



AWQAF

Refereed Biannual Journal Specialized in Waqf and Charitable activities

Chief Editor

Dr. Fuad Abdallah Al-Omar

Managing Editor

Dr. Ghanim Abdallah Al-Shaheen

Advisory Editor

Dr. Abdallah Tarak

Editorial Board

Dr. Issa Z. Shaqra

Khaled M. Al Busharah

Manal Mohammed Al-Mansour

Saad Hofan Al-Hajry

Advisory Board

(alphabetically)

Dr. Abdelaziz Al-Touijri

Dr. Mhammad Abdelgafar Al-Dherif

Dr. Jamal Eddine Atiya

Dr. Manzoor Alam

Administrative Secretary

Mishal Abdelaziz Al-Baker

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

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

Objectives of Awqaf:

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

❖ **English Section**

Current Waqf Experiences and the Future of Waqf Institution

Seyed Khalid Rashid..... 5

❖ **French Section**

La Fondation Publique des Awqaf du Koweït; L'expérience et ses perspectives.

Abdallah Tarak..... 27

❖ **Arabic Section**

Improving Institutional Structure to Cope with the Challenges Facing Waqf Institution. Kuwait Awqaf Public Foundation Experience.

Fuad Abdallah Al-Omar..... 13

Waqf Experience in UAE; Sharjah as a Model.

Sami Assalabat..... 41

Waqf Pillars in Islamic Jurisprudence; A comparative Fiqh Study.

Mohammad Abderrazaq Al-Tabatabai... 91

Duties of a Waqf Nazir in Islamic Fiqh.

Nour Bint Hassan Qarout..... 135

Waqif's Conditions and "Istibdal" Issues

Abdallah Saleh Ahmad..... 181

❖ **Summaries of Thesis**

Role of Waqf in Civil Society Development; Case Study (Kuwait Awqaf Public Foundation).

Ibrahim Mahmoud Abdel-Baqi..... 209

❖ **Book Reviews**

Waqf in Islamic Thought (Mohammad Bin-Abdallah)

Mohammad Bouzayan Ben-Ali..... 219

Publication Regulations

AWQAF journal publishes original Waqf-related researches in Arabic, English and French. It also accepts summaries of approved M.A's and Ph.D's reports on conferences, symposia, and seminars dealing with in the field of Waqf.

Contributions are accepted in Arabic, English or French, provided they abide by the following regulations:

- ❖ They should not be published before, or meant to be published anywhere else.
- ❖ They should abide by the scientific conventions related to the attestation of references, along with the academic processing.
- ❖ Articles should be written in good handwriting on A4 papers, preferably accompanied by a disk (Word software).
- ❖ Articles must be 4000-10000 words in length.
- ❖ All submissions must include an abstract of about 150 words.
- ❖ Material meant for publication should undergo a confidential refereeing.
- ❖ Coverage of seminars and conferences is acceptable.
- ❖ Material once sent for publication, whether published or not, is unreturnable.
- ❖ AWQAF is entitled to re-publish any material separately.
- ❖ All responsibility for the opinions expressed and the accuracy of facts rests solely with the author(s).
- ❖ All submissions should be sent to:

**AWQAF, Editor in Chief,
P.O. Box 482 Safat, 13005 Kuwait,
Tel. 253-2646 Fax. 965-254-2676
E-mail: awqaf_journal@awqaf.org
serd@awqaf.org**

OPINIONS EXPRESSED IN AWQAF
ARE THOSE OF THE AUTHORS AND DO NOT NECESSARILY REFLECT
THE VIEWS OF THE JOURNAL OR PUBLISHER.

Current Waqf Experiences and The Future of Waqf Institution

Sayed Khalid Rashid^(*)

Numerous problems afflicting awqāf today are restricting their benevolence from spreading among Muslim masses. Abolition of waqf-i-ahli, state control of waqf resources and management, non-recognition of waqf al nuqūd are some of these problems which need to be carefully studied in order to search for remedial measures. Democratisation and decentralization of waqf administration shall be the first step towards the revival of awqāf, followed by a coordinated effort to raise a huge amount out of developed waqf properties for Muslim causes. This must be done through Islamic financial instruments. And a World Waqf Academy may be established to undertake research and propagation of awqāf. Much of what has happened to awqāf during the last century may be attributed to the Westernisation of Muslim societies and consequent dilution of Islamic behavioural norms which traditionally governed the mind of every Muslim. A rebuilding of a true Muslim personality is a pre-requisite for any reformatory effort.

Introduction

Currently, the vast potentiality possessed by awqāf to boost the socio-economic and educational betterment of Muslims all over the world is either never utilized, under-utilised or simply squandered away. Malversation and mismanagement have become synonymous with waqf administration. However, it may be safely assumed that a time will soon come when the full potential of waqf resources will be harnessed to bring about positive improvements in

* B.Sc., LL.B, Ph.D (Aligarh), Professor of Law, Ahmad Ibrahim Kulliyah of Laws, International Islamic university Malaysia.

Muslim minority as well as majority countries and communities throughout the world. There are many problems which confront awqāf today and hinder the proper utilization of their resources in improving the quality of life in the Muslim societies. These problems deserve close attention and a search for possible solutions must be made.

Some of the problems confronting awqāf today include:

- 1 - Impact of colonial occupation on Muslim religious attitude and its reflection on *waqf-i-ahli* (family *waqf*);
- 2 - '*Waqf-i-Alhi*' became the target of hostility resulting into its present pathetic condition;
- 3 - Adverse effects of non-exemption of *waqf-i-ahli* from the operation of certain laws;
- 4 - Excessive involvement of the State in the management of awqāf;
- 5 - Neglect in conducting survey of waqf properties, and
- 6 - The problem of non-recognition of *waqf al nuqūd* in some countries.

After briefly examining the above six issues, an attempt will be made to peep into the future of *waqf* institutions, focussing in particular on the following issues:

- i) Democratisation and decentralization of *waqf* administration;
- ii) Enhancing the economic potentiality of *awqāf* through development of *waqf* properties;
- iii) A search for suitable Islamic financial instruments to finance the development of *waqf* properties;
- iv) Establishment of a World *Waqf* Academy to do research on and to repopularise *waqf* as a preferred mode of Muslim philanthropy.

A. CURRENT WAQF EXPERIENCES

1. Impact of Colonial occupation on Muslim Minds and on *Waqf-i-Ahli*

Colonialism brought to Muslim lands alien culture which regarded pursuit of worldly riches as an end in itself. This materialistic outlook gave very little importance to spiritual aspects. The mind of an average person, including a Muslim, slowly showed signs of an increased readiness to tolerate corruption, deceit, and covert breach of trust as 'facts of life' and as 'unavoidable means' for collecting riches. Acquisition of wealth has been made the focal point of life. As morality is given very little or no place in the domain of law in Western jurisprudence, it has created a mind-set in which immorality is regarded as a non-issue so long it is not regarded as something wholly "illegal" in the eyes of law. This dilution of ethical norm exhibited through the conduct of colonial officials and their successors, presented a very bad example to the common man. For example, the British rule in Bengal began with outright plunder. The English historians of India tell us that "a gold lust unequalled since the hysteria that took hold of the Spaniards of Cortes and Pizarro's age" filled the minds of English colonists⁽¹⁾. The corruption, venality, nepotism and greed for money shown by those early Britishers set a very bad example to the Indian masses. It is significant that one of the Hindustani word which has become part of the English language is "loot"⁽²⁾. This dilution of morals through the commission of actual immoral acts or paying little heed to them or treating them as 'facts of life' happened in every colonized Muslim country, and the phenomenon was not confined to India alone.

Everyone, including Muslims, were affected by this relegation of morality to the background. It was especially unfortunate for Muslims as it eroded their basic concept in which law and morality

(1) Edward Thompson and G.T. Garrett, *Rise and Fulfillment of British Rule in India*, (London, 1953), p. 132.

(2) Jawaharlal Nehru, *The Discovery of India*, (New Delhi, 1974), p. 302 citing K.S. Shevankar, *The Problem of India* (Penguin Special, London, 1940).

were one and the same. Over and above that, Muslims' belief in *shariah* and 'accountability in the world hereinafter' was ridiculed "as orthodoxy". It produced very negative effects. So long a Muslim continued to hold tightly the onto *shariah* and made it the guiding force of his life, he was better protected from many corrupting influences, and things like breach of trust and misappropriation of *waqf* funds rarely occurred to him. With the westernisation of Muslim societies and dilution of the *shariah* based behavioural norms, malversation of *waqf* funds became frequent. No amount of legal regulation and sanctions may be enough to eliminate this mental corruption unless religious morality is re-infused into the minds of Muslims, and self-control as dictated by Islam once again becomes an inbuilt quality of every Muslim's personality, and all of his activities, including the way he manages *waqf* properties start reflecting his new-found conformity with the religious morality.

