiîte Ibn Chouikh, des cheikhs de Balkh, afin d'encourager le waqf...»<sup>(2)</sup>.
3. Sur le plan économique, le waqf constituait par ses procédures et modalités d'exploitation et surtout ses ressources financières, une véritable base économique au service de la société locale à travers la location des maisons (bouyout et ghoraf) et des boutiques et les services des fondouks, magasins, fours, moulins, hammams et cafés, et aussi l'exploitation des terres agricoles: haouchs (الأحواش), champs (houkouls) (الحقول) et jardins (bassatin et djenans) (البساتين والجنائن).

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(1) Le contrat de quasi-aliénation des awqâf à Alger à la fin de la domination turque, étude de deux documents d'âna, Hoexter Miriam, p245.

(2) Archives nationales algériennes, Documents de Mahkamas, Série Z, Boîte 106, Document 208-53.

Ces enseignements tirés des échantillons étudiés rendent compte de certains traits de la société algéroise à l'époque ottomane, elles gagneraient toutefois à être étoffées par l'analyse d'échantillonnages plus élargis dans le cadre de futures recherches.

## (5) Conclusions

À la fin de cette recherche nous pouvons émettre quelques conclusions générales sur la nature et les effets du waqf algérois:

1. L'expansion des awqaf et leur rattachement en majorité aux Haramayn s'expliquent par des facteurs politiques, une situation sociale et économique et des motivations religieuses. Les titres nombreux sont là pour témoigner de la prévision et de la crainte des spoliations et de l'arbitraire des gouvernants<sup>(1)</sup>. Aussi, la crainte d'une spoliation arbitraire ou d'une confiscation a conduit à la constitution d'un patrimoine familial intangible échappant aux effets de la loi successorale<sup>(2)</sup>. Ainsi, on recherchait à préserver l'avenir de la famille et à en assurer la cohésion, et à protéger ses membres handicapés et les héritiers en général. À cela s'ajoute la recherche de la bienfaisance et la rétribution divine. Ces motivations combinées à un climat intellectuel et à une conjoncture économique difficiles ont poussé les propriétaires à mettre leurs biens sous le régime du waqf.

Par le biais de l'exploitation par le 'ana, le waqf contribuait à la préservation du groupe familial qui constitue le fondement de la société musulmane, ainsi le patrimoine demeure indivis et sous protection<sup>(3)</sup>. Cela explique aussi l'importante contribution des femmes aux awqaf de la ville d'Alger, ainsi sur 818 awqaf, 187 étaient constitués par des femmes soit un pourcentage de 22,36 % des awqaf de la période ottomane (1545-1840)<sup>(4)</sup>. Cet aspect renvoie aussi à la question de la désignation de la postérité devant bénéficier des awqaf pour limiter par exemple ce droit aux enfants mâles et à leur descendance.

(1) Archives d'Outre-mer, Aix-en-Provence, F.80/1082, Rapport sur l'administration des corporations religieuses à M. l'intendant civil, Alger 1837. (Rapport Bernadet du 1er septembre 1837.)

(2) Les habous ou waqf, J. Luccioni, p68.

(3) Les habous ou waqf, J. Luccioni, p169.

(4) إسهام المرأة في الأوقاف في مجتمع مدينة الجزائر خلال العهد العثماني، عائشة غطاس، المجلة التاريخية المغربية، تونس، العدد 85-86، 1997، ص. 101 (اعتبرنا على سجل 11).

7. Les soldats de la garnison (Yoldach) qui portaient des numéros en référence aux registres de l’Oudjaq, étaient des bénéficiaires privilégiés du ‘ana par les droits d’exploitation qu’ils acquéraient en tant que moutaoualis al-‘ana. Nous avons en effet recensé 48 moutaoualis al-‘ana appartenant à l’Oudjaq (selon leurs numéros) sur un total de 60 propriétés agricoles durant la période 1185-1195 (1674-1683).
8. Nous remarquons une absence des baranis (individus d’origine étrangère à la ville d’Alger), des individus de statut social modeste et des femmes de l’effectif des moutaoualis en charge de l’exploitation du ‘ana, et ce malgré le fait que de nombreux awqaf agricoles bénéficiaient à des femmes ou avaient été constitués par des femmes comme en témoignent leurs appellations telles que: Djenat Bent Zekoualou, Djenat Fatma Bent Mustapha, Djenat Bent al-Jiar. La désignation de nombreux biens waqf agricoles par des noms de femmes reflète la part importante de ces dernières dans la constitution des awqaf, tout autant que les bénéfices qu’elles en tiraient grâce au ‘ana.
9. Les fonctionnaires du corps religieux, notamment ceux en charge de la justice et les responsables des awqaf, participaient à l’exploitation des biens par le ‘ana comme: le wakil de Zaouïa Moulay Hassan, le cadi hanéfite Chams-eddine. Les Amins des corps de métiers tiraient eux aussi profit du ‘ana, tels que: Kahiat al-Banaiin Kassem Ben Khalfallah, Amin an-Najjarin Hadj Messaoud.
10. La valeur de chaque bien agricole est restée sensiblement stable sur une période relativement longue et malgré le changement des moutaouali al-‘ana et des responsables du waqf. Cette valeur descendait rarement sous 30 boujous et dépassaient rarement les 60 boujous, ce qui confirme un état de déclin socioéconomique de la société algéroise. Toutefois, le statut socioprofessionnel du moutaouali al-‘ana pouvait avoir un effet sur le niveau de la rente. Nous avons noté en général une stabilité de la valeur du ‘ana des échantillons étudiés quand l’exploitant n’avait pas une fonction ou un titre militaire; cependant cette valeur avait tendance à baisser quand l’exploitant avait une fonction et un titre militaires. Le meilleur exemple à ce sujet est celui de Djenat Fahria dont le ‘ana s’élevait à 38 boujous durant son exploitation par Agha Es-S’baïchia (1097 H./1685) et par Ibrahim Khodja (1116 H./1704), alors qu’il a atteint 75 boujous sous Aïssa al-Bahar (1104 H./1692) et 160 boujous sous Omar al-Fakkah (1126 H./1714). Contrairement à Djenat Fahria, le ‘ana de Djenat al-Menia, qui était aux mains d’exploitants civils, était resté stable à 100 boujous sur une période relativement longue (1121-1185 H./1709-1771).

Sur la base de l'étude de l'évolution du 'ana des échantillons (environ 80 biens waqf agricoles du fahs de la ville d'Alger de natures diverses: djena, djenina, haouch, arbres, etc.) analysés du point de vue des fluctuations de la valeur de la location et des professions et fonctions des bénéficiaires et des personnes chargées de l'exploitation du 'ana, nous pouvons dégager quelques constatations préliminaires:

1. Les exemples et les échantillons étudiés démontrent l'importance du 'ana dans la vie économique et sociale et même politique et culturelle. Il imprégnait la vie quotidienne et les relations dans la société locale, notamment entre les populations et les sphères influentes.
2. La valeur du 'ana était différente d'un bien agricole à un autre, selon l'importance du bien et sa productivité, ce qui dépendait de la facilité d'accès à l'eau, de la proximité de la ville, du type de récoltes notamment les céréales et les fruits, ce qui a conféré une importance particulière aux awqaf du fahs Bab Azzoun par rapport aux autres localités du fahs.
3. Les institutions en charge des awqaf soumettaient rarement le 'ana au processus de révision et de réadaptation, confirmant ainsi une quasi-aliénation perpétuelle au profit du moutaouali.
4. Les moutaoualis al-'ana portaient, en majorité, des titres militaires et professionnels, et ont hérité du 'ana de père en fils. Ils étaient des citadins pour l'essentiel, et de surcroît des citadins influents.
5. La majorité des awqaf agricoles étaient sous le régime du waqf ahli au bénéfice des Haramayn. Ces awqaf étaient connus sous les noms de leurs constituants souvent désignés par leur corps de métier, tels que: El-Bahar, Es-Samman, El-Kazaz, El-Fakkah, El-Kahouaji, Er-Ressaïssi, El-Kouach, Ed-Debbagh, El-Bannaa, En-Najjar. Le fait que la plupart de ces titres renvoient à des métiers de l'artisanat, confirme le statut social privilégié dont jouissaient les artisans dans la ville d'Alger et aussi leur situation matérielle aisée.
6. Nombreux parmi les moutaoualis al-'ana des échantillons étudiés étaient des fonctionnaires du Diwan ou des membres de la garnison militaire comme l'indiquent les nombreux titres militaires qu'ils portaient: Caïd, Khodja, Agha, Agha Es-S'baihia, Maazoul Agha, Yoldach, Bouloukbachi, Mezouar, Bach Tabji, Kohdjat al-Banjak (Douanes), Daftar Dar, etc.

2. Dans le ‘ana, l’acquéreur prend les titres originaux de propriété des mains du vendeur; dans le cas de la qâada, les titres restent entre les mains des bailleurs.
3. Dans la qâada, le preneur a le droit de rendre l’immeuble au bailleur quand il lui convient et le bailleur est obligé de le reprendre. Le bailleur (sahib al-Âyn) (صاحب العين) ne perd rien puisque le premier preneur (sahib al-qâada) (صاحب القعدة) a mis l’immeuble en meilleur état qu’au moment où il l’a loué.
4. La cession de la qâada se fait de gré à gré entre le preneur et le bailleur et n’engage que le bailleur, et non les héritiers, envers le preneur; tandis que la cession du ‘ana ne se fait que par voie de justice et par suite du jugement du majliss.
5. La cession du ‘ana se fait pour toute espèce d’immeuble. La cession de la qâada ne peut se faire que pour les boutiques, bains, moulins, etc. mais ne peut avoir lieu pour les maisons ou immeubles ruraux.

Il existe donc une différence entre moutaouali al-‘ana (متولي العنا) et sahib al-qâada (djalssa) (صاحب القعدة أو الجلسة), mais l’expansion du ‘ana et la limitation de la qâada à quelques awqaf de nature commerciale (boutiques, hammams, etc.) a conduit au fait que de nombreux écrits ne distinguent pas entre moutaouali al-‘ana (bailleur) et moutaouali al-qâada (preneur).<sup>(1)</sup>

#### (4) Essai d’analyse

Les documents du waqf et les chartes du ‘ana fournissent des renseignements précieux et des éléments d’explication du contexte socioéconomique et des indicateurs précis et importants de la dynamique économique et des relations sociales<sup>(2)</sup>. Ils précisent la nature de l’encadrement du droit religieux et coutumier, ce qui permet de mieux connaître les rapports politico-religieux et l’évolution dans le temps et l’espace.

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(1) أساليب الانتفاع الاقتصادي بالأوقاف في مصر في العهد العثماني، محمد عفيفي، ص 116

(2) Parmi les travaux qui ont essayé de dégager des enseignements des documents de waqf, citons: Recherches sur la constitution de la propriété territoriale dans les pays musulmans et subsidiairement en Algérie, Dr M. Worms; Le contrat de quasi-aliénation des awqâf à Alger à la fin de la domination turque, étude de deux documents d’âna, Miriam Hoexter.

(fatwa charîa) (الفتوا الشرعية) et reflétant une réalité sociale et des besoins économiques<sup>(1)</sup>. Les nombreux concepts développés reflètent aussi la vitalité des sociétés musulmanes locales, dont la société algéroise.

Il est évident que ces procédures sont reliées à une notion spécifique relative aux procédures d'exploitation du waqf telle que la zina qui désigne les réparations et les ajouts faites par moutaouali al-'ana ou (متولي العناة) sahib al-djalssa ou al-manfaâ (صاحب الجلسة أو المنفعة) (jouissance/utilité).

Les baux à rente portent des noms différents suivants les pays et variant avec la nature des biens waqf. Existe-t-il une similitude entre la qaâda (العقدة) en Algérie, la djalssa (الجلسة) au Maroc et le khoulou (الخلو) en Égypte; et entre le 'ana en Algérie, le khoulou al-maftah (خلو المفتاح) et le khoulou en Égypte et le enzel (الإنزال) en Tunisie; entre les notions de 'ana ou enzel ou hikr (الحکر) et les notions de qaâda ou djalssa ou khoulou ou djaza (الجزاء) (par lequel le locataire acquiert le droit de vendre le khoulou ou waqf al-manfaâ (وقف المنفعة) qui désigne un ordre moral que détient celui qui paye la somme d'argent pour l'utilité et la jouissance dans la boutique waqf, permettant ainsi à sahib manfaât al-khoulou (صاحب منفعة) de vendre son droit à un autre locataire contre une somme d'argent).

Malgré l'ambiguïté dans l'utilisation de ces expressions (الصيغ), il existe des différences entre le 'ana et la qaâda dans la manière dont ce procédures étaient appliquées à Alger dans les premières années d'occupation française. Ainsi dans la qaâda ou djalssa toutes les réparations du bien waqf surviennent après la prise de possession<sup>(2)</sup>.

1. Dans la qaâda, toutes les réparations de l'immeuble postérieures à la transaction primitive exigent le concours du propriétaire du melkia (الملكية) et de celui du qaâda. Dans le 'ana le propriétaire de la zina (الزينة) en est le seul chargé de cela.

(1) Pour connaître les notions et expressions relatives à l'exploitation du waqf par le biais de la location, voir:

Démembrements du habous, L. Milliot, p8-12; Essai sur les contrats de quasi-aliénation et de location perpétuelles auxquels l'institution du habous a donné naissance, J. Abribat, pp22-26; Le contrat d'Enzel en droit tunisien, Albert Scemla, Thèse, Université de Paris, 1935, p14-15; Annales algériennes, E. Pélliissier de Reynaud, T3, p476; Principes du droit musulman selon les rites d'Abou Hanifah et de Chaff'i, L. W. C. Van den Berg, Alger, A. Jourdan, 1896, p565-569.

أساليب الانتفاع الاقتصادي بالأوقاف في مصر في العهد العثماني، محمد عفيفي، ص. 116.

(2) Notes sur la propriété à Alger avant l'occupation française, Mangay Ch., in «Moniteur algérien», décembre 1836, n° 267, pp2-4.

أساليب الانتفاع الاقتصادي بالأوقاف في مصر في العهد العثماني، محمد عفيفي، ص 116.

2. La location des biens waqf (Ijar al-Âqqarat al-Waqfia) (إيجار العقارات: الوقفية: la location du droit d'usufruit de la rente des Aâyian (sing.: Âyn) (الأعيان، العين)<sup>(1)</sup>.

- Hikr ou Ihtikar (الحکر، الاحتکار): terme répandu en Égypte qui désigne une location de la terre waqf, mais le bénéfice de l'usufruit ne peut se faire qu'après sa réhabilitation et son développement<sup>(2)</sup>.

- Enzel (الإنزال): terme utilisé en Tunisie<sup>(3)</sup>.
- Charaka (الشراكة): permanente ou décroissante.
- Istissnaâ (الاستصناع)<sup>(4)</sup>.
- Âkd al-ijaratain (عقد الإجارتين)<sup>(5)</sup>.

Ces expressions qui au fond veulent dire la même chose, encore qu'elles aient une portée différente, signifient l'utilité qu'acquiert la personne qui a payé une somme d'argent au propriétaire des fonds lequel conserve la propriété de la rakaba (الرقبة) (domaine éminent, subsistance)<sup>(6)</sup>.

Ces procédures et sighas (الصيغ)<sup>(7)</sup> relatives au awqaf ont enrichi le lexique juridique des modalités d'exploitation des terres waqf, et ont fini par forger une réalité juridique originale basée sur la consultation juridique

(1) Sous le prétexte de la nécessité de développer le waqf, de l'incapacité des parties en charge du waqf à le faire, et de la longue période de temps que cela requiert.

