



Refereed Biannual Journal Specialized in Waqf and Charitable Activities

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

[Narrated by Muslim]



## **Project of AWQAF journal**

AWQAF Project is based on a conviction that Waqf – as a concept and an experience – has a great developmental potential which entitles it to contribute effectively to the Muslim communities and cope with the challenges which confront the Muslim nation. The history of Islamic world countries also reflects on Waqf rich experience in devising a societal involvement which encompasses almost all diverse walks of life and helps primarily in developing solutions for emerging human difficulties. During the decline of the Muslim nation, Waqf provided shelter and support for a significant share of the innovations that Islamic civilization was famed for and assured them to pass from one generation to another.

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

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

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

### **AWQAF Journal Objectives**

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

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

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

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

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

- The material should not have been published in any journal (electronic or printed)
- The material should abide by the rules of academic research conventions related to documenting the references and sources, together with conducting an academic handling.
- A research should fall in (4000 to 10,000) words, to which a summary of 150 words in both Arabic and a foreign language should be attached. Researches meant for publication shall undergo a secret academic refereeing.
- A researcher should attach the form of Work Originality to his research.
- An article should fall in 3000 - 4000 words.
- The Journal receives book's presentations and here priority is given to modern publications. The revision should fall in 5000 to 1000 words. The presentation should include the main points about the book, for example the author, publisher, year, version, along with laying stress on the presentation, analysis through scientific method, interest in the essence of the book and its chapters, and assessing it in the light of other relevant works.
- The Journal receives coverages of seminars and conferences, provided that a report should mention the organizing body, the subject of the seminar, place and date of the seminar, the major axes, survey of the researches submitted with their main ideas. There should be a stress on the recommendations of the seminar, together with indicating the activities conducted on the sidelines of the seminar( if any).
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## EDITORIAL



### **Waqf Values and Development Experiences**

#### **I**

It goes without saying that sustainability, as early as the 90's of the last century, represented a value sought by the development examples, which strive to attain and hold onto it in view of what it reflects in terms of economic and social performance, and further its attempts to avoid falling a victim to the sudden changes and exceptional leaps which could impinge on the society at any moment.

Apart from all the developmental recipes carried out by the third world, including the Islamic world, the developmental examples once dubbed 'sustainable' or 'human', remained to gain ground outside those countries, though according to foreign mechanisms. In countries where financing is poor due to the limitedness of natural resources, we find developmental recipes depending on getting loans from international financial institutions, e.g. the World Bank and the International Monetary Fund. These institutions specify in advance the technical and economic, even the social, package of conditions for advancing such loans.

The best scenarios created by such loans is that they augment the abilities of such countries to develop the local manufacturing industries. Given that this step was a success and overcame the local various obstacles such as administrative bureaucracy and corruption, we find that these





export-oriented industries, being the highest in rank in terms of the VAT by virtue of being the main source for hard currency, are structurally connected with fulfilling the needs of outside companies. This means that the entire business cycle from the very beginning is contingent on loans and in the end it turns into products exported to foreign agencies which represent the chief control of the developmental process. The same case applies to those countries which abound in natural resources, though these countries are not short of the financial resources due to the revenues of the exporting process. The development of the economy of those countries is intimately connected with the status of the world markets and the price of such products where the natural resources exporting countries do not play a crucial role.

Sustainability, in its best image as a development example, is based on factors which cannot be controlled from inside, but it can be dealt with in the way the 'key-in-hand' projects were approached and prevailed in the third world through three consecutive decades (from 1960 to 1990) during which multinational companies tightened their grip on many poor raw-materials producing countries. This fact linked the movement of the economy of such countries with the world markets and the advanced countries.

In the light of the above mentioned, it seems logical that such a sustainable development coming from outside should bring about some results which reflect the fragility of such recipes and their failure to create a development in the proper sense, especially in a world where 10% of its population dominates 86% of the entire potential of the globe. Half population of the globe accounts only for .05% of such potential. It should be mentioned here that more than 1.2 billion of the population of the globe do not have the fresh drinking water and 3 billion of the population depend on a daily income which does not exceed \$ 2.

These figures require the pillars on which development experiences were based to be revised. These pillars, as maintained by international economic institutions, are still tottering and stand in need of more effort to overcome the poor, if not the disastrous results, in many countries of the world.





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What distinguishes waqf is the fact that it embraces a host of values with interlaced and overlapped dimensions, having a quick effect on the environment and its components. By virtue of being a sadaqa (free offering), waqf implies purification and chastity, which entail a process looking forward to beautification, improving performance, sublimity and promotion which are realized through activating, developing and re-directing the self potentials regardless of their size. The lesson here is not viewed in quantities but rather in qualities. That is why it is associated with the Ihsan (good doing) at the individual level (for a waqif) through observing the rights of creatures (human beings, animals and environment). Waqf deeds in this respect, abound in high examples which show the waqifs' keenness to achieve the best service to the beneficiaries, in addition to the absolute interest in specifying the sides and specifications of such a service, and exhorting the nazirs to observe the relevant conditions thereof, and to stand against any change, default or irregularity.

At the collective level, waqf translated the concept of developing the concept of sadaqa and organizing its economic and social performance . Furthermore, it re-shaped it according to a social arrangement which assisted in establishing a civilization in which waqf played a crucial role. Consequently it does not sound strange to find the Islamic civilization inlaid with value components integrated in waqf. This showed an exceptional ability which managed to induce specific civilizational shifts.

In this context, the value of sustainability played a crucial role in strengthening the make-up of the Islamic communities, starting with self-factors which reflected the responsibility assumed by the individuals in taking part in managing their societies and dedicating part of their human and material wealth in favour of the general good. Here sustainability becomes a self-giver issuing from the mechanisms of the environment itself which utilizes its potentials to create social and economic solutions which react with the challenges internally and externally.



Sustainability changes from figures and data into a structural case which allows the social movement to become a sustainable and growing case through home-made potentials. This attitude issuing from inside does not contradict with openness to the outside world. Islamic civilization witnessed economic, political and cultural relations with its spacious geographical neighbourhood and it also reacted with other different civilizations. Nevertheless, it counted first and foremost on the fact that the development process in the various domains should have fixed principles which rely on parameters, self values and mechanisms, all of which act to identify objectives linked with human domains and real material needs. Consequently this promotes the inside and strengthens its immunity.

Partnership between waqf and other social sectors (state and the private sector) played a prominent role in this regard. Moreover, waqf values managed to solve many problems, whether this be in having a great role for the state or the attempt of the private sector for overdominance and imposing the concept of the material profit as a higher social value.

The partnership of individuals, men and women alike, in the movement of waqf added new highly significant dimensions to the social movement so much so that 'giving' has become one of the components of the collective consciousness through its weightiness and presence. It assisted, through its special tools, in the advancement and promotion of the group on the one hand, and in confirming another group of values such as the collective work and assuming the responsibility for managing a society, away from fully depending on the state and its resources, in addition to opening the door for women to manage their own affairs.

These values and other values made it easy for the Islamic civilization, and for lengthy periods of time, to strike a developmental example issuing from what a society produces to promote a human being in his various dimensions.





### 3

The researches and articles of this issue of “*Awqaf 34*” are associated with many basic issues; the first issue approaches the relation between waqf and sustainable development.

In this regard, Dr. Abdul Qader bin Azzouz raises the questions about the contributions of the waqf charitable projects to boosting the system of values. To answer such questions, he presents a definite set of waqf value systems and their effect, whether this be at the level of the Islamic financial transactions, faith values, or at the level of legislative values. The researcher ends his research by submitting an integrated theory for a system of values which link a human being with his immediate and spacious environment in which the values of waqf play a decisive role.

Dr. Tareq Mohammad Darwiche writes about the awqaf in Morocco and their role in warding off the risks and averting the damage. He resorts to historical examples which date back to the Alawi epoch in the far West (the end of the 19<sup>th</sup> century) which witnessed the role of waqf in observing and protecting the rights of human beings, in addition to constructing the lands, whether this be by fighting diseases, fortifying cities or attending to the poor, all of which constitute social activities which secure the individual and the environment while observing the general good of all.

Dr. Abdul Qader Qaddawi approaches one of the important developmental questions touching the majority of the Islamic countries which stand in need of strengthening their ‘agricultural security’. Here the researcher puts forward a financial model through waqf sukuk donations in order to finance the investment of the cultivable waqf lands as a means for providing the financial resources and to link the waqf institutions with the real developmental needs. The researcher suggests utilizing the formula of waqf donation sukuk to create a



financial affluence which is helpful in investing in the waqf agricultural lands. The research indicates, through the Algerian example, the main reasons which should be made available so that the waqf sukuk donation could be a financial instrument for the waqf lands to be converted into self-financing agricultural institutions as well as a means for developing the country.

In his article, Dr. Abdul Karim Banani deals with the role of waqf in boosting and developing the shari'a learning within the framework of the interest of waqf in education in general and the direct financing of an educational infra-structure which assist remarkably in developing Islamic sciences and provide education for the majority of social sectors, which was reflected on the general civilizational performance.