2 . 'Waqf-i-Alhi' Became the Target of Hostility, Reducing it to Its Present Pathetic Condition

The colonial powers gave the derogatory name of '*mortmain*' (Dead Hand) to *waqf-i-ahli* and generally to all the *awqāf*⁽³⁾ According to Fyzee, who is reflective of the Western thinking:

"....it was already realized at the beginning of the twentieth century, *first by France*, and later in Turkey and Egypt, that the possession of the Dead Handicap to the natural growth and development of a healthy national economy.

In 1830, the French Government took over the '*habous*' in Algeria and later on in Morocco. The economic ruin that it brings about is indicated by the significant phrase 'The Dead Hand'. *Waqf* to some extent ameliorates poverty, but it has also its dark side. When a father provides a certain income for his children and descendants, the impulse to seek education and the initiative to improve their lot gradually decrease. Charitable aid often keeps

(3) See, for example, the Mortmain and the Charitable Uses Act, 1888 (U.K.).

people away from industry, and lethargy breeds degeneration..... it can by no means be said that the institution of *waqf* as a whole has been an unmixed blessing to the community”⁽⁴⁾.

The above observations were in line with the Privy Council’s judgment in *Abul Fata’s Case*⁽⁵⁾ in which *waqf-i-ahli* was held as void, for it was for “the aggradizement of a family”. Fyzee confesses his own personal disapproval of *waqf-i-ahli* and says:

“Speaking for myself, and in the light of actual experience, it is unfortunate that the opinion of Lord Hobhouse in *Abul Fata’s Case* did not prevail in India, although it is contrary to the law laid down by ancient authorities”⁽⁶⁾.

The anti-*waqf-i-ahli* trend of thinking started by the Privy Council found symphathizers among colonized and Westernised Muslims and nations. In Egypt, the Egyptian Law No. 180 of 1952 abolished *waqf-i-ahli*, so did the Syrian Waqf Decree No. 97 of 1949. It was statutorily abolished in United Arab Republic in 1980⁽⁷⁾, by Libya in 1973⁽⁸⁾, by Tunisia in 1962-63⁽⁹⁾, and by Turkey in 1926. In other countries like India, Pakistan, Bangladesh, Myannar, Malaysia, Indonesia, Singapore, family *awqāf* are allowed, but they are neither administratively supervised nor exempted from income tax, wealth tax, estate duty, and other taxes. Consequently, such *awqāf* are left to slowly drift towards a certain death^(9A).

(4) Asaf A.A. Fyzee, *Outlines of Muhammadan Law*, 3rd ed. (Oxford University Press, 1964), pp. 266-267, 268.

(5) *Abul Fata Mohamed Ishak v Rusomoy Dhur Chowdhry* (1984) 22 I.A. 76.

(6) Asaf A.A. Fyzee, *op. cit. supra*, p. 268.

(7) United Arab Republic, *Awqāf* Decree of 1980.

(8) Libyan *Waqf* Law, No. 16 of 1973.

(9) Tunisian *Waqf* Laws 1962-63.

(9A) Also see, David S. Powers, “Orientalism, Colonialism and Legal History: The Attack on Muslim Family Endowments in Algeria and India”, *Comparative Studies in Society and History* (1989), pp. 535-571.

It is unfortunate to abolish *waqf-i-ahli*. Instead of abolishing them it appears far more prudent to devise some reformatory measures to overcome any un-intended negative consequences which may be found to be flowing out of such *awqāf*. The fact that the Qurān and *hadith*⁽¹⁰⁾ give support to the underlying idea of these *awqāf*, qualify them to a better deal instead of a summary execution. The (Egyptian) Law of *waqf* of 1946 which possesses continued relevance today, provides a formula to resurrect these *awqāf* in a changed form. Article 5 of the 1946 Law states as follows⁽¹¹⁾:

A non-charitable *waqf* must be of a temporary nature and shall not extend to more than two generations (*tabaqāt*) of beneficiaries. If a non-charitable *waqf* is made for a specified period, its tenure cannot exceed, sixty years from the date of the *wāqif's* death. The *wāqif* of an existing *waqf* having the power of revocation can make it temporary in either way.

There is a similar provision in the 1980 Kuwaiti Decree on *Waqf*.

In view of the strong religious support that *waqf-i-ahli*, a Muslim who wishes to obey Allah and His Prophet and wishes to create a *waqf* in favour of his own descendants and other family members, should be allowed to do so, if not in perpetuity, then at least for a limited duration, as permitted by Imam Abu Hanifa and Imam Malik.

Thus, in countries where *waqf-i-ahli* has been totally abolished, a more desirable course of action would be to allow their creation for a fixed duration of time. They may also be allowed to enjoy the

(10) See, Sūrah Al Baqarah (2), ayat 177 and 215.

Ṣaḥīḥ Al Bukhāri, Bād al-Waqf: Ṣaḥīḥ Muslim, Kitāb al-Zakāt.

(11) As quoted in, Tahir Mahmood, "Contemporary *Awqāf* Legislation in Muslim Countries and Communities", paper presented at the International Seminar on *Awqāf* and Economic Development, Kuala Lumpur,, 2-4 March, 1998.

same privileges extended to other kinds of *awqāf*. In many countries which disallow creation of *waqf-i-ahli*, a Muslim is allowed to create a trust for the same objects but in conformity with the Rule against perpetuity. Hence, it will be only logical to allow creation of such *awqāf* for a limited duration. In Malaysia, although *waqf-i-ahli* is allowed, yet those who do not wish to tie up in perpetuity their property, go for “*hiba harta*” or a trust which, being governed by secular law of trust, is both revocable and is for a limited period of time. It is given approval by the (Malaysian) Majlis Fatwa Wilayah Persekutuan (Fatwa Council, Federal Territory)⁽¹²⁾, and is said to be quite popular among Muslims in Malaysia.

In countries which allow *waqf-i-ahli* but do not grant them the same privileges and immunities as granted to other kinds of *waqf*, should treat them *at par* with the charitable *awqāf*, because this is how Islamic law treats them, based on the provisions in the Qurān and a *ḥadith*^(12A).

3. Adverse Effects of Non-exemption of ‘*Waqf-i-Ahli*’ from the Operation of Certain Laws

During the long colonial period, Islamic law came to be judicially interpreted in terms of Western legal notions. It is not surprising therefore to find that *waqf-i-ahli* came to be equated with

(12) See, “How Do You Turn Your Assets Into A Lifetime Gift Without a Will”, an informative brochure issued by the Trustee Branch of one of the leading Malaysian bank - Bank Bumiputra Commerce, 6th Floor, Wisma TAS, 50100 Kuala Lumpur, Malaysia.

(12A) See, *Sūrah Al Baqarah* (2), *āyat* 177: “.... it is righteousness.... to spend of your substance.... for your kin...”. Similarly *āyat* 215 of this *sūrah* equates charity with the act of spending money on “parents and kindred”. In *Sūrah Al Naḥl* (16), *āyat* 90, Allah commands us to show “liberality to kith and kin”. In *Ṣaḥīḥ Muslim*, vol. 2, p. 478, the Prophet is reported to have said: “The most excellent *ḍinār* is one that a person spends on his family” (English translation by Abdul Hamid Siddiqi). Chapter 368 of *Ṣaḥīḥ Muslim*, vol. 2 has 11 *ḥadīth*, all dealing with excellence of giving to one’s own family (wife, children, parents) and relatives. The whole of *ḥadīth* literature is full of such *awqāf* were created by the *sahāba* during the lifetime of the Prophet. See, *Ṣaḥīḥ Bukkārī, bāb al-waqf, Ṣaḥīḥ Muslim, kitāb uz zankāt: Tirmizī, Ibn Mājā, Nisāi*.

private trusts and as such were required to pay income tax and other taxes. This practice is still continuing in countries where *waqf-i-ahli* is presently recognized. Equating family *waqf* with private trusts and giving them an inferior position *vis-à-vis* charitable *awqāf* is not correct. In the law of *waqf*, all the kinds of *awqāf* are given similar and equal status, and none is inferior to the other in any respect whatsoever.

Income of religious and charitable *awqāf* is exempted from the payment of income tax, but family *awqāf* are not so exempt⁽¹³⁾. In India, according to section 13 of the Income Tax Act, 1961 income tax is leviable on even that income of *waqf-i-ahli* which is reserved for a charitable purpose. This rule is apparently based on the principle of English law of trust which says that where charitable and non-charitable objects of a trust are mixed, the whole trust becomes non-charitable⁽¹⁴⁾. This rule is peculiar to English law of trust and it has no relevance to the law of *waqf*, which does not have such a rule. It is so because of the basic difference in the concept of "charity" in the two legal systems. Whereas giving to one's own children is regarded as a non-charitable act in the English law, that is, charity never begins at home, it is treated as a perfect example of charity in the Islamic law.

In India, *waqf-i-ahli* properties are subject to estate duty, a tax which is leviable when property of a given valuation owned by a person passes on the death of this person to another. The Bombay High Court imposed this tax⁽¹⁵⁾ on *waqf-i-ahli* notwithstanding the fact that ownership of a *waqf* property does not vest in any human being but in Allah, and it does not pass on the death of a beneficiary to the next beneficiary. The Estate Duty Act, 1953 of India should be suitably amended to grant express exemption to *waqf-i-ahli*.

