



AWQAF

Refereed Biannual Journal Specialized in Waqf & Charitable Activities

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Faruk Bilici

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

AWQAF

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

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

Objectives of AWQAF:

- ❖ 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.

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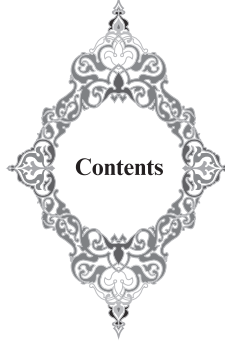
AWQAF journal publishes original Waqf-related researches in Arabic, English and French. It also accepts summaries of approved M.A's and Ph.D's and reports on conferences, symposia, and seminars dealing with the field of Waqf.

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Waqf and Education: A Partnership Required for Building Communities of Knowledge

Education, being universally acknowledged as an essential element for development, is believed to enable societies acquire the means of human power and knowledge, in addition to curbing economic discrepancies and giving development its sustainable nature. Reflecting on the current state of affairs, we notice that the current strategic trends in most Islamic countries reveal a change in the educational chart reflected in the considerable decline in the expenditures of governmental educational. This, no doubt, brings about detrimental effects on the quality and outcome of education. Relevant international reports indicate that there is a gap between what the educational system brings forth and the requirements of economic development in the Islamic world. Consequently, we find that there is a flimsy relation between education and economic growth which can be attributed to the remarkably low educational level. Regardless of the great efforts to eradicate illiteracy, its rate in the Arab world is twice the rate in East Asia and Latin America.

In view of the weakness of the governmental institutions of learning and the financial and human challenges which confront them, we find that private and foreign educational institutions have gained ground, with the educational process acquiring a corporate nature. Education has become more of a commodity determined by the commercial criterion of supply and demand. This should not prevent us from claiming that the private education experience stands in need of a thorough objective evaluation. The Arab and Islamic world are in dire need for strategic alternatives to safeguard the sanctity of education on the one hand, and the quality of its programmes and the sought output on the other. The presence

of waqf in the educational area has never received the due attention despite being a strategic partner in the educational process and its ability to maintain a quality education and build highly efficient institutions with a role to play in the promotion of society.

The evidences on success of this trend are numerous. Historically speaking, Islamic civilization benefited from waqf in building its unprecedented educational edifice. Major educational institutions were built through a liberal usage of the waqf formulas. Historical documents confirm that these institutions which started by *katateeb*, schools and universities were established according to the waqf system and helped Moslem societies to meet their educational needs through urging people to contribute to such institutions which spread across the whole parts of the Islamic world. Likewise, Modern documents on this issue show that the voluntary sectors, with waqf institution on top, occupy an effective and prominent place in the academic life of the west in general and the USA with its 1600 waqf universalities in particular.

The relation between waqf and education is not confined to financial areas, despite their importance, but it extends to touch upon the educational vision as a 'strategic element' in its direct relation with the projects of progress and advancement. In order to acquire this nature, the relation requires the availability of major elements which act in concert to realize an elevated type of education.

Education, with its materials, curricula and output is a key stage in building the community of knowledge and an asset to its civilizational comprehensive promotion This type of education has also its objective and quality parameters which do not suffice by the information quantity received by the students in the various educational stages, but it is connected with the methodology and objectives of education. Therefore, an educational system should monitor the educational output in each society and define accurately the objectives of the educational process per se.

Within the context of the stunning flow of information through different means, it is not fair to concentrate on stuffing a student's mind with a quantity of information however this may be rich or poor. Educational performance should contribute to building a creative personality with an ability to take on challenges and find solutions. It is the battle of epistemological quality adopted by the educational institutions which took up the responsibility for organizing the community of knowledge. As early as the sixties of the last century, Asian Tigers, for example, have decided to build the community of knowledge and dedicated for this aim the suitable legal and objective resources. Within four decades, they became a strong contributor to scientific innovation and managed to compete

with the USA, Japan and Europe. The question which yields itself here is: What are the options available to the Islamic world in order to adopt the strategic decisions and get on the track to build a quality educational system which bridges the gap between the communities of knowledge?

Eliciting lessons from the successful experiences worldwide is essential and what concerns us here is the methodology adopted by such experiences to shift from a quantitative educational system to another system that focuses on quality and building a human being. Today the waqf experience is the most outstanding for building exceptional educational models in both the governmental and private education. The introduction of waqf as a strategic partner in the educational process in order to serve the educational and epistemological issues is something which should be given a proper heed for the following reasons:

Making Quality:

The philosophy of waqf is supposed to embrace ‘promotion and seeking the better’ simply because a waqif (dedicator or settlor) spends his money to get nearer to Allah and win His good pleasure. Meditating on the waqf deeds, we can verify the minute details set forth by the waqifs in their deeds in order to secure extending the best services through their awqaf. The first impact of waqf on education is getting it out of the framework of a ‘commodity’ which is subject to supply and demand conditions. The aim here is to assert quality and introduce an educational service which goes in line with the community objectives. Unfortunately, this attitude is missing in the educational systems in the Islamic world. University degree holders constitute a broad section, but this section often fails to push the wheel of development and advancement in the society. Concentration of waqf education on quality stems from the organic relation between the establishment of a waqf and providing its means for success because the point of quality is made known publicly.

Guaranteed Continuity:

Starting from the last decades of the 20th century, financial obstacles hindered the development of the educational institutions in most of the Islamic world. Many ministries of education were under pressure to sacrifice methodology and programmes to safeguard the public education. Private education experience, on the other hand is characterized, with few exceptions, by seeking profit, giving minimal efforts to develop the scientific background and the requirements of scientific research. For many reasons not to be mentioned here this sector failed to reach the level of long investment in the Arab world. It is still sticking to the saying often reiterated by economists purporting that ‘a

capital is cowardly'. Any economic shock will turn this sector from a traditional commodity into another commodity with more profitability and attractiveness which carries it from a state of recession into a state of boom. Thus the relation between this sector and education is not based on solid foundations, but rather affected by the circumstantial profitability which is obsessed with this idea even at the expense of quality. Here the contribution of waqf in procuring sustainable financial resources within a balanced vision for investment and development remains the true solution for the problem of funding and the possibility of promoting the educational level and developing its output.

Involving Society:

The role of waqf in finding solutions for the adamant obstacles experienced by the educational sector is to involve the society, with its individuals and institutions, in executing the strategic decisions taken by the countries. It is an open secret that this trend is one of those absent mechanisms in the Moslem societies which used to depend on the state. It is known that the state has expanded to embrace most of the social arenas. Consequently, we see nowadays this state of structural imbalance which still casts its pall on the attempts of progress and advancement. The social role of waqf is to recover the self-efficacy of societies and that those social sectors involved in social activities should assume distinctive roles in managing and monitoring waqf institutions. This trend would gather momentum in the educational domain and become a major partner in developing educational institutions in terms of funding, investment and control.

It is natural to find difficult and tricky questions raised about the nature of such a would-be partnership between waqf and education from a strategic viewpoint, in addition to the influence of the waqf sector's contribution in bringing to tract the educational process in the Islamic world. Within this framework, the forthcoming seminar due in March, 2011 will concentrate on "waqf and Education". The seminar will try to find answers to a host of questions and concerns related to the developments introduced to the educational systems in the Islamic world. There will be discussions about the possibility of finding any actual alternative based on the actual setting up and sustainability of this partnership. The discussions will also handle the effect of such a process in supporting the educational process in the Islamic world in a way that promotes human capital and benefits from the material resources. The recommendations of the said seminar will be highlighted in due course Insha Allah.

In the 19th issue of *Awqaf Journal*, there are five researches dealing with the social role of waqf on the one hand, and the challenges which confronted the

waqf practices throughout history. We find *Omar Siraj Abu Rezaiza* in his research "Encroachments on Wadi Numan and their Influence on Ain Zubaida, Arafa and Um el Qura University" handles the encroachments on the waqf set up by Zubaida, wife of the Caliph Harun Al Rasheed in the 8th century. The researcher also handles and analyses the economic and legal repercussions which affected this historical highlight, besides defining the responsibility of the governmental and private authorities for committing those encroachments and their consequences.

The Spanish writer *Anna Maria Carballeira Debasa* in her research "The Alienation of Waqf Property in Andalusia" handles the problems and complications brought about by the Social practices in Andalusia during the period falling between the 10th and the 12th centuries. She also approaches the attitudes of the Andalusia faqihs towards the amendments of the Waqifs' Conditions. The researcher sought to analyze the sharia and legal adaptations and their relation to the social transformation and the new social requirements in the Andalusian environment.

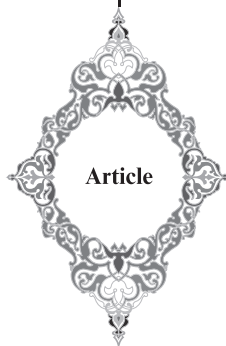
Mu'awiya Saidouni in analyzing the contemporary role of waqf reviews in his research "Maintaining the Architectural Legacy and Realizing Sustainable Development" the mechanism produced by awqaf to maintain architecture, either through waqf and its ability to maintain and perpetuate the services extended to the society or through connecting waqf with the architectural development of the Islamic city. The researcher is interested also in presenting a new outlook for maintaining legacy which exceeds the point of rehabilitation of such buildings and other architectural structures. He moves forward to deal with the city in a human-like manner that allows for a specific shift in dealing with the architectural legacy in the light of the mechanisms of realizing multilateral sustainable community development combining both originality and modernity.

Ahcene Lahsasna suggests developing the role of cash waqf so as to become a new model of a financial instrument in the Islamic banking system. This model aims to boost financial transactions related to small and medium economic enterprises. The researcher also studies the potentials of cash waqf in supporting small and medium-sized companies and helping them in overcoming financial hindrances in a way that improves their local economic standing and in preparing them for a better role in economic and social development.

Faruk Bilici sheds a spotlight on the social role of women in Islamic societies through an analysis of his article "Women Waqf in Istanbul during the first half of the 16th Century". He reviews types of women awqaf in the Ottoman state and benefits from the waqf documents in depicting a picture of the Ottoman

Caliphate. The portrait he draws might differ from the traditional one given by many other writers. He maintains that Ottomans strongly urged women from the various categories to get involved in the charitable work which brings about benefit and good to a society. Thus women contributed effectively to the waqf process, taking into account the various styles and mechanisms which prevailed through the period.

In addition, the Issue includes a book overview submitted by Ibrahim Abdul Baqi about the book of Osama Abdul Majeed Al Aani "Investment Waqf Funds - A jurisprudential - economic study".



The Alienation of Waqf Propert in Al-Andalus^(*)

By: Ana María CARBALLEIRA DEBASA^(**)

Few institutions have left such a deep impression on Islamic society throughout the centuries as the institution of *waqf* did. Progress registered in terms of knowledge of this subject has unquestionably been significant. The different perspectives from which this subject has been approached have contributed to bringing into focus a multiform reality, providing information that leads towards a global and, at the same time, specific understanding of the institution. Nonetheless, despite the existence of these works, we certainly cannot claim that the institution of *waqf* has been sufficiently explained within the context of Islamic civilisation. It is to be hoped that work currently being developed by researchers of different nationalities will contribute to clarifying the least known aspects of this classical institution and to dispersing the unknown quantities that still cloud our perception in this area.⁽¹⁾

(*) This paper has been carried out within the research project “Theory and Practice of Notaries in the Nasrid and Mudejar Granada. A study of the Arabic Granadan documents”, funded by the Spanish Ministry of Education (ref. FFI2009-09897).

(**) Escuela de Estudios Árabes (CSIC, Granada).

(1) It is precisely within this framework that the line of research I have been developing over recent years is situated. One of the aspects I have dealt with is the role played by the institution of *waqf* within the context of Andalusí society. See, among others, the following publications: A.M. Carballeira Debasa, *Legados píos y fundaciones familiares en al-Andalus (siglos IV/X-VI/XII)*, Madrid, 2002; *idem*, “Pobres y caridad en al-Andalus”, in C. de la Puente (ed.), *Estudios Onomástico-Biográficos de al-Andalus. XIII (Identidades marginales)*, =

Arabic legal sources are to be found among the documents that make it possible, to a certain degree, to palliate the archival impoverishment of Western Islam in the Middle Ages. These are collections of legal opinions or edicts⁽²⁾ for the elucidation of obscure points in the law or to provide guidance for new cases, collections of legal dicta⁽³⁾ adopted by cadis (judges) in the development of judicial processes; models of documents (*watha'iq*,⁽⁴⁾ that lay down the guidelines that notaries must be oriented by when writing documents. Although the exploitation of texts from this genre provides a high yield for the study of diverse legal aspects that characterise the institution of *waqf* in al-Andalus, the lacunas that are evident in this documental base should not be obviated. Juridical sources, although they are the most explicit with regard to this question, only furnish a fragmentary description of this type of foundation because most of them concentrate on particular technical features of this institution, disassociating them from their context and dispensing with other information that is not relevant for the legal matter they are tackling, including the dates and proper names of founders and beneficiaries, which are only known in some cases.