In the English section, Dr. Ahsan Lahsasna introduces the idea of developing the financial portfolios of the waqf institutions so they might become an active vehicle in the financial market and a basic component in the structure of the Islamic finance. The researcher believes that the cash waqf has a dynamic nature which enables it to regulate most of the banking businesses, takaful systems, the market of Islamic capital and other businesses. Moreover, the researcher believes that the contribution of the cash waqf in its new form will play a basic role in achieving the objectives of the shari'a in terms of finance and economy through injecting the economic cycle with the values of justice, fairness, cooperation and solidarity in the society.

The two researchers Abdullahi Saliu Ishola and Sharifa Zubaida Syed AbdulKader acquaint us with the contemporary waqf experience in Nigeria. This study seeks to explore the link between the waqf jurisprudence (Fiqh) and the legal system in Nigeria, laying stress especially on its concepts and components. The research introduces the legal requirements for creating more harmony between waqf with its rules and philosophy on the one hand, and the Nigerian legal system on the other.





This issue of Awqaf includes a research in French by Dr. Tarak Abdallah entitled ‘Integrated Investment for Waqf Funds’ through which the writer highlights the importance of linking the waqf funds with an integrated vision which adopts the magnifying of the social return because it is nearer to the philosophy of waqf. The researcher confirms that the separation between spending the proceeds and investing the waqf assets from a strategic point of view causes the waqf institutions to lose its entire potential, including the process of choosing specific investment attitudes which are helpful in upgrading the social revenues.

**Editing Staff**



## Researches



### **The Jurisprudence of Islamic Endowment System (Al-waqf) in Nigeria: Concepts and Ingredients**

Abdullahi Saliu Ishola\*

Sharifah Zubaidah Syed AbdulKader\*\*

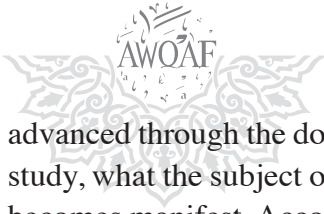
#### **ABSTRACT**

As popular as items designated as Islamic personal matters under the Nigerian Constitution are, there have not been dedicated studies on each of those items to unravel what they truly connote within the context in which they have been so designated. While out of these matters, issues relating to marriage and its allied subjects like divorce, child custody and maintenance have received some attentions in scholarly works expounding their principles, with issues of inheritance (*mirath*) and will (*wasiyyah*) featuring much more in court cases, the subject of waqf (endowment) has not yet been given the desired legal study in the country. This study therefore undertakes to explore the jurisprudence of waqf within the Nigerian legal system with specific focus on its concepts and ingredients for its validity. This study is explorative with the discussions

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advanced through the doctrinal legal research methodology. Through this study, what the subject of waqf purports within the Nigerian legal regime becomes manifest. Accordingly, it is clear that, the Islamic law definition of waqf as espoused by the MĒliki School holds sway in Nigeria as the Islamic purports of waqf. It is also revealing that waqf is an Islamic personal law which also has some peculiar conditions attached to it for its validity which stands unique to the waqf institution within the Nigerian legal context.

## I. INTRODUCTION

A study of the Nigerian law would reveal that Islamic law occupies an enviable place as one of its major sources.<sup>(1)</sup> It is also revealing that there are some peculiarities in the concept and application of some Islamic law concepts and administration of Islamic justice system in the country.<sup>(2)</sup> This at times requires that Islamic law should be understood within the Nigerian legal context for proper appreciation of the approach that may be adopted in enforcing relevant Islamic matters. However, this does not suggest or support the proposition that there truly exists what can be regarded as “Islamic law in the Nigerian context” regardless of whether it contravenes the pristine Islamic law principles or not.<sup>(3)</sup> Rather, such a special study of the Islamic law in Nigeria would assist to appreciate how Shari’a compliant is the Islamic law within the Nigerian context. Accordingly, there is need for jurisprudence of various subjects of Islamic law to be understood as conceived in the country. Thus, this exercise is exerted in this study in respect of Islamic endowment system (Al-Waqf).

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(1) Abdulmumini Adebayo Oba, ‘The Judicial Machinery for Administration of Islamic Law in Northern Nigeria with Particular Reference to Kwara and Kaduna States’ (International Islamic University Malaysia 68 (2012).

(2) In this regard, priority is given to the Islamic law principles in accordance with the interpretations of the MĒliki jurist. This is due to the adoption of the MĒliki School as official Madhhab in the country. This is explained in subsequent discussions.

(3) For arguments on this proposition, see Abdullahi Saliu Ishola, ‘Issues in the Practice of Binding Judicial Precedent in the Shari’ah Courts of Nigeria’ (9 (2013 Journal of Islamic Law Review 40 ,27.





To understand the conception of waqf under the Nigerian law, i.e. jurisprudence of waqf in Nigeria, its concepts under the Constitution and some legal instruments must be appreciated; this is in addition to clarifications on its concepts in Islamic law with specific focus on the MĒliki School's perspectives as the official Madhhab (school of thought) in Nigeria. Accordingly, its constitutional conception and conceptions under other legislative instruments are examined. Within the Nigerian jurisprudence, certain conditions are observed for any waqf to be valid.

## II. CONCEPT OF WAQF IN ISLAMIC LAW: THE MÓLIKI DEFINITION

This segment is divided into two sub-segments. The first sub-segment focuses on the concepts of the subject matter of waqf. The second sub-segment clearly demonstrates how Mosque qualifies as waqf. In the technical understandings of waqf, the scholars, based on their divergent views, are categorised into three. As such, their three views on the matter are as expressed respectively by AbĒ xanĒfah<sup>(1)</sup> (not the *xanafyyah*);<sup>(2)</sup> the *JumhĒr* (the majority Jurists)<sup>(3)</sup> and the *MĒlikiyyah*.<sup>(4)</sup> The Maliki School's view is specifically relevant to this study because the Islamic law in Nigeria is interpreted in accordance with the view of this School. For this reason, the technical meaning of waqf is explained below in accordance with the views of the Maliki School.

(1) He is An-NuĒman Bin Thabit Al-Kufy. For a brief on his biography, see 'Abdur Rahman I. Doi, *Shari'ah: The Islamic Law* (Seventh Pr, A S Noordeen 2007) 88–92.

(2) *anafyyah* is the Hanafi School of Islamic law. It is one of the four orthodox Sunni Schools of Jurisprudence. Others are the Maliki School; the Shafi' School; and, the Hanbali School. Where the founder of the School expresses a view on any issue that is not generally shared by his disciples, it would be isolated and specifically personally accredited to him rather than being advanced as the view of the school. This is what happened in respect of the technical meaning of waqf given by the founder which is however not shared by his prominent disciples, as explained in details in the segments following.

(3) This is the term used to show that a particular position is maintained by the majority of jurists or Islamic scholars on an issue in Islamic law. The Schools to constitute the majority do vary from issues to issues. It does not really have a fixed identification or accreditation to fixed ascertained Schools of law. This is unlike when the term *mutafaqun alayhi* is used in the science of hadith which invariably refers to the unanimous agreement on the authenticity of a hadith by both Bukhari and Muslim, without its usage for reference to any other group of Scholars.

(4) This is the MĒliki School of Islamic law. Its founder is Imam MĒlik Bin Anas. Doi provides a precise narration on him. See *ibid* 92–107.



The MĒliki School sees waqf as the giving out of benefits or proceeds of something by its owner (*mĒlik*) for the periods in which the thing continues to exist with the mandatory requisite of its ownership remaining vested in the owner even though by mere presumption, assumption or implication (*taqdĒran*).<sup>(1)</sup> This School essentially places emphasis on the proceeds or benefits of the property as the endowment and not necessarily on the property itself with the understanding that only the proceeds can be transferred to the beneficiaries.<sup>(2)</sup> By implication therefore, only the owner can retain the ownership of the property for the period of waqf and the property is prevented from any act capable of transferring its ownership to any other person, such as through sales and gift, for the moment within which the waqf of the property lasts.<sup>(3)</sup> This is so much so that even the property cannot be inherited after the death of the owner as long the property still remains declared as waqf.<sup>(4)</sup>

From the perception of the MĒliki School on what waqf connotes, it is noticeable that the School does not make it a rule that the waqf must be perpetual; rather the wāqif is permitted to specify the period within which the waqf would last,<sup>(5)</sup> implying that it can either be perpetual (*muabbad*) or temporary (*muaqqat*).<sup>(6)</sup> In other words, this School gives the meaning of waqf to connote the possibility of endowing permanent or temporary waqf, as the settler may choose.<sup>(7)</sup>

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(1) Saleem Haany Mansur, *Al-Waqf Wa Dawruhu Fi Tanmiyyat-L-Iqtisadiyyah* (1st edn, Sharikah Daar Bashaer Al-Islamiyyah 14 (2009).

(2) Ni'mat Abdullateef Mashhur, *Atharu-L-Waqf Fi Tanmiyah Al-Mujtami'* (Jāmi'ah Azhar (1997 15.

(3) *ibid*.

(4) *ibid*.

(5) *ibid* 16.

(6) For a study on temporary waqf, see MaajdahMahammad Hizaa'i, 'Al-Waqf Al-Muaqqat', *Al-Buhuth Al-'Ilmiyyah Lil Mutamir Thāny Lil-Awqāf Bil Mamalat-l-'Arabiyyah Sa'udiyyah*, vol 2 (Jaami'ah Umu Quraa 2006).