(13) See for example, sections 11 and 12 of the Income Tax Act, 1961 (India).

(14) See, Hanbury and Maudsley's *Modern Equity*, 13th ed. by J.E. Martin (Stevens & Sons, London, 1989), p.421 seq.

(15) See the Bombay High Court's judgment in *Khatizabai v Controller of Estate Duty*, AIR 1960 Bom. 61.

Rents of many *waqf* properties including *waqf-i-ahli*, which were fixed long ago at ridiculously low rates, cannot be raised to the prevailing market rate due to the Rent Control laws. In India, fourteen states have granted the exemption from this law but only to religious and charitable *waqf* properties⁽¹⁶⁾. *Waqf-i-ahli* properties deserve the same exemption, as these *awqāf* are treated by Islamic law as charitable as any other *waqf*. In other countries, too, grant of such an exemption is very necessary.

4. Excessive Involvement of the State in the Management of Awqāf

Basic responsibility of administering *awqāf* rests with the *mutawallis*, and they are supervised by the *qādis* within whose jurisdiction the *waqf* is situated. This practice is observed by the Muslims right from the times of the Umayyads to the 19th Century. During the period 1839 to 1875, however, a series of statutory measures taken in Ottoman Turkey, particularly in 1843, took away the administration of *awqāf* from the hands of *mutawallis* and took it from the supervision of *qādis* and placed them under the Ministry of *Awqāf*⁽¹⁷⁾. By way of justification for this action, the Turkish government accused the *mutawallis* and *qādis* of corruption and their inability to look after the *awqāf* effectively.

This was the time when colonization of Muslim lands was in full swing outside the Ottoman Empire. Turkey still commanded the respect and veneration of the Muslims in the rest of the world. The Ottoman take-over of the direct control of *awqāf* provided a good excuse to the colonial powers to do the same. This take-over was fully exploited by the British, French, Dutch, Italian and Portuguese colonizers. A pattern of governmental control was established which still continues even after colonial rule has ended long ago. Direct control of *awqāf* was too alluring and empowering a thing for the governments to give up easily. The system is thus continuing everywhere with only a few exceptions.

(16) These States are: Andhra Pradesh, Assam, Bihar, Chattisgarh, Haryana, Jharkhand, Karnataka, Kerala, Madhya Pradesh, Pondicherry, Punjab, Tamil Nadu, and Uttar Pradesh.

(17) John Robert Barnes, *An Introduction to the Religious Foundations in the Ottoman Empire* (Leiden, E.J. Brill, 1987).

It is now generally realized throughout the Muslim World that direct governmental control over *awqāf* is unhealthy. It opens the door to corruption, mismanagement and abuse⁽¹⁸⁾. It is probably better to leave the administration of *awqāf* in the hands of *mutawallis* and the supervision of *mutawallis* in the hands of a representative body of Muslims constituted for this purpose, with an assisting hand of the government. The government may be asked to enact a *waqf* law, and to lay down an administrative set-up for *awqāf* in the country. Muslim masses should be given an opportunity to participate in *waqf* administration to make it truly representative. More details of this Model will be discussed elsewhere in this paper.

Neglect in Conducting Survey of Waqf Properties

Effective supervision and administration of *awqāf* in any country requires information about their number, valuation, income, objects, etc. Unfortunately, much of this information is not available in majority of countries where *awqāf* exist. For instance, a proper survey of *awqāf* has yet to be conducted in Pakistan, Bangladesh, Sri Lanka, Malaysia, Maldives, Myanmar, Indonesia, and nearly every country in the Middle East and Africa, not to mention Western countries where a large number of *awqāf* exists.

In many of these countries, sometimes the only way to know a rough estimate of the number of *awqāf* is through the revenue records in the land record offices, or through voluntary declarations made by the *mutawallis*, or the self-evident nature of the *waqf*, like a mosque, graveyard, *dargah*, etc.

Left to themselves, persons administering *awqāf* generally tend to hide the *waqf* nature of these properties, and make them to appear as if these were their personal properties. The real worth and true income of such properties are generally concealed to allow

(18) See, Omar Altalib, "Problems and Prospects Facing the Muslims: The Case of *Waqf* (Islamic Foundations)", paper read at the Annual Convention of the Association of Muslim Social Scientists, Nov. 28-30, 2000 Rochester, New York (unpublished).

misappropriation. Thus, unless full information about such properties is made available, it is not possible either to suggest any comprehensive administrative or developmental scheme. Example may be given of India where large scale concealment of *waqf* properties in 1960s put their total number to 100,000.⁽¹⁹⁾ But by 2002, survey of *waqf* properties conducted throughout the country revealed many concealed properties and their number shot up to 332, 724, and the survey is still not complete⁽²⁰⁾. Similar may be the situation in many other countries.

Provisions regarding survey of *awqāf* contained in the (Indian) *waqf* Act, 1995 provide a good model of statutory provisions and rules that may be adopted by any country wishing to conduct a systematic survey of *awqāf*. The case law on the provisions of the 1995 Waqf Act as well as on the now repealed *waqf* Act, 1954 provide a wealth of information about survey work as contained in the Indian law reports.

6. The Problem of Non-Recognition of *Waqf al-Nuqūd* in Some Countries

The two great Hanafī jurists, Imam Muhammad and Abu Yusuf, differed on the validity of *waqf* of movables. Imam Muhammad approved such *awqāf* but Abu Yusuf subjected them to the rider of conformity with custom and usage of the place. Malikis, Shafiis, Hanbalis and Shias are in agreement with Abu Yusuf⁽²¹⁾. What was permitted in the matter of movables got

(19) Syed Khalid Rashid, *Waqf Administration in India*, (Vikas Publishing House, New Delhi, 1978), p.i.

(20) Syed Khalid Rashid, "Islamic Financing Techniques for the Development of *Awqāf*: with Special Reference to India", IIUM Law Journal Vol. 10, No. 2 (2002), p.179 at 217.

(21) See, generally, Hassan A. Latiff Shafie, "Juridical Issues in the Management of *Awqāf* and Economic Development, Kuala Lumpur, 2-4, March 1998. See, also, Murat Cizakca, "Awqāf: In History and Implication For Modern Islamic Economics", paper presented at International Seminar on *Awqāf* and Economic Development, 2-4 March, 1998, Kuala Lumpur.

extended in due course to *waqf* of cash (*waqf al-nuqūd*)⁽²²⁾. But controversy continued in later centuries on the validity of cash *waqf*. The main objections were based on the ground of difficulty in meeting the requirement of perpetuity in case of money in cash, and the difficulty in investing the money to earn profit without any involvement of *ribā* and ensuring, at the same time, the safety of the corpus. In 1905, the Privy Council gave its verdict against the validity of cash *waqf*⁽²³⁾. The effect of this judgment was short lived in India, because of a provision in the *waqf* (Validating) Act, 1913, which allowed the *waqf* of “any property”. The expression “any property” was interpreted to mean *waqf* of money in cash, among other things. As this enactment is operative in India, Pakistan, Bangladesh and Myanmar, therefore, such a *waqf* may be created in all these countries. But in some of the Middle Eastern countries, *waqf al-nuqūd* was never accepted due to the fear of *riba*⁽²⁴⁾. However, in Egypt⁽²⁵⁾, Iraq⁽²⁶⁾, Syria⁽²⁷⁾, Iran⁽²⁸⁾ and Turkey⁽²⁹⁾, cash *waqf* are allowed. It is also allowed in Singapore⁽³⁰⁾. Imam Zufar’s *fatwa* back in the 8th century that the corpus of the cash *waqf* should be invested through *mudarabah*, and the profit be used for the objects of dedication still hold good in principle. They only care which is required to be taken at all times is to meticulously avoid *riba* and to show averseness to “undue risks”. However, as no

(22) See, Syed Ameer Ali, *Mohammadan Law*, vol. 1 5th ed. By Raja Said Akbar Khan (Lahore, n.d.), p. 261, citing *Radd al Muhtār*, vol. 3, p.578 and *Fath ul Qadīr*, vol.2, p.636.

(23) *kulsom Bibee v Golam Hossain* (1905) 10 CWN 449.

(24) See, Murat Cizakes, *supra* n. 21. See also, Mandaville, “Usurious Piety: The Cash *Waqf* Controversy in Ootoman Empire”, *IJMES*, vol. 10, No. 3 (1979), pp. 289-308.

(25) G. Baer, *Studies in the Social History of Modern Egypt*, (University of Chicago Press, 1969), p. 80.

(26) In Iraq there is a *fatwa* permitting them, see, *supra* n. 24 at 15.

(27) Bruce Masters, *The Origins of Western Economic Dominance in the Middle East* (New York University Press, New York, 1988), p. 162.

(28) Cabinet Decree of May 17, 1986, *supra* n. 24 at 15.