(2) La terre waqf est ainsi confiée au mouhtakir (locataire) avec l'approbation de nadher al-waqf, pour qu'il entreprenne les travaux de réhabilitation du bien.

(3) Désigne l'action par laquelle le propriétaire du waqf ou le nadher octroie un droit d'exploitation perpétuelle du waqf au moustanzel qui s'engage à payer une somme fixe, annuelle ou mensuelle, pour ce droit.

(4) Par lequel le fabricant fournit la matière.

(5) Par un prix de location anticipé équivalant à la valeur approximative du waqf, ou un prix de location modique payé annuellement par le locataire.

(6) Essai sur les contrats de quasi-aliénation et de location perpétuelles auxquels l'institution du hobous a donné naissance, J. Abribat, p35.

(7) Il s'agit d'une multitude de concepts: le hikr en Égypte, le enzel et le kardar en Tunisie, le 'ana en Algérie, le kadak et le marsad au Sham, qui est la même chose que le enzel mais avec la possibilité de modifier le prix de la location, le khoulou en Égypte pour les locaux commerciaux, le khoulou an-nasba en Tunisie et au Maroc, le khoulou al-maftah et la qaâda en Algérie, le djaza au Maroc, et pour les terres la djalssa au Maroc, alors qu'en Algérie le terme qaâda est utilisé, le nazakat en Tunisie terme qui désigne le monopole de la location pour les Juifs qui préservent leurs droits dans la location des maisons.

### (3)

## Questions de terminologie: ‘ana et autres modalités

L’exploitation du waqf par le biais du contrat de ‘ana<sup>(1)</sup> renvoie à la question des termes et de leur signification, surtout que les documents du waqf mélangent souvent entre l’exploitation du waqf par l’usufruitier, moutaouali al-’ana et le détenteur de la qâada ou djalssa. Cette ambiguïté est renforcée par l’interpénétration des termes et leur usage spécifique d’un territoire à un autre.

Bien que nous comptons publier à l’avenir une contribution sur la définition des termes du waqf employés au Maghreb, nous sommes tenus ici, dans cette étude sur les contrats de location des awqaf de présenter quelques remarques, à cet égard, selon différentes modalités (sighas) (الصيغ) de développement du waqf qui sont la mourabaha (المرابحة), la ijara (إيجار) et firadh (الفرض) et indépendamment des différentes fatwas sur les conditions définies par les écoles malékite, chafîite, hanbalite et hanefîte.

1. Les procédures exceptionnelles qui vont au-delà de la préservation du waqf<sup>(2)</sup> pour le rénover ou le remplacer par un autre bien waqf: istibdal (الاستبدال), ibdal (الإبدال) et muâwada (المعاوضة)<sup>(3)</sup>.

(1) ‘Ana est un mot issu du verbe arabe aania c’est-à-dire “s’occuper” de quelque chose, selon Supplément aux dictionnaires arabes, Dozy, 2 vol., Leiden 1881.

(2) En référence aux sources anciennes relatives à ces procédures: Ibn Rochd, Ibn Taïmia, Ibn Âbidin, At-Tanouir, Ad-Dour. Et des recherches récentes:

الدور التنموي للوقف الإسلامي، يوسف خليفة اليوسف، مجلة العلوم الاجتماعية، الكويت، مج 28، العدد 4، 2000، ص 85-111؛ مقدمة في التاريخ الاقتصادي العربي، عبدالعزيز الدورى، ص 10-14؛ أساليب الانتفاع الاقتصادي بالأوقاف في مصر في العهد العثماني، محمد عفيفي، ص 116-104.

(3) Istibdal et Ibdal: c’est l’échange d’un waqf contre un autre bien de même valeur qui devient waqf à son tour. Quant à l’ancien waqf il devient alors la propriété de l’ancien propriétaire du droit de Dieu.

- Muâwada: c’est le remplacement des biens existants en argent, qu’ils soient des biens pouvant faire l’objet d’une exploitation agricole ou d’une construction, à la condition que les responsables du waqf achètent avec la somme d’argent d’autres biens.

Voir: Islamic Society and the West. Vol I: Islamic Society in the Eighteenth Century, H. A. R. Gibb and Harold Bowen, Oxford University Press, 1950, p157-158. D’après Tal Shuval.

Il existe de nombreuses définitions du ‘ana dont celles contenues dans:

Lettre sur la colonisation des possessions françaises dans le nord de l’Afrique, H. Saladin, Delador et Ramboz, Genève, 1837, p71; De l’établissement des français dans la Régence d’Alger et des moyens d’en assurer la prospérité, Pierre Genty de Bussy, p50; La colonisation de l’Algérie, ses éléments, L. de Baudicour, Le Coffre, Paris, 1856, p404-405; Le contrat de quasi-aliénation des awqâf à Alger à la fin de la domination turque, étude de deux documents d’âna, Miriam Hoexter, p243.

	Nombre de awqaf khaïri (exploités)	Nombre de awqaf ahli mises en ‘ana (au profit de tiers)
Haramayn	60,5	10,33
Grande mosquée	15	63
Soboul al-Khaïrat	2,5	16
Sidi Abderrahmane	5,5	7,5
Andalous	-	6
Totaux	83,5	102,53

Dans un autre rapport daté en 1834, Genty de Bussy fixe le nombre des exploitations agricoles (bassatin) (البساتين) exploités par le ‘ana à 116 et évalue leurs revenus à 2270,85 Fr.<sup>(1)</sup>. Alors que Aumerat estime, au milieu du 19<sup>ème</sup> siècle (1859), le revenu du ‘ana des awqaf des institutions religieuses à 20000 Fr. contre 30000 Fr. pour le loyer des maisons hors waqf<sup>(2)</sup>.

Nous trouvons une autre évaluation des montants de ‘ana dans le projet du budget des corporations musulmanes pour 1848, que cite Busson de Janssens<sup>(3)</sup>:

Corporations	Baux	‘ana
Haramayn	104 103, 35	84 100
Soboul al-Khaïrat	10 245,47	7 984,67
Andalous	2 704,05	1 503,80

(1) De l'établissement des français dans la Régence d'Alger et des moyens d'en assurer la prospérité, Pierre Genty de Bussy, p342-344.

(2) Le Bureau de bienfaisance musulman, J.F Aumerat, p62.

(3) Contribution à l'étude des habous publics algériens, Gérard Busson de Janssens, p77.

socioéconomique et politique. Une modalité comme le ‘ana constituait une réponse adéquate à des réalités et contraintes sociales<sup>(1)</sup>.

Ainsi, à titre d’exemple, il résultait de la location par divers contrats sur des périodes successives le fait que le prix de la première location est fort élevé alors que les prix des locations suivantes sont plus bas. Le recours à cette action survient quand le waqf est menacé de ruine et de décadence et qu’il n’est plus possible pour le nadher ou le bénéficiaire de l’exploiter. Il le cède alors contre un prix de location en vue de sa réhabilitation. La personne en charge de cette réhabilitation prenant une part de l’usufruit par la location de la djalssa (الجلسة) ou la qaâda (القعدة) du waqf à un prix qui garantit un bénéfice pour moutaouali al-qaâda ou al-djalssa (متولي القعدة أو الجلسة) ou son auxiliaire c’est-à-dire moutaouali al-’ana.

Dans ce cadre, nous avons essayé d’examiner la valeur de la rente annuelle de ‘ana en nous basant sur les responsables du waqf et ses exploitants. Étant impossible de faire un suivi exhaustif et précis de l’évolution des revenus du ‘ana, les noms des mutaoualis al-’ana et ses bénéficiaires car les textes restent souvent muets quant aux loyers versés, nous préférons recourir à un échantillonnage sélectif et à des sources particulières dont les informations permettent de dresser les grandes lignes de la réalité du waqf et de l’évolution du ‘ana comme un mode de son exploitation.

Par ailleurs, les chiffres disponibles concernant les sommes de ‘ana doivent être traitées avec précaution, comme d’ailleurs doivent l’être toutes les statistiques et les estimations concernant l’Algérie ottomane.

Le ‘ana s’applique au waqf ahli et occupe une place importante si on le compare au nombre des awqaf publics (khaïri). D’après les estimations du mois d’août 1833 le rapport entre les ‘anas du waqf ahli au awqaf khaïri s’établit comme suit<sup>(2)</sup>:

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(1) L’administration française et la transformation du waqf algérien: cas de la fondation des Haramayn à Alger (1830-1873), M. Saidouni & N. Saidouni, in « Quaderni storici », 132, Décembre 2009, Numéro spécial “Waqf, Colonialisme et Pluralisme juridique dans la société musulmane”, dirigé par Pr. Paolo Sartori, p. 691.

(2) Land Policy in Colonial Algeria, the Origins of the Rural Public Domain, J.Ruedy, University of California in Los Angeles (Near Eastern Studies), 1967, p.71. D’après Genty de Bussy.

véritable titre de la propriété à Alger<sup>(1)</sup>, l'acte de donation ('ana) doit être revêtu de la signature des deux éléments, ainsi que des sceaux du cadi et du pacha alors régnant. Ce titre de donation est déposé à la Grande mosquée et confié à la garde du mufti (malékite)<sup>(2)</sup>. Selon la description de Worms: "On trouve les actes de 'ana dans des rouleaux de papier sur lesquels ils sont inscrits à la file les uns des autres"<sup>(3)</sup>.

Le 'ana fait donc partie de l'arsenal juridique développé pour sauvegarder l'intégrité du waqf, le maintenir en état de productivité et préserver son caractère perpétuel imprescriptible et inaliénable contre un prix de location ou une part du revenu. Pour cela des arguments juridiques ont été développés pour justifier la cession du droit d'usufruit par contrat. Il s'agit principalement de l'état du waqf qui justifie la mise à 'ana. La mise à 'ana est suggérée par le cadi ou le responsable du waqf au majliss al-ilmi et doit être basée sur le témoignage du majliss qui se réunissait chaque jeudi à la Grande mosquée. Pour mettre en 'ana un bien waqf, le majliss doit constater un état de ruine du waqf ou arriver à la conclusion qu'une conservation de celui-ci exige d'importantes dépenses ou une réparation qui seraient susceptible d'un bon produit<sup>(4)</sup>.

Il devient alors obligatoire pour l'acquéreur de faire les améliorations exigées, de plus le waqf est cédé à l'acquéreur (moutaouali al-'ana) moyennant une rente annuelle à payer à perpétuité qui prenait la place de l'immeuble. La procédure de 'ana garantissait à l'acquéreur la possession et la jouissance de ce qu'il aura construit moyennant l'acquittement de 'ana. L'édifice qu'il élèvera à ses frais est sa propriété personnelle; le sol qui lui est livré sous condition d'un cours annuel ('ana) reste<sup>(5)</sup>.

À travers le cas du 'ana (العناء), il apparaît que le waqf en Algérie n'était pas une organisation ou une institution close coupée de son environnement

(1) Recherches sur la constitution de la propriété territoriale dans les pays musulmans et subsidiairement en Algérie, Dr M. Worms, p473

(2) Archives d'Outre-mer, Aix-en-Provence, F.80/1082, Rapport sur l'administration des corporations religieuses à M. l'intendant civil, Alger 1837. (Rapport Bernadet du 1er septembre 1837).

(3) Recherches sur la constitution de la propriété territoriale dans les pays musulmans et subsidiairement en Algérie, Dr M. Worms, p473.

(4) Archives d'Outre-mer, Aix-en-Provence, F.80/1082, Rapport sur l'administration des corporations religieuses à M. l'intendant civil, Alger 1837. (Rapport Bernadet du 1er septembre 1837.)

(5) Recherches sur la constitution de la propriété territoriale dans les pays musulmans et subsidiairement en Algérie, Dr M. Worms, p477.

Ces deux personnages, notamment le cadi, doivent avoir la moralité et la compétence indispensables<sup>(1)</sup>, car c'est à eux qu'incombe le respect des procédures et des modifications appliquées au waqf. Le cadi doit contrecarrer les desseins de ceux qui tenteraient d'accaparer le waqf à leur profit. Il est en droit de le mettre aux enchères pour déterminer la valeur du ‘ana. Il doit enfin veiller à l'application des procédures de transformation et d'échange du waqf.

Les deux fonctionnaires étaient soumis à la supervision du majliss al-ilmi qui est l'organe habilité à prendre les décisions affectant le waqf. Les efforts de ces entités devant concourir à la réalisation de l'intérêt du waqf, c'est-à-dire<sup>(2)</sup>:

1. Le suivi de l'état du bien waqf et, le cas échéant, le consensus de toutes les parties sur le fait que le bien est sur le point de subir la ruine, que son moutaouali (الموظف) est incapable d'en assurer la remise en état, la réhabilitation et la rénovation, et que l'exploitant du waqf en a été absent pendant une longue durée ce qui résulte en une interruption du bail.
2. Le maintien de l'adéquation entre le prix du ‘ana stipulé dans le contrat et la valeur locative réelle de l'immeuble<sup>(3)</sup>. Une différence de plus de cinquième entache le bail de nullité et entraîne pour le preneur l'obligation de payer pour les termes échus la différence entre le loyer stipulé au contrat et le prix réel<sup>(4)</sup>.
3. Le respect des règles juridiques du ‘ana qui doivent correspondre sur la forme et le fond aux règles de constitution du waqf. Ainsi, le

(1) Les habous ou waqf, J. Luccioni, p78.

(2) Les habous ou waqf, J. Luccioni, p76-77; Essai sur les contrats de quasi-aliénation et de location perpétuelles auxquels l'institution du hobous a donné naissance, J. Abribat, in « Revue algérienne et tunisienne de législation et de jurisprudence », 17, 1901, p12-16.

(3) De façon que la valeur locative du bien waqf soit similaire à celle des biens privés et waqfs comparables, avec la possibilité de louer à moindre valeur faute de locataire consentant à payer la valeur souhaitée .Voir: أسلوب الانتفاع الاقتصادي بالأوقاف في مصر في العهد العثماني، محمد عفيفي، ص 106. Recherches sur la constitution de la propriété territoriale dans les pays musulmans et subsidiairement en Algérie, Dr M. Worms, in « Revue algérienne et tunisienne de législation et de jurisprudence », Mai 1884: De la propriété rurale et urbaine en Algérie), p473.

(4) Les habous ou waqf, J. Luccioni, p79.

Étant donné que les règles juridiques du waqf ne permettent normalement que le bail de courte durée conditionné par la préservation de l'intérêt du waqf, c'est-à-dire d'une durée d'un an pouvant être étendue à trois ans si le cadi voit un intérêt dans la prolongation de la durée du 'ana et à la condition que la valeur du bail corresponde à celle pratiquée communément pour un bien similaire<sup>(1)</sup>, et de façon à garantir que l'usufruit revienne au bénéficiaire selon la durée stipulée par le constituant du waqf. L'octroi du bail ('ana) se fait en règle générale sous la forme d'une mise aux enchères.

Dans ce cadre se pose aussi la question de l'appréciation de l'état de ruine éminente par le majliss al-ilmi (المجلس العلمي) qui devait décider la vente ou plutôt l'aliénation avec un titre spécial ('ana) de l'immeuble qui dépérissait entre les mains de l'usufruitier sans que le possesseur actuel pût faire les dépenses exigées.