(7) Mohammad Tahir Sabit b Haji Mohammad and Abdul Hamid b Hj Mar Iman, 'Obstacles of the Current Concept of Waqf to the Development of Waqf Properties and the Recommended Alternative' <<http://eprints.utm.my/38-27/1/501.pdf>> accessed 8 April 2016.



Again, what is emphasised by the School is that waqf does not forfeit the ownership right of the donor in the property endowed; rather, it only forfeits his right to the benefits or proceeds acquirable from the property (except if he himself is also a beneficiary), i.e. such ownership rights which may be derived through transfer of the property, to another person by any means. This is expressed in the Arabic language in the following terms:

لا يقطع الوقف، عند المالكية، حق الملكية في العين الموقوفة، وإنما يقطع حق التصرف فيها<sup>(1)</sup>

Waqf does not, to the *MÉlikiyyah*, cut off the ownership right in the original property, but it cuts off the right of disposal inherent in the property.

What is clear from the perspectives of the *MÉliki* School therefore is that waqf may involve perpetuation of a property, but with retention of its ownership in the endower, and transfer of the ownership of its usufruct and whatever benefits that may be derived from it to specified beneficiaries.

Notably, the declaration of waqf on the property endowed also puts some constraints on the ownership right to be exercised by the *wÉqif* on the property. Essentially, such ownership right cannot be exercised in a way that would affect the terms of the waqf to which the property has been put into. What remains for the *wÉqif* in the property is just a mere abstract ownership which is only recognised for possible reversion of the property to the *wÉqif* if the terms of the waqf so specifies such a possibility or in case of any such eventuality. Even at that, a mosque is not liable to be reversed from the status of a waqf once it is created. A look at the legal presumption of Islamic law on a mosque as waqf would make this better appreciated.

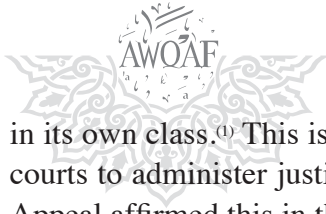
### III. CONSTITUTIONAL CONCEPT OF WAQF IN NIGERIA

Islamic law is indisputably the major source of the Nigerian legal system, in addition to the other two sources, namely common law and customary law, citing that each of the sources is a distinct legal system

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(1) Mashhur 16.





in its own class.<sup>(1)</sup> This is constitutionally safeguarded through creation of courts to administer justice based on each of the sources.<sup>(2)</sup> The Court of Appeal affirmed this in the case of *Giwa Osagie v. Giwa Osagie*<sup>(3)</sup> when it held as follows:

The 199 Constitution established three distinct legal systems operating concurrently in Nigeria, the English Common law and statutes enacted by various legislative houses at various tiers of government, the native law and custom of the people (as long as it meets and satisfies the repugnancy test) and Islamic law which by its nature is an absolute law which I don't think can be subject to the repugnancy test. In *KHAIRE ZAIDAN v. FATAIWAH KHAHIL MOHSEN* -Reported by 1974 Unife Law Reports Pt. 11 pg. 290 the Court upheld Islamic law as against lex situs law to hold that the law applicable to the intestate was Islamic law there being no doubt that the intestate was a Lebanese governed by Islamic law. See also M. A. Ambali – *The Practice of Moslem Family Law in Nigeria*. Pg. 29 – 30.

However, beyond its recognition as a source of law, Islamic law is divided within the Nigerian legal system into two, namely; “Islamic Personal Law” and “General Islamic Law”.<sup>(4)</sup> Historically, the term “Personal Law” did not have constitutional affiliation in Nigeria until it was first incorporated into the 1979 Constitution and its first constitutional introduction was specific to Islamic law by which there came to be known what is called “Islamic Personal law”.<sup>(5)</sup> However, a proper understanding of the concept of personal law would show that other religious groups in

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(1) See Niki Tobi, *Sources of Nigerian Law* (MIJ Professional Publishers Limited 152–135 (1996); Abdulmumini Adebayo Oba, ‘The Shari’a Court of Appeal in Norther Nigeria: The Continuing Crisis of Jurisdiction’ (2004) LII The American Journal of Compative Law 861–859 ,859; Abdullahi Saliu Ishola, Sharifa Zubaidah Syed Abdul Kader and Abdul Haseeb Ansari, ‘Viability of Cash Waqf Models Under The Nigerian Law: An Appraisal’ (12 (2016 Journal of Islamic Law Review 23–22 ,19; Oba, ‘The Judicial Machinery for Administration of Islamic Law in Northern Nigeria with Particular Reference to Kwara and Kaduna States’ 70–68.

(2) Constitution of the Federal Republic of Nigeria 1999 Chapter VII.

(3) [2011] All FWLR (Pt. 363 (555

(4) These cover any other matter that does not fall within the list of Islamic personal law matters such as Islamic land law cases; Islamic contract cases;

(5) Tobi 167.



the country could also be earmarked with “personal law”. According to Mona Rafeeq, the idea of personal law connotes application of different laws to “certain segments of the population”.<sup>(1)</sup>

Many Nigerian lawyers do not know anything about Islamic law in Nigeria other than that the Constitution refers to some subjects as “Islamic Personal Law matters”.<sup>(2)</sup> To an average Nigerian lawyer, “personal law” means nothing other than the law which an individual has chosen to regulate his personal affairs such as marriage, family system, inheritance and general ways of life. Thus, as regards such matters, to Nigerian lawyers, an individual is absolutely free to choose, adopt, adapt and change his personal law at one time to another and from one personal law to another.

Based on such understanding, when a Nigerian dies, and the deceased did not leave a will as followed in the western way, guided by relevant legislation, Nigerian lawyers, in the Bar and on the Bench, would make his estates to be subjected to “personal law test” to determine which customary law would apply to his estate distribution. Even if the deceased happened to be a Muslim, it was never believed that Islamic law had any relevance to such persons who died without a will other than the relevant customary law. This reasoning shaped erroneous decisions which were reached in many celebrated cases where the estates of deceased Muslims were subjected to customary law.<sup>(3)</sup>

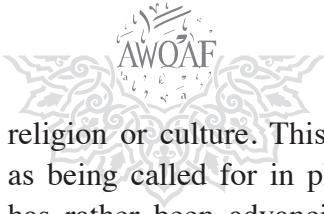
Contrariwise, however, “personal law” does not correctly connote the understanding held of it among Nigerian lawyers. By international jurisprudence across jurisdictions, the idea of “personal law” simply connotes a process or practice whereby certain unique law on specific subjects is made applicable to a specific segment of the population in a society, nation, country or community based on the demands of their

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(1) Mona Rafeeq, ‘Rethinking Islamic Law Arbitration Tribunals: Are They Compatible With Traditional American Notions of Justice?’ (28 (2010) *Wisconsin International Law Journal* ,108 110(fn 15).

(2) Constitution of the Federal Republic of Nigeria.

(3) For instance, see *Yinusa v Adesubokan*; *Giwa-Osagie v Giwa-Osagie*



religion or culture. This is as against the practice of “one law for all” as being called for in places like UK.<sup>(1)</sup> Thus, Nigerian legal education has rather been advancing and impacting the erroneous knowledge of the concept of “personal law” on generations of members of the legal profession as “personal legal effects” which, like other “personal effects”, a person owns and often carries with him to any place and even unto his grave. The Nigerian legal education, at both academic<sup>(2)</sup> and vocational<sup>(3)</sup> levels, therefore has a duty to correct this age-long misinformation and wrong knowledge.

The correct legal notion that should be held is that there is nothing personal about Islamic personal law matters in Nigeria in the sense of the Muslim having freedom to either choose to conduct his affairs as relate to those subjects in accordance with Islamic law or otherwise. Rather, every Muslim in Nigeria is bound by Islamic law of marriage, divorce, maintenance, child custody and welfares, wills (wasiyyah), gift (hibbah), waqf (endowment) and mirath (inheritance). For those who see “personal law” as a matter of choice, it should be properly appreciated that the consequence of being a Muslim in Nigeria is that once a person is a Muslim, he has chosen Islamic law to regulate all his affairs and therefore Islamic law becomes his “personal law”. Thus, as argued by Oba<sup>(4)</sup> “the law in Nigeria today is that a Muslim is subject to Islamic personal law so long he or she professes Islamic even if he or she is not diligent in following some of the injunctions of the religion”.<sup>(5)</sup>

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(1) Mona Rafeeq 110.

(2) This is the training received at the Universities, usually at various Faculties or Colleges of Law.

(3) Vocational legal education is received at the Nigerian Law School after graduation from the University.

(4) His full name is Abdulmumini Adebayo Oba and he is a Professor Lecturer in the Faculty of Law, University of Ilorin. He is a prolific scholar, researcher and writer on administration of Islamic law and justice.

(5) Oba A. A., “Can a Person Subject to Islamic Law Make a Will in Nigeria?: Ajibaiye v. Ajibaiye and Mr.Dadem’s Wild Goose Chase”, *Review of Nigeria Law and Practice*, Vol. 2 (2) 2008 pp. 131-145 at p. 136.