= Madrid, 2003, p. 53-91; *idem*, "Pauvreté et fondations pieuses dans la Grenade nasride: aspects sociaux et juridiques", *Arabica. Revue des Études Arabes* 52 (2005), p. 391-416; *idem*, "The Role of Endowments in the Framework of Andalusian Society", in M. Borgolte (ed.), *Stiftungen in Christentum, Judentum und Islam vor der Moderne. Auf der Suche nach ihren Gemeinsamkeiten und Unterschieden in religiösen Grundlagen, praktischen Zwecken und historischen Transformationen*, Berlin, 2005, p. 109-121; *idem*, "Caracterización de los pobres en la literatura paremiológica andalusí", *Al-Qantara*, XXVII (2006), p. 105-135; *idem*, "Forms and Functions of Charity in al-Andalus", in Y. Lev and M. Frenkel (eds.), *Charity and Giving in Monotheistic Religions*, Berlin-New York, 2009, p. 189-202. Regarding *waqf* in al-Andalus, see also A. García Sanjuán, *Hasta que Dios herede la tierra. Los bienes habices en Al-Andalus (siglos X-XV)*, Huelva, 2002; *idem*, *Till God Inherits the Earth. Islamic Pious Endowments in al-Andalus (9-15th Centuries)*, Leiden-Boston, 2007.

- (2) See Ibn 'Iyad, *Madhahib al-hukkam fi nawazil al-ahkam*, ed. M. b. Sharifa, Beirut, 1990 and trans. D. Serrano, *La actuación de los jueces en los procesos judiciales*, Madrid, 1998; Ibn Rush (al-Jadd), *Fatawa Ibn Rushd*, ed. al-M. b. al-T. al-Talili, 3 vols., Beirut, 1987; al-Sha'bi, *Al-Ahkam*, ed. S. Haloui, Beirut, 1992; al-Wansharisi, *Kitab al-Mi'yar al-mu'rib wa-l-jami' al-mugrib 'an fatawi ahl Ifriqiya wa-l-Andalus wa-l-Magrib*, ed. M. Hajji et alii, 13 vols., Rabat, 1981-1983.
- (3) See Ibn Sahl, *Al-Ahkam al-kubra*, ed. R. al-Nuaimy, *Diwan al-Ahkam al-kubra: al-nawazil wa-l-'lam li-bn Sahl*, 2 vols., Riyadh, 1997.
- (4) See Ibn al-'Attar, *Kitab al-Watha'iq wa-l-sijillat*, ed. P. Chalmeta and F. Corriente, Madrid, 1983 and trans. P. Chalmeta and M. Marugán, *Formulario notarial y judicial del alfaquí y notario cordobés Ibn al-'Attar, m. 399/1009*, Madrid, 2000; Ibn Mugith, *Al-Muqni' fi 'ilm al-shurut (Formulario notarial)*, ed. F.J. Aguirre Sádaba, Madrid, 1994 and partial trans. S. Vila, "Abenmoguit. Formulario notarial", *Anuario de Historia del Derecho Español*, 8 (1931), 5-200; al-Jaziri, *Al-Maqṣad al-mahmud fi talkhis al-'uqud (Proyecto plausible de compendio de fórmulas notariales)*, ed. A. Ferreras, Madrid, 1998.

Furthermore, in the immense majority of cases a complete transcription of the endowment deed (*waqfiya* or *waqf deed*) is not provided, so that what is lacking, inter alia, is a more thorough description of the administration of this kind of property, as well as of the different commercial transactions that affected it. Although all these factors do not diminish the importance of this type of documentation, it is not advisable to disregard other sources (historical⁽⁵⁾, biographical⁽⁶⁾...) which provide additional information and reinforce that contained in the legal texts, so that they prove mutually complementary.

As is well known, the reason for setting up a *waqf* is to perpetuate the pious work to which it is dedicated.⁽⁷⁾ Perpetuity not only entails the immutability of its founder's stipulations, but is also implicitly accompanied by the conditions of immobility, inalienability, intangibility and imprescribability of the objects donated. As a general

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- (5) See Ibn Hayyan, *Muqtabis II. Anales de los Emires de Córdoba Alhaquém I (180-206 H./796-822 J.C.) y Abderramán II (206-232/822-847)*, ed. M.'A. Makki, *Al-Sifr al-thani min Kitab al-Muqtabas*, Riyadh, 2003 and trans. M.'A. Makki and F. Corriente, *Crónica de los emires Alhakam I y 'Abdarrahman II entre los años 796 y 847 [Almuqtabis II-I]*, Saragossa, 2001 (*Muqtabis II/1*); Ibn Hayyan, *Al-Muqtabis min anba' ahl al-Andalus*, ed. M.'A. Makki, Beirut, 1973 (*Muqtabis II/2*); *idem*, *Al-Muqtabis fi ta'rikh rijal al-Andalus*, ed. M. Martínez Antuña, Paris, 1937 (*Muqtabis III*); *idem*, *Al-Muqtabas V*, ed. P. Chalmeta, F. Corriente and M. Sobh, Madrid, 1979 and trans. M.J. Viguera and F. Corriente, *Crónica del califa 'Abdarrahman III an-Nasir entre los años 912 y 942*, Saragossa 1981 (*Muqtabis V*); *idem*, *Al-Muqtabis fi akhbar balad al-Andalus*, ed. 'A.'A. al-Hajji, Beirut, 1965 and trans. E. García Gómez, *El Califato de Córdoba en el Muqtabis de Ibn Hayyan. Anales palatinos del califa de Córdoba al-Hakam II, por 'Isa Ibn Ahmad al-Razi (360-364 H. = 971-975 J.C.)*, Madrid, 1967 (*Muqtabis VII*); Ibn 'Idhari al-Marrakushi, *Al-Bayan al-mugrib fi akhbar al-Andalus wa-l-Magrib*, ed. G.S. Colin and É. Lévi-Provençal, vol. 2, Leiden, 1951 and trans. É. Fagnan, *Histoire de l'Afrique et de l'Espagne intitulée Al-Bayano'l-Mogrib*, vol. 2, Algiers, 1904 (*Bayan II*); *idem*, *Al-Bayan al-mugrib fi akhbar muluk al-Andalus wa-l-Magrib*, ed. É. Lévi-Provençal, Paris, 1930 and trans. F. Maïllo, *La caída del Califato de Córdoba y los Reyes de Taifas*, Salamanca, 1993 (*Bayan III*); *idem*, *Al-Bayan al-mugrib fi akhbar al-Andalus wa-l-Magrib*. Vol. IV: *Qit'a min ta'rikh al-murabiitin*, ed. I. 'Abbas, Beirut, 1967 (*Bayan IV*).
- (6) See Ibn Bashkuwal, *Kitab al-Sila*, ed. 'I. al-'A. al-Husayni, Cairo, 1955; Ibn al-Faradi, *Ta'rikh 'ulam' al-Andalus*, ed. F. Codera, Madrid, 1891-1892; Ibn Harith al-Khushani, *Akhbar al-fuqaha' wa-l-muhaddithin (Historia de los alfaquíes y tradicionistas de al-Andalus)*, ed. M.L. Ávila and L. Molina, Madrid, 1992; *idem*, *Qudat Qurtuba*, ed. and trans. J. Ribera, Madrid, 1914; 'Iyad b. Musa, *Tartib al-madarik wa-taqrib al-masalik li-ma'rifat a'lam madhhab Malik*, ed. M. b. Sharifa et alii, 8 vols., Rabat, 1983.
- (7) The characteristic of perpetuity of this institution implicitly suggests that the donation of real estate properties is preferable, these being, by nature, imperishable. The perishable condition of personal properties, on the other hand, renders the endowment temporary. This is why some legal doctrines of Islam have expressed their opposition to the donation of personal property. However, documentation regarding this institution in al-Andalus reveals the existence of this practice. This is due to the fact that the Malikis (the dominant doctrine in =

rule, the affected goods become immobilized, since they cannot be alienated, this being one of the limitations which characterise the foundation. In this regard, they cannot be sold, inherited, bequeathed or donated. However, although one can conceive, in juridical terms, of an immobilised good, its material immobility is unlikely due to the changing conditions of the circumstances surrounding it.

The documental base being used makes it evident that, in the immense majority of cases, the inalienable and intangible nature of these goods, to a great extent, conditions the legal consultations that arise in relation to this type of property. This aspect explains the fact that, with relative frequency, cases that are dealt with involve a violation of the characteristics of inalienability, intangibility and immobility inherent in these goods. In this connection, the main aim of this article consists of determining the circumstances in which Andalusí jurists authorise the modification of the legal rules that govern the institution of *waqf* and, consequently, the legal criteria that were employed in order to justify the alienation of goods so established. Likewise, cases will be examined in which this act is deemed to be unlawful in the absence of justifiable causes. From this point of view, legal sources can point to the way in which legal doctrine in al-Andalus adapted to the needs of society. To carry out this task, I concentrate my attention on the chronological period encompassed by the 10th and 12th centuries.

1. LAWFUL ALIENATION

It must be borne in mind that, as much as the alienability of *awqaf* is concerned, prohibition is the rule and authorisation is the exception. The *cadi* or judge is responsible for taking the most important decisions in relation to these foundations, especially in the area of alienation.⁽⁸⁾ Although the alienation of this type of property has had its detractors, who displayed a hostile attitude towards this kind of procedure, Andalusí jurists, in general, considered it to be lawful in really extreme and duly justified cases.

1.1. Sale of *waqf*

To judge by the information recorded in juridical sources, the most common procedures by which *awqaf* property was alienated in al-Andalus were purchase transactions, but they could only be executed in particular circum-

= this geographic area) were more flexible in this sense, for they recognised the temporary nature of *waqf*; accepting the donation of all kinds of goods. See J. Schacht, "Early Doctrines on Waqf", *Mélanges Fuad Köprülü*, Istanbul, 1953, p. 448-449.

(8) Concerning the role played by the *cadi* in relation to the institution of *waqf* in al-Andalus, see Carballeira Debasa, *Legados píos y fundaciones familiares*, p. 290-296; García Sanjuán, *Hasta que Dios herede la tierra*, p. 263-273; *idem*, *Till God Inherits the Earth*, p. 304-327.

stances: in the case of an unproductive or ruinous *waqf*; in the event the *waqf* formed part of an undivided property; in the case of an urgent need to amplify a Great Mosque; in the event of the impoverishment of the founder or the beneficiaries, prior authorisation granted by the former or in the case of a debt incurred by the beneficiaries. I shall refer to all these cases below.

1.1.1. Sale of unproductive or ruinous waqf⁽⁹⁾

We have already seen that, from the legal point of view, the endowed goods are immobilized and withdrawn from circulation. However, from an economic perspective, this immobility may become unviable, since real estate, in general, is perishable in the sense that buildings can fall into ruin and land can cease to be productive. This means there may come a time when the *waqf* cannot fulfill the purpose for which it was established. In that case, it is preferable to substitute it with a property of a similar kind which is in good condition and which may be destined as a *waqf*. This practice is known by the name of *istibdal*.⁽¹⁰⁾

Through the sale of real estate property constituted as *waqf* it is possible to permit the continuity of the objective that accompanied this kind of foundation. It is strictly prohibited to replace *waqf* property as long as it is productive, even if better property may be obtained in its stead. In general, the exchange of goods is allowed on the express condition that income from the *waqf* property is undergoing constant decline. Thus, when the real estate ceases to be productive, it can be replaced by another that produces ample income. Yet this circumstance calls into question the inviolability of the endowed good and implies the inevitable modification of the endowment contained in the foundational act. It might be said that it is basically a matter of rectifying an error or a lack of foresight on the part of the founder, who thought that the most effective way of imbuing his action with longlasting consequences was to immobilise the property. However, reality demonstrates that it is necessary to get rid of this property, replacing it with another, the purpose being to safeguard the founding act that set up the *waqf*, so that the good in question does not cease to fulfil the function that was assigned to it. Andalusí jurists generally accepted this alternative solution for it was necessary to choose between the inalienability of the *waqf* and the ruin of the endowed property.

(9) For more information regarding the sale of unproductive *awqaf*, see Carballeira Debasa, *Legados píos y fundaciones familiares*, p. 312-315; García Sanjuán, *Hasta que Dios herede la tierra*, p. 295-301; *idem*, *Till God Inherits the Earth*, p. 345-353.

(10) This operation could come about through a simple exchange or through a formal contract of sale. The sale of an unproductive or ruined *waqf* was the most common procedure to resolve this problem in al-Andalus in the period under study. For an example of exchange, see section 2.2 of this article.

The *cadi* had to verify the situation of unproductiveness of such a property. Once he had ascertained that it had become totally or scarcely profitable and that the situation was irreversible, the next step was to replace this good with another of the same kind and of the same or higher value, located in the vicinity. The operation was executed as follows: the *waqf* good became alienable property and the other good that it was replaced by became *waqf*. Although, from the material viewpoint, there was an exchange of two objects, from the juridical perspective, the *waqf*, as such, did not cease to function as it had been intended. If the sale actually took place, a deed was required recording the replacement of the old property by the new and the complete re-establishment of the endowment.