(29) Murat Cizakca, “Cash *Waqf* of Bursa: 1555-1823”, *JESHO*, vol. 38, No. 1995, pp.313-355.

(30) *Annual Report 1995*. Majlis Agama Islam Singapore, pp. 54-55.

business activity could totally expunge the element of risk, therefore, *mudarabah* is also subject to the same amount of risk as any other business activity. The *wāqif of a cash waqf* presumably takes into consideration this 'risk factor' while creating a cash *waqf*.

In the present world where money in cash far exceeds the landed property, it is convenient for a *wāqif*, both Muslim and non-Muslim, to create *waqf* of cash that he may possess. In all the Western countries, where Muslims are now domiciled, they are allowed to create trust of their money under the law of trust in force in these countries. This form of settlement by Muslims is becoming more and more common. As doing so does not infringe any principle of Islamic faith, so long the object of the trust remains *sharī'ah* compliant, it will only be logical to allow Muslims, wherever they might be, to create similar type of *waqf*, on the ground that it has already become customary for them to create similar trusts. With the increasing availability of Islamic banking and Islamic finance, investment of cash in *mudārabah* or in an Islamic manner has become much easier. Cash *waqf* should therefore be freely allowed throughout the Muslim communities and countries. Doing so may give a fresh spurt to the creation of new *awqāf*, a process which has considerably been slowed down during the last one century.

B. FUTURE OF WAQF INSTITUTIONS

For Muslims, *waqf* is a unique expression of philanthropy which is both worldly and divine. For numerous reasons, not even a few of which have been mentioned in this paper, *waqf* has lost its pre-eminent position as an expression of Muslim philanthropy. A detailed analysis of these causes may probably help in chalking out the course of future action. Some of the remedial measures necessary to rectify these problems may include the following:

1) Democratisation and Decentralisation of Waqf Administration

Governmental control of *awqāf* must come to an end. Inefficiency, slowness in decision making process and lack of enterprise have become well known facts of governmental *waqf*

administration. The time has come to democratize and decentralize *waqf* administration by re-emphasizing the role of *mutawallis* and by putting in place an administrative set-up in which there is total involvement of Muslim public and professionals.

The kingpin of *waqf* administration will still be the *mutawalli*, appointed within the framework of *shari'ah* provisions. In order to supervise the working of *mutawalli*, and also to undertake developmental and reformatory work, a five-tier system is suggested here to be put in place in countries which may have a *waqf* legislation to put this scheme in operation. It will have a Central *waqf* Board for the whole country, a State *waqf* Board for each State and a District *waqf* Board for each district in the State, a Tehsil *waqf* Committee for each *Tahsil* in a district and a Village *waqf* Committee for each big village (or group of small villages) in each *Tahsil*. In case of metropolitan cities, village and *tehsil* committees would be irrelevant and shall be replaced by Area Waqf Committees, dividing the metropolis into 'areas'.

Membership of the Committees must be through elections and on a purely voluntary basis. No remuneration shall be paid to any member of the three committees (village, *tahsil* and district) to eliminate accusations and suspicions of corruption. Election and decentralization of the administrative set-up will bring democratization and decentralization.

The details of these measures shall be contained in an enactment to be passed by the government, and the Rules made thereunder.

Composition and Functions of the Suggested Waqf Committees and Boards.

Village Waqf Committees (VWC).

Each VWC shall consist of 10 members to be elected for a term of 5 years from amongst themselves by the Muslims of every village having a population of 500 Muslims or more, or a group of small villages.

The functions of such a committee shall be to keep a watchful eye on the *awqāf* situated in the village and to redress any wrong on the strength of social pressure and whatever small powers are given to these committees under the statute, and to report any wrongdoings to the higher committee.

Tehsil Waqf Committee (TWC)

TWC shall consist of 15-20 members elected for a term of 5 years by members of all the Village *waqf* Committees in a *tahsil* from amongst themselves. The elected members will thus have a dual capacity: to be a member of VWC and TWC at the same time. In this way the TWC will have full knowledge of the happenings in the various VWC's. Meeting dates of VWC and TWC may be fixed in such a way as to avoid clashes so that the elected member may be able to attend meetings of both the Committees.

TWC shall supervise the working of all the VWCs and try to solve any problem faced by them; it shall hold regular meetings with VWC's; and carry out any instructions received from the higher committees.

State Waqf Board (SWB)

Every State shall have a statutory SWB consisting of 15 elected and 4 co-opted members who hold the membership for a term of 5 years. The 15 members shall be elected by the members of the following electoral colleges from amongst themselves: *One* member to be elected by the Muslim Members of Parliament belonging to the State; *two* members to be elected by the Muslim members of the State Legislative Assembly; *three* members to be elected by the Muslim advocates of the State; *three* members to be elected by Muslim religious and social organizations of the State; *three* members to be elected by the academic staff of prominent Muslim religious academic institutions in the State; and three members to be elected by the Muslim members of the academic staff of the Universities or colleges of higher learning situated in the State.

All the 15 elected members shall co-opt 4 more members: *two* out of the retired Muslim judges of the Supreme Court and High

Court who belong to the State, and *two* retired Muslim civil servants belonging to the State.

The SWB shall have its own administrative staff, headed by a secretary, to run the day-to-day administration of the Board and discharge its statutory duties. SWC shall intervene in *waqf* matters only where it is extremely necessary to do so, leaving *mutawallis* and the VWCs, TWCs and DWCs to do the job. The SWB shall keep a *muhtasib*-like watchful eye on the various *waqf* officials; shall make efforts to develop *waqf* properties; must strive to educate public opinion about the beneficial role of *awqāf* in community development; and to educate the *mutawallis* of the sanctity of the office they are holding and to train them to be better *mutawallis*.

Central waqf Board (CWB)

There shall be a statutory CWB consisting of 20-30 members (depending on the number of SWBs in the country), *one* member to be elected by the members of each SWB from amongst themselves, and all the members so elected shall co-opt 6 members: *two* representatives of Muslim religious organizations of national stature; *one* Muslim lawyer of the Supreme Court; *one* retired Muslim civil servant; *one* Muslim professor of law; and *one* Muslim economist.

The CWB shall have its own administrative staff to be appointed by the CWB to run the day-to-day administration and discharge the statutory duties. The Board shall supervise the working of the SWBs; undertake the development of *waqf* properties and to procure funds for this purpose; to undertake research and training; and to advise the government in matters of *waqf*.

The expenses of the SWBs shall be met out of the 8% contributions deducted from the income of every *waqf* in the State and that of CWB out of 2% similar contribution deducted from every *waqf* in the country.

Set-up in case of Western Countries

The administrative set-up for *awqāf* management in the European countries, U.S.A., Australia and New Zealand, etc. need

not naturally be that elaborate. As there may not be a statute to regulate *waqf* affairs, Muslims may therefore have to devise a voluntary scheme for keeping a watchful eye on the *mutawallis*. Details of this scheme may be finalized in a national conference especially convened for this purpose. With the help of expert legal opinion, such legal actions may be identified and given wide publicity that may be taken against various types of deviant behaviours on the part of *mutawallis* effect. However, emphasis should remain on amicable settlement and prevention, and methods such as ex-communication and public censure, may be found to be quite effective. Measures must be taken to increase the general awareness of religio-ethical dimension of *waqf* administration.

KAPF Model for Waqf Development

Those countries and *waqf* organizations wishing to give emphasis on the development of *waqf* properties and to launch various welfare schemes, will find the KAPF model quite interesting and worth emulating.

Kuwait *Awqāf* Public Foundation (KAPF) does not compete with any *waqf* institution. It rather becomes partner of such an institution for any developmental activity that the institution wishes to undertake. KAPF has devised several minimum risk investment schemes and has collaboration with certain specialist financial institutions which may be of use in developmental work.

KAPF was established in November, 1993 by an Amiri Decree which delegated the powers of the then Ministry of *Awqāf* and Islamic Affairs to KAPF, giving it an independent status in decision making. KAPF has established 'Waqf Funds' and 'Waqf Projects', and the three of these act as a single entity⁽³¹⁾.

'Waqf Funds' finances projects aimed at increasing the income of existing *waqf* institutions. 'Waqf Funds' is made up of a specified

(31) See, Dhahi Al Fadhli, "Case Study: Kuwait" paper presented at the International Seminar on *Awqāf* And Economic Development, held in Kuala Lumpur, 2-4 March, 1998, and Abdul Mohsen M. Ali Othman and Dhahi Al Fadhli, "Role of Kuwait *Awqāf* Public Foundation in Promoting *Awqāf*", in Syed Khalid Rashid (ed.), *Awqāf Experiences in South Asia* (Institute of Objective Studies, New Delhi, 2002), pp. 249-262.

percentage of the income of all the charitable *awqāf* in the country, any *waqf* that is created in favour of the Funds, or donations made to it. Rules and Regulations govern the utilization of Waqf Funds. KAPF provides expert advice and infrastructural facilities.