Le recours au 'ana sous le prétexte des circonstances exceptionnelles faisait que de nombreux biens étaient transférés à d'autres mains pour une longue durée quasi-perpétuelle, ce qui ouvrait la porte à des dépassements au détriment de l'intérêt du waqf, à quoi s'ajoutait l'incompétence et la malhonnêteté de certains woukala (الوكلاء) et nadhers comme ce fut le cas notamment pour la gestion des awqaf au cours des premières années de l'occupation française<sup>(2)</sup>. Ainsi à titre d'exemple le wakil des Haramayn (وكيل الحرمين) a versé au Trésor sur une période de quatre années 34 531 Fr. et a distribué au cours de la même période 50 000 Fr.<sup>(3)</sup>.

La responsabilité de l'exécution du contrat de 'ana est confiée au nadher (الناظر) en tant que gestionnaire du waqf, sous le contrôle du cadi (القاضي) qui a autorité sur le waqf. Le cadi et le nadher sont les principaux responsables du waqf. Le premier constitue l'organe essentiel de l'exécution de la fondation<sup>(4)</sup>. Le dévoltaire peut faire autoriser, par jugement du cadi la vente de l'immeuble en remployant le prix à l'achat d'un nouvel immeuble"<sup>(5)</sup>. Tandis que le nadher est le véritable administrateur direct du waqf qui veille à l'exécution de ses conditions.

(1) دور الوقف في التنمية، عبدالعزيز الدوري، مجلة المستقبل العربي، بيروت، العدد 221، 1997، ص.16

(2) Tableau des établissements français en Algérie, 1839, p156.

(3) Annales algériennes, E. Pélliplier de Reynaud, Librairie militaire, Paris, Librairie Bastide, Alger, 1954, TI, p128; Les habous ou waqf, J. Luccioni, p78.

(4) Les habous ou waqf, J. Luccioni, p78.

(5) Traité élémentaire de législation algérienne, E. Larcher & G. Rectenwald, Arthur Rousseau, Paris, 3ème éd., 1923, T3, p17.

de trois ans et jusqu'à une durée indéterminée, afin de garantir la durabilité du waqf et son développement. Avec le recours parfois à une multiplicité de contrats comme par exemple une location pour dix ans avec plusieurs contrats ayant chacun une durée de trois ans<sup>(1)</sup>.

À Alger, le ‘ana apparaît comme le mode dominant de location et de développement des biens waqf. Il s’agit d’un bail perpétuel de l’emplacement et une aliénation de la propriété primitive (waqf) auxquels est joint un droit, qui est à la fois une obligation de remettre l’emplacement en valeur et une assurance du preneur du droit de propriété sur ce qu’il élèvera sur l’emplacement, droit qui est conditionnel du paiement de la rente<sup>(2)</sup>.

En tant que sorte de bail à rente perpétuelle<sup>(3)</sup>, le ‘ana est un droit viager de participation aux revenus du habous<sup>(4)</sup>. Le bail s’éteint seulement par l’arrivée du terme, la mort du locataire ou la perte de la chose louée. Le habous de famille est résilié de plein droit par le décès du ou des bénéficiaires qui l’ont consenti<sup>(5)</sup>.

Le waqf reste en vigueur avec la prise en considération des améliorations du bailleur primitif qui deviennent un fait accompli. Ainsi les intérêts des trois parties (sahib al-waqf) (صاحب الوقف) ou preneur primitif; moutaouali al-‘ana (متولي العناة) ou bailleur primitif; et sahib al-qâda ou djalssa (صاحب القعدة أو الجلسة) (ou preneur), ce qui permet le développement du waqf qui n’est plus figé.<sup>(6)</sup>

Le droit de ‘ana est à la fois une obligation de mettre l’emplacement en valeur. Par le droit cédé à l’acquéreur, les juristes admettaient dans certaines circonstances des baux divers à long terme équivalant à une quasi-aliénation, malgré la loi musulmane qui n’admet en principe que des baux à courte durée pour les awqaf.

(1) للآثار الشر أساليب الانتفاع الاقتصادي بالأوقاف في مصر في العهد العثماني، محمد عفيفي، مجلة حلويات إسلامية، المعهد العلمي الفرنسي  
قية بالقاهرة، مج 24، ص 111-110، 1988.

(2) Le contrat de quasi-aliénation des awqâf à Alger à la fin de la domination turque, étude de deux documents d’âna, Miriam Hoexter, p257; La pratique de la Muawda (Echange de biens habous), Tal Shuval, p57.

(3) La propriété foncière en Algérie, M. Pouyanne, p232.

(4) Les habous ou waqf, J. Luccioni, p78.

(5) Les habous ou waqf, J. Luccioni, p84.

(6) أساليب الانتفاع الاقتصادي بالأوقاف في مصر في العهد العثماني، محمد عفيفي، ص 111-110 و 116

fondations religieuses, 5000 au Beylik et 1000 à des particuliers<sup>(1)</sup>. Plus de la moitié des terres agricoles exploitées dans le fahs d'Alger était sous le régime du waqf<sup>(2)</sup>. Le plus grand nombre de ces biens waqf revenait à la fondation des Haramayn. Ainsi, sur 1717 biens waqf ahli, 1419 étaient rattachés aux Haramayn, selon les estimations de 1837<sup>(3)</sup>.

Après ce rapide aperçu de la situation du waqf dans la ville d'Alger et ses environs à la fin de l'époque ottomane et au début de la colonisation française, abordons maintenant la procédure spécifique de location des awqaf développée par la société algéroise afin d'assurer la pérennité des awqaf et leur viabilité économique. Il s'agit de la procédure de 'ana.

## (2)

### **Une modalité algéroise d'exploitation des awqaf : Le 'ana (العناء)**

Le revenu du waqf constituait un élément fondamental dans l'organisation et de l'exploitation du waqf algérois, la préservation de son caractère durable et des intérêts des bénéficiaires. La pratique d'exploitation du waqf découle du statut juridique du waqf en tant que "donation de l'usufruit d'une chose, pour une durée égale à celle de la chose, la nue-propriété restant au donateur, réellement pendant sa vie et après sa mort," et en tant que "donation d'usufruit faite en perpétuité au profit des pauvres ou des fondations religieuses ou d'utilité générale déterminées par le constituant"<sup>(4)</sup>.

L'exploitation des awqaf par le biais de la location et des contrats de 'ana est une modalité économique dictée par l'intérêt du waqf et qui reposait sur l'avis juridique qui admet la location à long terme, pour plus

(1) La propriété foncière en Algérie, M. Pouyanne, A. Jourdan, Alger, 1900, p333; La pratique de la Muawda (Echange de biens habous), Tal Shuval, in « Revue de l'Occident musulman et de la Méditerranée », n° 79-80, 1997, p56.

(2) La propriété en Afrique du Nord, P. Berthault, Conférence, 4 mai 1936, p21.

(3) Archives d'Outre-mer, Aix-en-Provence, F.80/1082, Rapport sur l'administration des corporations religieuses à M. l'intendant civil, Alger 1837. (Rapport Bernadet du 1er septembre 1837).

(4) Selon les termes utilisés par Ibn 'Arafa d'après Moukhtassar al-Fiqh de Khalil Ibn Ishaq. Voir : Code musulman par Sidi Khalil (rite malikite), statut réel, N. Seignette, Texte arabe et traduction, Imp. L. Arnolet, 1878, p389; Habous ou Ouakaf, ses règles et sa jurisprudence, E. Mercier, p10.

Cette ne diffère pas beaucoup de celle de celle de «Tanouir al-Abhar» qui définit le waqf comme la donation de l'usufruit du bien du constituant... à la condition de la perpétuité.

- Awqaf des Haramayn: 952 waqfs, 381 ‘ana, 8 affectés à l’administration; soit un total de 1414 avec un revenu annuel de 117858,75 Fr.
- Awqaf de Soboul al-Khaïrat: 119 waqfs, 212 ‘ana, 29 affectés à l’administration; soit un total de 360 avec un revenu annuel de 14295,75 Fr.
- Awqaf des Andalous: 40 waqfs, 61 ‘ana; soit un total de 101 avec un revenu annuel de 1670,75 Fr.
- Awqaf d’autres institutions: 15 waqfs, 17 ‘ans, 9 affectés à l’administration; soit un total de 41.

Au début de la colonisation française, le nombre total des awqaf de la ville d’Alger et de son fahs a été évalué à 2756 par le rapport Bernadet<sup>(1)</sup>, 2101 par le rapport de la Commission africaine<sup>(2)</sup>, et 1558 selon les données recueillies par Devoulx<sup>(3)</sup>. Il convient de remarquer que dans ces évaluations, les maisons (bouyout ou diar) constituaient l’essentiel de ces awqaf; ainsi sur 1100 waqfs publics des Haramayn, 730 étaient des maisons; sur 90 waqfs mixtes (Haramayn et autres institutions de waqf), 77 se rapportaient à des maisons; et sur 141 ‘ana des Haramayn il y avait 26 maisons<sup>(4)</sup>. Par ailleurs, selon les indications de Devoulx, les Haramayn disposaient de 840 maisons waqf contre 258 boutiques (hanouts) (الحانوٰت), 3 hammams et 11 fours à pain (أفران الخبز)<sup>(5)</sup>.

D’un point de vue général, nous pouvons affirmer que les awqaf représentaient à la fin de l’époque ottomane la plus grande partie des propriétés. Elles constituaient entre 25 et 30 % des biens fonciers et immobiliers de la ville d’Alger. Ainsi, sur 8000 propriétés recensées durant les premières années de l’occupation française 2000 revenaient aux

(1) Archives d’Outre-mer, Aix-en-Provence, F80/1082, Rapport sur l’administration des corporations religieuses, p1-2; Tableau de la situation des établissements français en Algérie, 1837, p224.

(2) Procès-verbaux et rapports de la Commission d’Afrique, T2.

(3) Notice historique sur les mosquées et autres édifices religieux d’Alger, Albert Devoulx, in « Revue africaine », T. 4-6, 1860-1862, p15.

(4) De l’établissement des français dans la Régence d’Alger et des moyens d’en assurer la prospérité, Pierre Genty de Bussy, Tableau n° 63.

(5) Notes historiques sur les mosquées et les autres édifices religieux d’Alger, accompagnée de documents authentiques et inédits, Albert Devoulx, Alger, A. Jourdan, 1912. (Extrait de « Revue africaine », 1860-1862), p5.

Awqaf des Haramayn	1100 waqfs	52351,80 Fr.
	141 ‘ana	58,15 Fr.
	90 mixtes	329,33 Fr.
	Total: 1387	52739,28 Fr.
Awqaf de la Grande mosquée (13 waqfs affectés à des services administratifs)	137 waqfs	7294,26 Fr.
	78 ‘ana	2294,32 Fr.
	Total: 228	9588,58 Fr.
Awqaf de Soboul al-Khaïrat (mosquées hanéfites) (mixtes ayant un revenu de 50,16 Fr.)	136,5 waqfs	10817,28 Fr.
	85 ‘ana	994,15 Fr.
	Total: 234,5	11861,59 Fr.
Awqaf de Sidi Abderrahmane	31,5 waqfs	2157,60 Fr.
	10,5 ‘ana	335,66 Fr.
	Total: 42	2493,26 Fr.
Awqaf des Andalous (2 ruinés)	75,5 waqfs	1230,98 Fr.
	15 ‘ana	410,44 Fr.
	Total: 92,5	1641,42 Fr.
Awqaf des Marabouts (saints) (Sidi Boukadour, Sidi Dada, Sidi Mohamed ben Abderrahmane, mosquée de Hamamat)	290 waqfs	17520,47 Fr.
	454 ‘ana	5318,30 Fr.
	Total: 744	22838,77 Fr.

Ces informations ne sont pas très différentes de celles du rapport Bernadet daté du 1<sup>er</sup> septembre 1837<sup>(1)</sup> qui donne les chiffres suivants:

(1) Archives d'Outre-mer, Aix-en-Provence, F.80/1082, Rapport sur l'administration des corporations religieuses à M. l'intendant civil, Alger 1837. (Rapport Bernadet du 1er septembre 1837); Tableau des établissements français en Algérie, 1837, p227.

- Contribution à l'étude des habous publics algériens, Gérard Busson de Janssens, p75-114.

revenir à sa destination ultime, ou bien permanent à durée indéterminée tout au long de son exploitation<sup>(1)</sup>.

Les deux types de waqf –khaïri public ou ahli privé- peuvent prendre la forme de biens fonciers et immobiliers tels que les immeubles et les terres agricoles ou d'objets et biens divers tels que des équipements, du mobilier, des animaux et autres. Le waqf peut être aussi un waqf communautaire (mouchaâ) (المشاع) qui se fonde indistinctement dans une masse de biens ou bien non communautaire se distinguant des autres propriétés par des limites bien identifiées<sup>(2)</sup>.

Nonobstant leur type (public ou privé), les awqaf d'Alger, à l'intérieur de la ville et dans son fahs, étaient destinés à divers bénéficiaires et obéissaient à divers cadres administratifs sous la forme d'institutions spécifiques dont la plupart ont fait l'objet de recherches. Parmi ces institutions, la plus importante est celle des Haramayn (les deux lieux saints de l'Islam: La Mecque et Médine) (الحرمان الشريفان) qui contrôlait la majorité des biens waqf, le nombre de ses awqaf à l'intérieur et à l'extérieur de la ville d'Alger s'élevait à 1419 selon Bernadet<sup>(3)</sup>, et à 1409 selon les estimations de Girardin (1831)<sup>(4)</sup>. Les awqaf de la Grande mosquée occupaient la deuxième position avec 548 biens waqf selon les registres qui leur étaient consacrés<sup>(5)</sup>. Les awqaf de Soboul al-Khaïrat (سبل الخيرات) (awqaf hanéfites des Voies de la bienfaisance) totalisaient 234,5 biens; ceux des Marabouts 744; ceux de Sidi Abderrahmane 24; et ceux des Andalous 92,5<sup>(6)</sup>.

Afin d'avoir un aperçu global du nombre et des revenus des awqaf de ces institutions, nous avons établi le tableau suivant selon les renseignements recueillis par l'administration française durant les premières années, notamment sur la base des informations de Genty de Bussy<sup>(7)</sup>.

(1) Le contrat de quasi-aliénation des awqâf à Alger à la fin de la domination turque, étude de deux documents d'âna, Miriam Hoexter, in « B.S.O.A.S. », Vol. XLVII, Part. 2, 1984, p245.

(2) Indiquées dans les documents du waqf selon les conditions de constitution du waqf.

(3) Tableau des établissements français en Algérie, 1837, p224.

(4) Archives d'Outre-mer, Aix-en-Provence, 8 H. 9, Rapport de Girardin (22 Août 1831).

(5) Archives d'Outre-mer, Aix-en-Provence, I MI 64, n° 8.

انظر: من أجل كتابة تاريخ الجامع الأعظم بمدينة الجزائر، عبد الجليل التميمي، المجلة التاريخية المغربية، عدد 12-19، يوليو 1980، ص 189.

(6) De l'établissement des français dans la Régence d'Alger et des moyens d'en assurer la prospérité, Pierre Genty de Bussy, Firman Didot, Paris, 1ère éd., Paris, 1831, 2ème éd., 1839, T2, Tableau n° 65-68.

(7) De l'établissement des français dans la Régence d'Alger et des moyens d'en assurer la prospérité, Pierre Genty de Bussy, Tableau n° 63-68.

## (1)

## Introduction à la réalité du waqf à Alger

L'Algérie a connu durant la période musulmane, et particulièrement pendant l'époque ottomane, le phénomène du waqf qui a fait l'objet de nombreuses recherches qui en ont abordé la nature, la procédure des contrats waqf, les modes, les méthodes et les chapitres des dépenses<sup>(1)</sup>.