We have several statements in this regard. Andalusí mufti Ibn Zarb (d. 991), for instance, echoes the opinions of the first Maliki jurists concerning the sale of both real estate and personal property established in a *waqf*. In this connection, he indicates that Malik b. Anas (d. 796) and his disciples categorically prohibited the sale of real estate if it was productive. But they gave their approval when such property was in ruinous condition unless the contrary was stipulated in certain legal works. In addition, they authorised the sale of personal property, provided that the founder had not otherwise stipulated. Whatever the case might be, with the money obtained in the sale a good equivalent to the previous one had to be acquired in order for it to be established as a *waqf* in its stead.⁽¹¹⁾ Andalusí Ibn al-'Attar (d. 1009) also expressed his opinion in this respect, without making any distinction between real estate and personal property, preferring the sale of *awqaf* that have no use.⁽¹²⁾

1.1.2. Sale of waqf in an undivided property⁽¹³⁾

Other cases where the licitness of the sale of *waqf* was envisaged arose when they formed part of an undivided property, because the property rights were shared by the *waqf* and a private entity.⁽¹⁴⁾ In such a case, the administration of the good became complicated because of the detriment that its common use could entail.

(11) See Ibn Sahl, *Al-Ahkam al-kubra*, ed. al-Nuaimy, p. 986-988; al-Wansharisi, *Mi'yar*, VII, p. 421-423

(12) See Ibn Rushd, *Fatawa*, n° 581; al-Wansharisi, *Mi'yar*, VII, p. 75-76. See also Ibn Sahl, *Al-Ahkam al-kubra*, ed. al-Nuaimy, p. 979; al-Wansharisi, *Mi'yar*, VII, p. 454-455 (cfr. V. Lagardère, *Histoire et société en Occident musulman au Moyen Âge. Analyse du Mi'yar d'al-Wansharisi*, Madrid, 1995, p. 257, n° 163).

(13) For further information about the sale of *awqaf* that constituted a part of properties that were undivided, see Carballeira Debasa, *Legados pios y fundaciones familiares*, p. 315-320; García Sanjuán, *Hasta que Dios herede la tierra*, p. 302-304; *idem*, *Till God Inherits the Earth*, p. 353-357.

(14) In the opinion of M. Shatzmiller, this circumstance is the direct result of hereditary laws, which divided property into small parts. See "Islamic Institutions and Property Rights: The Case of the «public good» Waqf", *Journal of the Economic and Social History of the Orient*, 44 (febrero 2001), p. 51-52.

Various questions are considered in the legal documentation on *waqf* in this area. One detects a certain divergence of opinions among the Andalusí jurists with respect to which procedure to follow. Some seem to favor giving priority to dividing it and opting to sell only in the case that the division would prove to be unprofitable. So, in a question put to the Cordovan mufti Ibn al-Hajj (d. 1134) regarding an individual who endows part of a house, the jurist rules that, if it is possible to divide the house, it should be divided up; otherwise the whole property will be sold and with the price obtained in the sale of the endowed part a property will be bought and established in turn for a *waqf*. His line of argument for this is based on the opinion of Ibn al-Majishun (d. between 827-829) and of Ibn al-Qasim (d. 806) with regard to this question.⁽¹⁵⁾

Other jurists, however, favoured proceeding directly to the sale. This is the posture adopted by Andalusí Ibn al-Fakhkhar (d. 1028), who holds that an undivided property, part of which is established as a *waqf*, must be sold in their entirety owing to their slender return, so that with the price obtained from the sale of the endowed part, a good similar to the latter is bought in order to allocate it for the same purpose.⁽¹⁶⁾

The two procedures adopted in al-Andalus in relation to *awqaf* that formed part of a collective property are based on the division and sale of this asset. But the jurists in favour of the sale of the communal property are unanimous in that, with the amount obtained from this transaction from the part established as *waqf*, another property must be acquired and set aside for the same end.

1.1.3. Sale of *waqf* for the enlargement of mosques⁽¹⁷⁾

When the amplification of a mosque was imposed by force in al-Andalus, the procedure was to expropriate neighbouring properties, regardless of whether or not they were *awqaf*, since this circumstance was considered to be a greater need than the observance of the inalienability and intangibility of these pious legacies. In this case *awqaf* were united with the other inviolable property.⁽¹⁸⁾

In the legal documentation, all the questions that are dealt with in relation to this subject converge on the same objective since the aim is to clarify under

(15) See al-Wansharisi, *Mi'yar*, VII, p. 446. See also Lagardère, *Histoire et société*, p. 273, n° 219.

(16) See al-Wansharisi, *Mi'yar*, VII, p. 454-455. See also Lagardère, *Histoire et société*, p. 257, n° 163.

(17) More detailed information on this question can be obtained in Carballeira Debasa, *Legados píos y fundaciones familiares*, p. 96-104; A. Carmona, "La expropiación forzosa por ampliación de mezquita en tres fetuas medievales", in P. Cressier, M. Fierro and J.-P. Van Staëvel (eds.), *L'urbanisme dans l'Occident musulman au Moyen Âge. Aspects juridiques*, Madrid, 2000, p. 141-151; García Sanjuán, *Hasta que Dios herede la tierra*, p. 316-319; *idem*, *Till God Inherits the Earth*, p. 370-380.

(18) With regard to the regulations governing mosques and other buildings of public utility, see section 1.2 of this work.

what conditions the enlargement of a mosque may be undertaken and the repercussions (expropriation of buildings) this may have on the surrounding area, when this circumstance is imposed due to imperious necessities. In one case there was a proposal for the enlargement of the Great Mosque of Ceuta at the expense of the shops around it, a question that aroused some polemic because of the refusal of the shop owners to sell their property. The great Cordovan jurist Ibn Rushd (d. 1126) replied that if the Great Mosque had become small and needed enlargement, the owners of the shops would willy-nilly be forced to sell because of the vast benefits that would derive from this action for the faithful who went there to pray. He goes on to add that, were the shop owners to argue that they were constituted in a *waqf* in their own favour and be unwilling to sell them, the same procedure should be adopted.⁽¹⁹⁾

This legal opinion is classified within jurisprudence (fiqh) against private individuals and in favour of the public good. This was perhaps the underlying reason that led owners of buildings adjoining important mosques to endow them in the hope that they would not be forced to sell them in the event of their being enlarged. However, the latter circumstance was deemed to constitute a greater need than respect for the inviolability of pious endowments, and the procedure to follow in the expropriation of the properties adjoining the Great Mosque at Ceuta proposed by Ibn Rushd set a legal precedent.

The same procedure nonetheless was not followed with minor mosques. In this regard, in the 10th century Ibn Zarb considered it lawful to enlarge Great Mosques with endowed houses, arguing that what is assigned to the service of God can lawfully be allocated to another purpose, whilst it continues to be in God's service. He adds, however, that, when there is an excessive agglomeration of people in the minor mosques, they should be transferred to a more spacious building.⁽²⁰⁾ Andalusī mufti Ibn 'Attab (d. 1070) also expresses a similar opinion, admitting alienation of *awqaf* for the enlarging of a Great Mosque, but not of a minor mosque, in which case it could only be extended with a house that was not *waqf*, using part of the road or the surrounding space. If neither of these options were possible, it should either be transferred to another building or a new mosque would be built.⁽²¹⁾

(19) See Ibn 'Iyad, *Madhahib al-hukkam*, ed. p. 306-309 and trans. p. 494-497; Ibn Rushd, *Fatawa*, n° 46.

(20) See Ibn Sahl, *Al-Ahkam al-kubra*, ed. al-Nuaimy, p. 990-991; al-Wansharisi, *Mi'yar*, VII, p. 424-425. See also Lagardère, *Histoire et société*, p. 256, n° 156; M. Marín, "Documentos jurídicos y fortificaciones", in *Actas del I Congreso Internacional de Fortificaciones en el-Andalus (Algeciras, Noviembre-Diciembre, 1996)*, Cadiz, 1998, p. 81.

(21) See Ibn Sahl, *Al-Ahkam al-kubra*, ed. al-Nuaimy, p. 992-995.

1.1.4. Sale of *waqf* in case of poverty⁽²²⁾

In al-Andalus the procedure of selling *awqaf* was also applied under other special circumstances, as in cases where the founder or beneficiaries fell into a situation of destitution. In this event there had to be a clause in the endowment deed where the founder explicitly stipulated this possibility. The income obtained from selling the *waqf* was used to the benefit of the founder or of the beneficiaries. In general therefore in cases in which the founder considered the sale of *waqf* due to the imperative of poverty, the jurists tended to admit the validity of the clause in the foundational act in which this stipulation is recorded.

We find an example of this in a question addressed to Ibn Rushd in the 12th century. It poses the case of an individual who sets up a family endowment, imposing as a condition that, if he himself ends up in a situation of economic necessity, he will be able to sell goods that are the object of *waqf* and benefit from the income secured in this operation.⁽²³⁾ Ibn Rushd's silence in this regard provides eloquent testimony of the validity of this stipulation.

In other cases, the condition imposed by the founder, when setting up the *waqf*, envisages the possibility of selling it should the beneficiaries fall into poverty. Cordovan mufti Ibn Sahl (d. 1093), for once, expresses approval in this regard. To argue his position, he cites the favourable opinion of Malik b. Anas concerning the sale of *waqf* in case of need, in connection with an individual who establishes a family foundation in benefit of his descendents, authorising them to sell it for the reason referred to above.⁽²⁴⁾

Although this was the most frequent situation alluded to in most of the questions dealing with the sale of *awqaf* in case of poverty, another case could also be considered, namely the sale of property established in a *waqf* when the beneficiaries suffered from material need, without the existence of any prior stipulation by the founder in this respect. This is evident in a legal consultation addressed to Sevillian mufti Ibn al-Makwi (d. 1010). However, in the fatwa he issues on the question, he decrees rescission of the sale despite the need of the beneficiaries.⁽²⁵⁾ It is very likely that the absence of the stipulation mentioned explains the position taken by this jurist.

(22) For more information about the sale of *awqaf* in case of the beneficiaries' poverty, see Carballeira Debasa, *Legados pios y fundaciones familiares*, p. 320-323; García Sanjuán, *Hasta que Dios herede la tierra*, p. 314-316; *idem*, *Till God Inherits the Earth*, p. 370-380.

(23) See Ibn Rushd, *Fatawā*, n° 148.

(24) See Ibn Sahl, *Al-Ahkam al-kubra*, ed. al-Nuaimy, p. 956-961.

(25) See al-Sha'bi, *Ahkam*, n° 184; al-Wansharisi, *Mi'yar*, VII, p. 432.

In the remaining cases, admission of the sale of *waqf* in response to a plea of poverty is probably due to the pious motivation that underlay an action of this kind. But, in this case, the property was neither replaced by another, nor went on to form part of a public good, which means that the sale implicitly involved the total alienation of the *waqf*.

1.1.5. Sale of *waqf* in case of debt⁽²⁶⁾

Debts could constitute a reason for revoking a *waqf* and selling the property in order to settle a debt incurred by the beneficiaries. This is another case in which the act of purchase involves the total alienation of the foundation. That is how Ibn Sahl expresses it in the 11th century in response to a question addressed to him dealing with the case of an individual who endowed a house for his two daughters, recognising their right to sell it should they so desire. Ibn Sahl, following the opinion of Malik b. Anas, goes on to add that in the event that the daughters incur a large debt, their creditors will have the right to execute the sale of the house in order to pay off that debt.⁽²⁷⁾ In this question, what is striking is that the founder authorises his daughters to sell the house without a justifying reason.

Likewise, a debt contracted by the founders before or after the constitution of a *waqf* is admitted to constitute sufficient reason for the *waqf* to be declared null and void. Perhaps the fact that the debtor is the founder or beneficiary is precisely what defines the difference in the criteria adopted by Andalusí jurists in relation to a debt incurred in such circumstances because the procedure in the first case was to nullify the *waqf*⁽²⁸⁾ and in the second to sell the property that had been established in this way.

1.2. Transfer of *waqf*

Andalusí jurists had not only to confront the thorny question of the lack of economic productivity of *awqaf*, but also the opposite case, i.e., the excess of productivity in relation to the income from this kind of property, which called into question the decision that had to be taken with this surplus⁽²⁹⁾. Likewise, some legal questions consider the possibility of changing the purpose the *waqf* was devoted to in case the primary objective of this property had disappeared. In these cases Andalusí jurisprudence reveals that the jurists were sometimes in favour of defining another use for the property donated or for the surplus in

(26) See Carballeira Debasa, *Legados píos y fundaciones familiares*, p. 324.

(27) See Ibn Sahl, *Al-Ahkam al-kubra*, ed. al-Nuaimy, p. 956-961.

(28) Regarding the nullifying of *waqf*, see Carballeira Debasa, *Legados píos y fundaciones familiares*, p. 335-338.

(29) See Carballeira Debasa, *Legados píos y fundaciones familiares*, p. 93-96; García Sanjuán, *Hasta que Dios herede la tierra*, p. 304-313; *idem*, *Till God Inherits the Earth*, p. 357-380.

order to cover different needs from those initially stipulated by the founder⁽³⁰⁾. In the documentation that have been analysed these questions affect religious buildings and other constructions of public use.