Similarly, in the case of *Shittu v. Shittu*,<sup>(1)</sup> per Oredola (Kadi),<sup>(2)</sup> the Kwara State Shari'a Court of Appeal, which has the last say on matters of Islamic law in Kwara State (though subject to right of further appeals), also gave judicial endorsement to Islamic law as the personal law of Muslims in Nigeria when it declared as follows:

The point to be made is that a Muslim and as long as he or she professes Islam, he has no option or choice regarding the application of Islamic law - personal or otherwise onto his person. Having voluntarily assumed the status of a Muslim, he or she is disentitled from accepting or rejecting according to his or her whims and caprices. He cannot back out therefrom and he must not allow any body to either encourage or discourage him therefrom. There cannot be a superimposition or juxtaposition of customary law over Islamic law. It cannot be done. It is never done.<sup>(3)</sup>

Also, in the case of *Ajibaiye v. Ajibaiye*,<sup>(4)</sup> per Sankey JCA, the Court of Appeal, while equally emphasizing that Muslims are the persons who are subject to Islamic Law, acknowledged the fact that "it is Muslims, (as opposed to adherents of other religions), who are subject to Islamic Law".<sup>(5)</sup> Finally, in the case of *Alhaji Agbebu v. Shehu Bawa*<sup>(6)</sup> the point was equally made that "once a person is born into Islam or converted into same when he merely has to believe LAILAHA ILLA ALLAH MUHAMMED RASULULAH (meaning "I accept the Oneness of Allah and the Prophethood of Muhammed SAW") he is a Muslim and Islamic Law becomes the personal law of the person".<sup>(7)</sup> Thus, the "way-of-life" test applied in the case of Giwa-Osagie was uncalled for since it was not in doubt that the deceased died as a Muslim.

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(1) (1998) Annual Report Shari'a Court of Appeal (Kwara State) 93 at 98.

(2) As he then was, now Justice of the Court of Appeal (JCA).

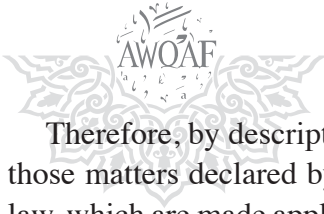
(3) (1998) Annual Report Shari'a Court of Appeal (Kwara State) p. 98.

(4) [2007] All FWLR (Pt. 359) 1321.

(5) Ibid at pp. 135-1354, paras H-A. Section 74 (1) referred to above is now Section 122 (1) under the Evidence Act, 2011.

(6) (1992) 6 NWLR (Pt. 245) 80.

(7) Ibid at p. 90.



Therefore, by descriptions, Islamic personal law matters in Nigeria are those matters declared by the Constitution as matters of Islamic personal law, which are made applicable to Muslims specifically as a segment of the Nigerian population in respect of the subject matters specifically spelt out, while any Islamic law issues that fall outside them are “General Islamic Law” matters. Accordingly, by elaborate substantive law inferences, Islamic personal law matters in Nigeria cover the followings:

1. Any question regarding a marriage concluded in accordance with Islamic law.
2. Any question relating to the validity of a marriage concluded in accordance with Islamic law.
3. Any question relating to the dissolution of a marriage concluded in accordance with Islamic law.
4. Any question that depends on a marriage concluded in accordance with Islamic law relating to family relationship.
5. Any question that depends on a marriage concluded in accordance with Islamic law relating to the guardianship of an infant.
6. Application of Islamic law of Marriage to the marriage of Muslims concluded in accordance with another law.
7. Application of Islamic law of Marriage to the determination of the validity of the marriage of Muslims concluded in accordance with another law.
8. Application of Islamic law of Marriage to dissolution of the marriage of Muslims concluded in accordance with another law.
9. Disputes over family relationship where all the parties are Muslims.
10. Disputes over foundling or the guardianship of an infant where all the parties are Muslims.
11. Application of Islamic law to a wakf issue where the endower is a Muslim.





12. Application of Islamic law to a will issue where the testator is a Muslim.
13. Application of Islamic law to a gift issue where the donor is a Muslim.
14. Application of Islamic law to a succession issue where the deceased person is a Muslim.
15. Application of Islamic law to an infant who is a Muslim.
16. Application of Islamic law to a prodigal who is a Muslim.
17. Application of Islamic law to a person of unsound mind who is a Muslim.
18. Application of Islamic law to maintenance of a Muslim who is physically infirm.
19. Application of Islamic law to maintenance of a Muslim who is mentally infirm.
20. Application of Islamic law to guardianship of a Muslim who is physically infirm.

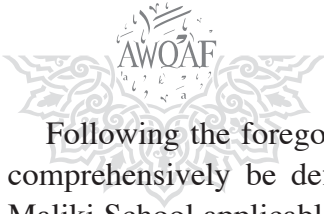
Appellate jurisdiction in all the above listed matters is vested in the Shari'a Court of Appeal<sup>(1)</sup> while each State is given the liberty to put in place lower court structure from whose decisions appeals will go to the court.<sup>(2)</sup> There is no precise definition of what "Islamic personal law" itself connotes. Matters that qualify as Islamic personal law issues in the country from the entire gamut of Islamic law are just as listed above. It is therefore not surprising that various Shari'a Court Laws in the country define "Islamic personal law" simply as "Islamic law of the Maliki school governing the matters set out" (i.e. those matters listed above).<sup>(3)</sup>

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(1) Constitution of the Federal Republic of Nigeria.

(2) The judicial power of every State is vested in the courts established for the State by the Constitution either expressly or "such other courts as may be authorised by law to exercise jurisdiction at first instance or on appeal on matters with respect to which a State House of Assembly may make laws". See *ibid* sections 6(2) and (5)(k).

(3) Shari'a Court of Appeal Law, CAP. S4, Laws of Kwara State of Nigeria, 2006, section 2;



Following the foregoing, Islamic Personal Law in Nigeria can more comprehensively be defined as “the principles of Islamic law of the Maliki School applicable to specific matters listed in the Constitution as Islamic personal law matters and duplicated in the various Shari’a Courts of Appeal Laws of States where the court exists”.<sup>(1)</sup> But beyond this, it appears that any other subject or transaction covered by Islamic law, but not expressly listed in the Constitution and the State Laws, would also become an Islamic personal law matter if the parties before the trial court are Muslims and they request the trial court to apply Islamic law to determine their case before the court.<sup>(2)</sup> By requesting the court to determine any such question in accordance with Islamic law, it becomes Islamic personal law matter. However, courts have reasoned differently by interpreting such other questions as those that must still relate to matters already expressly listed as Islamic personal law.<sup>(3)</sup> This however looks ambiguous.<sup>(4)</sup>

Technically, the idea of Islamic personal law in Nigeria does not necessarily connote that the matters covered under it are truly personal to the individuals in terms of their benefits, uses and controls. For instance, a mosque (*masjid*) and a cemetery (*maqbarah*) are subjects under waqf which is an Islamic personal law matter, but in terms of their benefits, uses and controls, they cannot be treated as being personal to any individuals and an example of this is mosque, which, is being held as a waqf matter, it cannot be personal.<sup>(5)</sup> Although *Al-AhwÉl Al-Shakhsiyyah*, translated as “personal

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(1) This is a novel contribution from this research.

(2) *ibid* sections 2)262)(e) and 2)277)(e): “the Shari’a Court of Appeal shall be competent to decide ‘where all the parties to the proceedings, being Muslims, have requested the court that hears the case in the first instance to determine that case in accordance with Islamic personal law, any other question’”.

(3) For instance, in *Fannami v. Sarki* (1 (1989-1961 Sh. L.R.N. 94.

(4) For a critique of the court reasoning, see Oba, ‘The Judicial Machinery for Administration of Islamic Law in Northern Nigeria with Particular Reference to Kwara and Kaduna States’ 111–107.

(5) Interview with Dr Abdulrazaq Abdulmajeed Alaro, Associate Professor of Islamic Law, University of Ilorin, Ilorin, Nigeria held on 4th October, 2016 at Assunnah Academy of Da’awah & Research, Tanke, Ilorin, Kwara State, Nigeria.



law” is recognised as a branch of Islamic law,<sup>(1)</sup> the subjects covered under the branch are just grouped together and called by that name just for a sort of knowledge acquisition convenience. They are not taken outside the whole *legal corpus* of Islamic law. It may therefore be correct to posit that what is regarded as Islamic personal law is an aspect of the Islamic private law which, like any other private law, is the aspect of law which concerns interaction or transaction of an individual with another person with wide freedom of choice in terms of the transaction or contract.

As must have been noted, waqf is expressly listed as an Islamic personal law matter. There are therefore no arguments on the jurisdiction of the Shari’a Court of Appeal in disputes relating to waqf matters, with the original jurisdiction to be exercised by the relevant lower courts that may be created for that purpose in the relevant State.<sup>(2)</sup> As Islamic law/ Islamic personal law applicable in Nigeria is based on the interpretations of the MĒliki School, it should be mentioned that the jurisprudence of waqf in the country is as espoused, conceived and expounded by the MĒliki School, though it has been suggested that the waqf law in the country should not be so restricted to the view of that School alone, but should rather be based on “a hybrid of best practices in the four major schools recognized in Islamic jurisprudence, keeping in view the practicability of such laws in the modern Nigerian society”.<sup>(3)</sup> But this remains the law and practice.

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(1) Syed H. A. Malik, ‘Shari’ah: A Legal System and A Way of Life’ in M. Oloyede Abdul-Rahmon (ed), *Perspectives in Islamic Law and Jurisprudence* (1st edn, National Association of Muslim Law Students (NAMLAS), University of Ibadan Chapter 25 (2001).