Le waqf devait obéir à des conditions et modalités dont: sighat al-waqf d'usage (صيغة استعمال الوقف) (الواقف); la présence du constituant (le waqif) (الواقف); les témoins; la détermination de la nature du waqf, des modalités de son exploitation, de sa transmission; la désignation de ses responsables et des conditions qu'ils doivent satisfaire; et, enfin, l'indication de la date, la certification des signatures et le sceau.

Le statut juridique et le contexte social du waqf ont été abordés et interprétés d'un point de vue subjectif par de nombreux auteurs français du 19<sup>ème</sup> siècle qui ont fourni à l'administration française en Algérie les bases théoriques de la politique de liquidation des awqaf<sup>(2)</sup>.

Il ne s'agit pas ici de revenir sur cette littérature, nous nous limiterons en effet à rappeler le cadre général des awqaf dans l'Algérie ottomane fixé par les deux modèles de waqf: le waqf khairi public (الوقف الخيري) adopté par le rite malékite et dont le fondateur destine la rente à la préservation et au développement des biens publics; et le waqf ahli (الوقف الأهلي) privé de rite hanéfite dont le fondateur préserve les intérêts de ses héritiers et de sa descendance, et qui peut être provisoire à période déterminée avant de

(1) Le Bureau de bienfaisance musulman, J.F Aumerat, in « Revue Africaine », 44<sup>ème</sup> année, n° 236, 1900; Traité élémentaire de droit musulman : École malikite, A. Jourdan, Alger, 1886; Le code de habous, E. Mercier, Braham, Constantine, 1899; Habous ou Ouakaf, ses règles et sa jurisprudence, E. Mercier, A. Jourdan, Alger, 1895; La propriété au Maghreb selon la doctrine de Malik, E. Mercier, in Journal asiatique, juillet-août 1894, 23p; Le habous, L. A. Eyssautier, in « Revue algérienne et tunisienne de législation et de jurisprudence », T24, 1898, p20-24; Essai sur les biens habous en Algérie et en Tunisie, J. Terras, Imp. du Salut public, Lyon, 1899.

(2) Étude de droit musulman algérien, Alger, 1900; Démembrements du habous, L. Milliot, Leroux, Alger, 1918; Le régime foncier de l'Algérie, F. Godin, in « L'œuvre législative de la France en Algérie », Collection du Centenaire de l'Algérie (1830-1930); État de la propriété rurale en Algérie, M. A. E. Clavelli, V. Heintz, Alger, 1935; De l'emploi des Arabes et de leur réforme considérés comme moyens de domination en Algérie, Librairie Bastide, Alger, 1847; Contribution à l'étude des habous publics algériens, Gérard Busson de Janssens, Thèse, Alger, 1950; Les habous ou waqf, J. Luccioni, Thèse, Imp. Réunies, Alger, 1942.

## English Abstract

### **Awqaf Rental Agreements**

#### **Case of algiers and its fahs during the ottoman period**

As the most common type of waqf rental agreements in Algiers and its region during the Ottoman period, the ‘ana was the dominant modality of waqf management. The organization and the management of the waqf foundations in Algiers and its fahs were widely based on the enforcement and the development of the ‘ana procedures, which became the pivot of waqf reality in Algiers society during the Ottoman period with many direct and indirect effects on local life.

The Algerian waqf documents of the Ottoman period give a detailed and precise picture of administrative procedures, economic operations and social conditions related to the ‘ana, and allow the researcher to conduct more thorough and exhaustive studies on the local society and to draw its economic and social portrait, by compiling and analyzing the qualitative and statistical data of the evolution of ‘ana income and establishing data charts of the value of the ‘ana, waqf expenses and the many and various operations related to it.

The data and transactions related to the ‘ana are so many administrative procedures, economic indications and social indicators of the state of the local society and of important aspects of the everyday life and the social relationships on which the institutions of the waqf had a direct influence through their management of the income of khaïri and ahli waqf properties, via the procedures of the ‘ana.

The ‘ana, as a practical modality of waqf legal requirements, was, in ottoman Algiers context, the most adapted response to fiqh rules aiming at the exploitation of waqf properties, the fair use of their income and their sustainability. At the same time, the ‘ana was an adaptation of the waqf to the needs and conditions of the socioeconomic reality of the local society. This study highlights the multiple aspects that make the ‘ana a valuable socioeconomic indicator for historical research.

Une étude comme celle-ci basée sur l'analyse et la réinterprétation des données historiques contenues dans les documents du waqf nécessite avant tout une approche de la réalité du waqf à Alger et son fahs, les modalités de son exploitation et les procédures de sa gestion. Elle impose aussi une définition des notions juridiques et de la terminologie courante dialectale adoptée pour décrire ces modalités et procédures.

## ملخص البحث:

### عقود كراء الأوقاف:

#### حالة مدينة الجزائر وفحصها في العهد العثماني

يعتبر العنااء أكثر أصناف إيجار العقارات الوقفية شيوعاً في مدينة الجزائر ونواحيها أثناء العهد العثماني، وقد حرصت تنظيمات المؤسسات الوقفية بمدينة الجزائر وفحصها على الالتزام بتطبيق إجراءات العنااء وتطويرها، بحيث جعلت منها أداة محورية في استغلال الوقف لدى المجتمع المحلي بمدينة الجزائر، وهذا ما كان له انعكاسات مباشرة وغير مباشرة على مختلف أوجه الحياة بمدينة الجزائر وفحصها.

وتقدم لنا وثائق الوقف الجزائرية التي تعود للفترة العثمانية، وخاصة منذ منتصف القرن الثامن عشر، عرض حال مفصل ودقيق عن الإجراءات الإدارية والمعاملات الاقتصادية والعوامل الاجتماعية المتعلقة بالعناء، مما يمكن الباحث من دراسة أعمق وأشمل للمجتمع المحلي عبر رصد الوضع الاقتصادي والحياة الاجتماعية السائدة آنذاك بمجتمع مدينة الجزائر، والسماح له باستخلاص المعطيات، وبوضع الإحصائيات المتعلقة بتطور مردود العناء في شكل جداول إحصائية، تبرز القيمة المالية للعناء وكيفية الاستفادة منها، وتبعد المعاملات العديدة والمتنوعة الناجمة عن تطبيق هذا الإجراء.

إن هذه المعطيات وتلك المعاملات المرتبطة عن عملية العناء هي بالنسبة للباحث في قضايا الوقف تُعد بمثابة آليات إدارية ومؤشرات اقتصادية ودلالات اجتماعية، تبرز حالة المجتمع المحلي وملامح الحياة اليومية وطبيعة العلاقات الاجتماعية، التي كان لمؤسسات الوقف دور مؤثر فيها من خلال إشرافها على تسيير الأوقاف الأهلية والخيرية وتصريفها في مردودها عن طريق العناء.

إن العناء باعتباره التطبيق العملي للأحكام الشرعية يمثل حلاً عملياً لا يتنافى مع الضوابط الشرعية لمسألة استغلال الوقف والانتفاع بمردوده المادي والمحافظة على ديمومته. كما يعتبر الحل الملائم لمتطلبات وظروف الواقع الاجتماعي والاقتصادي الخاص بالمجتمع المحلي لمدينة الجزائر، فضلاً عن كونه بالنسبة للباحث مؤشراً ذا دلالة اجتماعية ومضمون اقتصادي، وهذا ما يحاول هذا البحث عرضه ومناقشه.

préservation de sa pérennité, et était aussi une réponse adaptée aux besoins et aux conditions de la réalité socioéconomique de la société locale. Cette étude expose les différents aspects du ‘ana qui en font un précieux indicateur socioéconomique pour la recherche historique.

Cette contribution pose une double problématique. Premièrement, le fondement de la pratique de la location des awqaf (الإوقاف) dans le droit religieux et coutumier. Et deuxièmement, la relation entre cette pratique et les conditions sociales, économiques, culturelles et spirituelles.

Il est bien entendu que ces questions sont déterminées par les conditions du lieu (dans ce cas Alger et ses environs) et du temps (c'est-à-dire l'évolution historique à l'époque ottomane). Les meilleurs indicateurs pour retracer l'évolution de la pratique de la location des awqaf sont:

1. Les modalités de gestion et les procédures juridiques appliquées aux awqaf et qui leurs confèrent leur place et leur importance dans l'organisation socioéconomique.
2. L'identité et le statut des personnes en charge des awqaf tout au long de cette même période.
3. Les fluctuations de la valeur des loyers sur une assez longue période. Le loyer étant un instrument de régulation sociale permettant l'adaptation de l'institution du waqf aux changements de la conjoncture socioéconomique.

La méthodologie adoptée ici se fonde sur un échantillonnage de biens waqf agricoles pour lesquels les documents des awqaf (documents de mahkamas (المحاكم الشرعية) nous donnent de précieux renseignements. Cette démarche s'inscrit dans le cadre d'un projet de plus grande envergure qui prendrait en compte dans une phase ultérieure les awqaf à l'intérieur de la ville d'Alger dans une perspective comparative avec les situations dans d'autres villes d'Algérie et de l'Empire ottoman.

La présente contribution concerne au premier lieu le statut des terres agricoles waqf (awqaf agricoles) dans le fahs (الفحص) de la ville d'Alger et sera complétée ultérieurement par l'étude des awqaf dans la ville. L'étude est basée sur l'évolution de la valeur du loyer, les individus chargés de leur encadrement et de leur gestion, et l'identification des moments de continuité et de rupture dans la gestion de ces awqaf sur une période dépassant un siècle et demi (1092-1251 de l'hégire/1681-1835).

## **Contrats De Location Des Awqaf**

### **Cas De La Ville D'Alger Et De Son Fahs À L'époque Ottoman**

**Prof. Nacereddine Saidouni \***

#### **Résumé en français:**

Le plus répandu des types de contrat de location des biens waqfs, le ‘ana était et la principale modalité de leur gestion à Alger et ses environs pendant l’époque ottomane. L’organisation et le fonctionnement des fondations du waqf à Alger et son fahs étaient essentiellement basées sur l’application et le développement des procédures du ‘ana qui devinrent le pivot de l’exploitation du waqf dans la société algéroise à l’époque ottomane, avec de multiples retombées directes et indirectes sur la vie locale.

Les documents de waqf algériens de l’époque ottomane, notamment depuis la deuxième moitié du 18<sup>ème</sup> siècle, présentent un tableau détaillé et précis des procédures administratives, des opérations économiques et des conditions sociales relatives au ‘ana, ce qui permet au chercheur de mener des recherches plus approfondies et plus exhaustives sur la société locale en dressant le portrait économique et social de la société algéroise, en compilant et en analysant les données qualitatives et statistiques relatives à l’évolution des revenus des ‘ana sous la forme de tableaux de données indiquant la valeur du ‘ana, les chapitres de dépenses et les transactions multiples et diverses liées au ‘ana.

Les données et transactions du ‘ana sont autant de procédures administratives, d’indices économiques et d’indicateurs sociaux reflétant l’état de la société locale et des aspects importants de la vie quotidienne et des relations sociales sur lesquels les institutions du waqf avaient une influence directe à travers leur gestion des revenus des biens waqf khaïri et ahli par le biais des procédures du ‘ana.

Le ‘ana, en tant que forme pratique d’application des prescriptions légales, était une solution conforme aux règles du fiqh relatives à l’exploitation des biens waqf, à l’utilisation de leurs revenus et à la

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- Exchange of experiences between waqf cadres and researchers in the field of Islamic awqaf and presenting them.
- Urging the governments to give priority to the Islamic waqf in their strategies and plans as it is the case in the West.

## CONCLUSION

This comparative study involving Islamic waqf and Western charitable organizations led to recording several remarks which pinpoint the common and distinctive factors for each of both systems. There is not the least doubt that concentration on the most important of them could take us away from the faulty impressions or being fascinated by things which cannot be adopted by the Islamic waqf due to its specific nature. It had been noticed that the Islamic waqf and the Western charitable organizations share a common factor in being philanthropic, but they differ in some details touching the religious and cultural backgrounds of each one. Studying the points of strength in the Islamic waqf system were actually invested positively, but this does not stand against benefiting from the western experience in the charitable domain known by its pioneering and professional nature in management and positive reaction to the society. In view of these facts the author recommends the following::

- Benefiting from the effective factors of the Western charitable organizations, especially in the domain of governance and planning.
- Developing the structures of the waqf departments and their laws in a way that maintains the peculiarity of the waqf, and to be guided by the best experiences.
- Promoting the waqf cadres through training, continued development, communication, investment and control.
- Diversifying the channels of spending and guiding them to the most sensitive domains in the society such as education, health and scientific research.
- Reviving the waqf culture and adopting strategic plans in presenting it and calling for it.
- Intensifying the studies and researches in the area of benefiting from the Western charitable experience.
- Encouraging and assessing positive initiatives in the area of waqf management and investment in some Islamic countries, for example Gulf countries and Turkey.

Western countries does not only impose a strict control policy with respect to charitable organizations which is far from inspection and accountancy, but they also concentrate on the details of auditing which allow for instruction and guidance, and following the reaction to comments and recommendations.

In view of the professionalism advocated by those institutions to go ahead successfully with their work, there are continued training courses to the managers of the waqf institutions in order to know how to manage them properly and be familiar with their legal responsibilities. Moreover, there are studies and instructions made by specialists in the areas of internal and external control so that these institution should stand on equal footing with other institutions in respect of governance.

We have referred above to the criteria which can be resorted to in terms of assessment and performance, in which case such measures may overlook the mistakes and promote revenues. The reports which can be published on a large scale relevant to the pioneering charitable organizations will cover not only the volume of spending on charitable deeds but also in terms of transparency and quality. This step is an effective means to exercise control and to surround those transactions carried out by those institutions with all financial and legal guarantees.

- Adopting the criteria of governance in managing waqf with all its equity and transparency as it is the case with the Western charitable organizations.
- Commitment to the aforementioned requires adopting a developmental policy based on the Western charitable organizations which is based on the following:
  1. Adopting strategic planning techniques in drawing the management and developmental formulas and the gradual switching from a traditional financial system to a modern waqf system.<sup>(1)</sup>
  2. Adopting innovative financing instruments which mesh with the development of modern financing means and observing the shari'a restrictions related to waqf.
  3. Diversifying waqf assets and advocating the open door policy in connection the financial and economic transactions in specifying investment opportunities.
  4. Maintaining and renewing waqf assets to improve their image and augment their revenues.
  5. Coupling the projects of high economic revenue and those having social, religious and cultural benefits.
  6. Giving priority to the sensitive sectors in the countries, mainly health and education.
  7. Promoting partnerships with the private sector and benefiting from the accumulated experiences.

**d. Developing and Activating internal and External Audit at Awqaf Institutions:**

It is not an easy job to consolidate the confidence in a waqf institution and to increase the number of waqifs in a way that leads a citizen to react positively to the waqf institution through relying on a communicative policy whose interest is based on presenting the achievements of the waqf institutions. It is necessary to reassure the individuals as to the waqf funds through the results of control and auditing.