Regarding pious endowments and the issue of the rubble of ruined mosques, the legal sources illustrate that the general tendency among the jurists was characterized by the inviolability of both elements in view of their possible future reconstruction. Mufti Abu Ibrahim al-Andalusi (m. 963), among others, expressed this attitude, choosing not to divert the *awqaf* from ruined mosques to other mosques currently in use⁽³¹⁾. A similar attitude was adopted regarding the use which should be made of the *awqaf* left over from mosques. In general, the Andalusi jurists opted to reserve the surplus income of a mosque for the necessities that could arise, even if this meant an agreement to transfer it to other mosques in case of necessary. There are, however, those like 'Iyad b. Musa (d. 1149), who emphasise that while it is lawful to act in this way, it is preferable for this transfer not to take place.⁽³²⁾

Meanwhile some texts discuss the inviolability of Andalusi cemeteries with regard to the reutilization of the land of the cemetery which falls into disuse and to the use of the building materials proceeding from the abandoned tombs. In these cases, while the Andalusi jurists, such as Ibn al-Salim (d. 978) and Ibn Zarb, approved of the re-use of the terrain of the cemetery in disuse in order to amplify or build mosques⁽³³⁾, they did not authorise the “recycling” of the building materials of abandoned tombs under any circumstances. In this regard, Cordovan Ibn Lubaba (d. 926) argues that it is forbidden for cemeteries to be left exposed.⁽³⁴⁾

On occasion, the terrain upon which mosques are built and where burials take place is the object of a pious endowment, but this is not always the case. Yet this latter circumstance does not impede attributing to mosques and cemeteries a status similar to that of pious endowments which are founded upon their inviolability. In reality, public goods designated for the benefit of a Muslim community represent a status similar to that of *awqaf* and they acquire a status similar to them.

(30) See Carballeira Debasa, *Legados píos y fundaciones familiares*, p. 90-92; García Sanjuán, *Hasta que Dios herede la tierra*, p. 321-330; *idem*, *Till God Inherits the Earth*, p. 380-391.

(31) See al-Wansharisi, *Mi'yar*, VII, p. 226. See also É. Amar, "La pierre de touche des Fétwas. Consultations juridiques des Faqihis du Maghreb", *Archives Marocaines*, 13 (1909)", p. 364-365.

(32) See Ibn 'Iyad, *Madhahib al-hukkam*, ed. p. 304 and trans. p. 491.

(33) See al-Wansharisi, *Mi'yar*, VII, p. 19, p. 425.

(34) See al-Wansharisi, *Mi'yar*, VII, p. 103. See also Amar, "La pierre de touche des Fétwas", p. 375; M. Fierro, "El espacio de los muertos: fetuas andalusíes sobre tumbas y cementerios", in Cressier, Fierro and Van Staëvel (eds.), *L'urbanisme dans l'Occident musulman*, p. 173; Lagardère, *Histoire et société*, p. 254, n° 149.

In the same way, fortifications located on the Christian-Muslim frontiers were the objects which absorbed the greatest maintenance costs, which required the most care and which had the most pious endowments established for their maintenance. Regarding the use which should be accorded to the *awqaf* to reinforce fortifications that later fell into enemy hands, the two jurists who pronounce on the question, Ibn Zarb and Ibn Dahhun (d. 1039), coincided in responding that the *waqf* should be applied to other similar fortifications and in assigning the income of the *waqf* to a purpose analogous to that stipulated previously by its founder⁽³⁵⁾. This contrasts with the immobilization of the usufruct of the *awqaf* established for the benefit of mosques when the latter fell into ruin as we have seen. Perhaps this difference in criteria resides in the fact that a mosque is a religious edifice, while a fortress is a civilian structure. In any case, one appreciates the existence of a juridical doctrine that is not applied equally.

2. UNLAWFUL ALIENATIONS

2.1. Unlawful alienations carried out by founders and beneficiaries

The fact that the sale of a *waqf* was not authorised unless a powerful reason existed is cited therefor. In case a sale took place and was carried out by the founder or the beneficiaries without complying with any of the reasons mentioned above, the transaction was rescinded and the *waqf* was restored to its pre-sale state, thus respecting the inalienability of an endowment of this nature⁽³⁶⁾. From the abundant references contained in the legal documentation on this question, we can deduce that this phenomenon was relatively frequent in al-Andalus. It also shows that cases of the irregular sale of *awqaf* affected family foundations to a large degree.

This situation raised doubts as to the use that should be allocated to the income obtained by the buyer from the exploitation of these properties, while they had remained in his possession. The Andalusí muftis based their *fatawa* on whether the buyer and the seller were fully aware of the existence of the *waqf* at the time of executing the purchase. That is, if the buyer was unaware of the existence of the donation, he was not obliged to restore the income obtained from

(35) See Ibn Sahl, *Al-Ahkam al-kubra*, ed. al-Nuaimy, p. 990; al-Sha'bi, *Ahkam*, n° 1082; al-Wansharisi, *Mi'yar*, VII, p. 64, 424, 218. See also A. García Sanjuán, "Frontera, *Yihad* y legados piadosos en Al-Andalus (siglos X-XV)" in F. Toro Ceballos and J. Rodríguez Molina (coords.), *III Estudios de Frontera. Convivencia, defensa y comunicación en la frontera*, p. 325; Lagardère, *Histoire et société*, p. 256, n° 156; Marín, "Documentos jurídicos y fortificaciones", p. 81; Shatzmiller, "Islamic Institutions and Property Rights", p. 66.

(36) For detailed information on this subject, see Carballeira Debasa, *Legados píos y fundaciones familiares*, p. 324-333.

exploitation of the property in question in favour of the beneficiaries, as he would be considered a victim of the bad faith of the seller of the *waqf*. But if the buyer was aware, he would have to pay back the value corresponding to all the income from which he had made a living during the time of exploitation. Whatever the situation might be, the buyer was forced to give up the property and be duly compensated for his ignorance of the *waqf*, if such were the case, as a means of compensating him for the transferred property, but should the seller be a usurper, the purchaser could only call him to account whilst this individual were alive. If it was clear that the seller was insolvent or if he was not a usurper, the purchaser was granted the right to a share in the income from the foundation alongside the beneficiaries until he recouped the value of what he had invested in the *waqf*. Finally, when the executor of the sale was the *waqf*'s beneficiary, he would completely lose his right to enjoy the part of the endowment that corresponded to him due to the simple fact that he had committed a fraudulent act.⁽³⁷⁾

We can generally observe that the tendency is to concede priority to the foundation, granting preferential treatment to the beneficiaries to the detriment of the buyer, even if he has no knowledge of the *waqf*. Nevertheless, the latter's rights to receive compensation for the money invested in acquiring and exploiting the property in question are recognised in exchange for renouncing the good that he has purchased. One must also point out that the immutability of a *waqf* does stand out in the replies of some muftis, when it is indicated that the property must be restored to its pre-sale state.

2.2. Unlawful alienations carried out by members of the Andalusí administration

As we have just seen in the legal material I have used, there are records of fraudulent acts committed by founders and beneficiaries of *awqaf*. As might have been expected, the legal sources do not contain allusions to fraudulent management by the individuals responsible for the administration of such goods, particularly in relation to embezzlement by cadis. From an early period, however, the biographical literature is instructive in this regard. The oldest reference that I have located on this question concerns *cadi* 'Amr b. 'Abd Allah (d. 886), who confiscated ten thousand gold coins delivered as *waqf* to a person of his trust and gave him the corresponding receipt before sixteen witnesses. The judge denied having received this amount and even swore on the Koran that he

(37) See, for instance, Ibn al-'Attar, *Watha'iq*, ed. p. 588-594 and p. 620-625; trans. p. 860-866 and p. 931-936; Ibn Sahl, *Al-Ahkam al-kubra*, ed. al-Nuaimy, p. 964-965, p. 983-985; Ibn Rushd, *Fatawa*, n° 70; al-Sha'bi, *Ahkam*, n° 27, 51, 52, 54; al-Wansharisi, *Mi'yar*, VII, p. 224-227, p. 427-428, p. 430-431, p. 452-454.

was innocent. In spite of the existing testimony and proof against him, Muhammad I (r. 852-886) absolved him of the offence imputed to him.⁽³⁸⁾

On other occasions, some scholars could be victims of their own rectitude, by not favouring the material pretensions of the Andalusí monarchs when it came to *awqaf*, as against others who put their own personal interests before those of the foundations. There are various cases of the way in which rulers manipulated this kind of property, with or without the blessing of the scholars. Nevertheless, the fact that they did not dare to expropriate them without the issue of a fatwa authorising the transaction is certainly significant, as we shall see in the following example I have chosen. It is an anecdote involving the Cordovan caliph 'Abd al-Rahman III (r. 912-961), which throws into relief the degree to which the inalienability of *awqaf* was at the mercy of the whims of the rulers. The monarch in question expressed a desire to buy a country house belonging to the pious endowments established for the lepers of Cordoba. But the majority of the jurists opposed this transaction because of the *hurma* of this kind of property. Only Ibn Lubaba, basing his judgement on the people of Iraq (that is, on the Hanafí doctrine) issued a fatwa favourable to the sovereign by virtue of which the monarch gave the lepers some of his properties in the countryside in exchange for the country house.⁽³⁹⁾ It is necessary to frame this conflict within its political context since the position taken by Ibn Lubaba in this affair has much to do with his evident interest in recovering the posts in the Andalusí administration of which he had previously been divested.

Lastly, one must not forget that, on other occasions, it was the rulers themselves who urged the cadis to take money from the pious legacies and spend it on useful objectives⁽⁴⁰⁾, and who called the administrators of these goods to account regarding the missing money.⁽⁴¹⁾

(38) See al-Khushani, *Qudat Qurtuba*, ed. p. 144-146 and trans. p. 178-181. See also Carballeira Debasa, *Legados píos y fundaciones familiares*, p. 291.

(39) See 'Iyad b. Musa, *Tartib al-madarik*, VI, p. 87-91. See also Carballeira Debasa, *Legados píos y fundaciones familiares*, p. 187-188; García Sanjuán, *Hasta que Dios herede la tierra*, p. 343-346; *idem*, *Till God Inherits the Earth*, p. 410-414. Sometimes, the establishment of a *waqf* was due to the founder's desire to secure his patrimony against confiscations by the rulers during periods of turbulence. But we saw in the previous example that this circumstance did not prevent the magnates from seeking satisfaction for their desires.

(40) See 'Iyad b. Musa, *Tartib al-madarik*, VIII, p. 87.

(41) See Ibn 'Idhari, *Bayan III*, ed. p. 148 and trans. p. 129.

2.3. Unlawful alienations: preventive measures

The main means of exploitation of real estate established in a *waqf* was renting or leasing, since this was the system often used for achieving a return on this type of property⁽⁴²⁾. The legality of this procedure is evident through the abundant legal texts that allude to it. In some cases it is expressly indicated that the rent from the lease of a *waqf* property formed part of the latter's income⁽⁴³⁾. This is why the Andalusí legal texts do not actually associate the lease of such property with alienation since the fact that it was leased did not prejudice the interests of such a foundation, but rather increased its benefits.

Nonetheless, on certain occasions this operation could have negative repercussions on the functioning of the *waqf* to a point where its very existence was jeopardized. This occurred in cases where the term of the lease was so prolonged that it could prove seriously detrimental for the pious foundation. *Awqaf* subjected to excessively long lease periods ran the risk of manipulation at the hands of the lessees who might try to become the owners of the property they were leasing; so the question was to preserve the intangibility and inalienability of such property and to prevent it from falling into oblivion. This is one of the reasons that explain why Andalusí jurists generally expressed support for the establishment of short-term leases.

Most of the information contained in the juridical sources regarding the lease of *waqf* focuses on clarifying the duration and limit of the lease period. Consequently, the different classes of beneficiaries in whose benefit the foundation had been set up were taken into account, as well as the kind of property that was the object of the donation. Thus, the legal documentation informs us that if the *waqf* was constituted to the benefit of private individuals, there was a maximum period of two years during which the lease was in force. *Awqaf* instituted for the destitute, lepers and mosques were subject to a four-year renting period, especially where farm land was concerned, as this land depended on the fertilising function that the lessees applied. The maximum period for buildings was one year. Likewise, the possibility of renewing the lease on *awqaf* property existed when the stipulated period expired, although we are unaware of the exact procedure that had to be followed in such cases⁽⁴⁴⁾.

(42) For more information about the lease of *waqf* in al-Andalus, see Carballeira Debasa, *Legados píos y fundaciones familiares*, p. 297-309; García Sanjuán, *Hasta que Dios herede la tierra*, p. 131-137; *idem*, *Till God Inherits the Earth*, p. 132-141.

(43) See al-Sha'bi, *Ahkam*, n° 54.

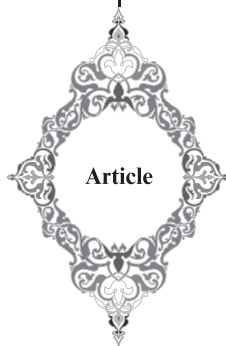
(44) See Ibn Mugith, *Muqni'*, p. 224-225; Ibn Rushd, *Fatawa*, n° 55; Ibn Sahl, *Al-Ahkam al-kubra*, ed. al-Nuaimy, p. 973-974; al-Sha'bi, *Ahkam*, n° 467; al-Wansharisi, *Mi'yar*, VII, p. 437 (see also Lagardère, *Histoire et société*, p. 257, n° 159).