(2) For instance, such lower courts are Area Courts (e.g. in Kwara, Kogi States) and Shari’a Courts (e.g. in Kaduna, Kano, Zamfara States). Section 1) 54), *Area Courts Law (Kwara)*: “Any party aggrieved by a decision or order of an Upper Area Court or any Area Court, Grade I or II in an Islamic Personal Law matter may appeal therefrom to the Shari’a Court of Appeal”. Also, section 10, *Shari’a Court of Appeal (Kwara)*: “the Court shall have jurisdiction to hear and determine appeals in respect of matters in cases of Islamic personal law from any decision of any Area Court”.

(3) Umar A Oseni, ‘The Need for an Effective Legal and Regulatory Framework for Waqf in Nigeria’ in Syed Khalid Rashid (ed), *Issues in Waqf Laws & Management (With Focus on MALAYSIA)* (1st edn, IIUM Press 255 (2017).



#### IV. WAQF CONCEPTS UNDER OTHER NIGERIAN LEGAL INSTRUMENTS

Beyond the Constitution, the jurisprudence of waqf in Nigeria can be deciphered from some other legal instruments. These legal instruments are State Laws relating to waqf enacted in twelve States in Northern Nigeria<sup>(1)</sup> fondly called the “Shari’a States”<sup>(2)</sup> Out of all these twelve States, only Zamfara State has specific provisions on waqf. Accordingly, in the State Law, waqf is defined as:

Giving out money, items or properties in part or in whole out of the ownership of oneself, transferring it permanently or for a fixed period of time to the ownership of Allah, and dedicating it all or its proceeds to the use of others or the Muslim *Ummah*.<sup>(3)</sup>

Scrutinizing the above concept of waqf under the Nigerian law would reveal that the definition accords with the MĒliki School’s perspectives. This is based on the position of the School in the country by which “the Islamic personal law practiced in Nigeria from the time Islam got to the shores of the country is based on the interpretation of the Maliki School”.<sup>(4)</sup> This therefore makes it reasonable to posit that the concept of waqf within the Nigerian jurisprudence is simply based on the *MĒlikiyyah* perspectives.

Again, the Kano State Law, using the term *hubusi* instead of *waqf*, which is however “a general word used synonymously in Islamic law for *waqf*”,<sup>(5)</sup> conceives waqf as “endowment or a voluntary gift of wealth, more especially property”.<sup>(6)</sup> The inclusion of “gift” in the scope

(1) The twelve States are: Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe and Zamfara States.

(2) Abdullahi Saliu Ishola, Isa Olawale Solahudeen and Maruf Adeniyi Nasir, ‘Legality of Plea Bargaining in Nigeria: Old Debates and the Present Legal Regime’ (1 (2016) *Miyyeti Quarterly Law Review* 75).

(3) Zakat (Collection, Distribution and Endowment) Board Law 2003 A1, section 3.

(4) Oseni 256–255.

(5) *ibid* 266.

(6) Kano State Zakah and Hubusi Commission Law, 2003 2003 section 2.



of what *waqf/hubs* connotes in the Kano Law certainly creates some confusions as gift (*hibbah*) has its own separate rules and regulations in Islamic law without any arguments from the jurists. Noting the confusion, Oseni provides some clarifications when he observes as follows:

This definition might not properly represent what *hubs* stands for in Islamic law as a synonymous word for *waqf* is some legal Maliki treatises. Islahi gives a more comprehensive definition of *hubs* as the process or concept of “taking the corpus of any property from personal ownership, transferring it permanently to the ownership of Allah and dedicating its usufruct to purposes recognised by the shari’ah as pious or charitable”. Islahi’s definition provides much clarity in the conceptualization of *hubs* to avoid the confusion of likening it to *hibah* (gift).<sup>(1)</sup>

It is therefore clear that a gift cannot be taken to be truly conceived as part of *waqf* as the statutory provision of the Kano State impresses in its definition of *hubusi*. It may however be presumed that what the law intends is for the Zakah and Hubusi Commission, as the regulatory and institutional body responsible for *waqf* in the State, to take any property and treat it as *waqf* even if the donor presents it as gift. In this regard, it may be correct to conclude that gifts from any person to the Commission is also conceived as *waqf* which must be treated and preserved in accordance with the rules of *waqf*.<sup>(2)</sup> Thus, all gifts from any quarters to the Commission are *waqfs* which the Commission must preserve and not to be taken as personal properties. The jurisprudence of *waqf* within the Nigerian legal context reveals some required conditions to be met for any *waqf* to be valid in the country. These are expounded below.

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(1) Oseni 266.

(2) The Commission is empowered to “collect zakah and hubusi from individuals and/or organisations”. Based on this, it means that if there is any gift from any individual/organisation, such gift would not be expended by the Commission as gift but as *waqf* since *hubusi* (i.e. *waqf*) is defined to cover such gifts. See Kano State Zakah and Hubusi Commission Law, 2003.



## V. INGREDIENTS OF A VALID WAQF UNDER THE NIGERIAN LAW

If the Nigerian law is deeply combed, it would reveal that certain conditions must be satisfied for any waqf to be valid in the country. These conditions are, in this research, referred to as the ingredients of a valid waqf. Since the concepts of the waqf itself within the Nigerian legal context are understood from the provisions in the Constitution and other legal instruments, as analysed above, these ingredients are as well derived from the provisions of those constitutional and legal instruments.

### 5.1. Islamic Faith/Islam/Being a Muslim: Constitution vs. State Laws

The Constitution does not, either expressly or by inference, prohibit waqf of a non-Muslim because Islamic faith is not a condition attached to the endower or donor for the waqf to be valid.<sup>(1)</sup> Rather, what the Constitution does is to separate the court with jurisdiction in questions relating to waqf when the endower is a Muslim from when the endower is not a Muslim. This is the only possible interpretation of the provisions of the Constitution vesting appellate jurisdiction in the Shari'a Court of Appeal to decide any question of Islamic personal law regarding waqf where the endower is a Muslim.<sup>(2)</sup>

Thus, while a non-Muslim may make waqf, disputes arising from such waqf would not be decided by courts within the Islamic law court structure where appeals would go to the Shari'a Court of Appeal. Rather, the High Court would most likely exercise jurisdiction in such matters except with the new arrangement in the Shari'a States where jurisdiction is vested in Shari'a Courts and the Shari'a Court of Appeal in all Islamic civil law matters.<sup>(3)</sup>

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(1) This would be properly understood from the wordings of the Constitution where waqf is mentioned.

(2) Constitution of the Federal Republic of Nigeria.

(3) Mamman Lawan Yusufari, 'Shari'a Implementation in Kano State' (International Conference on 'the Implementation of Shari'a in a Democracy: The Nigerian Experience', 2004) <<http://www.gamji.com/article3000/NEws3706.htm>> accessed 30 December 2016.



While the foregoing represents the general positions as regard the validity of waqf of the non-Muslim or nonrequirement of Islamic faith for validity of waqf of any person, the situation under the Zamfara State Law seems differed. It is legally required in the State that the Board shall only receive endowment (waqf) from any individual persons or groups who profess Islamic faith.<sup>(1)</sup> A careful study of this provision of the law would however suggest that waqf of a non-Muslim is still not illegalised in the State as well. Rather, the power of the Board to collect, administer and distribute endowment has only been restricted to those coming from a Muslim while non-Muslims are left to private arrangement for the management of their waqfs.<sup>(2)</sup>

From the constitutional law perspectives, if the Zamfara State Law provision requiring Islamic faith is taken to invalidate the waqf of the non-Muslims, generally and in all terms, then the section would be contrary to the constitutional provisions allowing waqf of non-Muslim and therefore stand null and void to the extent of its inconsistency with the constitutional provisions.<sup>(3)</sup> Even if it is taken to just restrict the wÉqif from whom the Board can receive endowment to those professing Islamic faith alone, the section of the Law may still have conflicts to pick with the Constitution for tending to discriminate such non-Muslim endowers on religious grounds.<sup>(4)</sup> The constitutional provisions being violated in that regard states in clear terms as follows:

42 (1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person –

- (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject to; or

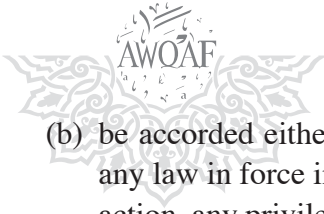
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(1) Zamfara State Zakat (Collection, Distribution) and Endowment Board Law 2013 section 31.

(2) *ibid* section 5.

(3) Constitution of the Federal Republic of Nigeria. “If any other law is inconsistent with the provisions of this constitution, this constitution shall prevail, and that other law shall to the extent of the inconsistency be void”.

(4) *ibid* section 42.



(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.<sup>(1)</sup>

From the above constitutional provisions, the provision of any law would be discriminating against a citizen if it, expressly or by its practical applications, places restrictions on any citizen based on his religion. Such a discrimination would also make the law contrary to the Constitution and therefore null and void to the extent of its inconsistency with the Constitution.