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(1) Dr. Omar Al Ashqar in his book 'Developing Islamic Waqf Institution, P 103 referred to Wellcom Trust in which spending jumped to 3/- billion pound.

charitable organizations is 2.3% if the citizens have a high income, and 1% for the citizens with a low income.<sup>(1)</sup>

The statistics of 2009 indicate that the number of the charitable institutions in the USA has amounted to 238000, and the amount of donations in the same year amounted to USD 303,75 billion which account for 2% of the GDP.<sup>(2)</sup>

### c. Professionalism in Management and Investment:

It is not strange to find waqf face to face with unsatisfactory conclusions in many of the Islamic countries as long as it does not constitute a priority for those countries. Moreover, they have adopted management procedures which do not cope with the requirements of the modern age and fall short of utilizing modern technological means in this domain. Nevertheless, charitable work in the West is of professional nature based on modern administrative means and searches for the best means of innovation and development. It can be said that the professionalism in management required by Islamic awqaf includes the following:

- Developing the legal, organizational build of the Islamic awqaf
- Counting the waqf assets and assessing them.
- Attending to the waqf deeds and updating the relevant information and technically archiving them
- Qualifying the waqf cadres and improving their potentials through continuous development and visiting western charitable organizations to be familiarized with their work.
- Extending bridges of cooperation with the experts and institutions which can push the wheel of improving awqaf and putting forward the best means of management and development.
- Reviewing the structure of Awqaf departments to create harmony between them and the expectations of the society.
- Asserting the legal status of awqaf and protecting them against any excesses.

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(1) Islamic Waqf and Similar systems: Endowment – Foundation – Trust ([www.amb-usa.fr.org](http://www.amb-usa.fr.org)).

(2) Harvard and its sisters by Tareq Abdullah, previous article, p 48.

## **b. Consolidating confidence in the western charitable organizations and disseminating volunteering culture**

The dissemination of volunteering culture is an effective means for increasing the number of waqifs and striking a reconciliation with the society. A confidence, once well established in an institution, represents a strong underpinning for building social security. A citizen who puts his confidence in such institutions will, no doubt, sense the advantages of such an institution and thereby he will consider himself a partner of this institution. He would exert his best efforts to maintain its existence and survival. In order to achieve that, such deeds have no longer become the result of improvisation or random initiatives. This type of work should be based on reconciliatory mentalities which constitute part of the charitable work itself. To this end, there are two vehicles:

### **1. Continued awareness campaigns to propagate charitable work**

This should be carried out at the level of religious institutions and media. Western charitable organizations benefited greatly from modern communication media in expanding the number of potential waqifs. Such means would not have achieved that success had not the results been made remarkable in the West through the awareness campaigns.

### **2. Transparency and Disclosure:**

These elements should publish the revenues and expenditures in the press and on the websites, in addition to opening the door for discussions and receiving comments and recommendations. In such a work, institutions should rely on financial and accountancy principles which could represent a popular control on managing a charitable institution and an interactive means between the institution and the citizen.

The figures and statistics stand evidence to the increasing awareness of the public in the West of the charitable work. Individual charitable donations in the year 2004 amounted to \$190 billion out of the donations which amounted to \$250 billion, i.e. at a percentage of 76%, and an increase by 4.1% if compared to the year 2003. It is interesting enough to know that the percentage of Americans who contributed to charitable works fell between 70% and 80%. The average donation of a citizen for

### a. Integrating charitable work as a priority into the policies of the state and other special institutions.

In view of the honourable services extended by the western charitable organizations and assisting the state in the areas of education and health, charitable work has become a priority in the strategies of western countries in the area of human development. The role of the western governments in supporting awqaf is as follows:

- Laying laws concerning the establishment of charitable organizations.
- Integrating charitable work into the policy of the state through specifying special sporadic requirements related to health, education and scientific research.
- Establishing an administrative and financial system for charitable organizations.
- Tax exemption granted to charitable organizations for encouragement.
- Activating accountability and referring offences to the law,
- Assisting the institutions through providing them with the results of auditing to help them overcome the obstacles and improve their performance.
- Creating competitiveness among those institutions through highlighting their achievements and announcing their classifications.
- Supporting research and studies which are likely to improve the performance and augment the revenues of charitable institutions.

In addition to the governmental subsidies, we notice that there are many voluntary organizations in the West which provide charitable organizations with consultations, training, promotion, publicity and new donors.<sup>(1)</sup> There are other charitable organizations which set specific criteria for assessment of performance through which grades are given<sup>(2)</sup>. Through studying the work of those institutions, it was found that they adopt professionalism in charitable work as they provide them with the means of improving performance and creating competitiveness to augment the returns.

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(1) Islamic waqf system and similar systems in the West: Endowment – Foundation by Mohammad Abdul Halim Omar, Footnote p 19 .

(2) American Institute of Philanthropy Website: [www.charitynavigator.com](http://www.charitynavigator.com)

be carried out, registered and documented.<sup>(1)</sup> In all cases, guaranteeing the ongoing nature of a waqf entailed those strict measures as to the principle of compensation through laying specific conditions under the control of a judge who takes charge of confirming that<sup>(2)</sup>.

## Paragraph 2

### **Influential Factors in the Western Charitable Organizations**

Numerous are those areas whose emergence was attributed to waqf as validated by many historical documents and led to a great community progress without seeing waqf regulations as a stumbling block. On the contrary, these regulations paved the way for that progress and incentivized it. Reflecting on the western charitable experience, one can see several modern similar examples which keep abreast with the development of the society. As an example, we have the charitable organizations with scientific purposes. We cannot talk about the most prestigious universities without talking about Harvard University, neither can we talk about western hospitals without talking about those hospitals which enjoy a charitable nature.<sup>(3)</sup>

The great fact which cannot be obscured is that diversity of Muslim awqaf and their civilization in many Islamic countries constitute part of the historical tales if compared to the prestigious status, where awqaf occupy a distinctive position, among the western charitable organizations. This requires searching for the reasons underlying their success and the possibility of benefiting from them. The most outstanding reasons are as follows:

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(1) Ibid,Section 7,p 138.

(2) Article 60 of the Awqaf Maghribia Code stipulates that ‘ waqf funds dedicated in the absolute sense all the measures for protecting them and promoting their revenues in the light of their nature .Paragraph 2 of Article 63 stipulates that ‘ funds resulting from replacement shall be dedicated to their replacement or investing them in order to keep the corpus. In this sense it is obligatory to keep the asset and develop it. Article 4 of the decision of the Minister of Awqaf and Islamic Affairs stipulates that compensation is acceptable if the funds of a waqf have come to an end or declined considerably or it has become impossible to benefit from it, or it was likely to fall into ruin or jointly owned by other parties, or if is in the interest of the waqf.

(3) Harvard and its sisters: meaning of educational waqf in the USA, Tareq Abdullah, Awqaf Journal, Issue 20, PP 145.

#### d. Guarantee of ongoingness:

Waqf is an ongoing charity which does not come to an end by the demise of the waqif. Through this concept numerous regulations came to existence, all of which constitute the backbone of the waqf system. Given that waqf originally meant the withholding of an asset and the releasing of the usufruct or the fruit, it follows that a waqf is inalienable and undisposable because it concerns all Muslims. Based on this saying, jurists viewed replacement or Muawadha as a narrow exemption which may be carried out in extenuating circumstances and under stringent conditions. It is also said that some jurists stood against replacement or Muawadha.

It was narrated by al Barzali through Fatawa al Suri that it is not allowable to replace a waqf even in fear of loss or usurpation. He was asked about a room dedicated to a mosque, connected to a house owned by someone. The room was dark and remained unrented for long periods of time. The owner of the house wanted to replace the room with buckets of pure water throughout summer and winter. The room was falling into ruin partially or wholly and if it remained as it is it could be dangerous. In response to the possibility of replacement, al Suri said that replacement is not allowed and the room shall remain as it is in its current<sup>(1)</sup> condition.

Some jurists pushed things to extreme when they objected to the replacement of some moveables, such as the mats. Al Sarqasi was asked about some worn out mats and the possibility of selling them, but he rejected the idea and requested keeping those mats for the future in case a need arises for using them in the future. This is the attitude of jurisprudence, but if those mats are shifted to another mosque without selling them due to its need, this is allowable as sanctioned by scholars whose knowledge and deeds are worthy of being reckoned with.<sup>(2)</sup> On the other hand, there were people who sanctioned compensation under specific conditions. In this sense, ibn Rushd said, ‘if a waqf piece of land is no longer beneficial and its construction is unlikely, compensation here is allowed, provided that there should be another piece of land in its stead as considered by the judge after considering the reason for that compensation. This should also

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(1) Fatawa Al Barzali; Jamie Masail Al Ahkam . edited by Dr. Mohammad Al Habib, part 5 Dar El Gharb Al Islami Printing press, Edition 1, 2002, P 457.

(2) Al Miyar al Muarrab wal Jamie Al Mugharrab, Al Wansharisi under the supervision of Mohammad Hajji, Section 7, p 146.

posthumously; (c) if the amount of waqf exceeded one third or more of the waqif's wealth before death; (d) settling of debts that cover all his wealth; (d) settlement of mortgage if the waqf is mortgaged' <sup>(1)</sup>.

Article 10 of the same law stated that ' a valid condition is attached to the waqf, this waqf should implemented unless implementing it has no longer been in the interest of the waqf or the beneficiary, or if ignored a lawful purpose of the waqif, in which case it can be amended through a judicial judgment.

Observing the principles of justice and equity derived from the religious nature of the waqf entails the observance of the owner of the interest of the property through proposing the acceptance of sanctioning al Fudhouli Waqf (the waqf established on behalf of somebody else without knowing it) or nullifying it ( Article 9 of the Maghribia Awqaf Code). It is clear that the reason underlying this step rests in addressing the intention of the shari'a or fudhouli representative who could conceive a desire to damage the waqf funds under the guise of protecting the public good.

Cogitating upon the circumvention to which the inheritance rules are subject as exemplified in exempting females from benefiting from al Thurri waqf, known in Al Maghreb as Al Muaqqab waqf, some legislations stated expressly that such a condition is null and void. Thus Article 14 of the Maghribia Awqaf Code stipulated that 'in case a waqf is specified for males with the exception of females or vice versa, or for some of his sons with the exception of others, this waqf is valid for all of them and the condition is void'.

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(1) Corresponding to this article, article 10 of the Maghribia Waqf Code stipulated the following:  
 ' if the debt covered all the waqf monies at the time of Hubus or before assessing the waqf monies, the waqf was null and void unless approved by the creditors. In this case the waqif's themma was loaded with debts covering all his money at the time of Hubus. The legislator wanted to preserve the rights of creditors on the assumption that the debtor could have resorted to Hubus in an attempt to avoid repayment of debts. Here this should not be taken to mean the legality of waqf because the waqf monies have not entered the waqf themma, but still in the waqif's themma. In this case the approval of creditors to go ahead with the process of dedication will be viewed as a waiver regarding their rights in the dedicated funds of the debtor. See Al Maghribia Awqaf Code Principles and Dimensions by Majeeda Al Zayani, Rabat,2014, p 201 .

countries to confirm that religious nature of the waqf. In the preamble to the Maghribia Awqaf Code<sup>(1)</sup>, we read, 'As a confirmation by our majesty as to the independence of waqf and preserving its peculiar religious nature, and providing it with lawful means which provide it with protection and proper management, we have meant through this code to maintain that peculiarity and to provide it with the legal means for its protection which guarantees its proper management, benefiting from it through investment means which enable it to assist in the economic and social projects, and to restore its pioneering role which it used to carry through our glorious history'.

Article 2 of the Pilot Law dealt with the types of waqf and defined al Khairy waqf (or Aam) 'as it is the waqf whose benefits are channelled to a Charity (Birr)' agency .

Bearing in mind the religious connotations of this term, the condition for the legality of waqf is a major component for the validity of a waqf. Article 11 of the Pilot Law stipulates that any waqf condition contrary to the shari'a or law, discipline will be held null and void.

Article 27 of the executive by-law of this law lays emphasis on the availability of the condition on the legality of the beneficiary (al Mawqoof Alaih). The statement came as follows: '(3) The beneficiary should not be of an anti-Islamic nature; (4) it should include one of the birr aspects; (5) it should not include a behaviour which directly or indirectly encourages indecency according to the Islamic shari'a ;(6)it should not be prejudicial to the state's applicable laws and regulations;(7) it should not belong to a hostile country'.

The highlighting of the religious factor was not confined to the legality of waqf, but other waqf-related attitudes based on justice and equity were also observed. It is known that waqf is an act of obedience through which the reward of the ongoing charity is attained. Therefore it should not bring harm to others, especially inheritors and creditors. Article 8 of the Guide Law stipulates the following: 'In order to implement waqf (2) the approval of the inheritors is necessary in the following cases (a) if the waqf was during a terminal disease (b) if the waqf was recommended

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(1) The Maghribia Waqf Code was issued on Feb, 2010 and appeared in the official gazette n5847 on June 2010.

In addition to the aforementioned, waqf tax exemption constitutes a legal incentive for waqf investment because proper management will have better revenues. Article 62 of the Pilot Law stipulates that ‘Khairy awqaf and charitable portions in the joint waqf are exempted from any taxes, fees or publication costs required to be collected in case they appear in the official gazette. Likewise, the Khairy waqf and the charitable portion in the joint waqf are exempted from the judicial fees in case of all tiers litigation.

### **c. Observing Legality Condition:**

The special nature of waqf came to explore a humanitarian intent which combines all global images of giving and kindness irrespective of all religious backgrounds, while solely being characterized by that peculiar quality based on the ongoing benefit and reward. In Islam, we have an addition which is the spiritual dimension which differentiates the Islamic waqf system from other similar western examples. This is still a strong incentive for creating more awqaf of different types. As far as Islamic waqf is concerned, we find that the religious touches of the waqf can be noticed through the great interest among the shari'a scholars to study it thoroughly so that they can preserve the spirit of the Islamic shari'a and its intents, in addition to protecting the waqf against encroachment of those in charge or the rulers. Some jurists pushed this to extreme when they said that a Waqf is the property of Allah the Almighty.

We have referred to some Quranic Suras which define charitable work and connect it with the great reward. That is why the Islamic Waqf system has been connected with shari'a regulations without which there would be no waqf. Such a peculiarity has never been absent from the modern legislations or judicial systems.<sup>(1)</sup>. This principle is still valid in many Islamic

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(1) In the Decision of The Supreme Council in Morocco , issue n 579 and the Minister of Awqaf and Islamic Affairs, on one side, and the inheritors of Haj Abdullah Amar came the following statements: ‘Waqf land must remain subject to the fiqh regulations related to any disposition thereof. According the Islamic fiqh regulations, the issue is connected with a dispute over dedicating a piece of land. There is no doubt the waqf deed has fulfilled its conditions in terms of law and documentation and its existence is solid and its establishment shall remain valid as conditioned by the dedicator. Its registration with the real estate department regardless of the objection of the dedicator’s inheritors. The waqf deed stipulated that this waqf (Hubus) is perpetual as long there this life in this world.

which allows for racing in charities and averting any inconvenience once the benefit and the shari'a purposes are observed. This can be tracked in the Zakat channels of spending and charities in general; it is also in the prescribed prayer or a recommended one which can be performed while a worshipper is sitting, and such is the case with other types of worship. The determinant in this regard is the observance of the waqif's conditions. In case the condition is obscure, then the current custom is followed, then by the established convention and following a previous practice'.

Within this framework and Article 9 of the Waqf Pilot Law we read‘ a waqif is entitled to attach to his waqf the conditions deemed suitable and here the correct condition of the waqif carries the same meaning and significance of a legislator. The statement made by the waqif should be taken as meant by the current conventions at the time of creating the Waqf even if it does not go with linguistic rules’.