3. CONCLUSIONS

The information that comes from the Andalusí sources offers a general view of different aspects of the juridical regulations by which the inhabitants of al-Andalus were governed in their relations with the institution of *waqf*. Among other things, the documentation we have studied gives an insight into the way that *waqf*, which theoretically consists of an immobilisation of property, also serves as a factor of change. This aspect leads me to examine the degree to which the immobilisation of these foundations was real. While in some cases the alienation was the product of fraud or of ignorance, in other circumstances it was justified. From the data recorded in the sources consulted, it is not possible to gauge the dimension of the economic impact that this institution had. But it may be supposed that it must have been quite considerable owing to the repercussions arising from the immobilisation of property, although these effects were partially counteracted by a series of economic activities, such as leases, purchase and sale transactions...

The legal sources in particular focus on a series of conflicts stemming from the greater or lesser respect demonstrated towards the inalienability of the *waqf*. The alienation of these kinds of goods is among the acts that are most criticized by Muslim jurists as it called into question the intangibility of the object of a donation, as well as the founder's stipulations embodied in the *waqf* deed. The cases of alienation of *awqaf* highlight the fact that in al-Andalus, during the period under study, there existed a general tendency to privilege the inviolability of the properties so established except in extraordinary and duly justified cases, motivated by the real changing circumstances, in which the sale or transfer of the *waqf* was imposed. This was the principal problem affecting the management and administration of such property. In general, the *fatawa* issued in this regard attempt to respond to the new economic and social needs posed in society. These needs constituted legal justification for the partial or total alteration of the foundation. In this sense, throughout this work it can be confirmed that the *muftis* attempted to adapt the legal regulations to a series of basic principles, chief among which were the degree of need and a general interest for the Muslim community to the detriment of the characteristics of immobility, inalienability, intangibility and imprescribability upon which rested the nature and status of the institution of *waqf*. Some of these aspects provoked a divergence of opinions among Andalusí jurists, which reflected a logical tension in the application of the principles of law. Consensus, however, existed around specific questions, such as when alterations were due to economic reasons or to a general interest for the society.

The cases analysed in this work constitute a good example of the dysfunctions associated with the practical application of theory within the framework of Islamic law. From this point of view, the corpus of *fatawa* concerning the institution of *waqf* transmits to us a picture of the Muslim juridical system in a process of permanent evolution.



The role of cash waqf as a financial instrument in financing small and medium sized enterprises (SME)

By: Dr. Ahcene Lahsasna

Abstract

The main objective of this paper is show the significant role of cash *waqf* as new financial model in the Islamic financial system. The cash *waqf* model is meant to develop and enhance the financial services for small and medium sized enterprises (SME). With the financial infrastructure based on cash *waqf* model the SMEs can overcome their financial challenges and obligations in business and commerce. However, the cash *waqf* model can be used as mechanism through its commercial and financial aspects to enhance the SMEs and facilitate their financial needs. The cash *waqf* has the potential to improve the domestic economic growth and play a significant role in the socioeconomic development by allowing the SME to have access to the financial services. The cash *waqf* model presented here will improve the function of the entrepreneurship and enhance other business models of equity financing such as *mudarabah* and *musharaka* financing, meanwhile increasing their implementation in the Islamic finance industry. The risk of capital is well mitigated, moderated and managed in cash *waqf* framework. In fact the mechanism of cash *waqf* goes further beyond the expectation by providing some free interest loan (*qard hasan*) to the SMEs

(*) INCEIF, Kuala Lumpur, Malaysia.

through a safety mechanism discussed in this paper based on trusteeship model, Equalization profit reserve, and surplus fund of the cash *waqf*. The scope of cash *waqf* channeled to develop the SMEs has very wide business concept and scope which include the most active segments in the market space such as banking, finance, Takaful, and capital market.

Key words:

Cash *waqf*, financing, small and medium sized enterprises (SME), debt financing, equity financing.

Theoretical framework of the research

In order to put the suggested model in very appropriate context, it is vital to start with an overview on the approach adopted in this research followed by the objectives of the suggested model.

A. An overview on the model and its approach

In order to understand the model discussed in this research, it is important to highlight some aspects which represent an overview of the model under discussion:

- The model is based on the integration of the cash *waqf* concept into the Islamic finance framework, whereby the Islamic finance benefits from the significant role that cash *waqf* can play and provide.
- The model presented in this research is designed to provide Islamic financing for the SME by using the cash *waqf* as a pool of funds.
- The Islamic financing suggested in the said model includes, debt financing and equity financing.
- Beside the typical model of financing mentioned, the model suggests including *Qard Hasan* as well as an additional tool to assist the SME financially as demonstration of the social responsibility of the cash *waqf*. However providing *Qard Hasan* is subject to the requirements and mechanisms discussed in this model.
- The model presented does not exist yet, but it is just business proposal to be considered to address the financial challenges faced by the SME.
- The model is designed for the SME, and uses the framework of SMIDEC as a vehicle; however the model can be customized to any other business sector other than SME, and can be applied to any other framework other than SMIDEC.

- The model is very flexible to accommodate any business requirements or framework.
- The research will introduce first the SME within the Malaysian concept, followed by implementing the cash *waqf* proposed model for the purpose of financing them by using SMIDEC as vehicle. The reason of using SMIDEC is because it is a governmental agency established to spur the development of small and medium enterprises (SMEs) in Malaysia, by providing infrastructure facilities, financial assistance, advisory services, market access and other support programmes.

B. The objective of the suggested model

The present research is trying to address one of the challenges of SME which is the limited access to the finance and capital. As we know, the SME are facing many challenges in the industry. According to Nelson Oly Ndubisi & Ali Salam Saleh, the challenges of SME in the domestic and international levels are the following:

1. Intensified global competition
2. Competition from other producers
3. Limited capacity to meet the challenges of market liberalisation and globalisation.
4. Limited capacity for technology management and knowledge acquisition.
5. Low productivity and quality output.
6. Shortage of skills for new business environment.
7. Limited access to finance and capital.
8. Difficulty in obtaining funds from financial institutions.
9. High cost of infrastructure.
10. General lack of knowledge and information.⁽¹⁾

The research is focusing on two of the above mentioned challenges (7 & 8), i.e., the challenges of limited access to finance and the difficulty in obtaining funds from financial institutions. The research is trying to provide solutions to the said challenges through the cash *waqf* model.

(1) Nelson Oly Ndubisi & Ali Salam Saleh (2006). Small and Medium enterprises, Malaysian & Global perspectives. pp:11-12.

1.0. Introduction to the Small and medium size enterprises

1.1. Concept of small and medium size enterprises

There is no standard definition for SME as different agencies define SME based on their own criteria, such as annual sale turnover, number of full time employees and shareholders funds. In this paper I refer the concept and definition of SME in Malaysia based on the National SME Development Council of Bank Negara (the Central Bank of Malaysia).

1.2. Small and medium size enterprises (SME) in Malaysia

Presently, there is no common definition of small and medium enterprises (SMEs) in Malaysia. Different agencies define SMEs based on their own criteria, usually benchmarking against annual sales turnover, number of full-time employees or shareholders' funds. In addition, present definitions focus mainly on SMEs in the manufacturing sector. The establishment and adoption of standard definitions for SMEs will facilitate better identification of SMEs across sectors, thus enabling more effective formulation of SME policies and implementation of SME development programmes, and provision of technical and financial assistance. It will also allow better monitoring of SME performance and their contribution to the economy. The National SME Development Council has, on 9 June 2005, approved the common definitions of SMEs across economic sectors, for adoption by all Government Ministries and Agencies involved in SME development, as well as financial institutions.⁽²⁾

1.3. Coverage of definition for SMEs in Malaysia:

The definitions of SMEs will be based on two criteria, namely: Number of employees; or Annual sales turnover.

Therefore, an enterprise will be classified as an SME if it meets either the specified number of employees or annual sales turnover definition. The definitions will apply for the following sectors:

- Primary Agriculture;
- Manufacturing (including agro-based);
- Manufacturing-Related Services (MRS); and
- Services (including Information and Communications Technology).⁽³⁾

(2) Secretariat to National SME Development Council, Bank Negara. Malaysia 13 September 2005. P. 2.

(3) Ibid, p. 2 - 3.

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Sector / Size	Primary Agriculture	Manufacturing (including Agro-Based) & MRS	Services Sector (including ICT)
Micro	Less than 5 employees	Less than 5 employees	Less than 5 employees
Small	Between 5 & 19 employees	Between 5 & 50 employees	Between 5 & 19 employees
Medium	Between 20 & 50 employees	Between 51 & 150 employees	Between 20 & 50 Employees. ⁽⁴⁾

The table below summarises the approved SME definitions based on annual sales turnover:

Sector / Size	Primary Agriculture	Manufacturing (including Agro-Based) & MRS	Services Sector (including ICT)
Micro	Less than RM200,000	Less than RM250,000	Less than RM200,000
Small	Between RM200,000 & less than RM1 million	Between RM250,000 & less than RM10 million	Between RM200,000 & less than RM1 million
Medium	Between RM1 million & RM5 million	Between RM10 million & RM25 million	Between RM1 million & RM5 million. ⁽⁵⁾

Therefore Malaysia adopted a common definition of SMEs to facilitate the identification of SMEs in the various sectors and subsectors. This has facilitated the Government to formulate effective development policies, support programmes as well as provision of technical and financial assistance.⁽⁶⁾

Category of SMEs	Micro-enterprise	Small enterprise	Medium enterprise
Manufacturing, Manufacturing-Related Services and Agro-based industries	Sales turnover of less than RM250,000 OR full time employees less than 5	Sales turnover between RM250,000 and RM10 million OR full time employees between 5 and 50	Sales turnover between RM10 million and RM25 million OR full time employees between 51 and 150
Services, Primary Agriculture and Information & Communication Technology (ICT)	Sales turnover of less than RM200,000 OR full time employees less than 5	Sales turnover between RM200,000 and less than RM1 million OR full time employees between 5 and 19	Sales turnover between RM1 million and RM5 million OR full time employees between 20 and 50

(4) Ibid, p. 5.

(5) Ibid, p. 6.

(6) National SME Development Council, SME Annual report 2008. P222. Nelson Oly Nbdubisi. (2008). Small and Medium enterprises in the pacific rim. P20. Nelson Oly Nbdubisi & Ali Salam Saleh (2006). Small and Medium enterprises, Malaysian & Global perspectives. P20. See also the official website of SMIDEC.. Retrieved: 2/2/2010.

2: The existing financial assistant for SME in Malaysia

There are some financial assistance to the SME in Malaysia provided by various ministries and agencies in various forms of grants and soft loans. The Government is trying to provide an enabling environment for the growth and development of globally competitive and resilient SMEs. Initiatives and programmes by the Government are directed towards addressing constraints and enhancing capabilities of SMEs in areas such as financial accessibility, advisory services, marketing, technology and ICT. Apart from the government, funds are also channelled through commercial financial institutions. The following financial assistance provided by the Malaysian government includes Islamic and conventional financing as follows:

2.1. Grants

To provide greater financial accessibilities, the Government, through its agencies, offers various grants and incentives to the SMEs. Partial grants are provided to finance product, process and quality improvements, market development, skills upgrading, factory audit and acquisition of strategic technology.⁽⁷⁾ The governments agencies involved in assisting the SME are as follows:

- Small & Medium Industries Development Corporation (SMIDEC)
- Malaysia External Trade Development Corporation (MATRADE)
- Malaysia Productivity Corporation (MPC)
- Malaysia Industrial Development Authority (MIDA)
- Ministry of Entrepreneur and Co-operative Development (MECD)
- Ministry of Agriculture and Agro-Based Industry (MOA)
- Ministry of Science, Technology and Innovation (MOSTI)
- Ministry of Rural Regional Development (MRD)
- Malaysian Technology Development Corporation (MTDC)
- Malaysia Venture Capital Management Berhad (MAVCAP)⁽⁸⁾

2.2. Loans

Access to financing is one of the major problems for SMEs especially for expansion and business development. In this regard and in order to facilitate the easy access to the fund and financing, the Government and commercial

(7) Official website of SMIDEC.. Nelson Oly Ndubisi & Ali Salam Saleh (2006). Small and Medium enterprises, Malaysian & Global perspectives. P20.

(8) Each one of the above government agencies has a specific criteria and procedure for the financial facility.

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institutions provide loans for working capital, purchase of fixed assets and project financing. The institutions involve in assisting the SME are as follows:

2.2.1. Government Financial Institutions

- Bank Negara Malaysia
- SME Bank
- Bank Pertanian Malaysia
- Malaysian Industrial Development Finance Bhd (MIDF)
- Sabah Development Bank Bhd
- ERF Sdn. Bhd
- Malaysia Debt Ventures Berhad.

2.2.2. Commercial banks:

The commercial banks are also involved in the financial facility for SME. The banks which provide Islamic financing models to the SME are as follows:

- EON Bank Bhd
- Hong Leong Bank Bhd
- HSBC Bank Malaysia Bhd
- Maybank Bhd
- OCBC Bank (Malaysia) Bhd
- Public Bank Bhd
- RHB Bank Bhd
- Southern Bank Bhd
- Standard Chartered Bank Malaysia Bhd.⁽⁹⁾

2.2.3. Finance companies

The finance companies are part of the SME financing facilities, they are providing Islamic financing for SME, and these banks are as follows: AFFIN-ACF Finance Bhd, Eon Finance Bhd, Hong Leong Finance Bhd, Mayban Fiance Bah. Public finance Bhd. Southern finance Bhd.