Notably, there are some exceptional circumstances when any law would not be taken as discriminatory even if it makes religion a consideration in the treatment of any person. Accordingly, the Constitution, referring to the above section 42, clearly declares that;

Nothing in subsection (1) of this section shall invalidate any law by reason only that the law imposes restrictions with respect to the appointment of any person to any office under the State or as a member of the armed forces of the Federation or a member of the Nigeria Police Force or to an office in the service of a body corporate established directly by any law in force.<sup>(2)</sup>

The implication of the above provision of the Constitution is that even though section 31 of the Zamfara State restricting the waqf which the Board can receive and administer to those endowed by Muslims could be taken as unconstitutional, where any law restricts appointment to the Board to certain individuals with specific religious affiliations, such legal requirement would not be unconstitutional. Therefore, as stipulated in the Kano State Law for its Zakah and Hubusi Commission that the Chairman of the Commission “shall be erudite scholar in Islamic Jurisprudence”,<sup>(3)</sup> such provisions are valid and constitutional.

(1) *ibid* section 42(1)(a) and (b).

(2) *ibid* section 42(3).

(3) Kano State Zakah and Hubusi Commission Law, 2003.





While the constitutional validity of the provision of the Zamfara State Law restricting the endowment to be received by the Board to those from Muslims remains doubtful, as analysed above, its practical application has even been proven unviable. Thus, the data collated during a visit to the Zamfara State Zakat and Endowment Board revealed that the Board receives endowment from non-Muslim contractors pursuant to the stipulations of the Law<sup>(1)</sup> which state that “contractors shall give 1%<sup>(2)</sup> of the total sum of each contract awarded by the State Government to the Board as endowment”.<sup>(3)</sup> With the earlier restriction of the endowments to be received to those from Muslims in the Law, one would reasonably expect that only Muslim contractors would be bound by this stipulation, though such a percentage is taken from both Muslim and non-Muslim contractors .<sup>(4)</sup>

It can therefore be concluded that, in the most proper legal perspectives, being a Muslim is not a condition for the validity of waqf in Nigeria and this is well fortified by the Constitution which does not prohibit waqf of the non-Muslims. Thus, whether the wÉqif is a Muslim or not, validity of his waqf is not to be affected by the religion he professes. The extent to which his participation in the waqf as the donor would be valid therefore depends on the juristic expositions and positions of the MÉliki School on the issue as earlier elucidated.<sup>(5)</sup>

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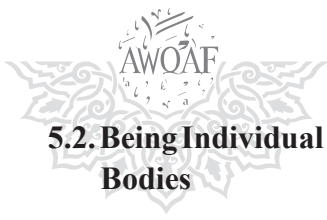
(1) Interview with Alhaji Ibrahim Tudu, Director, Zakat Collection and Distribution Department, Zakat and Endowment Board, Zamfara State, Nigeria at Gusau on 23rd October, 2016.

(2) This 1% was taken between 2003 and 2011 and while 2% has been taken since 2011 and there is also moves to increase it to 5%: Interaction of the Researcher with Alhaji Ibrahim Tudu, Director Zakat Collection and Distribution, Zakat and Endowment Board, Zamfara State, Nigeria at Gusau on 23rd October, 2016.

(3) Zamfara State Zakat (Collection, Distribution) and Endowment Board Law.

(4) Interaction of the Researcher with Alhaji Ibrahim Tudu, Director Zakat Collection and Distribution, Zakat and Endowment Board, Zamfara State, Nigeria at Gusau on 23rd October, 2016.

(5) This would be appreciated through the analyses of the legality of the waqf of the non-Muslims. For instance, see Abdullahi Bin Muhammad Nury Ad-Dayrshwah, ‘Legality of Waqf on a Non-Moslem - Mada Mash’uiyyah Al-Waqf ‘Ala Ghair Al-Muslim’ (2006) 6 AWQAF 13.



## 5.2. Being Individual Persons/Groups or Organizations or Corporate Bodies

By a study of the divisions of waqf, it is understandable that waqf can be in the form of those endowed by a person or groups.<sup>(1)</sup> This has been shown to be validly allowed in Islamic law and approved by the MĒliki School. Building on this, the Nigerian laws validate waqf whether it is endowed by an individual person, group of persons, organisations or corporate bodies.

Thus, in Kano State, the Commission can collect “hubusi from individuals and or/ organisations”<sup>(2)</sup> just as in Yobe State, the Directorate of Zakat and Endowment, which is the regulatory waqf body in the State, is saddled with “management of Islamic endowment (waqf) funds, properties and investments donated by individuals, groups or corporate bodies in accordance with Shari’a injunctions”.<sup>(3)</sup> Similarly, the Zamfara State Law is unequivocal in empowering the Board to receive endowments from “any individual persons or groups”.<sup>(4)</sup>

This leverage provides the desired chances for the poor to also participate in waqf through cash waqf by joining others in group in floating a cash waqf fund or contribute towards a completion or development of a waqf project in a “waqf cash” scheme.<sup>(5)</sup> It also shows that any cash waqf model that can be implemented either by individuals or in groups is viable under the existing laws in the country.<sup>(6)</sup> Even a cash waqf model coming from corporate institutions is also feasible in view of the provisions of the laws just analysed.

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(1) These are technically called waqf shakhsĒ and waqf jimĒĒĒ, respectively.

(2) Kano State Zakah and Hubusi Commission Law, 2003.

(3) Yobe State Religious Affairs Board Law 2001 section 13; Philip Ostien, Shari’a Implementation in Northern Nigeria 1999-2006: A Sourcebook, vol VI (Spectrum Books Limited 2007) 75.

(4) Zamfara State Zakat (Collection, Distribution) and Endowment Board Law.

(5) Waqf Cash is different from Cash Waqf. Cash waqf simply connotes a waqf established with cash with investment of the cash and use of the income generated for the beneficiaries and with circulation of the cash as loan all for the purpose of preserving the cash for perpetuity. Waqf Cash on the other hand connotes contribution or donation of cash for the financing of a waqf projects such as for building of mosque, digging of boreholes etc.

(6) There are different means by which cash waqf is implemented. This is called cash waqf models and they include corporate cash waqf model; share waqf model; cooperative cash waqf model; waqf takaful model; etc. The literature gap showing the need for feasibility of implementation of cash waqf models in Nigeria has been examined with a conclusion on the need for such study. On this, see Ishola, Kader and Ansari.



### 5.3. Residence in the State or Any Part of the Muslim World

The domiciliary or place of residence of the wáqif is not made a condition for the validity of a waqf in Nigeria, rather it is immaterial whether the donor is living in the State or any part of the country where the waqf is to be sited or established or not. This waqf would be valid regardless of whether he lives in State or outside the State.<sup>(1)</sup> By extension, waqf from foreigners are also valid. As a matter of reality, there are many awqáq in the country in the form of mosques, water projects (boreholes) and some *madÉris* (Islamic schools) which are from foreign donors.<sup>(2)</sup> This is however not to suggest that such similar forms of waqf endowed by citizens are not in multitude as well in the country.<sup>(3)</sup>

The Zamfara State Law has created another confusion when it stipulates that, other than the waqf from a person or groups resident in the State, the waqf of those living outside the State would only be valid if they reside anywhere in or any part of the “Muslim world”.<sup>(4)</sup> While “non-Muslim” countries may be regarded as the “non-Muslim world” and “Muslim countries” as the “Muslim world”, determining or categorising any country as Muslim or non-Muslim is itself not an easy task.<sup>(5)</sup> It may be correct to state that a Muslim world is any country that declares itself as “Islamic”, such as done by Islamic Republic of Afghanistan; Islamic Republic of Iran; Islamic Republic of Mauritania; and, Islamic Republic of Pakistan.<sup>(6)</sup>

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(1) Zamfara State Zakat (Collection, Distribution) and Endowment Board Law.

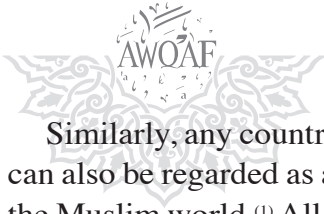
(2) Interview with Arch Seifullahi Alege in Adewole, Ilorin on 5th October, 2016.

(3) Detailed accounts on various waqf endowed by Nigerians are provided in ‘Abdul Kabeer Ballo Adelani, ‘Al-Waqf N-Naqdy Wa-Istithmaruhu Fi Malaysia: Khutot Muqtarhah Li Tatbeeqihi Fi Nigeria’ (International Islamic University Malaysia 2014) 222–235.

(4) Zamfara State Zakat (Collection, Distribution) and Endowment Board Law.

(5) For an impressive attempt at clarifying such difficulties, see Zaleha Kamarudin and Sharifa Zubaidah Syed AbdulKader, ‘External Constraints for Awqaf in Non-Muslim Countries’, 5th Awqaf Magazine Conference (2016).