Paragraph 1 of Article 10 in the same law stipulates that ‘in case the waqif's conditions is attached to a correct condition, then it should be implemented if this does not bring any harm to the waqf, the beneficiary, or if it ignores a lawful purpose for the waqif; in this case the condition may be amended through a judicial award’<sup>(1)</sup>. In the Explanatory Memorandum to this law, we read that ‘as an exception to the aforementioned rule, the law sanctions the non-compliance with the waqif's conditions in certain cases. Proponents of this attitude indicate those cases if such a non-compliance affects negatively the waqf, waqif's or beneficiaries' interests. This attitude was adopted by al Hanafi school of thought’<sup>(2)</sup>. It is through this saying that such legal attitudes are meant to allow for going round the connotations of the statement “the Waqif's condition is as effective as the legislator's condition”.

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(1) Article 34 in Al Awqaf Al Maghribia Code, we read ‘ the conditions of the waqif must be complied with once the are feasible and workable, in case this condition in difficult to implement, then this condition is held null and void, though the stipulations paragraph 1 of Article 14 above should be observed.

(2) Given that the condition of the waqif is of paramount importance for all Maleki jurists, this school of thought assumes that the implantation of this condition is not to carried necessarily through complying the waqif's conditions, but through eliciting the intent. Those who followed this attitude were abu Abdullah al Quri,. Ibn Rush said, ‘This question was a moot point long time ago. See Al Miyar Al Muarrab wal Jamie al Maghreb on Fatawa of the Africans, Andalus and Al Maghreb: Al Wansharisi, Publications of the Ministry of Awqaf and Islamic Affairs in the Kingdom of Maghreb, Section 7, PP187-188.

In this respect, modern means advocated by the West can be utilized in disseminating the culture of giving, promoting confidence in the charitable institutions as it will appear later.

### **b. Flexibility and ability to cope with community needs:**

Time falls short of detailing the types of awqaf known by the Islamic communities, but what can be confirmed is the principle of Ijtihad concerning the regulations of the waqf and how this principle facilitated the process of strengthening social ties. Regardless of the differences over the minute jurisprudential views connected with waqf, jurists nowadays and in the past managed to extend bridges of benefit among them, putting such differences aside in order to create an opportunity to get nearer to the waqf experiences within a corresponding jurisprudential system.

It goes without saying that this splendid work carried out by **Kuwait Awqaf Public Foundation**, in collaboration with the **Islamic Development Bank**, embodied in preparing the Waqf Pilot Law has sought to wipe out the concerns of inter-fertilization between the jurisprudential schools of thought. Moreover, the flexibility of waqf regulations account for this conclusion. As such, some regulations assisted in creating the convenient environment for multiplying the numbers of waqifs and the diversification of the channels of spending. The non-restriction of waqf to real estate led to creating the industrial property waqf, the time waqf, the shares and bonds as long as the legality of the waqf purpose is observed. On the other hand, observing the principle of timing the waqf or perpetuating it gave impetus to the waqf and the diversification of its channels of spending.

Among the major regulations of waqf is treating the waqif's conditions on equal footing with legislator's conditions; this means that a waqif's conditions should be fully observed. This principle of Ijtihad attributed to jurists confirms the flexibility of waqf regulations which do not contradict with its purposes. That's why there are those partly agree with the changeability of the waqif's conditions, either by the waqif or anybody else, once this is stipulated in the waqf deed. One researcher<sup>(1)</sup> maintains that 'it expands the circle of Ihsan and avoids any restriction touching recommendable channels. Reflecting on the details of such recommendable channels will not make us fail to see that liberality

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(1) Waqf companies through partnerships : Khaled Al Mehanna, P27.

*the Hereafter’<sup>(1)</sup>. Among the merits of the good doer is that he should not expect any advantages for his giving. In the Quran, we read the following verse: ‘ We feed you for the sake of Allah alone: no reward we desire from you, nor thanks’<sup>(2)</sup>.*

From the early beginning, the Islamic nature of the waqf was evident. Consequently the Prophet(PBH) dedicated a waqf and his companions followed him. The Muslims hastened to good-doing through offering out what they cherished. This historical depth accounts for the collective conscience of the Muslims who stuck to waqf and defended it and surrounded it with their utmost care. Irrespective of the encroachment on waqf funds by the rulers or others, the invaluable value of the waqf was recognized by all. The relevant rules and regulations constituted the impregnable bulwark which protected the waqf. Among the things to be recalled in this context is facilitating the means to validate a waqf.

It causes some pain for those Muslims showing devotion for Islamic waqf to see this retrogression of waqf if compared to its status in the past. It is also deplorable to see the Hubus operations in many Islamic countries retreating and mostly limited to building mosques. Nevertheless, some Islamic experiences are pioneering in this domain and worthy of being copied either in creation or maintaining and diversification of the channels of spending. These aspects reflect the bright sides of waqf if they are considered nowadays.

The Islamic countries abound in old and various awqaf whose religious origin can never be overlooked. Lack of maintenance and poor revenues and encroachment due to lack of religious incentives among some state departments which used to abuse those awqaf if compared to their actual values – All those factors assisted in creating a dim picture of the waqf.

The rumour concerning the spreading of waqf culture cannot be effective unless this is carried out through highlighting the religious aspect with its religious values, in addition to showing its historical roles in the Islamic community. This makes available the possibility of being involved in the process of comprehensive development of a modern state.

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(1) Al Waqi’ah , 10.11.,12.

(2) Al Insan, 9.

*believe in Allah and the last day, and the angels , and the Book, and the messengers; to spend of your substance out of love for Him, for your kin, for orphans, for the needy, for the wayfarer, for those who ask, and for the ransom of slaves, to be steadfast in prayer and give zakat.<sup>(1)</sup> .*

Birr is an act of obedience and God-fearing which provides for the needy and causes its doer to assume a prestigious position among the people. In the Holy Book, we read the following, ‘*Those who have faith and do righteous deeds, they are the best of creatures*’<sup>(2)</sup>. There is no doubt that preference is linked with a high reward in the Hereafter. *In the Holy Quran we read the following, ’And whatever good you send forth for yourselves, ye shall find it with Allah, yea, better and greater, in reward, and seek you the Grace of Allah, for Allah is off-forgiving, Most Merciful.’* To encourage spending in the way of Allah, we read the following Quranic verse, ‘*The parable of those who spend their wealth in the way of Allah is that of a grain of corn, and each grain hath a hundred grains. Allah giveth manifold increase to whom He pleaseth: And Allah careth for all and He knows all things.*’<sup>(3)</sup> Moreover, the meaning of Birr and Ihsan will not be accepted by Allah if it is not out of those items cherished by a human being. *In the Holy Book, we read the following verse: By no means will you attain righteousness unless you give freely y of that which you love: and whatever ye give Allah knoweth it well*<sup>(4)</sup> . It is clear that the creator gave a prestigious status for the works of Birr and it is not the amount of spending that makes spending significant ; it is the nature of what is offered out of the items cherished by a giver that makes sense. This causes the human soul to be sublimated, while avarice is kept in check feeling towards others is promoted. In the Holy Quran, we read the following verse, ‘*But give them preference over themselves, even though poverty was their portion*’<sup>(5)</sup>. Preference is a human attribute in the sense that it is a good quality which puts a human soul, known for its egotism, under control and causes it to rush towards good deeds. In the Holy Book, we read another verse: ‘*And those Foremost in faith will be Foremost in*

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(1) Al Baqara Sura, verse 177.

(2) Al Bayyena, 7.

(3) Al Baqara, 261.

(4) Al imran, 92.

(5) Al Hashr, 9.

## Third Theme

### Prospects of Cooperation between Islamic Waqf and Western Humanitarian Charitable Organizations

Despite the bright history of the Islamic waqf and the peculiarity which distinguishes it from other systems, in addition to the jurisprudential background which forms a convenient environment to keep abreast with the requirements of the age, the status quo reveals shortcomings in management and a lukewarm response on the part of the society.

The religious essence of waqf is predominant to which can never be ignored because it is associated with that essence and legality. Some Western systems took religion away from the western style of life due to the waves of thought and politics which swept their countries. A new and unbounded system came in their stead, bringing with it intense controversy. Despite all this, the global humanitarian purposes are still able to achieve that proximity between them and the Islamic waqf, while the regulations and restrictions of the latter have to be observed.

The question which yields itself is : What are the influential factors in the Islamic waqf system which, if coupled with the positive aspects of the western charitable experience, would assist in creating a fruitful cooperation between the two system?

#### Paragraph 1 Influential Elements of the Islamic Waqf System

The Islamic waqf is characterized by its religious origin and special nature consolidated by the Ijtihad of our honourable jurists and those in authority in the various Islamic countries. This peculiarity is a strong point which could be developed, besides being a lever to promote this system. In the following, we shall refer to those factors and the most to be utilized:

##### a. Religious background and historical depth:

The peculiarity of the giving value is attributed to its relation to the concept of Birr as it is mentioned in the Holy Book, 'It is not righteousness that you turn your faces towards east or west; but it is righteousness to

the principles of democracy, promoting toleration and developing the community of information.

Based on the aforementioned, it can be said that the Western charitable organizations seek to serve philanthropy, but this general purpose is restricted by the purposes attributed to the charitable work in those countries because their community culture appears clearly in the domains of the work of those institutions. To clarify this, we find that the laws of those institutions do not object to extending help to the homosexuals<sup>(1)</sup>, citing the value and legal systems of many western countries which do not object to that, but rather it is considered an aspect of defending human rights. The motives of the aforementioned institutions are not always connected essentially with charitable work, but it could seek the achievement of political objectives, for example the promotion of the European international dialogue, or a specific purpose for a company in order to improve the image of this company to help it acquire a tax exemption. With reference to the Islamic waqf, its religious background stresses its reward in the Hereafter if it is created through good money and for a lawful channel. The motives of a waqif are seeking God's good pleasure and getting nearer to Him to be among the prosperous in the Hereafter.

In addition to the aforementioned, we can maintain that many of the purposes advocated by Western charitable organizations have been undertaken by the Islamic civil societies. This means that they are governed by the societies law not by waqf legislations. This naturally keeps the areas of waqf associated only with charitable work apart from other purposes ignoring the ongoing charity.

Based on the above mentioned in terms of the differences between the Islamic waqf system and the Western charitable organizations , either in relation to concept or rise and development, this proximity between the two systems relevant to pure humanitarian purposes away from any personal interests gives rise to the question about the prospects of cooperation and benefiting from the accumulation of experiences embodied in the western humanitarian charitable organizations.

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(1) For more detail, see the by-law of the purposes of the western charitable organizations my  
Mohammad Abdul Halim Omar , Ibid, PP12/13

3. Extending support to the victims of violence.
4. Cooperation in the field of development.
5. Education and vocational formation
6. Maintaining the cultural , artistic and historical legacy.
7. Alleviation of poverty and preventing it.
8. Promoting citizenship and protecting human rights
9. Encouraging culture
10. Promoting the means of inclusion inside the society.
11. Encouraging scientific and technological research.
12. Encouraging arts.
13. Encouraging humanitarian initiatives
14. Encouraging sporting activities.
15. Promoting European and international dialogue.
16. Supporting free business, innovation, economic social and cultural development.
17. Promoting job opportunities.
18. Supporting preventive protection and health control.
19. Protecting environmental space.
20. Extending help to old people and these failing to make money.
21. Protecting consumers.
22. Protecting the family.
23. Protecting children and young people
24. Providing solutions to the housing problem.
25. Fighting all forms of illegal discrimination<sup>(1)</sup>.

Some European legislations add other purposes, for example the Spanish Law n 2002/50 issued on Dec 26, 2002 related to the charitable organizations <sup>(2)</sup> included some other purposes which serve humanity in terms of keeping up with today's developments, for example defending the victims of terrorism, promoting the constitutional values, defending

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(1) Original is in Portuguese language.

(2) Original is in Portuguese language

awqaf because purity (tahara) is the essence of worship. The humanitarian elevated feelings should not be ignored when we talk about the system of waqf in its relation to animals as many awqaf were established for animals, such as the stork birds and cats. Other awqaf established special awqaf for the leprosy; others for the settlement of debts and setting prisoners free. These examples show how the waqf system managed to embrace different humanitarian systems. Concerning the achievement of other humanitarian purposes, we find the health waqf which represents a lively example for maintaining the soul and mind. Many Muslim cities established hospitals and maristans which combined the purposes of waqf and the Islamic humanitarian dimensions at the same time. There are also the awqaf for covering the marriage arrangements of poor girls, in addition to the waqf of suckling mothers, all of which reflect those humanitarian purposes which addressed the needs of society.

## **Paragraph 2**

### **Humanitarian purposes of the western charitable organizations**

In defining the concept of the western charitable institutions, we have noticed that they were centered on charitable work which required the use of the term ‘charity - charite - caridad’. Irrespective of the legal naming given to charitable organizations which share one humanitarian purpose concerned with achieving the public good or social good<sup>(1)</sup>.

Reviewing the charitable purposes of some European laws, it is clear that they have a philanthropic purpose aiming to achieve a human service which may take different forms ; as an example the Portuguese Law which defined the social interest attended to by the following institutions as follows :

1. Extending support to the people with special needs.
2. Extending support to immigrants and refugees

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(1) Notice that the Portuguese law uses the expression ‘social interest’ instead of ‘public interest’. See the difference between this law and the Spanish law: El tiempo de las fundaciones carlo Moreno Pietro. Op cit p.625.

terms of pens and lightening<sup>(1)</sup>. Among the manifestations of the learning waqf was the dedication of books to the universities, schools, Zawaya and rubut .Moreover, the waqf was behind the spreading and circulation of books among the people. To get a book, entails copying it and this process was demanding and a student would not be able to afford. The waqifs felt that and thereby they facilitated the process of getting a book either for copying, reading or comparison<sup>(2)</sup>.

With respect to the waqf of water, it is regarded as a response to the Quranic verse , ' *We made from water every living thing, will they not believe*'<sup>(3)</sup>? It is well known that the climate in the Arab-Islamic world is mostly dry, thus there is no doubt that water, in such a climate acquires a great importance and represents an essential part of the economic and social life. It is also natural that peoples of the area will cherish water close to their hearts. It follows that providing water is a means to get the birr as it occurs in the Quranic verse, ' *by no means shall ye attain righteousness unless you give freely of that which you love; and whatever you give, Allah knoweth it well*'<sup>(4)</sup>. The example of Mrs. Zubaida, wife of Jaafar Al Mansour, in bringing water to Mekka Al Mukarrama and exerting sincere efforts to this glorious aim in the interest of pilgrims represent the best model of awqaf. Big amounts of funds were spent on bringing water from Wadi al Nu'man, east of Mekka, despite the difficulty of the terrain. It was the Caliph Othman ibn Affan (may Allah be pleased with him) who dedicated Roma water well for God's sake; similarly caliph Ali ibn Abi Taleb dedicated springs of water in Yanbu'.

In a similar behaviour, many Muslims provided the cities with water so that they managed to create water security in many other places<sup>(5)</sup>. The same can be said about bathrooms which were under the management of

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(1) Awn al Maaboud ala Sharh sunan Abi Dawod : Abadi Abu Abdul Rahman , edited by Abu Abdullah Al Numani, Dar ibn Hazm,2005,

(2) Cultural influence of waqf in the Islamic civilization by Abdullah Al Zaydi, p 103, copied from Al Awqaf and Life and the Social Life in Egypt by Amin Mohammad, Dar Al Nahdha, 1980, P209.,

(3) Al Anbia'a, verse 30,

(4) Al Imran, verse 92,

(5) The officials of the city of Meknas indicated the process of bringing water which benefited the whole city. Water was also provided to animals in the old parts of the city because were the important means of communication..

human values are of a universal nature, instilled by the Almighty Creator in the hearts of human beings. Once they are given the opportunity to serve the community without any negative intervention or instigation, they will act as the safety valve for that community.