2.3. Bank Negara Malaysia: Development Finance and Enterprise Department

In order to assist SME in Malaysia, Bank Negara Malaysia has set-up the "Development Finance and Enterprise Department". The Unit aims to assist viable SMEs in obtaining financing. While the banking system is the main provider of funds to the SMEs, other alternative sources of financing for SMEs

(9) Each one of the above banks has a specific criteria and procedure for the financial facility, base on bank parameter but within the framework of government guideline.

include the development financial institutions and the various special funds established by the Government.

SME Special Unit

Bank Negara Malaysia has “Small and Medium Enterprise Special Unit”. The SME Special Unit is a centre to assist viable SMEs in obtaining financing.

The SME Special Unit is to assist the SMEs in the following areas:

- To provide information on the various sources of financing available to the SMEs.
- To facilitate SMEs in their loan application process.
- To address difficulties faced by viable SMEs in securing financing.
- To provide advisory services on other SMEs financial requirements.⁽¹⁰⁾

3. The role of cash *waqf* in financing micro and medium sized enterprises (SME)

(The new suggested financial approach by using cash *waqf* model):

The above mentioned financial assistant to the SME provided by various government agencies could not resolve the financial problem faced by the SME, and still the limited access to finance and capital, and difficulty in obtaining funds from financial institutions are challenges faced by the SME. Therefore, the best solution is that the SME solve their financial problems and challenges by themselves by looking at the following model. This model is base on the cash endowment scheme that the SME create for their benefit, the model is explained as follows:

3.1. The concept and framework of the commercial and financial aspect of cash endowment scheme:

The concept and framework of the commercial and finance aspect of cash *waqf* will be explained as follows:

3.2. Corporate and financial definition of cash endowment

Cengiz Toraman and Bedriye Tuncsiper cash *waqf* is defined as “*waqf* whose corpus consists of cash”.⁽¹¹⁾ It and can be defined also as: “The confinement of an amount of money by a founder(s) and the dedication of its

(10) . Retrieved: 2/2/2010. Official website of the central bank of Malaysia. Lee Khee Joo. (2003). Credit facilities for small and medium industries. P15.

(11) Cengiz Toraman and Bedriye Tuncsiper, Cash Awqaf in the Ottmans as Philanthropic foundations. p6.

usufruct in perpetuity to the welfare of society”.⁽¹²⁾ The general concept of *waqf* is grounded on the above definition; however the concept of cash *waqf* should be more oriented towards financial and economic dimension in order to suit the corporate need of the industry. Hence in order to have an accurate definition of cash *waqf* it should incorporate the elements of perpetuity and liquidity of the *waqf* as essential components in the definition, therefore the appropriate definition will be: cash *waqf* is mobilization cash funds from donors based on perpetuity and investing them in productive assets that provide revenues for future consumption by individuals or groups by taking into account the policy and guideline provided by the donors and beneficiaries.⁽¹³⁾ This definition of cash *waqf* is in compliance with the Shariah concept of *waqf*.

3.3. The benefit of cash endowment for SME in commerce and finance

The commercial aspect in cash *waqf* has multiple benefits, which can be described as follows:

- The cash *waqf* with its commercial and financial aspect will be more productive for the benefit of SME particularly, and for the society in general especially at macroeconomic level.
- The benefit of cash endowment will include the donor himself in the first place who will be one of the beneficiaries of the *waqf*.
- Cash endowment creates a great opportunity for SME by getting financial reward and profit which can be channelled to their needs according to their terms during the establishment of the cash *waqf*.
- Cash endowment increases the accumulation of liquidity and capital in the industry and creates more business opportunities.
- Improve the market by increasing more business activities.
- Enhancing the domestic economy by providing the following:
 - Liquidity to the business sector.
 - Financing the SME in the industry.
 - Circulating the fund in the market.
 - Creating more jobs.

(12) Magda Ismail & Ahcene Lahsasna, Cash Waqf a new financial product model: aspects of Shariah principles on its commercialization. Paper presented in the third Islamic banking, accounting and finance conference, 29 - 31 July 2008. Kuala Lumpur, Malaysia.

(13) This definition is provided by the author.

3.4. Objectives of cash *Waqf* certificate

Cash *waqf* is certificate or a document provided to the *waqif* as an evidence for his contribution to the cash *waqf*, the total contribution of the participants will create the pool of fund for the cash *waqf* which has a significant role in developing finance and economy. According to Mannan the objectives of cash *waqf* certificate are as follows:

- To equip banks and other *waqf* management institutions with cash *waqf* certificate,
- To help collect social savings through cash *waqf* certificate (cash *waqf* certification can be done in the name of other beloved family member to strengthen family integration among rich families),
- To help transform the collected social savings to social capital, as well as to help develop social capital market,
- To increase social investment,
- To encourage rich communities' awareness of their responsibility for social development in their environment,
- To stimulate integration between social security and social welfare.⁽¹⁴⁾

3.5. Process of the cash endowment model for SME (Malaysia framework by using SMIDEC).⁽¹⁵⁾ Below is the process of setting up the cash *waqf* model, which starts from SMIDEC as vehicle and involving other parties.

SMIDEC Stand for Small and Medium Industries Development Corporation (Malaysia).⁽¹⁶⁾

Phase 1: Establishment of the cash *waqf* by SMIDEC. SMIDEC in this case will be the founder of the cash *waqf*.

Phase 2: Appointment of trustee by the SMIDEC as founder of the cash *waqf*, whereby

(14) Mannan, M. A. New frontiers of Islamic Micro Finance and voluntary sectors banking and finance, 2007, p22-23. Paper presented at the National conference on Islamic finance, Kuala Terengganu, 27-28, 2007, Malaysia.

(15) This model does not exist in Malaysia, it is just a propose model that can be used in Malaysia or else where.

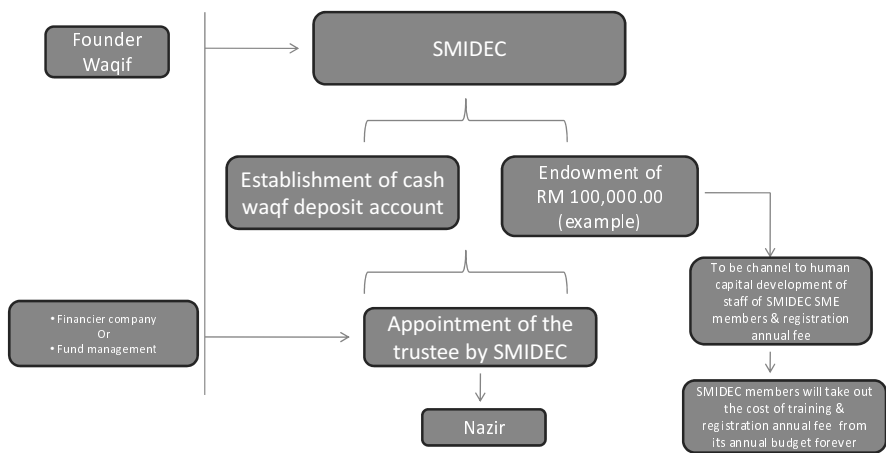
(16) SMIDEC began on 2 May 1996, when a specialised agency was established to spur the development of small and medium enterprises (SMEs) by providing infrastructure facilities, financial assistance, advisory services, market access and other support programmes. Known as the Small and Medium Industries Development Corporation (SMIDEC), its aim was to develop capable and resilient Malaysian SMEs to be competitive in the global market. The reason of choosing SMIDEC as the founder of cash *waqf* is because the research is related to the SME.

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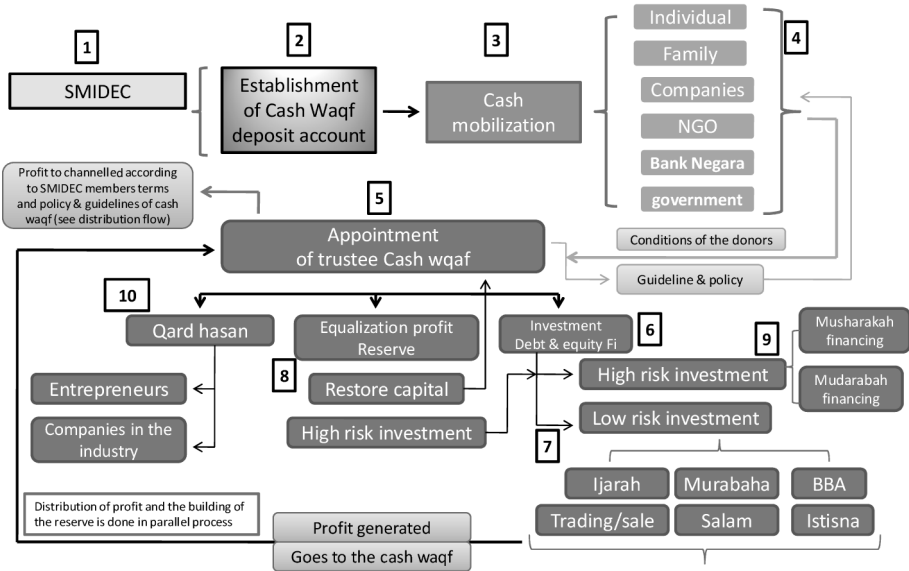
SMIDEC appoints a trustee who will be the fund manager who invests the capital of the cash *waqf*)

- Phase 3: Fund mobilization and creating the cash *waqf*
(this process will include SME members in SMIDEC, Non Government organization (NGO), financial institutions, Government, etc..)
- Phase 4: Investment of the cash *waqf* fund in debt financing instruments (low risk investment: murabahah, Ijarah, Istisna, Bai' Bithaman Ajil (BBA))
- Phase 5: Profit generated from investment
 The profit will be channelled to three different accounts in parallel:
 - Building reserve account
 - Building *qard hasan* account
 - Distribution of the profit to SME according to their terms
- Phase 6: Accomplishment of building: Equalization Profit Reserve & *Qard hasan* account.
- Phase 7: Investment of the fund in equity financing & providing *qard hasan*
(High risk investment: Mudarabah & Musharakah)
- Phase 8: Distribution of the profit according to SMIDEC member's terms and according to the accounts of cash *waqf* management.

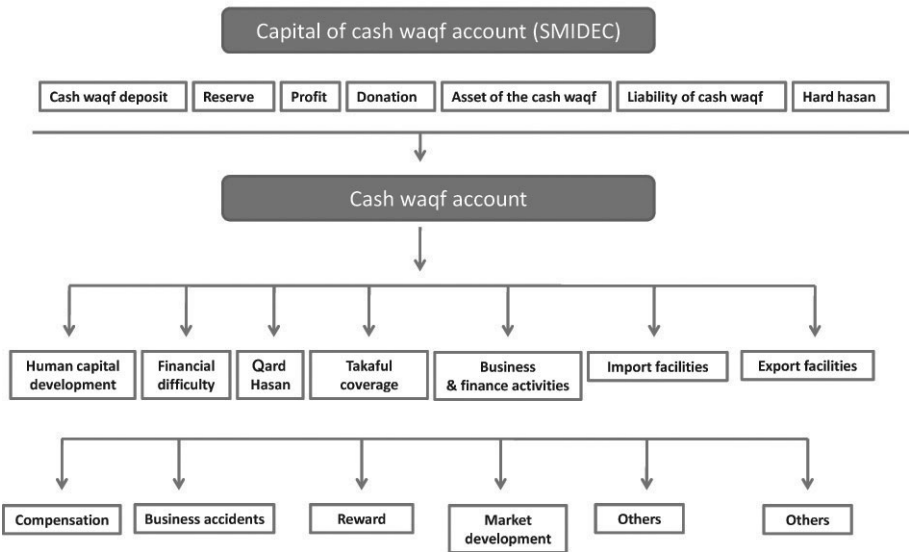
Establishment of Cash waqf deposit account by SMIDEC