(6) <http://www.oicexchanges.org/members/oic-member-state-countries> (accessed on 15 April, 2016)



Similarly, any country in which “Islam” is the official State Religion can also be regarded as a Muslim country and consequently qualifies as the Muslim world.<sup>(1)</sup> All countries with membership in the Organisation of Islamic Conference (OIC) are Muslim countries and therefore fall within the Muslim world.<sup>(2)</sup> This should not be surprising because, by its objectives, principles and membership requirements, it is obvious that any member country is a Muslim country.<sup>(3)</sup> This criterion proves useful in determining the status of a country like Lebanon where the President is constitutionally required to be a Christian by which situation one might have tended not to categorise it as a Muslim country, even despite the fact that its Prime Minister is also required to be a Muslim of Sunni faith. Membership of Lebanon on OIC thus clarifies all doubts concerning its status as a Muslim country and therefore a Muslim world.<sup>(4)</sup>

It equally follows that any country where Muslims are in the majority is also a Muslim country/Muslim world even if such country is claimed to be secular.<sup>(5)</sup> This perhaps explains why a fundamental criterion for membership of the OIC is for the applicant country to have Muslim majority population.<sup>(6)</sup> Thus, where a country is not a member of OIC, its Muslim status can be determined through its Muslim majority population.<sup>(7)</sup>

On the other hand, although non-Muslim countries may also not be easily categorised as well, there are useful determinant guides. In other

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- (1) Seventeen of such countries can be noted. These include Malaysia, Saudi Arabia; etc.
  - (2) OIC currently has 57 members, see Article 1) 3) of the OIC Charter available at [http://www.oic-oci.org/oicv3/page/?p\\_id=53&p\\_ref=27&lan=en](http://www.oic-oci.org/oicv3/page/?p_id=53&p_ref=27&lan=en) (last accessed on 15 April, 2016).
  - (3) See generally the OIC Charter, particularly Chapters I and II.
  - (4) See <http://www.oicexchanges.org/members/oic-member-state-countries> (accessed on 15 April, 2016).
  - (5) Examples of these are Nigeria; Zanzibar; and Tajikistan.
  - (6) See Article 2) 3) of the OIC Charter available at [http://www.oic-oci.org/oicv3/page/?p\\_id=53&p\\_ref=27&lan=en](http://www.oic-oci.org/oicv3/page/?p_id=53&p_ref=27&lan=en) (last accessed on 15 April, 2016): “Any State, member of the United Nations, having Muslim majority and abiding by the Charter, which submits an application for membership may join the Organisation if approved by consensus only by the Council of Foreign Ministers on the basis of the agreed criteria adopted by the Council of Foreign Ministers”
  - (7) An example of this is Zanzibar which is not yet a member of OIC despite its Muslim majority population.



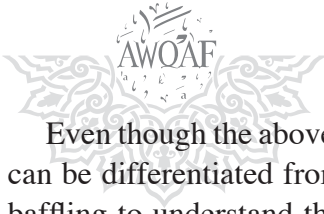
words, a country may be regarded as a Muslim/non-Muslim world if any of certain situations is identified with it. Kamarudin and Abdel Kader clarify this when they express the views as follows:

Non-Muslim countries are generally countries where Muslims are a minority such as in most Western countries like those in Europe, Canada, Australia and New Zealand and also some other countries across the world such as South Africa, India, China and Japan. Some other possible categorisations of non-Muslim countries are as follows:

1. Another religion other than Islam is the official state religion, e.g. Thailand (there are 15 of such states).
2. Islam is officially banned as a religion, as widely reported to be done in Angola in November 2013, but later denied by the country.<sup>3</sup> There is fear of banning Islam in France in 2017. Islam is also not allowed in Vatican City.
3. There is official hostility, legally or politically documented, against Islam/Muslims, on non-Islamic grounds/ethics (e.g. France with its official banning of the use of *Hijab*; Angola with strict restrictions on Muslims refusing to register Muslim organizations and denying them freedom to build mosques; Myanmar with ethnic cleansing of the Rohingya who are predominantly Muslims.)
4. Non-Muslims are in the majority or Muslims are in a minority group/bloc, e.g. Ghana, Kenya, Uganda.
5. Secularity officially upheld, e.g. North Korea (where religion is not allowed); the Russian Republic, USA.
6. Multi religious culture without preference to Islam or any other religion is upheld, but with non-Muslim majority e.g. Singapore, India.
7. Where there are no Muslims at all, e.g. Vatican City.<sup>(1)</sup>

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(1) *ibid* 1.



Even though the above can be useful factors by which Muslim countries can be differentiated from their non-Muslim counterparts, it still remains baffling to understand the purpose meant to be achieved by the Zamfara State Law in restricting the donors whose waqf would be accepted by the Board to only those who are resident in the Muslim world. While there may certainly be some challenges in receiving waqf from donors who are resident in non-Muslim countries across the globe,<sup>(1)</sup> it is not good enough for such legal restraints to come from a Muslim environment like Zamfara State. This may have negative devastating effects on the growth of waqf in general and cash waqf fund in particular in the State on the donors who are resident in places not regarded as a Muslim world. Accordingly, the section is recommended to be amended to read as follows:

The Commission may receive endowment from any individual persons, groups, organizations or corporate bodies, whether of Islamic faith or not, whether resident in the State or not, but who are the rightful owners of the property so endowed, whether the property is in the State or not.<sup>(2)</sup>

The statutory interpretation crisis which the section in the Zamfara State Law under review has created can also be better imagined than imaged if the question of the differences between an “Islamic Society” and a “Muslim Society” is brought into the fore. It would then become intriguing whether any person not living in an Islamic Society would qualify as living in the “Muslim World” if he lives in a “Muslim Society”. In essence, the purport of the “Muslim World” used in the Law must be well clarified whether it refers to an Islamic Society or a Muslim Society. The differences between these two worlds have been explained by Dasuki when he posits as follows:

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(1) Milton Cerny and Michele AW McKinnon, ‘The Globalization of Philanthropy: International Charitable Giving in the Twenty-First Century’ (45 (2010) Real Property, Trust and Estate Law Journal 4 <<https://www.mcguirewoods.com/news-resources/publications/taxation/globalization-of-philanthropy.pdf>> accessed 14 April 2016.

(2) This is recommended to be the new couching of section 31 of the Zamfara State Zakat (Collection, Distribution) and Endowment Board Law.



The fact remains that *Shari'ah* is the life of Islam itself. Therefore, any Muslim society in which the *Shari'ah* is not applied in its totality cannot be said to be truly Islamic even though all its members might claim to be Muslims. The test of the Islamicity of any society is the extent of its application of the *Shari'ah*. No amount of *salat*, *zakat*, *saum* or *Hajj* alone can make a society truly Islamic, if the *Sharicah* is not applied as a comprehensive legal system. This is because to submit to a law other than that prescribed by Allah is to submit to another god beside Allah, which amounts to rejection of Islam. The Qur`an in three different verses calls those who reject *Shari'ah* ‘unbeliever’, ‘wrong-doer’ and ‘rebel’ against the authority of Allah.<sup>(1)</sup>

Based on the foregoing, it may not be helpful to interpret the “Muslim World” used in the Law as connoting an “Islamic Society”. This is because majority of the countries that qualify as Muslim countries may not meet up with this standard and this would be counterproductive against the intents of the Law.

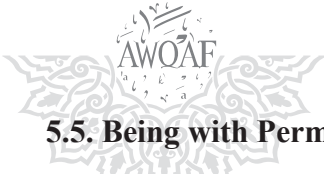
#### **5.4. Rightful Ownership of the Endowed Property**

The end-result of waqf in terms of rewards to the endower (the wÉqif) is personal. Therefore, the property that must be endowed must also personally belong to the donor. In both conventional common law and Islamic law, it is well established that he who lacks ownership in any property cannot dispose it off.<sup>(2)</sup> Thus, for any waqf to be valid, it must be ascertained that the property endowed rightfully belonged to the donor. While there is no express provision of the law in Nigerian on the waqf of jointly owned properties, the position of the MÉliki School earlier clarified could be taken to apply to the matter. To this end, there is no doubts on the position of the law on the matter within the Nigerian legal regime.

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(1) Muhammad Jumat Dasuki, ‘Challenges Facing Shari’ah Courts in Nigeria’ <[http://iwf.com.ng/coin\\_2015\\_papers/challenges\\_facing\\_shari'ah\\_courts\\_in\\_nigeria\\_Muhammad\\_Jumat\\_Dasuki.pdf](http://iwf.com.ng/coin_2015_papers/challenges_facing_shari'ah_courts_in_nigeria_Muhammad_Jumat_Dasuki.pdf)> accessed 10 January 2017.

(2) This is expressed in the common-law maxim stated as *nemo dat quod non habet* and in the SharÉÑah maxim expressed as *fÉqid Shay'un la yÉtiha*.



### **5.5. Being with Permissible Items in Islamic Law**

An established principle of Islamic law is that the object of transactions must be lawful (*halÉl*) and not prohibited (*ÍarÉm*).<sup>(1)</sup> There is no exception to this in the matters of waqf as well. As expected, the law has therefore stipulated that waqf cannot be valid in Nigeria except the property endowed is lawful (*halÉl*) in the eyes of Islamic law. In other words, the law stipulates that even if the property is owned by the endower, it must still be “lawful items permitted by Shari’ah”.<sup>(2)</sup> This is therefore a commendable safeguard as expected in the law.

### **5.6. Can Be with Any Amount or Quantity**

The validity of any waqf in Nigeria does not depend on the worth of the property in terms of the monetary value or otherwise. Accordingly, a waqf property to be endowed can be of “any amount and quantity”.<sup>(3)</sup> This provision also strongly provides a good legal ground for cash waqf to thrive in the country as even with the littlest amount he may be able to contribute, the poor can also participate in the waqf scheme.