‘Waqf Project’ identifies possibilities for and then extend facilities to any *waqf* institution which wishes to participate in any developmental project. Waqf Projects has already put in place such useful schemes as ‘Voluntary Work Project or Time *Waqf*’ where persons dedicate their time for doing voluntarily something; Project to Avoid Marital Discord’ and another project to educate newly married couples of their rights and duties, and Project on Islamic Developmental Studies.

KAPF endeavours to find new ways for the effective management of *awqāf* by using information technology and other modern means. It tries to find and develop modern *shariah* investment instruments and means to minimize risk in *waqf* investments. KAPF has successfully applied these means in reviving and regenerating several unproductive *waqf* institutions. It has invested cash in short-term investments and project participation, and managed investments of third parties.

ii) Increasing the Economic Potentiality of *Waqf* through Development

With fast urban development and surge in economy, sometimes an ordinary piece of land or property dedicated as *waqf* long ago may become valuable prime property due to its location in a posh or developed locality that was once an ordinary suburb. The enormous economic potentiality possessed by these properties make them worth developing. The average rate of return on investments made on the development of such properties comes to a high figure, making it a lucrative prospective venture. Example may be given of the 100 *waqf* properties developed in India recently. The average annual rate of return comes to 31% with the highest rate touching 48% and lowest 22%⁽³²⁾. In a North African country, the rate of

(32) Syed Khalid Rashid, “Islamic Financing Techniques for Development of *Awqāf*: With Special Reference to India”, (2002) *International Islamic University Malaysia Law Journal* (IIUMLJ), vol. 10 (2002), p. 179 at 208.

return on a big project of urban development of *waqf* lands came to 19.42%. In a Gulf country, development increased the revenue of a *waqf* property by 69%, fixed assets by 120% and capital assets by 79%⁽³³⁾.

As thousands of *awqāf* possess the requisite potentiality for such development, the economic benefit it may bring would be substantial. Such development undertaken on a global level may provide a stable source of vast income that may be spent on the various needs of Muslims.

iii) Search for Suitable Islamic Financial Instruments for the Development of *Awqāf*

Two Islamic financial instruments, *istiṣnāʿ* and *mushārakah mutanāqīṣah*, out of many such instruments, appear to be best suited for the purpose of financing the development of *waqf* properties⁽³⁴⁾.

Istiṣnāʿ is suitable for situations where a bank or finance company is willing to advance money for the construction work but either itself undertakes to take up construction or due to lack of expertise gives it to a third party, with whom it deals directly. However, the primary responsibility for construction quality, time schedule compliance, etc. remains with the financier. This is known as *istiṣnāʿ ʿala istiṣnāʿ* (back-to-back *istiṣnāʿ*). In this, the financier feels more assured of proper utilization of the advanced amount. On the other hand, the *waqf* institution may also be equally happy because it too may have no expertise in construction work. Thus, the scheme finds satisfaction of both the parties.

(33) Mahmoud A. Mahdi, "Enhancing The growth & Performance of *Awqāf*: The IDB Experience", in Syed Khalid Rashid (ed), *Awqāf Experiences in South Asia*, (New Delhi, 2002), p. 233.

(34) Other instruments include *hukr*, *mursad* loan, *ijāra*, *mudārabah*, *murābaha* and *waqf* bonds. See, Syed Khalid Rashid, "Islamic Financing Techniques for Development of *Awqāf*: With Special Reference to India", (2002) 10 IIUMLJ 179; and Ausaf Ahmad, "Contemporary Practices of Islamic Financing Techniques", *Islamic Economic Studies*, vol. 1, No. 2 (June, 1994/1415 AH), p. 15.

Muskārah mutanāqishah (diminishing partnership) is a special type of partnership between a *waqf* institution needing funds to finance the development of its property and the financier who is ready to advance the money for this project. As a partner, the share in the ownership of the developed property acquired by the financier slowly diminishes with the equity interest of the financier in the developed *waqf* property being purchased by the *waqf* institution, under an agreement between the two, so that the full ownership of the developed *waqf* property ultimately stand fully transferred to the *waqf* institution. As temporary vesting of the whole or part of *waqf* property under these circumstances is allowed by the shariah, this financial instrument appears to be suitable for use in financing the development of *waqf* properties⁽³⁵⁾.

iv) Establishment of a World Waqf Academy

A World Waqf Academy may be established to undertake researches on *waqf* and *waqf* related matters and to organize regular Conferences and Seminars on the subject. The Academy may be a part of and financed by the World Waqf Foundation which has been established in 2002 under the umbrella of Islamic Development Bank. Presently research and training form part of World Waqf Foundation programme, but in view of the importance of research and training it deserves a more focussed attention could be given by entrusting this duty to a separate Academy. Devising measures for re-popularising *waqf* as a mode of Muslim philanthropy should also be made the responsibility of this Academy.

CONCLUSION

Awqāf resources constitute a major component of societal wealth of Muslims. The institution of *waqf* belongs to non-

(35) IDB Task Force Report on Appropriate Mode of Financing for the Development of *Awqāf* Properties, IRTI, IDB, Jeddah, 1987, cited in Tariqullah, Boualem and Khan, Economics of Diminishing *Musharakah*, Research Paper No. 31, IRTI, IDB, Jeddah (1416 AH), pp. 15-16 see also, Nicholas Dylan Ray, *Arab Islamic Banking and the Renewal of Islamic Law* (Graham and Trotman, London, 1995), p. 59.

governmental sector, then its control must rest with the public. As the aim of *waqf* is to improve the quality of life and welfare services, it deserves protection, preservation and propagation.

Muslim minds need to be re-oriented to the beauty and benefits of *awqāf*, their divine roots, their economic potentiality and their importance as a means to help one's own family and that of others and the society at large.

This article has endeavoured to identify some of the challenges facing *awqāf* today, and also to look at some of the possible remedial measures, but the task is big and needs continuous attention of scholars and professionals to bring about the needed reforms and improvements. The efforts which are now being made by institutions like Islamic Development Bank, Kuwait *Awqāf* Public Foundation and World *Waqf* Foundation, give some hope that *inshā Allah* *awqāf* may soon once again become major instruments to achieve Muslim social welfare and progress and will reclaim its position as a popular expression of Muslim philanthropy.

La Fondation Publique des Awqaf du Koweït; L'expérience et ses perspectives

Dr. Abdallah Tarak^(*)

Cet article essaye d'exposer les principales actions menées par la Fondation Publique des Awqaf du Koweït depuis sa création en 1993, et d'analyser les conséquences socio-économiques des diverses orientations adoptées par cette institution. Une attention particulière sera mise en relief pour les perspectives que l'expérience offre à la participation du waqf dans les schémas du développement humain.

Introduction

L'idée d'une «participation civile» dans les affaires de «la cité» n'est pas étrangère à l'histoire sociale des pays musulmans. Non seulement les pratiques individuelles de solidarité faisaient partie de la vie courante et reflétaient entre autres la pesanteur sociale de cette idée, mais surtout elles ont été incarnées dans plusieurs «sous systèmes» qui l'ont institutionnalisé comme partie intégrante de la dynamique sociale⁽¹⁾.

Telles étaient les awqaf dans l'histoire musulmane: un sous système, usant de toute les modalités juridiques, économiques et administratives. L'interférence des *awqaf* dans le social se faisait à l'aide d'une construction multidimensionnelle où l'économique, le politique et le religieux se combinaient pour offrir un modèle qui a pu marquer la vie sociale des musulmans durant de long siècles.

* *Conseiller scientifique, Fondation Publique des Awqaf du Koweït.*

(1) Voir par exemple: Denoix, Sylvie (éd). Biens communs, patrimoines collectifs et gestion communautaire dans les sociétés musulmanes, Édisud, France, 1997.

Néanmoins, malgré cette position (ou peut-être grâce à elle) le mode du waqf n'a pu s'échapper des grandes problématiques qui avaient secoué le mode sociétal musulman, et il a par conséquent fait face à des questions liées à la viabilité de son sous système dans les fonctions qu'il s'est assigné. En témoigne les demandes multiples tout au long de l'histoire musulmane pour reformer ce secteur. Ainsi l'historien pourrait remarquer que ces demandes étaient très vigoureuses durant la période allant de la deuxième moitié du 19^{em} siècle jusqu'au premier quart du 20^{em} siècle, particulièrement avant l'arrivée de la colonisation européenne.

Dans la suite de ce contexte historique, l'administration coloniale des pays musulmans conquis a eu des conséquences néfastes sur les awqaf. Non seulement sa politique avait détruit violemment et systématiquement les composantes socio-économiques de ce qu'elle appelait « le système traditionnel », mais surtout elle a fini par arrêter les ébauches des projets de réforme qui se dessinaient avant l'arrivée coloniale. Les changements des stratégies nationales dans les divers pays conquis et l'orientation quasi unanimes des efforts vers la « libération politique » finissent par transférer les dossiers de réforme à l'après colonisation!