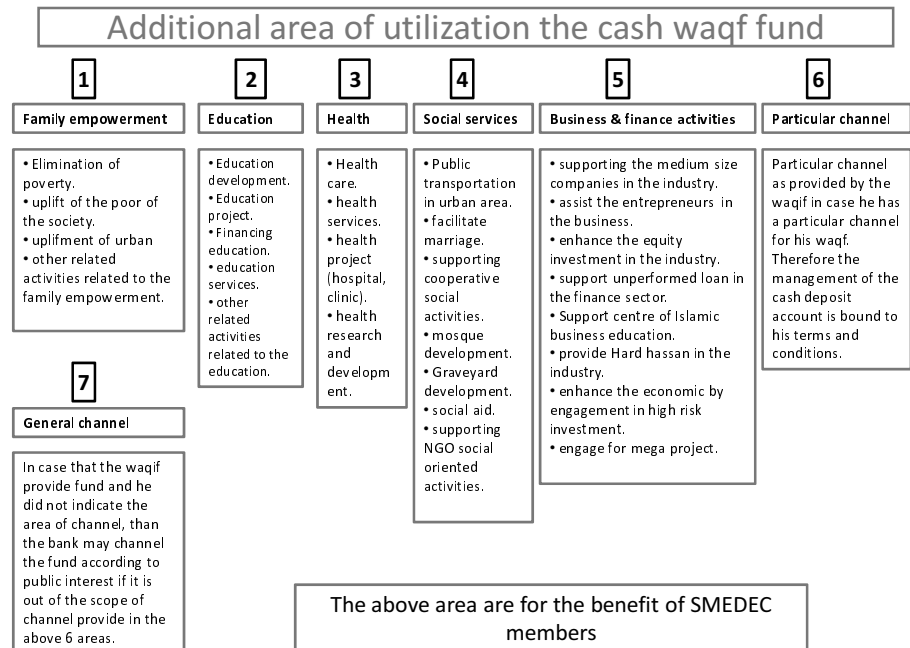
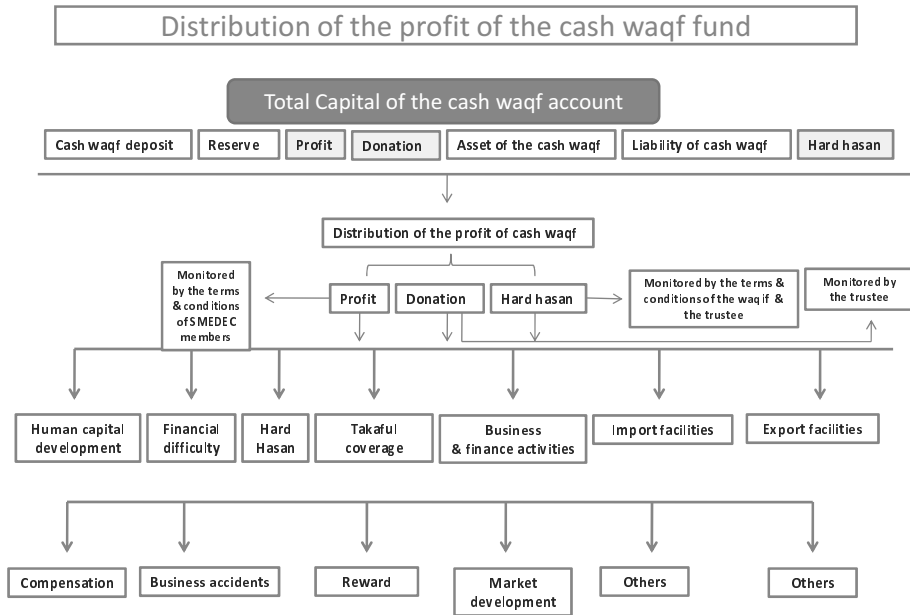
Structure of cash waqf deposit account fund mobilization & investment



Types of account under cash waqf deposit



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3.6. The relationship between the SME depositors and the account of cash endowment:

The fund will be deposited in the account of the *waqf* established by SMIDEC; upon the contribution and deposit of the cash as *waqf* in the account, the certificate of the cash *waqf* will be provided accordingly (during the opening of the account). After the creation of the cash *waqf* account the trustee starts investing the capital to generate profit, the investment can be channelled to different area of investment which include education, social services and financing. The trustee will act as financial institution with business entity, and profit oriented. The profit generated from the business activities will be spent on different purposes according to the terms of the SMIDEC members. If the SME members don't have a specific channel the fund manager (the trustee appointed by SMIDEC) will channel them according to predetermine agreement with the SME members. It is important to note that there is policy in the form of agreement which guides the contribution of SME to the cash *waqf*, that policy governs the relationship between the cash *waqf* management (trustee) and the donors including SME members. This policy can be described as a guideline for the operation of the cash *waqf* scheme as provided by the Social Islamic Bank in Dhaka as follows:

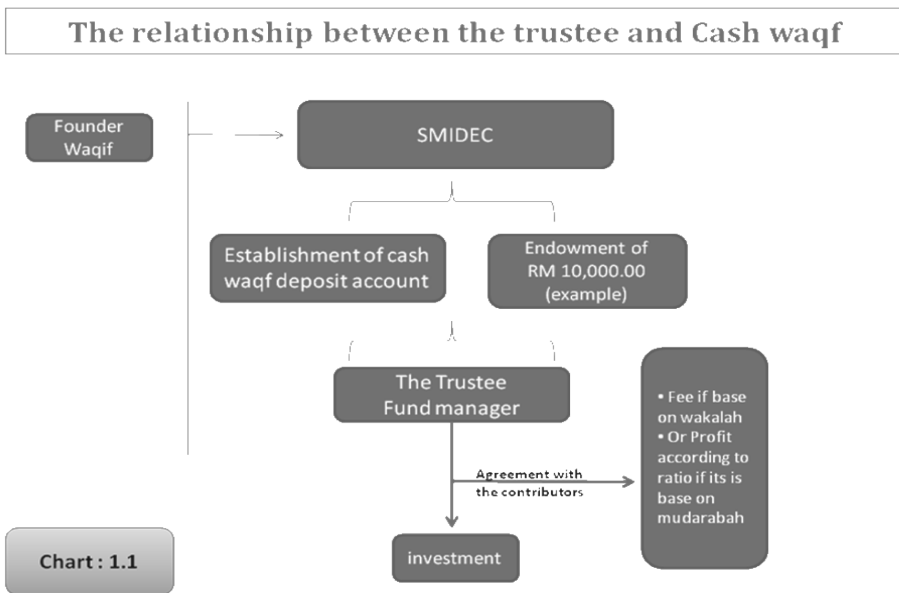
- Cash *waqf* is an endowment in conformity with *Shariah*, the institution manages the *waqf* on behalf of the *waqif*.
- *Waqif* is done in perpetuity and the A/C is opened in the title given by the *waqif*.
- *Waqif* has the liberty to choose the purpose(s) to be served either from the list provided and identified by the institution, covering (a) family empowerment credits (b) Human resource development (c) Health sanitation and social utility services or any other purpose(s) permitted by *Shariah*.
- Cash *waqf* amounts remain intact and only the profit amount is spent on the purpose(s) specified by the *waqif*.
- Unspent profit amounts automatically are added to *waqf* amount and earn profit to grow over the time.
- *Waqif* can also instruct the institution to spend the entire profit amount for the purpose specified by him/her.
- *Waqif* has the opportunity to create cash *waqf* at a time.
- The deposits can start with any amount.
- *Waqif* has the right to give standing instruction to the institution for regular realization of cash *waqf* at a rate specified by him/her from any other A/C maintained with the institution.

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- The amount in cash *waqf* of account is a perpetual deposit.⁽¹⁷⁾

3.7. The relationship between the trustee and the cash endowment account.

The relationship between the fund manager or operator and the cash *waqf* endowment account is based on *mudarabah* or *wakalah* concept, therefore the fund manager will be sharing profit according to ratio agreed upon, and the relationship can be similar to Takaful operators in Islamic insurance. However, if the concept is based on *wakalah*, the fund manager will be entitled for afee. (see: chart: 1.1.).



3.8. Cash endowment mobilization:

This is a very important stage in the structure of the cash *waqf* as it is basically the starting point towards the financial dimension of this model. The mobilization of the fund for the cash waqf is based on the prearrangement agreement between SMIDEC and SME members.

However we should highlight two points here:

(17) Social Islamic Bank, Bangladesh, <http://www.siblb.com/html/homepages.php>. Mannan, New frontiers of Islamic micro finance and voluntary sector banking and finance, p26. (with some amendment).

- The cash *waqf* is established and designed for the business community of SMIDEC who are the SME members in order to meet their financial needs.
 - The fund mobilization to the cash *waqf* is not limited to the SMIDEC members, but open to any contributor. (see: chart: 1.2.).
- A. Individuals: The participation of the individual can be part of the contribution by having a cash *waqf* certificate which represents a financial contribution to the fund of cash *waqf*. This cash will located to the cash *waqf* funds, and channelled to one of the available models provided by the funds manager.
- B. Organizations and Financial institutions:** The organizations and financial institutions are very important counter part of the creation of the cash *waqf*, the organizations and financial institutions include banks, Non Government Organization, government, government agencies and others regardless of the nature of their business activities. The organization will be treated as separate entity for the cash *waqf*, and all the terms and conditions apply.
- C. **SME members:** The companies of SME represent the core of cash *waqf*; they are behind the creation of the cash *waqf*, and therefore they should be very active participants in the growth and expansion of the cash *waqf*. by directing their business activities to the cash *waqf*. On the other hand, the SME will be an important partner for the funds manager who runs the cash *waqf* fund, whereby the investment of the cash *waqf* in the market will be through the SME members as well.
- D. Government: The government is the key player in the success of the cash *waqf* operation. The importance of the government can be observed in the following:
- Supporting the cash *waqf* as unique instrument and approach in the industry.
 - Facilitate the legal framework of the cash *waqf* operating in the financial market, and be part of the national business activities.
 - Regulate the function of *waqf* by putting *Shariah* standards that govern the *waqf*; this includes *Shariah* aspect, financial aspect, accounting aspect, and managerial affairs accurately.
 - Amend the existing legal framework to suit the cash *waqf* business operation.
 - The government has the full responsibility to safeguard the interest of cash *waqf* in the nation not by managing the cash *waqf* but by facilitating the cash *waqf* operation in the industry.

—— The role of cash waqf as a financial instrument in financing small and medium sized enterprises (SME)

- Full responsibility of standardized method to manage the *waqf* marketing, information related, managerial. fees payment, compensations expenses which could be used for auditing, investigation and rating.
- The government agencies related to SME can contribute to the cash *waqf* for the benefit of the SME, the cash *waqf* can be channeled to any particular aspect of their needs and activities according to government agencies plan and programme.

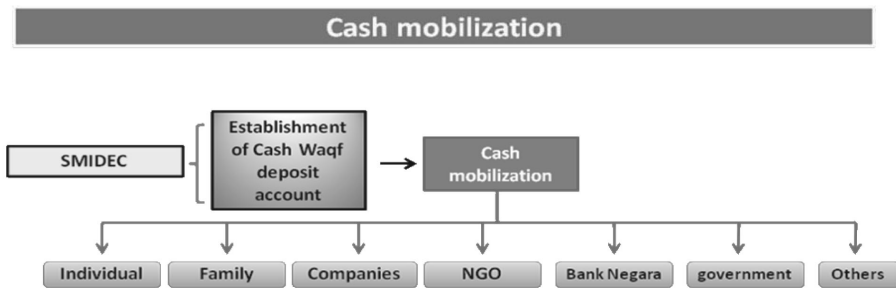


Chart : 1.2

3.9. Notion of the contribution and the cash endowment account

The contribution of the above categories including SME is for the sake of the following purposes:

- Participation for the creation of cash *waqf* by seeking the reward from Allah without any further intention of getting the reward in this world which can be in form of collecting benefit generated from the cash *waqf* investment.
- The contribution of the individual can be in form of supporting the various segments of the industry.
- The contribution of the companies can be as benevolent act for the benefit of the needy of the SME which are facing a financial difficulty.
- The contribution can be for the improvement of SME member in SMIDEC. This improvement includes education development or health care or other social activities.
- The contribution can be also in form of supporting the investment of SME in the industry.

- The contribution can also be in form of supporting the investment of the *waqf* funds by taking care of the investment and ensuring the safety of the *waqf* funds as part of their corporate responsibility for the successes of the *waqf* project.
- The contribution of the government and related organizations and agencies attached to the government will be in similar form of the above mentioned, which means that the government can contribute by donation to support the social activities by providing more support to the investment of the *waqf* funds and ensure the safety of the capital.

The contribution can have two different aspects based on the attitude of SME:

- The first one is social aspect as part of the social responsibility of SME; this contribution can be in form of supporting the needy of the society at the macroeconomic level and at the level of the individuals as well.
- The second aspect is related to the business activities which include investment in banking, entrepreneurship and capital market and other segments of the market as well.

4. The financial framework of the cash endowment in investment and its mechanism:

The financial framework of the cash endowment in investment can be described as follows:

4.1. The financial framework of the cash endowment in investment

The framework of the cash *waqf* is based on a trust's concept; the fund will be managed according to the same model of the financial institution, such as Islamic bank, Takaful operator, fund manager, or asset management. This model will safeguard the capital in case of misconduct, corruption or unforeseen circumstances such as bankruptcy. Furthermore this concept will increase the efficiency and productivity of the business, and operation, meanwhile ensure a sound management and revenue of the capital.

4.2. Investment of cash endowment

The purpose of the cash *waqf* is to channel the funds to the market for investment to contribute to the economic growth and generate profit to fulfill the intent of the participants provided in the policy of cash *waqf* if any. The fund's management has the full responsibility as professional and trustee to exert their best effort for the success of the investment.

There are some important guidelines that must be observed in order to ensure the safety of the investment of the cash *waqf*. These guidelines have been

mentioned by the Islamic *Fiqh* academy in its resolution No. 140 (15/6) as follows:

- From Islamic point of view Cash *waqf* is permissible because its objective is to restrain the 'ain (property) and to channel its usufruct to the beneficiaries, with the original 'ain protected.
- Cash *waqf* can be created for *qard hassan* (benevolent loan), for investment either direct investment or *musharakah* investment through fund investment or through issuing of cash *waqf* shares. This will encourage the establishment of cash *waqf* from all people.
- When cash *waqf* is invested in acquiring tangible assets such as buying real estate, or made an *Istisna* contract, the acquired asset or the assets of *Istisna* can not be considered as *waqf* property and it can be sold cash or reinvested but the original cash *waqf* amount must be preserved.⁽¹⁸⁾

4.3. Type of investment in cash *waqf*

The funds of cash *waqf* can be invested according to a professional business plan provided by the trustee based on the needs and requirements of the industry and market, therefore the trustee who manages the fund must act as financial organization with business entity oriented which means that the goal will be to generate profit by investing the funds. However to ensure the safety of the capital it is recommended to invest the capital in low risk investment and secured projects following the same path of investment of the Islamic financial institutions. The trustee should take the Islamic bank investment as model and benchmark, the reason being is to avoid any deficit of the capital and avoid exposing it to any substantial risk or damage.