What are the humanitarian purposes of each of the Islamic waqf and the western charitable organizations which can be reckoned with in order to provide a basis for cooperation and inter-fertilization of the two systems?

### **Paragraph 1**

#### **Humanitarian purposes of the Islamic waqf**

The Islamic waqf system managed, through jurisprudential ijtihad, to realize the purposes of the Islamic shari'a. Various Islamic countries witnessed different types of awqaf which go harmoniously with the basic purposes of such countries as exemplified in maintaining religion, life, mind, posterity and money. The Prophetic tradition about the ongoing charity had a great effect in accelerating the race among Muslims for Ihsan and Ijtihad in formulating waqf and its types. Moreover, the hadith narrated by Anas ibn Malek (may Allah be pleased with him) through the Prophet (PBH) had also a great effect when he said: 'Seven things for which a dead person is rewarded after his death: He who disseminated a learning; cut a river; dug a well; cultivate a palm tree, bequeathe a Quran or left a son praying for him' <sup>(1)</sup>.

In this context, Jalaluddin Al Sayouti wrote a verse in which he enumerated the seven good deeds which profit a Muslim after his death.

Learning is the basis which leads a person to know His Creator and see his way towards guidance and rectitude. It was an attribute of learning when it viewed the posthumous ongoing charity as something which brings a human being nearer to his Creator. To this end, Muslims hastened to build schools and attend to students through providing the decent residence for them and providing for the poor and the needy in

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(1) Corrected by Al Albani in Sahih al Jamie n3596,

In the light of the aforementioned, we can record the following:

- All charitable agencies already mentioned, revolve round charitable work and Ihsan, citing the difference in emergence and development.
- The term ‘foundation’ implies a more universal connotation and it expresses the organizational form of the different charitable organizations.
- The term ‘endowment’ is getting nearer to the Islamic waqf except for the religious background of the latter.
- The term ‘trust’ is based on the legal relation between the land owner and the trustee and it could take images far from Ihsan. The part thereof connected with the charitable work is the Charitable trust. It is near to waqf, but it differs from it in respect of the legal ownership vested in a trustee and the beneficiary. On the other hand, a Nazir in the Islamic waqf is not the owner of the waqf, but rather a trustee on the property of a minor.

If the western charitable organizations differ from the Islamic waqf in the concept and background, the question revolves round the possibility of cooperation between the two systems in the light of the approximate purposes and objectives undertaken by each one of the.

## **Second Theme**

### **Humanitarian purposes of the Islamic Waqf and similar charitable systems**

Irrespective of the causes underlying the establishment of the western charitable organizations, the stunning results which these organizations realized and the sectors on which the modern state bets in uplifting its status confirm the ability of the charitable work, regardless of its backgrounds, to achieve the social and economic security more than the state alone can do.

It is not an exaggeration to assert this fact because the history of the Islamic waqf stands evidence to this fact and the presence of the charitable work on the table in some Islamic countries and the western charitable organizations substantiate and approve this conviction. This means that

### **Special Trust:**

The aim of this type of trust is to bring a benefit to the community or to a great number of persons in a community in case the devisor has passed away, for example spreading education or alleviating poverty. In advocating these aims, it moves closer to al Thurri waqf or al Waqf al Aam.

The emergence of the Trust dates back to the Middle Ages when the lords used to levy heavy taxes on the successors on the death of a devisor. This behavior came as a trick to avert tax payment in the 12<sup>th</sup> century. Based on this behavior, the land owner chose one of his near friends or relatives who were winners of his confidence. He vested him with the rights of the lawful owner to his property vis-à-vis an undertaking made by this friend or relative to pass the utilities of such funds to the land owner's successors according to what had been termed as the Utilities contract. During the reign of King Henry VIII in 1536 the Utilities Law was issued through which tax evasion was checked. Thereafter they resorted to the Trust contract which transferred the legal ownership of the funds to the trustee, along with involving non-successors to benefit by the trust monies, especially the poor and the needy<sup>(1)</sup>.

Some researchers attribute the emergence and spreading of such charitable organizations in the West to the following factors:

- Resentment and feelings of inconvenience experienced after the Industrial Revolution which brought with it what can be termed as the caste system and the amassing of wealth in the hands of few businessmen. This caused some of those to allocate part of their wealth to charitable works.
- The Communist Revolution which posed a threat to capitalists who feared that workers could adopt its principles.
- The high taxes imposed on workers' establishments and the tax exemption offered to charitable works .
- The interest on the part of the USA to extend its global presence during the cold war, which brought with it encouraging the charitable work and the support to many parts of the world <sup>(2)</sup>.

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(1) Ibid: Emergence of Al Khairy waqf in the Islamic world: Ahmad M. Ashur,

(2) The Islamic Waqf system and other similar systems: Mohammad Abdul Halim Omar. A research submitted to the Second Awqaf Conference, Mekka Al Mukarrama, pp 9-10,

According to the French Law, there are some types of the charitable institutions, including the institution of public utility which is governed by article 18 and the parts following it in the said law; there are also institutions of Scientific Cooperation which are governed by article 11-344 and what follows it in the research code (Law n45.2006 dated April 18, 2006 related to the research program. They are specified for the university scientific research, in addition to the university institutions regulated by article n12/719 in the Education Code (Law n 1199-2007 dated August 10, 2007 related to the freedom and responsibilities of the university graduates. Code<sup>(1)</sup>). There is another type related to the recuperation institutions governed by article 3-7-6141 in the Public Health

## **2. Endowment:**

Linguistically speaking, endowment means a grant or a gift, but terminologically speaking it means a donation (in money or property) made by an individual or an institution or any permanent source to offer services to a charitable society, for example a college, a hospital or any other institution.<sup>(2)</sup> The religious factor is credited with creating such institutions in 1601, taking a primitive shape<sup>(3)</sup>, then developed after 1736, then spread on a large scale in 1880

## **3. Trust:**

Linguistically speaking, this term means honesty and reliability or an investment fund, but legally speaking, it means a behaviour which allows the owner of a property to convey a property or a movable asset to a person named Trustee who, in turn, takes charge of managing and investing the said property in behalf of beneficiaries designated by the owner. When 'charitable' is added to 'trust' the term 'Charitable Trust' becomes restricted to the purpose specified for it. As far as beneficiaries are concerned, a trust is divided as follows:

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(1) Essai sur la régime juridique des foundations, Valerie Guedj. These 1999 Université Panthéon Assas (Paris II), Droit – Economique-Sciences Sociales, P 37.

(2) Website: endowment definition www.Answers.com.

(3) The rise of the Islamic waqf in the Islamic world and the West :Ahmad M. Ashur.

jurisprudence. The waqf atmosphere coupled with a humanitarian sensation ipso facto left its remarkable effect on Pope Sylvester II, bearing in mind that the humanitarian objectives of the waqf would intersect with the call for coexistence and tolerance which inculcate parts of Christian teachings.

In the same context, some researchers believe that the benefit attained by the Europeans from the Islamic waqf started from the 10<sup>th</sup> century AD during the Crusades. It believed that the Trust system in Europe, known throughout history by its plentiful awqaf<sup>(1)</sup>, followed the ouster of the Crusaders from Jerusalem .

The crux here rests in the fact that it was the religious background which formed the bridge between the Islamic waqf and the western charitable organizations, but the Islamic waqf system did not fall under the monopoly of any agency; rather it left the door open for contributions from all the sectors of the society. Conversely, the western charitable systems were purely ecclesiastical, managed by the church, though they were converted later into various institutions and organizations. On the other hand, the Islamic system of waqf, though being different within uniformed regulations, was different from the western charitable organizations which took different forms.

A researcher in those systems will come across several definitions with different legal connotations and nature, for example:

### **1. Foundations - Fondacions - Fundaciones**

The term ‘Foundation’ means non-governmental and non-profit institutions which have funds employed in managing charitable purposes<sup>(2)</sup> or as it is defined in article 18 of the French Law # 571/87, 23<sup>rd</sup> of July 1987 related to developing welfare through which a donor or several donors allocate funds or rights to realize a non-profit public utility<sup>(3)</sup>. A charitable organization differs from societies in the fact that it does not include members, but includes donors.

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(1) Towards a Global Agenda for Awqaf: Dr. Tareq Abdullah, Awqaf Journal , Issue14

(2) Developing the Islamic waqf institution in the light of the western charitable experience by Osama Al Ashqar, winner of Kuwait WEaqf Contest, 2010, p 34.

(3) Article 18 de la loi n du 23 juillet 1987 sur le development du mécénat: ‘la foundation ast l’acte pae lequel une ou plusieurs personnes physiques ou moraledecident l’affection irrevocable de biens, droits ou resources a la realization d’une oeuvre d’interetgeneral et a but non lucratif’.

Mergablum , Edition y Communicacion , SL 2002,173 y 293. In this book he mentioned numerous purposes for the waqf, especially the waqf on the poor, the sick, the prisoners, ribat, Zawaya, cemeteries and in favour of education and culture. He laid emphasis on the harmony between the legal theory and meeting the requirements of the society. He came to the conclusion that the Islamic waqf in Andalusia was notably responding to such requirements and compatible with the needs known to several sectors of the society<sup>(1)</sup>. Undoubtedly such a strong presence will never fail to express its immense effect on the western societies, taking into consideration the religious culture of the society and the power of the church at that time.

On the other hand, the western academic expeditions in some Islamic countries assisted in boosting this civilizational inter-feretilization as validated by the historical documents. Monk Gerbert Duriak, who later became Pope Sylvester, conveyed to Europe the Arabic numerals and several Islamic jurisprudence theories. His promotion to Papacy came after finishing his studies in Andalusia and at Al Qarawiyyin University in Fez<sup>(2)</sup>.

Andalusia was abounding in the historical documents about awqaf which elaborated on the diversity of the channels of spending. They also show the ability and ijtihad of the Andalusian jurists and the due attention they accorded to this splendid system. Moreover, Al Qarawiyyin University is a waqf-based university, located in the older city of Fez where numerous awqaf existed, for example shops, bathrooms, mills, ovens and houses, many of which were dedicated to students and mosques. Some of these awqaf were used as residence for humanitarian purposes, for example attending to poor categories, including housemaids, the injured, prisoners, the needy, the blind, the psychopaths and others. The awqaf used to provide the university students with food, water and residence. The books were also dedicated by sheiks and jurists who never hesitated to provide waqf with many rules and regulations which constituted the basis for waqf

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(1) 'Hasta que Dios herede la tierra . Los bines habices an Al Andalus (Siglos X – XV, GRacia Sanjuan (Alexandro) Universidad de Huelva; Mergablum ,Edition y Communicacion , SL 2002,173 y 293.

(2) For more details about the life of Pope Sylvester, see Abdul Rahman Badawi (Orientalists Encyclopedia).

## Paragraph 2

### **Concept of the Western Charitable Organizations**

The emergence of the Western Charitable Organizations has been associated with a religious background and a special community movement, which differentiates it from the creation and development of the waqf system. To what extent did these factors help in crystallizing the concept of the Western Charitable Organizations? How did such factors, through their development and relations with the different religiously-based systems, left their impact on the Islamic waqf?

There is not the least doubt that the institutional charitable work in the West does not go beyond the legal contexts forming its framework, which can be divided into two important orders constituting the sources of the western laws which are the Roman Germanic and the Anglo Saxon. It is known that these two orders share something in terms of history i.e. affiliation to the Roman origin. Both of them were greatly influenced by the Ecclesiastical law whose philosophy was apparent in many legal institutions<sup>(1)</sup>.

Charitable work implies an aspect of coexistence and cooperation advocated by all heavenly religions. It is not a means for creating embarrassment to find the influence of Christianity throughout the historical role of the church on the laws which prevailed in Europe<sup>(2)</sup>. The relation between the western charitable organizations and the church were much stronger to the extent that charitable work was viewed as a mission carried throughout the ages by the church and a task carried out singly by the church during the Middle Ages.

It is a well-established fact that the Andalusian civilization had remarkably affected the western communities in various domains, especially those connected with charitable waqf. The Spanish researcher Alejandro Carsia San Juan studied the Institution of Waqf in his book entitled ‘Hasta que Dios herede la tierra Los bines habices an Al Andalus ( Siglos X – XV, Gracia Sanjuan (Alejandro) Universidad de Huelva;

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(1) Les grands systèmes de droit contemporains: Tren David, Dalloz, 11 th edition, 2002, p 25.

(2) El tiempo de las fundaciones( Análisis del Regimen Jurídico de las fundaciones y propuestas para un futuro renovado, Juan Carlos Moreno Pieoro, Tesis doctoral, Universidad de Extremadura, 2015

the Prophet (PBH) about the ‘ongoing charity’ impacted the legal nature of the waqf<sup>(1)</sup>. It goes without saying that waqf is a charitable work par excellence because it differs from other charitable works. Al Zakat, for example is different through being a compulsory deed made elaborate by the Legislator (Al Shar’i)<sup>(2)</sup>.

Waqf, which is known for its numerous channels of spending and being contingent upon the conditions of the waqif, is different from Al Zakat due to the absence of the restrictions imposed on Al Zakat. A charitable work has its benefits during one’s life and in the hereafter, but waqf has, in addition to such benefits, the concept of an ongoing charity which does not stop with the end of one’s life. The benefits of waqf continues in the interest of people through which a waqif attains the prayers of the beneficiaries. In his comment on the ongoing charity, Al Imam Al Nawawi said :‘the meaning of this hadith is that the work of a human being ends with his death and the reward for it comes to an end except for the three things mentioned above which are connected with waqf<sup>(3)</sup>.

In view of the foregoing, we can maintain that Islamic waqf managed through its peculiarities to acquire that specific quality of having multiple channels of spending on the one hand, and the moral motivation towards the ongoing charity on the other, in addition to their relevant restrictions.

This peculiarity however did not detach the Islamic waqf from sharing many aspects with other charitable organizations whose aims address the purposes of humanitarian services. Reflecting on the framed legal system of the charitable work in general confirms the success of such values in terms of ignoring the differences among the religious and cultural agencies so that the meaning of giving and beneficence may remain unified, whereas the differences shall rest in the motives of the establishment of charitable organizations and the restrictions imposed upon them.

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(1) The honourable Hadith narrated by Muslim and others through Abu Huraita: If 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 (Kitab el Wasiyya)

(2) In the Holy Book we read the following verse: ‘Alms are for the poor and the needy and those employed to administer the funds, for those whose hearts have been recently reconciled (to the truth), for those in bondage and in debt; in the cause of Allah, and Allah is full of knowledge and wisdom’.

(3) Sharh Al Nawawi ala Muslim 11/85

Thus the concept of the Islamic waqf was associated since its early emergence, which acquired it its legal nature and its difference from other behaviours, with being a system based on withholding the asset and releasing the usufruct. The processes of hubus and consolidating them in the words and deeds of the Prophet (PBH), followed by those awqaf of the honourable Companions and the Mothers of the believers (may Allah be pleased with them) impacted this specific nature. It is said that the Prophet (PBH) had dedicated seven walls in Al Madina<sup>(1)</sup>. It was narrated about Amr ibn el Harith that he said: 'the Prophet (PBH) had left neither dirham nor dinar, nor a slave nor a woman slave, it was his mule only that he left which he mounted, his sword and a piece of land which he offered in the way of Allah'<sup>(2)</sup>.