Une fois acquise, la libération politique se conjugait désormais avec les nouveaux changements structuraux qui ont affecté les sociétés musulmanes. Les priorités ne sont plus celles fixées avant la colonisation. La « modernisation » et plus tard le « développement » seront le leitmotiv du discours national post-colonial. Néanmoins, l'histoire récente avait montré que ce changement de discours n'écartait pas définitivement la demande de réforme de anciennes institutions, mais plutôt qu'il la transférait.

Après l'échec cuisant des modèles développementalistes tentés depuis les années cinquante, et le choix résolu et quasi-unanime des recommandations centrées autour des politiques de l'ajustement structurel (PAS), une nouvelle étape socio-économiques s'annonçait avec la fin des années 90, avec un objectif particulier: le désengagement progressif de l'Etat des affaires économiques au profit du secteur privé qui devrait, selon le tenants de cette thèse, reprendre sa place en tant que promoteur de l'économie et de

l'équilibre de la société. Socialement, ceci impliquait un retrait de l'Etat de la scène socio-économique c'est-à-dire de tout ce qui touche aux questions de justice sociale, du rapport entre les différentes couches de la société, et de la mise en œuvre des programmes de répartition adéquate de la richesse nationale.

Si le désengagement de l'Etat -quinze ans après son déclenchement officiel⁽²⁾- est devenu une réalité, l'équilibre social prôné par les recettes des PAS, est plus que nuancé. Pour palier à cette nouvelle situation, ces années verront l'émergence du débat sur le rôle de la société civile, des associations non gouvernementales, du troisième secteur, etc.... dans le développement social.

Le cas du Koweït

Les pays du Golfe ont cette renommée d'être «un cercle de pays riche». Une image liée directement au «phénomène pétrole» puisque avant son apparition, ces pays, à l'exemple du Koweït, avaient un poids stratégique relativement faible. A cette époque, l'économie Koweïtienne se basait essentiellement sur les activités de pêche, du commerce lointain, et de l'élevage. Les formes de solidarité sociale répondaient aux besoins qu'exprimait les conditions socio-économiques de la société. A côté des pratiques individuelles de charité, les documents historiques indiquent que les fondations des awqaf remontent au dix-septième siècle⁽³⁾. Il est évident que durant cette période la gestion des awqaf constitués, était de caractère privé et à un certain niveau communautaire.

(2) A la fin des années 1970, les Institutions financières internationales ont commencé à promouvoir les politiques d'ajustement structurel sur la base d'une théorie économique qui considère que le libre marché doit présider à la fourniture de biens et de services; la concurrence devant assurer l'utilisation la plus efficace des ressources ainsi que des bénéfices plus importants. Le mécanisme de ces PAS implique l'exécution de normes précises dont la dévaluation de la monnaie locale, la promotion des exportations au dépend des cultures vivrières, la libéralisation du commerce, la réduction des restrictions imposées aux investissements étrangers, etc. L'ensemble des pays arabes s'est associé successivement avec plus ou moins de réussite. (voir à cet égard: Kan'an, Tahir Hamdi: The social effects of economic adjustment on Arab countries, International Monetary Fund, 1997.)

(3) Il s'agit du waqf constitué en 1696 A.D au profit de la mosquée Al- Bahr au centre du Koweït.

Ce n'est qu'avec l'apparition du pétrole que « la grande transition » commençait. Durant les années 1950-1960 le Koweït passe d'un petit émirat à un Etat possédant des ressources financières relativement importante, qui se fixe comme objectif principal: la modernisation qui nécessite, selon ses tenants, une centralisation des pouvoirs économiques et politiques.

La modernisation du Koweït s'est bâtie exclusivement sur l'Etat, et jouissait d'une dominante ressource: le pétrole qui constituait depuis 1961 plus de 90% des exportations du pays et par conséquent l'essentiel des recettes budgétaires. De grands efforts ont été depuis réalisés. Dans les domaines d'éducation, de santé, et d'infrastructure, le Koweït a pu marquer des avancées importantes: la gratuité des services dans plusieurs secteurs à l'exemple de l'éducation et de la santé, de l'assistance sociale aux moins favorisés et même aux couches moyennes, et surtout de la prise en charge officielle de la question d'emploi de la population active par un recours systématique à la création de nouveaux postes dans le secteur public.

Dans ce modèle, c'était toujours l'Etat qui patronnait l'effort de modernisation. Il faut attendre 1981 -date du premier déficit budgétaire-, pour déceler les limites de ce système. Les recettes de l'or noir ne parviennent plus à couvrir la totalité des ambitions et à garder le même niveau de services sociaux fourni par l'Etat. Cette situation atteindra son paroxysme avec l'invasion iraquienne en 1990 qui avait alourdi la facture étatique et fragilisé ses possibilités financières.

La combinaison de ces facteurs, avait mis l'accent sur l'urgence d'une réforme socio-économique qui aura la tâche de trouver des solutions adéquates à la dépendance de la quasi-totalité de la population en vers l'Etat. Dans cette direction, l'appel du gouvernement koweïtien à une politique de privatisation⁽⁴⁾ avait

(4) Un document intitulé «Document de réforme économique et financière» a été présenté par le gouvernement au parlement Koweïtien en janvier 1999 qualifiant la situation de critique et invitant les membres du parlement à soutenir la politique du gouvernement pour réussir des mesures de privation fixée comme la seule solution compatible avec les défis internes et externes auxquels désormais fait face le Koweït.

démontré une orientation officielle pour réformer le secteur public, et faire associer le secteur privé et quelques composantes de la société civile dans le développement du pays dont la charge incombait totalement à l'Etat.

Le secteur des awqaf

Touchée par la dynamique de modernisation, la gestion de ce secteur qui était jadis privée ou communautaire devrait selon la nouvelle logique passer à l'Etat. En 1949 la «Direction Générale des Awqaf» (DGA) fut créée, et chargée de la gestion des awqaf principalement ceux des mosquées, et ceux constitués au profit des nécessiteux. En 1962 «le Ministère des Awqaf et des Affaires Islamiques» (MAAI) remplace la DGA et se charge en plus de ses fonctions précédentes de l'investissement des biens waqf en vue d'en augmenter le capital, et de mieux servir les couches désignées par les constituants.

Trente ans après la création du MAAI, les objectifs fixés ne sont pas atteints. Non seulement, le volume des awqaf est resté quasi stable, mais surtout que les domaines auxquels les constituants fondaient leur awqaf sont en grande majorité pris en charge par l'Etat (cas des mosquées, des nécessiteux, etc.).

Dans le contexte de la décennie 90, tant au niveau interne (répercussions de l'invasion iraquienne), qu'au niveau des conséquences de la conjoncture économique internationale (des cours très bas du pétrole), une orientation de réforme se dessine au Koweït⁽⁵⁾ avec pour leitmotiv l'encouragement de la participation du secteur privé et des associations non gouvernementales dans la gestion du pays.

Au niveau des awqaf, un décret Emiri a été promulgué en 1993 faisant état de la création d'une nouvelle entité: la Fondation Publique des Awqaf du Koweït (FPAK), « organisme gouverne-

(5) Sur l'échec du modèle économique rentier au Koweït voir: Muhammad A. Al-Omar: *Why the Rentier Economy Fails in Economic Development. The case of Kuwait*, (Ph.D Claremont Graduate University, California, 2002).

mental indépendant» chargé -à l'exception de l'administration des mosquées- des mêmes tâches qui étaient propres au ministère des awqaf. Le décret clarifie quatre orientations principales qui constituent le fondement de la création de la FPAK :

(a) La gestion des biens waqf

Une telle gestion devra être réalisée par l'usage de toutes les modalités administratives, comptables et financières afin de promouvoir le développement de ses biens, et d'en assurer la distribution du profit généré par leur investissement compatible avec les vocations légales des constituants.

Le décret stipule que la FPAK devient le Nàzir (administrateur) des awqaf dont les constituants la désignent délibérément comme tel, ceux reliés aux mosquées, ceux qui n'ont pas d'administrateur (généralement de très anciennes awqaf ou que les conditions de leurs constituants ne sont plus valables), et enfin les awqaf pour qui les constituants ont désigné une administration auquel la FPAK s'est associée selon les termes de la loi.

Dans ce domaine, la particularité de la FPAK reste, du moins théoriquement, sa qualité d'organisme «gouvernemental indépendant» qui lui confère une certaine liberté comparativement aux autres administrations officielles. Au-delà de son caractère formel, ce type de management est manifestement un avantage qui joue en faveur des awqaf dont la gestion nécessite une souplesse administrative et juridique capable de faire rapprocher les éventuels constituants aux besoins exprimés par les individus, les couches sociales, ou même la société en tant qu'entité à part. Pour réussir cette «autogestion» la FPAK a élaboré une stratégie de travail consistant à privilégier la spécialisation dans les domaines reliés à l'investissement des fonds du waqf et de la distribution de sa rente.

(b) l'investissement des fonds

Les fonds des awqaf restent majoritairement constitués en valeurs immobilières. La richesse des awqaf suit en quelque sorte la nature de l'économie. L'investissement immobilier se limitait à la collecte de la rente, la réparation des édifices endommagés, ou la

substitution d'un immeuble en ruine par un nouveau. La stratégie de la FPAK consistait à inciter les individus et les entreprises à constituer des awqaf monétaire afin de donner une souplesse dans la gestion des profits enregistrés pour répondre aux divers besoins qu'expriment les franges de la société.