There are some principles of investment of the cash *waqf* that must be observed and considered by the trustee while running their business operations and investment. These principles are as follows:

- The trustee should establish a guideline and principles for the participants, members of SMIDEC to be adopted during the establishment of the cash *waqf*. This guideline is in form of a policy which governs the relationship between the parties involved in the cash *waqf*.
- The investment must be in *halal*, and the non *halal* investment must be avoided at all circumstances.
- The investment should be in safe investment to safeguard the capital of the *waqf*.

(18) International fiqh academy in its resolution No. 140 (15/6).

- The trustee should create a reserve from the profit for the safety of the capital in case of loss in the investment and business operation.
- Once the reserve is created the trustee is required to invest in micro credit, and micro financing, and partnership financing such as *mudharabah* and *musharakah* in order to assist the entrepreneurship and medium size enterprises in SMIDEC.
- The trustee should create a fund to support the voluntary sector and demonstrate the social responsibility of the *waqf*; therefore the cash *waqf* should be able to provide *qard hasan* to assist the industry members of SMIDEC who are facing financial difficulty.
- The trustee should adopt the recommendation of the international *fiqh* academy in its resolution No. 140 (15/6): which is as follows:
- When investing the income of *waqf*, the following conditions should be observed:
 1. Statement and scope of the investment should be *Shariah* compliant.
 2. Observation of variation of investment scope in order to diversify business risks, taking guarantees, documentation of the contracts, conducting of feasibility study for the intended investment projects.
 3. Selection of the safest models of investment and keeping away from the high risk investment models.
 4. Investment of *waqf* properties should be *Shariah* compliant and models suitable to those properties which serve and protect the *waqf* and beneficiary's rights. Therefore, if the *waqf* properties are tangible assets, the investment should not lead to the termination of their ownership, and if they are in the form of cash they can be invested in any *Shariah* compliant model of investment, such as *Mudharabah*, *Murabaha*, and *Istisna*,...etc.
 5. There must be an annual disclosure of the investment activities and make such information available to the persons involved.⁽¹⁹⁾

4.4. Cash *waqf* and micro financing

Cash *waqf* is very liable source for micro credit and micro financing; it is a very strong source for the medium size enterprises and entrepreneurship. The cash *waqf* can contribute to the improvement and performance of the industry through the assistance provided to the SME. Cash *waqf* can create more projects, business opportunities, and more employment, which contribute to the economic

(19) International *fiqh* academy in its resolution No. 140 (15/6).

growth, and the financial system. There are many areas of investment of cash *waqf* that SMIDEC members can be part of it. We can divide the corporate financing into two major categories according to the market segment which are: debt financing and equity financing. The former is a low risk investment whereas the latter is a high risk investment; the cash *waqf* is the only model which can take the challenges to do both investments. (see chart: 1.3).

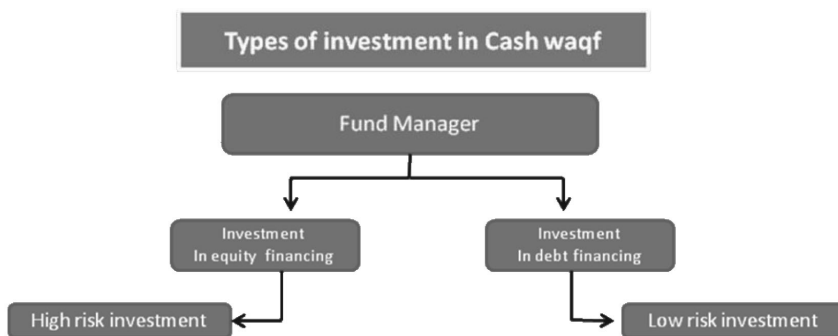


Chart : 1.3

4.4.1. Cash *waqf* in debt financing

The debt financing has low risk compared to equity financing, therefore the cash *waqf* can be invested in this business sector, especially in the first year of investment. The fund management should be very careful with the investment to safeguard the capital of the *waqf*. SMIDEC members will play a vital role in making this type of financing successful. On one hand they are the participants of the cash *waqf* and from the other hand they are the investor of cash *waqf*, it is their duty to safeguard the capital throughout the investment. There are many types of debt financing whereby the funds manager can engage him self actively to generate profit and ensure stability in the cash *waqf* fund. The debt financing is a *Shariah* compliant instrument such *Murabahah* financing model, *Salam* financing, *Istisna*, Bai' Bithaman Ajil (BBA) financing), Ijarah etc. (see chart: 1.4).

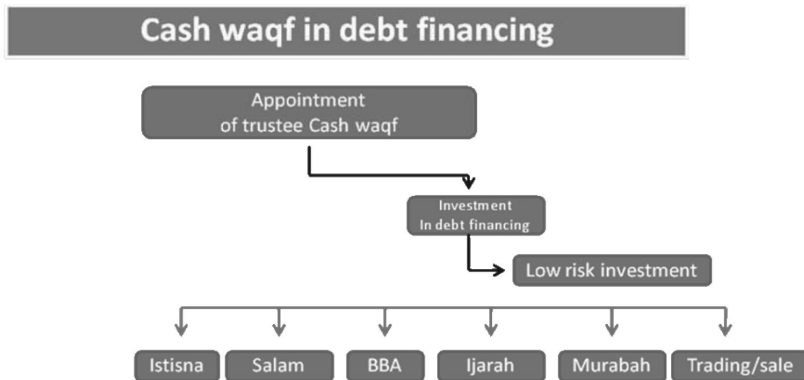


Chart : 1.4

4.4.2. Cash waqf in equity financing

Equity financing is a very important area of investment for the cash waqf. In our view, the cash waqf is the only financial model which can aggressively accommodate this type of investment by advocating a proper mechanism as discussed below. However under any circumstances, the trustee is required to act in the industry with a business identity to generate profit, the fund manager can engage actively in the market for business venture as far as the principles of *Shariah* in business are fulfilled. This investment will give a special consideration to partnership business, since there is a low rate of using the partnership model in the Islamic finance industry such as *mudarabah* and *musharkah*, the cash waqf can take the initiative to play this great role to enhance this type of business sector in the industry and show some good positive indication in the market. It should be noted here that the challenges that the cash waqf is taking does not mean exposing the funds and capital to risk due the nature of the investment in equity financing, but the objective is to activate this business sector, and improve the performance of the enterprise, in addition to that the engagement in equity financing by cash waqf might encourage the Islamic financial institutions to follow the same path and be more aggressive in this sector.

Since this type of investment has a high risk, the issue may arise regarding the safety of the cash waqf, and the possibility of deficit of the capital which creates a *Shariah* issue in the cash waqf. To overcome this problem we suggest the following:

- The trustee should allocate a proportion of the profit generated from the business activities, and create a fund reserve. The fund reserve will safeguard the capital of cash *waqf* in case of deficit.
- As we know the profit from *Shariah* point of view is not a *waqf*, but it is property owned by the *waqf*, therefore different rules can be applied to govern the profit generated.
- The profit can be channelled to different business activity which includes high risk investment and social investment.
- In order to ensure the *Shariah* compliant regarding channeling the surplus funds to different business activities, consent of the participants can be obtained upfront during the creation of cash *waqf*.
- Therefore the surplus of the cash *waqf* will be invested in high risk investment for the benefit of the Muslim entrepreneurs and enterprises, which is part of the social responsibility.
- Similar consent can be obtained from the creator of the cash *waqf* that portion of the profit will be located as *qard hasan* for the small and medium enterprise, who can not get such facilities from the Islamic banks. due the strict financial assessment of the risk management of the Islamic finance institutions.
- This scheme is for the benefit of SMIDEC members, and the investment will be channelled to them.
- This approach will enhance the application of the partnership in the industry (*musharakah & mudarabah*) and help the small businessman to get interest-free loan. However, if there is there a loss in the capital, the reserve fund will absorb it, and the cash *waqf* will stay safe and intact and will not be affected because the reserve will cover any loss likety to occur.

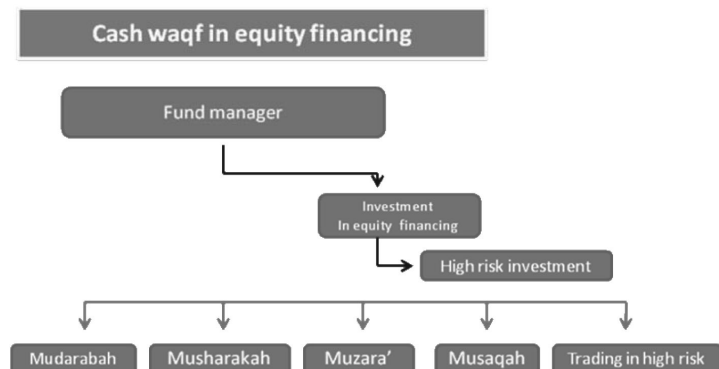


Chart: 1.5

5. Policy and guideline agreement between the trustee and the members of the cash endowment account.

A master agreement should be provided to govern the relationship between the trustee and members of the cash *waqf* in order to ensure transparency, mutual consent, right and obligations between the parties involved in this business arrangement. This guideline agreement will be agreed upon during the opening of the account from every participant in the cash *waqf*. The guideline agreement represents the policy of the cash *waqf* as follows:

- All the parties involved in the cash *waqf* must honor the policy and the guideline, and the policy will be binding to any contributor to the cash *waqf*.
- The investment must be in *halal* business, and the non *halal* investment must be avoided at all stages.
- The investment should be in safe investment to safeguard the capital of the *waqf*.
- The trustee should create equalization profit reserve from the profit generated for the safety of the capital in case of loss in the business operation.
- Once the reserve is created, the trustee is allowed to invest in micro credit, and micro financing, and partnership financing such as *mudarabah* and *musharakah* in order to assist the entrepreneurship and medium size enterprises.
- The trustee is allowed to use the surplus fund to support the voluntary sector and demonstrate the social responsibility of the *waqf* institution; therefore the cash *waqf* should be able to provide *Qard Hasan* to assist the industry members who are facing financial difficulty. This facility is channeled to SMIDEC members (SME).
- The profit of *waqf* is not a *waqf*, but it is property owned by the *waqf*, therefore different rules can be applied to govern the profit generated.
- The profit can be channelled to different business activities which include high risk investment and social investment.
- In order to ensure the *Shariah* compliance regarding channeling the surplus funds to different business activities, consent of the participant can be obtained during the creation of cash *waqf* by signing this agreement policy.
- The surplus of the cash *waqf* will be invested in high risk investment for the benefit of the Muslim entrepreneurs and enterprises, which is part of the social responsibility.
- Similar consent is obtained from the creator of the cash *waqf* so that portion of the profit will be allocated as *qard hasan* for the small and medium enterprise, which can not get such facilities from the Islamic banks.

- The trustee should adopt the recommendation of the international *Fiqh* Academy in its resolution No. 140 (15/6): which are as follows:
 1. When investing the income of *waqf* the following conditions should be observed:
 2. Statement and scope of the investment should be *Shariah* compliant.
 3. Observation of variation of investment scope in order to diversify business risks, taking guarantees, documentation of the contracts, conducting of feasibility study for the intended investment projects.
 4. Selection of the safest models of investment and keeping away from the high risk investment models.
 5. Investment of *waqf* properties should be according to the *Shariah* and models suitable to those properties which serve and protect the *waqf* and beneficiary's rights. Therefore, if the *waqf* properties are tangible assets, the investment should not lead to the termination of their ownership, and if they are in the form of cash they can be invested in any *Shariah* compliant model of investment, such as *Mudharabah*, *Murabaha*, and *Istisna*,...etc.
 6. There must be an annual disclosure of the investment activities and make such information available to the persons involved.

Conclusion

This research concludes with some findings and recommendation as follows:

- Cash *waqf* is a very powerful tool for fund mobilization and investment.
- The cash *waqf* should function on trust's concept and the fund manager of should act as financial institution.
- The participants involved in the creation of cash *waqf* can be individuals, family, groups, firms, companies, financial institutions, government, etc.
- The model provided can be customized based on SMIDEC requirement, or any other business or social organization.
- The cash *waqf* can accommodate the terms and conditions of *waqif* within the *Shariah* rules and framework.
- Cash *waqf* management should provide a policy as guideline to govern the relationship between the participant and the cash *waqf*.
- Cash *waqf* can play a crucial role in the improvement of the industry, financial system and the economic growth.
- The investment of cash *waqf* may be dedicated to debt financing which has a low risk investment to generate profit and expand the fund of cash *waqf*, and can be expanded to equity financing as well to assist the medium size enterprises in micro credit and micro financing.
- The cash *waqf* is able to enhance the partnership business organization in banking and finance.
- The cash *waqf* must create a reserve for the purpose of capital safety and allocate fund for high risk investment and *Qard Hasan*.
- Cash *waqf* can easily demonstrate the social responsibility in its business activity.
- Cash *waqf* is always guided by the *Shariah* advisory board to ensure *Shariah* compliance in the various business activities.