There is no difference between Hubus or waqf because both have the same connotation. Their essence remains revolving round the lawful behaviour of changing the nature of money and getting it out the lawful behaviours which aim at its conveyance presently or in the future so that it becomes money with special legal nature. In this case, and through this particular nature, dealing with this money starts with both the corpus and proceeds, which indicates withholding the asset, while its proceeds go to the benefit of a charitable agency.

It should also be noted that the Waqf Pilot Law has internalized this concept in defining the waqf and adopted the simplest definition which laid stress on the legal nature of waqf monies. Article 1 thereof stipulates that waqf, while adopting this law, means 'withholding the asset and releasing its proceeds'.

There is no doubt that using the cliche 'withholding the asset and releasing its proceeds' exceeds addressing the first premise about the content of the Islamic waqf as it is mentioned in the narration about ibn Omar ( may Allah be pleased with them). Here this is reflected clearly in the essence of this legal institution and making it different from other institutions, whether this be inside the Muslim system or in comparison with the western community systems. The implementation of the Hadith of

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(1) Al Mukademat al mumahedat by Ibn Rushd Al Jad, edited by Said Arab, Dar el Gharb al Islami, Beirut 1408H-1988, Part 2, p418,

(2) Narrated by Al Nasie in Kitab el Ahbas.

## First Theme

### A conceptual approach

In this theme, the researcher comes across several terms which are likely to have the same social goals, but ,at the same time, they are likely to differ in their components, conditions and legal connotations, and further this could expand to the factors which led to creating them. For this reason, I preferred to approach waqf and the similar western systems through approaching the legal definition of such institutions in order to see the common factors and locate the differences between them.

#### Paragraph 1

#### Concept of the Islamic waqf

Linguistically speaking, waqf means (hubus) i.e. retention, withholding; in waqf terminology, it means withholding the corpus and releasing the proceeds. Definitions of waqf varied and differed according to the schools of Islamic thought (mathaheb)<sup>(1)</sup>. The simplest definition is that one attributed to Ibn Omar (may Allah be pleased with them) when he came to the Prophet and said:’ I have acquired a priceless piece of land and what would you command me to do with it? The Prophet (PBH) said: if you mind you can withhold its corpus and give as charity its proceeds, provided that the asset shall not be sold, disposed of or bequeathed. Nevertheless, its owner is allowed to eat therefrom or to feed a friend who does not mean to amass money<sup>(2)</sup>.

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(1) To recall this type and as it occurs in the explanatory note of waqf in order to minimize the differences in terms of definition in which several definitions were provided for waqf. For Shafi'a school of thought, it means ‘withholding money which could be benefited by while the proceeds go to a lawful channel of spending: Nehayatul Muhtaj 5/385,6/235, Rawdatul Talibeen 5/314 and 332. For Malekiyya, waqf means that the proceeds should go to a beneficiary according to term specified by the waqif (Habis), Al Sharh el Saghir 2/296,297. Imam ibn Arafa defined as ‘ Giving a benefit to somebody as long as he is existent. According to the Hanafi school of thought waqf is defined as ‘withholding an asset and releasing the proceeds: Fath el Qadeer 5/40. For the Hanbali waqf, waqf means withholding the corpus and releasing the usufruct (Al Insaf by Al Merdawi 7/3. According to the guide law formulated by Kuwait Awqaf Public Foundation and the IDB its definition constitutes a basic foundation for developing and regulating the concept of waqf all over the Islamic countries , while recognizing the differences in its definition and to each country the right to adopt the best formula which keeps the peculiarities of each country.

(2) Narrated by al Bukhari in Al Wasaya and Muslim in Kitab ul Wasiyya and al Tarmathi in Kitab al Ahkam and Al Nasaie in Al Ahbas and Abu Dawud in Al Wasaya.

the concepts of giving and charity. On the other hand, this special reference exercised a great influence on the jurists in their ijtihad in terms of putting forward waqf rules and regulations which assisted in giving waqf its prestigious position in the Islamic society. Nevertheless, there were other factors which impacted the presence and influence of waqf in many Muslim countries and made it imperative to utilize the success of other similar-to-waqf systems.

It is a solid fact that the activities of many charitable western institutions have been connected with the same humanitarian aspects known to the Islamic waqf, but the West conviction of the efficacy of this system made of it a real asset to economic and social development. This was reflected clearly in integrating charitable work into developmental plans in a number of western countries. The arrival to this conclusion formed the basis of Ijtihad and its role in creating a scientific framework for charitable work which has no longer been limited to random charitable initiatives, but it has also been subjected to more fruitful and modern transparent methods.

Having a strong faith in the hearts of many devout Muslims as to the ability of the waqf system to satisfy the social needs embedded in its spiritual dimension and steeped-in-history humanitarian nature, we feel that being familiarized with the pioneering western charitable experiences has become recommended in order to achieve a fruitful cooperation, while keeping its peculiarity and looking forward to innovation and development.

This article therefore will approach both the humanitarian purposes of the Islamic waqf and the western charitable organizations and the prospects of cooperation between both of them. This is feasible through identifying the common factors and the prospects of exchanging benefit. To this end, the issue will be framed in terms of the concept in the first theme, as a step forward to deal with the humanitarian purposes of both the Islamic waqf and the similar charitable systems in the West which appear in a second theme. This will carry us to a third theme about the prospects of cooperation between the Islamic waqf and said systems.

# **Waqf and Western Charitable Organizations**

## **Human Purposes and Prospects of Cooperation**

**Dr. Majida Ziani\***

### **Introduction**

The concept of waqf and other similar institutions is characterized by this sense of giving and well-doing embedded in the humanitarian values based on solidarity and love of others. It goes without saying that Heavenly messages have stressed those values and highlighted their significance in terms of expressing a basic goal to all human communities aiming at social coexistence. Being committed to living inside a community, a human being is not content with just fulfilling his individual needs but also to improve the conditions of socializing with others and sharing good-doing and giving with them.

Given that the images of Birr and giving, though known to be diverse, share one common value, i.e. the strengthening of the social make-up. The Islamic waqf has, in addition to what has been said, other dimensions which bring it nearer to being a truly legal institution with a special characteristic. The exponents of such an attitude are far from going astray or lacking evidence in their saying. The best evidence for what has been based on origination and the best way to this is the adoption of the comparative approach. Reflecting on the status quo of waqf in the Islamic society in the past, we will notice that strong presence in the peculiarity of this system and its direct influence on multiplying and diversifying the numbers of awqaf. The reward of an ongoing charity is a major incentive for Hubus (retention or withholding). Following the utterances of the Prophet (peace and blessings of Allah be on him) and the works of his companions (may Allah be pleased with them) is considered the chief incentive for generating

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so that the Islamic waqf could be upgraded through this friction with the western charitable experience resulting from this fruitful cooperation between the two systems.

This issue of the Awqaf Journal includes an article by the researcher Said bin Rashed bin Said al Salmani entitled 'Waqifs' Conditions in the Omani Law', in addition to a book review by Dr. Hazem Ali Maher of the book of Ramzi Qanah 'Regulations of non-Moslems in the Islamic Waqf – A Comparative Study between Shari'a and Law'.

### **Editing staff**

cultural life whose influence on the Islamic civilizational output is indelible. Moreover, the researcher highlights the new role of waqf as a part of an Arab cultural renaissance which guides towards innovative thinking in the future.

**Dr. Karima Abdel Rauf El Domi**, in her research ‘Contributions of Women to Waqf and Charitable Work in Maghreb during the Middle Ages’ discusses the questions of wealth and Wealth Management by Women and its relation to the women’s trends of the spending channels. .

**Prof. Nacereddine Saidouni** In the French part of the Journal and in his research ‘Waqf Lease (Kira'a) Contracts: the Case of Algiers and Reviewing it during the Ottoman Era’ shows his interest in the administrative, financial and social procedures related to one specific type of the long term leasing known as ‘Al Ana'a' which is similar to the BOT system (Build, Operate and Transfer). The researcher lays emphasis on the methodical aspect submitted by such studies in terms of creating a link between the study of the historical documents connected with such contracts and analyzing the economic status predominant at that time in the Moslem societies. Consequently, this led to creating an accurate image of those societies during previous historical epochs and help us get acquainted with the prevalent social and economic systems. This procedure helped in acting differently from those stereotype images dealing with the history of the Islamic world which often fall short of acquiring the status of a weighty research.

**Dr. Majida Ziani**, in the English part and through her research entitled ‘Waqf and Western Charitable Systems: Human purposes and prospects of Cooperation’ monitors that discrepancy between the brilliant historical repertoire on the one hand and the poorness of its current status which reveals a defect in the management weak reaction to the expectations of the society on the other. The researcher seeks to put her fingers on the common parts shared by the two Islamic and western experiences in the area of waqf. This attempt is made to explore the prospects of cooperation between both of them. Several comparisons were drawn in terms of the historical and legal concepts, to highlight the possibility of mutual benefit

waqf whose movement has expanded to link the present with future, carrying with it the concept of sustainability and perpetuity within the context of public utilities operations which serve individuals and groups not necessarily co-living with the waqif at the time of establishing his waqf. Nevertheless, they fall within an unlimited time limit. ‘This means the work is ceaseless’.

The variety of the spending channels and their ongoingness throughout a lengthy period of the Islamic civilization poses a clear evidence that the waqf as a social initiative does not mean a charity extended at random by some individuals, but rather it is a type of social behaviour based on a theory which makes investment in a human being the access of any process for developing the individual’s and group’s capacities. This trend represents one of the pillars of the civilizational building of the Moslem societies for historical periods which are witnessed in most strong and balanced societies.

**Dr. Ahmed Jaballah**, in this issue, raises the question of investing the human resources as a means to promote waqf in terms of the practical means in order to develop the skills of the waqf cadres and beneficiaries or in terms of the internal or external changes which influence the process of investing the human resources in the waqf institutions and the policies of dealing with them.

**Dr. Murad Alla** discusses the relation between waqf and sustainable development through his study of the Algerian experience, starting by the Ottoman era through to the French imperialism era till the post-independence era of the country. In this study, the researcher analyses the on-and-off developments during those historical epochs and their influence on the social and historical life and the effect thereof on the sustainable development.

**Dr. Abdelfattah Mostafa Elsayed Ghonema**, in his research ‘Waqf in Modern Egypt as a support to Arabic Culture of literature, Science and Architecture’ discusses the role played by the waqf institutions in creating an academic infra-structure which assisted in stabilizing a prosperous

to providing it with the means of prosperity and affluence. The waqf brought to existence a unique vision towards development, holding man as a beginning and an end. It adopted the components of waqf in bringing its institutional approach to the concept of the ongoing charity nearer to a strategy which is liable for striking a balance between the various human needs. In this context, waqf was characterized by many advantages which can be put down as follows:

**First:** The function of waqf was not confined solely to the materialistic needs such as the solution of the poverty problem (while asserting its importance), but it gave amplitude to its social movement to include all the elements conducive to the welfare of human beings in the widest sense and providing all that contribute the fulfillment of the human dignity, whether this be in terms of the materialistic aspects such as the building hospitals or what pertains to public health), or the infra structure through designing complete quarters to facilitate the process of finding houses, or the spiritual side through providing the pilgrimage services which aim to ease the burden of the pilgrims by providing them with water, residence and road services, in addition to erecting mosques and other relevant facilities.

**Second:** Guaranteed waqf services through adopting a self-made financial formula based on the ongoing proceeds and the creation of a juridical personality, both of which assist in guaranteeing sustainability and protect the rights of beneficiaries as recommended by a waqif. Given that the ownership of a waqf belongs to Allah the Almighty, as maintained by the majority of jurists, the movement of a waqif seems to be limited once this waqf is documented so that it becomes confirmed within his conditions to all parties, including himself.

**Third:** The right of the future generations in having a share in a balanced development which is not drained by the present generations through the materialistic accumulation and squandering policies. Thus the waqf deeds abound in different types of awqaf which allow the future generations to benefit from the materialistic, the spiritual capacities of the people before such people are brought to existence. This is a unique quality in the Islamic

Despite the fact that the experts and scientists of the liberal economic thought have criticized (and are still criticizing) this trend for ignoring human beings as a chief objective and giving priority to the process of amassing and accumulating wealth whoever the owner or the beneficiary might be, this trend continued to impose its hegemony and build up its power to exercise its effect in the world of globalization. This is carried out through its mammoth mechanisms which set the stage for savage liberal potentials which highly appreciate the quantities and exhaust the nature, besides enslaving numbers of peoples in favour of financial institutions and few numbers of individuals. Such entities are solely concerned with widening their properties and expanding their influence everywhere, while ignoring the interests of people who are becoming poorer and poorer, in addition to lessening the value of work and triggering a wasteful exhaustion of the natural resources<sup>(1)</sup>.

## (2)

On the other hand and as based on a different philosophy, we find that the Islamic civilization throughout a lengthy period of its life has approached the issues of development and considering the needs of people, besides laying emphasis on the means of good life through an integrated approach which combined both theory and value as reflected in the Quranic verse which reads as follows: ‘ *We have honoured the sons of Adam* ’. This practical civilizational output came in compliance with this theoretical rule through creating social and economic systems which clearly reflect harmoniously the human dignity and convert it into a true behaviour and a tangible reality.

Waqf is one of those examples which, in collaboration with other examples, contributed to lengthening the age the Islamic civilization , in addition

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(1) In 2017, the wealth of the richest 26 worldwide, together was equal to the assets owned by half of the population of the globe – nearly 3.5 billion. 1% of the world’s population (the richest of the richest) got 87% of the wealth which was estimated in 2017. See the report of Oxfam: ( <https://www-cdn.oxfam.org> ) OXFAM BRIEFING PAPER SUMMARY-JANUARY 2018: 2018-summ-cn

# **Editorial**



## **Waqf and investment in human beings**

**(1)**

The theoretical build of the liberal economic thought lays stress on the quantity through a concourse of ‘digital’ indicators such as development rates, volume of production and export, the fluctuation of prices, inflation indicators, prices upgrade and the average of the annual profits, etc... On viewing the real world and the role and size of the international institutions such as the International Monetary Fund or the World Bank, in addition to the cross border companies, the trend affects clearly the international relations, besides acting as the chief motivator of the plans implemented by all countries which seek to attain the best results and indicators. These measures have been adopted firstly by the international economic institutions either in terms of the economic force which lead to the creation of partnerships or blocks, or in terms of offering facilities, loans and assistance to those who lost the digital battles.

Conversely, some institutions, for example UNDP (United Nations Development Programmes) sought to develop an economic vision which strikes a balance between the qualitative and quantitative indicators, without ignoring to include the social dimensions of development. The first Human Investment Report was issued In 1990. This report adopted a compound chief indicator which embraced three subsidiary indicators: education, life expectancy and the individual’s Gross Domestic Product.

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## **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.
- Material appearing in the Journal expresses the attitude of its author and does necessarily reflect the attitude of the Journal.
- Researchers shall receive a financial remuneration for their researches, articles and other relevant works approved for publication according to the applicable rules in this regard, in addition to 20 offprints.
- Failure to comply with the academic ethics made deliberately through literal borrowing of sections and paragraphs from different sources on the Internet or otherwise without indicating this, the internal rules of the Journal will stop their contributions to the Journal in the future.
- The researcher is empowered to deal with his research after it appears in the Journal provided a note should be sent to the Journal to this effect
- The Journal reserves the right to publish the material as per its plan.
- Any material published in AWQAF Journal expresses the opinions of the authors and not necessarily those of journal publisher.
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www.awqafjournal.net**



## 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]

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