En ce sens, la FPAK avait adopté une stratégie qui distingue entre l'investissement immobilier et l'investissement monétaire, tout en rattachant leur gestion à deux entités administratives différentes.

La gestion du capital immobilier s'effectue à travers à des agences spécialisées dans la gérance immobilière. Quant au capital monétaire, son investissement s'effectue soit à travers des placements dans des portefeuilles diversifiés et à moyen risques, soit aussi à travers des participations dans le capital des sociétés anonymes par action.

Pour donner une idée sur l'investissement du capital des awqaf selon la répartition sectorielle, le tableau suivant⁽⁶⁾ montre les chiffres réalisés durant l'année financière 2000-2001:

Tableau 1
Répartition du capital investi (2002-2001)

	Valeur du capital (dinar Koweïtien)	pourcentage
immobilier	71447083	57%
financier	44943058	35.8%
service	9009847	7.2%
industriel	32482	-
total	125432470	100%

La stratégie d'investissement du capital des awqaf avait permis une augmentation de l'assiette du capital qui passait de 103600000 (K D) en 1994 à 124000000 (KD) en 2002. Le profit annuel brut s'est conséquemment développé en enregistrant une hausse de

(6) Rapport statistique annuel de la Fondation Publique des Awqaf du Koweït, 2001, publication FPAK, Koweït, 2003, page 56.

50.74% par rapport aux résultats obtenus en 1995. (La valeur monétaire du profit passe de 10435978 (KD) en 1995 à 15807648 (KD) en 2002)⁽⁷⁾.

(c) la distribution de l'usufruit

Cette tâche forme en fait le cœur des activités menées par la FPAK, et dont dépend toute sa structure. Tout en l'accomplissant dans le cadre des statuts légaux des awqaf et par conséquent le respect stricte des conditions fixées par les constituants, la FPAK vise l'institution d'une dynamique à travers laquelle la redistribution exerce des effets d'entraînement et joue un rôle socio-économique qui dépasse la simple aide. Afin de réussir ce pari, deux axes de travail ont été élaborés:

(i) Le premier concerne l'introduction de nouveaux modes de distribution. En tenant compte de la grande diversité des domaines auxquels les constituants pourraient mobiliser des fonds, et en encourageant les awqaf monétaires, la FPAK avait introduit deux nouveaux modes de distribution destinés à servir les divers besoins sociaux: les «caisses» et les «projets».

Classifiés en quatre principaux domaines, les caisses ont cette particularité de s'intéresser à des besoins de société en ce sens qu'elles servent «les domaines d'utilité publique»:

- la caisse des awqaf pour la prévenance des mosquées.
- la caisse des awqaf pour le Saint Coran et les sciences coraniques.
- la caisse des awqaf pour la promotion médicale.
- la caisse des awqaf pour le développement scientifique et social.

Quant aux «projets des awqaf», ils ont attiré à des besoins individuels qu'ils soient immédiats ou non. Leur mode de gestion et patronnée par «une commission de projets» qui sélectionne les demandes soumises par les organisations gouvernementales et non

(7) Voir les Rapports Annuels 1995, 2002. (Publication FPAK, Koweït).

gouvernementales, et accorde l'aide selon des critères précis. A côté des aides courantes cinq projets ont été installés et fonctionnent de façon permanente:

- «projet de l'étudiant»: à travers lequel sont accordés les assistances financières aux étudiants qui nécessitent de l'aide pour achever leur scolarisation.
- «Centre de l'autisme» spécialisé dans le développement d'habiletés interpersonnelles chez les personnes présentant un syndrome autistique, ainsi que la promotion et la défense des droits et intérêts des personnes autistes.
- «Les mosquées patrimoine»: veille à la sauvegarde des très anciennes mosquées, de la conservation de leur architecture originale et de leur maintenance courante.
- «Projet des proches et des descendants des constituants» en guise de reconnaissance de la générosité des fondateurs et dans l'esprit de veiller au respect de leurs conditions relatives aux awqaf d'orientation privée ou familiales.
- «Sira prophétique et du Hadith» un nouveau projet qui consiste à édifier un centre médiatique usant de la technologie pour retracer la vie du prophète, ses œuvres et ses réalisations.

(ii) Le deuxième axe s'intéresse à encourager la participation de la société civile dans la gestion de distribution de la rente des awqaf. Dans ce sens quelques initiatives ont été adoptées. Chaque «caisse» est dotée d'un conseil d'administration réunissant des représentants de la FPAK et des associations non gouvernementales. Conséquence de l'autonomie administrative, le conseil d'administration de chaque caisse a la charge de la planification des projets auxquels cette distribution sera allouée. Plus encore, la FPAK avait adopté dans sa stratégie⁽⁸⁾ l'implication active des ONG dans la gestion de la rente des awqaf.

(8) Le document est intitulé «vision stratégique pour la promotion des awqaf 1996-2000». Il est actualisé récemment dans une deuxième version pour la période 2003-2007-.

Afin d'assurer une répartition de la rente des awqaf au service des besoins sociaux, quinze principaux domaines ont été désignés par la commission légale de la FPAK (*lajna chari'ya*). En plus des orientations classiques (mosquées, santé, éducation, assistance aux pauvres et aux familles, promotion de la culture islamique, etc.) la dite commission a considéré «les biens en général» en tant qu'autre option qui assure -au cas où elle est choisie par les constituants du waqf- une grande souplesse dans la gestion de répartition de la rente.

Tableau 2
Répartition de la distribution de la rente des awqaf selon le domaine.
(En Dinar koweïtien)

	domaine religieux	santé, environnement, catégories aux besoins spéciaux	services sociaux, éducation	autres distributions	Total annuel
1995	1.600.000	0.177.913	0.148.568	-	1.926.481
1999	3.963.471	0.703.551	1.616.149	1.005.703	7.288.847
2002	7.130.254	1.264.868	3.637.121	3.619.537	15.651.780

Tableau 3
Distribution de la rente selon le secteur bénéficiaire (en %)

	1995	1999	2002
Institutions Etatiques	65.2	66.1	93.5
Associations charitables	18.1	12.9	4.4
ONG	16.7	21.0	2.1

(d) waqf et développement durable

L'appel à la constitution de nouveaux awqaf, et la revalorisation de sa participation au développement socio-économique se fait à travers une action qui vise à attirer l'attention des spécialistes sur le rapport étroit entre le waqf et le développement durable, et les possibilités dont jouit le waqf en tant que concept socio-économique capable de collaborer positivement dans la mise en

œuvre de projets et de programmes combattant la pauvreté et les disparités sociales.

Depuis sa création⁽⁹⁾, la FPAK avait réussi à collecter une moyenne annuelle de 2 millions de dinars koweïtiens en fonds d'awqaf constitués (dont une partie importante est faite en dons monétaires). Bien que relativement minimes par rapport au budget gérée par l'Etat⁽¹⁰⁾, ces fonds de waqf attestent d'une volonté de la part de la FPAK pour élargir ses capacités d'action et pour faire bénéficier non seulement une plus grande partie d'individus mais surtout pour instituer des projets d'utilité publique en rapport avec la stratégie d'un développement durable.

Parallèlement à l'instauration des fonds des awqaf, la FPAK avait mis l'accent sur la création de divers programmes scientifiques visant les milieux académiques pour attirer leur attention et encourager une recherche scientifique active autour du sujet du waqf. Dans ce cadre deux grands programmes ont été élaborés:

(i) le premier concerne la promotion des études et recherches sur les awqaf. Il s'agit de doter les spécialistes intéressés par le thème awqaf de possibilités matérielles et scientifiques facilitant leurs recherches.

Dans une première étape la FPAK avait lancé «le projet des index bibliographiques du waqf» qui consiste à réaliser un classement des ressources, des références et des bases de données relatives directement ou indirectement au sujet des awqaf. Sept index ont été déjà publiés⁽¹¹⁾.

Un «Thesaurus du waqf» pour le traitement analytique des concepts relatifs au waqf est aussi en cours de réalisation. A côté de sa publication

(9) En 1993 le nombre des awqaf constitués et gérés par le ministère des awqaf et des affaires islamiques était de 408, en 2001 ce nombre passait à 592 sous l'administration de la FPAK. (Rapport Annuel 2002. Publication FPAK, Koweït)

(10) Le budget annuel du Koweït approche les trois milliards de dinar Koweïtien, quant à la FPAK, elle gère un capital de fonds des awqaf estimé à 125 millions de dinars koweïtiens qui représente une part très faible du budget étatique.

(11) Il s'agit des index des pays suivants: Le Koweït, l'Egypte, l'Arabie Saoudite, La Palestine et la Jordanie, l'Iran, le Maroc et la Turquie.

classique (papier), une version électronique facilitera sa disponibilité dans les librairies, les universités et les centres de recherche.

D'autre part, un concours international biannuel sur le thème des awqaf a été lancé en 1999. Quatre sessions ont été déjà accomplies avec la participation de dizaines de chercheurs des différents pays musulmans, dont plusieurs sont des étudiants de troisième cycle. Pour ces derniers un programme spécifique a été élaboré afin d'assister financièrement et académiquement ceux parmi eux qui ont choisi des sujets de Thèses de Maîtrise ou de Doctorat ayant un rapport étroit avec les awqaf.

Un effort particulier est aussi alloué à la publication. En plus des livres, la revue *AWQAF* est une des réalisations de ce programme. Animée par l'ambition de faire rapprocher les spécialistes de diverses disciplines autour du thème des awqaf, et par la volonté de devenir une référence en la matière, la revue essaye avec ces cinq numéros (déjà) de réussir le pari.

(ii) La tenue de conférences et colloques sur le thème des awqaf. Cette activité cherche à débattre des problématiques qui affrontent l'expérience contemporaine des awqaf en réunissant les professionnels du secteur qui s'échangent leurs expertises et débattent des questions que pose la pratique des awqaf⁽¹²⁾. Dans le même sens, un intérêt particulier est alloué aux cadres du secteur des awqaf à travers la tenue d'une série de sessions de formation, dotée de programmes adaptés aux nécessités du secteur et des avancés dans les domaines de la gestion, de la comptabilité, et de la technologie de communication.

Pour une meilleure utilisation de la valeur sociale du waqf

Il est indéniable que comme toute expérience, la gestion de la FPAK atteste de quelques lacunes. On pourrait à cet égard se poser

(12) Dans ce cadre, une série de colloques, est tenue depuis 1996 dans différents pays musulmans -avec le concours de la Banque Islamique de Développement (BID)- sous le thème «Exposé des expériences des awqaf». D'autre part, le «Forum international sur les questions contemporaine des awqaf» sera organisé en Octobre 2003 pour débattre des problématiques légales que pose la constitution contemporaine des awqaf.

la question sur la partie minimale de la rente dont bénéficient les associations charitables aux ONG. Les chiffres montrent que dans cette distribution l'Etat reste le grand bénéficiaire puisque il a accaparé l'essentiel de ce qui a été destiné aux institutions (tableau 3). Nous croyons qu'une partie de la réponse se trouve liée au paradoxe dont souffre l'économie koweïtienne depuis les années 80. D'une part la majeure partie de la population reste encore tributaire des services de l'Etat. D'autre part, l'Etat n'a pas réussi jusqu'à maintenant à réaliser une politique de privatisation viable qui allège ses charges et qui donne au secteur privé un rôle plus important.

Le maintien du niveau des services sociaux propres aux Etats rentiers, ainsi que le déficit budgétaire devenant chronique, font que les institutions étatiques concurrencent les organisations non gouvernementales dans la recherche des sources de financement dont disposent les awqaf. Les institutions gouvernementales seront même «favorisées» suite aux aléas de la politique internationale (les retombés des événements du 11 septembre 2001 qui ont fait de l'Etat un partenaire non douteux).

A un autre stade, l'expérience de la FPAK reste au niveau international « limitée » malgré une demande accrue de la part des institutions dans divers pays musulmans pour bénéficier de ce qu'elle a pu réaliser dans ce domaine. Là aussi, la politique d'ouverture qui a été ébauchée en 1997 à travers « le dossier coordination entre les pays musulmans au niveau des awqaf »⁽¹³⁾, demande plus d'efforts et nécessite une collaboration plus active des autres pays musulmans et particulièrement de ses institutions du waqf.

Par ailleurs, nous estimons que le plus important élément dans la tentative de la FPAK reste la solide démonstration, qu'elle a réussie à faire, des capacités socio-économiques qui sous-tendent le concept de waqf, et des valeurs intrinsèques qu'il véhicule. Plus que jamais,

(13) Lors de la session tenue à Jakarta (Indonésie) en 1997, le Koweït a été désigné par le « Conseil des Ministres des awqaf et des Affaires Islamiques » en tant que pays coordinateur entre les pays musulmans dans le dossier des awqaf..

dans le contexte actuel des pays musulmans le waqf apparaît comme une idée force capable de s'associer aux efforts de développement pour palier aux répercussions des théories de modernisation construites dans le sillage de l'idée de l'Etat-patron. Dans ce sens, cette expérience ouvre la voie à une promotion du waqf qui dépasse le stade de régler la question du financement de tel projet ou d'une assistance à tel individu. C'est au rôle du waqf dans la dynamique sociale, et à son utilisation comme « apport social endogène », que cette expérience nous invite à réfléchir.

Ainsi, la participation civile à la construction d'un projet de société reste le dénominateur commun auquel s'associe le concept waqf. Les possibilités qu'il génère et ses dispositions à participer à un développement humain et durable qui profite pleinement des capacités locales, pourraient inciter les décideurs politiques et sociaux à lui accorder un intérêt en rapport avec sa valeur sociale.

Références

- Al-Omar, Muhammad Ali: Why the Renter Economy Fails in Economic Development. The case of Kuwait, (*Ph.D Claremont Graduate University, California, 2002*), USA.
- Denoix, Sylvie (éd). Biens communs, patrimoines collectifs et gestion communautaire dans les sociétés musulmanes. Collection: Revue des mondes musulmans et de la Méditerranée. Histoire; no 79/80 Aix-en-Provence, Edisud, France, 1997
- Fondation Publique des Awqaf du Koweït:
 - a) «Rapport statistique annuel de la Fondation Publique des Awqaf du Koweït, 2001, publication FPAK, Koweït, 2003,
 - b) Rapports Annuels 1995, 2002. (Publication FPAK, Koweït)
 - c) «Vision stratégique pour la promotion du rôle des Awqaf dans le développement social « Rapport de suivie des projets de coordination des efforts des pays islamiques dans les domaines des awqaf, 2001. (non publié)
- Kan'an, Tahir Hamdi: The social effects of economic adjustment on Arab countries, edited by Taher H. Kanaan, Washington, D.C.: International Monetary Fund, 1997.

AWQAF DEED

In recognition of the waqf thought and philosophy in establishing the projects and extending social services in the framework of sustainable and self-supported system, KAPF established AWQAF Journal deed. Therefore, this journal will not depend on pricing its issues, rather it seeks to realize the aims and objectives for which it was created. It seeks to provide the journal free of charge to all waqf-related researchers, concerned people and research centers.

On the other hand, KAPF is on the lookout for financing AWAQF through soliciting contributions, whether in the form of subscriptions, an issue price or otherwise in an attempt towards authenticating the journal and enabling it to approach waqf as a specialty. This is meant to qualify waqf to take part in social development by bearing part of its responsibilities in extending vital developmental services.

Deed purposes:

The purposes can be put down as follows:

- ❖ Contributing to upgrading waqf researches so that the journal might rank with the prestigious refereed journals.
- ❖ Laying emphasis on the typical dimension of waqf, together with identifying its characteristics and the role entrusted to it.
- ❖ Advocating methodology in approaching issues based on the link between present and future, and therefore boosting thought in practical models.
- ❖ Linking its subjects to the waqf concerns in the entire Islamic world.
- ❖ Providing the greatest number of researchers, universities and research centers with this journal free of charge.
- ❖ Encouraging efficient people to specialize in waqf-related issues.
- ❖ Establishing a network for all people interested in Islamic thought, particularly waqf thought, and facilitating communication and interaction between them.

AWQAF Nazir

- ❖ KAPF is the Nazir of AWAQF DEED
- ❖ KAPF is keen to develop AWAQF and solicit contributors thereto.
- ❖ KAPF is keen to provide all facilities for publishing the journal, attending to the staff in charge of carrying out this mission in conformance with the strategy of promoting the waqf sector advocated by academic refereed journals.



Kuwait Awqaf Public Foundation
Fondation Publique des Awqaf du Koweït

AWQAF

Refereed Biannual Journal Specialized in Waqf and Charitable Activities

No. 5 - year 3 - Shaban 1424 A.H., October 2003

Articles in English

- **Current Waqf Experiences and the Future of Waqf Institution**
Seyed Khalid Rashid

Articles in French

- **La Fondation Publique des Awqaf du Koweït;
L'expérience et ses Perspectives**
Abdallah Tarak

Articles in Arabic

- **Improving Institutional Structure to Cope with the Challenges Facing Waqf Institution.
Kuwait Awqaf Public Foundation Experience.**
Fuad Abdallah Al-Omar
- **Waqf Experience in UAE; Sharjah as a Model**
Sami Assalahat
- **Waqf Pillars in Islamic Jurisprudence;
A Comparative Fiqh Study**
Mohammad Abderrazaq Al-Tabatabai
- **Duties of a Waqf Nazir in Islamic Fiqh**
Nour Bint Hassan Qarout
- **Waqf's Conditions and "Istibdal" Issues**
Abdallah Saleh Ahmad

ISSN 1609-4662

Issued by Kuwait Awqaf Public Foundation