## **VI. CONCLUSION**

Even though Islamic law is well recognised as a major source of the Nigerian law, various subjects of Islamic law attract different concepts within the Nigerian jurisprudence. Thus, it is not enough to just pick any aspect of Islamic law to be implemented without proper consideration and understanding of the legal terrain in respect of such subjects in the country. Accordingly, waqf must be understood within the 1999 Constitution of the Federal Republic of Nigeria as it is expressly stipulated<sup>(4)</sup> as an Islamic personal law matter.

(1) Abdullahi Saliu Ishola, Yusuf Abdul Azeez and Norfadhilah Mohamad Ali, ‘Al-‘aqd Al-sahih: The Legal Basis for Determining the Validity of Islamic Financial Transactions’ (6 (2016) International Journal of Economics and Financial Issues 142–141 ,140.

(2) Zamfara State Zakat (Collection, Distribution) and Endowment Board Law.

(3) *ibid*.

(4) It is written as wakf in the Constitution. See Constitution of the Federal Republic of Nigeria.





Therefore, this paper has provided some basic explanations on the jurisprudence of Islamic system of endowment (al-waqf) within the Nigerian jurisprudence. Through this, the concepts of the MĒliki School on the waqf subject is analysed and followed by the purports of the subject within the constitutional context as an Islamic personal law matters. The various definitions of the concept in various legal instruments at the State level are also disclosed. Drawing from these, the study proceeded to expatiate on the legal requirements for the validity of waqf within the Nigerian legal regime. Summarily, it is revealing that waqf scheme enjoys strong legal supports in Nigeria; it only requires that the conditions laid for its validity should be properly guided.





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## Researches



# **Integration of waqf portfolio into Islamic financial system: An innovative approach to developing waqf as a product and a business model in the financial market**

Dr.Ahcene Lahsasna<sup>(1)</sup>

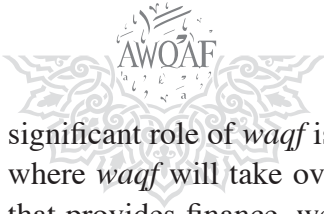
### **Abstract**

*Waqf* is a very powerful financial instrument whose resilience can be witnessed throughout history so that it managed to survive during economic recessions, financial crises, and even the brutal colonization the Muslim *Ummah* was subject to. During colonial era, every effort was made to abolish/destroy *waqf* because it was the only and consistent source of income for many entities. One way to take *waqf* to the next level of innovation and to make it more fruitful is to integrate *waqf* portfolio into the Islamic financial system. This is the best way that can transform *waqf* into an active market player and prominent component in the Islamic finance composition. It can be said that *waqf* is the sleeping giant and the day it wakes up it will take over substantial market share and become the dominant and the controller of many business portfolios of the market place. History shows that *waqf* was the dominant body in many countries such as Turkey, Egypt, Tunisia, Algeria, Syria, Iraq, Palestine etc. This

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(1) Assoc. Prof. Dr Ahcene Lahsasna, Deputy Director, Research and Publication, INCEIF, Malaysia.





significant role of *waqf* is again expected to get impetus in the near future where *waqf* will take over its prominent position as a leading institution that provides finance, welfare and prosperity to the *Ummah*. The present paper is discussing the approach of achieving this objective.

***Design/Methodology/approach:*** The paper follows comparative analysis method by looking at the *waqf* and the way of its implementation in the financial system in an innovative way to meet the objectives of *Shari'ah* in general, and finance and economics in particular.

***Findings:*** The result of the paper shows that cash *waqf* has a very dynamic structure that can penetrate in any financial structure of the Islamic financial system, banking, *Takaful*, Islamic capital market and other business activities in the market place. The contribution of cash *waqf* in its new format will result in playing a significant role in meeting the objectives of *Shari'ah* in terms of finance and economics where the value of justice, equity, cooperation and solidarity will flourish in the society and create a holistic environment that brings the society to the level of brotherhood and prosperity.

#### ***Reserch Limitations/Implications -***

***Pracical Implications:*** This paper can be useful in understanding how cash *waqf* is of a dynamic nature and can be shaped out and implemented in different sophisticated financial structures in the Islamic finance.

***Originality/Value:*** The paper provides a good knowledge about the principles of cash *waqf* and how it can be offered to the market in a sophisticated range of products in Islamic finance.

***Keywords:*** *Waqf*, Cash *Waqf*, Islamic Finance, *Shari'ah*



## **1. Introduction**

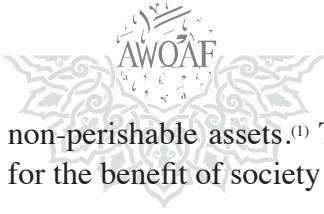
The best policy and strategy in developing and empowering *waqf* is to integrate it into the Islamic finance system by moving away from the traditional way in handling it where there is a total dependency on the donor with respect to distribution purposes. This traditional way of managing *waqf* exposes it to the problem of scarcity in liquidity. It is time to upgrade the *waqf* to the level of a sustainable source of funding where *waqf* generates income by itself to meet the future obligations without depending on a third party donations. This important policy has to be looked at as a crucial step towards bringing *waqf* to the next level where it becomes a robust financial instrument which not only contributes towards the welfare of the society, but also becomes an important financial component of the Islamic financial system.

## **2. Waqf: Basic Concept and Definition**

The literal translation of *waqf* (from Arabic) is to stop or to hold/inhibit. *Waqf* is a voluntary, permanent, irrevocable dedication of a portion of one's assets to Allah, citing that such assets can never be gifted, inherited, or sold. Therefore *waqf* always remains intact and directed for charitable/welfare purposes towards the benefit of the society.<sup>(1)</sup> *Waqf* is very practical, simple and convenient to function according to one's affordability where a donor needs not possess properties or high valued assets to perform *waqf*. It can be done on behalf of others such as deceased parents/family members. It has a huge potential due to the generosity, and population of Muslim worldwide. As for the cash *waqf*, it means the appropriation of an amount of money by a founder and the dedication of its usufruct in perpetuity to the prescript purposes. However, cash *waqf* in Islamic bank "is an integrated solution offered by the Islamic Financial Institutions (IFIs) that provides a seamless collection service and financial advisory to the non-profit/charity sector with the aim of creating a benefit to both the donor and the organization involved in charity. Cash *waqf* in this case is the act of *waqf* by using cash as the initial/intermediate asset for the purpose of collecting *waqf* fund which will eventually be changed/ converted into

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(1) See more definition at (Kahf, 2003)



non-perishable assets.<sup>(1)</sup> These non-perishable assets will then be utilized for the benefit of society continuously.

### ***3. Miss-concept of Waqf and its importance Islamic Financial System***

There is a wrong understanding of *waqf* concept, which has become the reason for its limitedness in the market. Colonial powers targeted *waqf* to be corrupt, and tried spreading the following aspects: 1) *Waqf* is only for religious purposes, 2) *Waqf* can be established only in real estate, and 3) *Waqf* cannot be a productive asset in the financial market. However, the introduction of *waqf* into the Islamic financial system will break the above mentioned myth; meanwhile it ensures the following objectives: 1) Ensures the welfare of the society due to the substantial *waqf* amount generated, 2) Enhances the financial system for the benefit of the society, 3) Ensures a consistent and stable source of income to the *waqf* fund, 4) Shifts the concept of *waqf* from wealth distribution to wealth creation, 5) Reduces the rate of profit requested by IFI, 6) Enhances financing of critical infrastructure requirements and in essence reduces the cost of governance. Thus, it contributes significantly to the financial inclusion.

### ***4. The Diversified Portfolio of Waqf in Islamic Finance***

*Waqf* has a diversified portfolio which can contribute significantly to the growth of Islamic finance and expand the asset size of the Islamic finance industry accordingly. *It* can also easily penetrate into the financial sector through the following portfolios:

#### ***4.1. Cash waqf in Banking***

The penetration of *waqf* in banking can be through different ways either as the underlying structure of the bank itself or as product offered by the bank. Brief descriptions of these two approaches are as follows:

##### ***4.1.1. The Cash Waqf as underlying banking structure***

Given that Cash *waqf* can be used as an underlying structure of an Islamic bank, the cash *waqf* will be the model used to design the capital structure of

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(1) See also (Md Saad & Anuar, 2009)

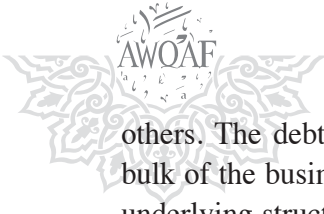




the Islamic bank, either as full-fledged bank based on cash *waqf*, or as hybrid where the cash *waqf* will be part of the capital structure of the bank; in this case the *waqf* will be one of the liquidity providers for the bank. Both models are acceptable and possible of achieving the liquidity needs according to the regulatory requirements according to each jurisdiction. There are examples of Islamic banks in the market which use cash *waqf* as their underlying banking structure like the social investment bank in Bangladesh, and the Bank of al Nur in Dubai. The Islamic bank using cash *waqf* as their underlying structure operates as a commercial bank in their business activities. However, it will be governed by Shari'ah rules related to *waqf*, in addition to its capital intensiveness or any additional cash flow based on *waqf*. As an Islamic bank using cash *waqf* as their underlying banking structure, they will offer products in deposits, financing, trade financing, and wealth management, in addition to cash *waqf*. Some of the most popular products offering are as follows:

- ***Deposit facility:*** The Islamic banks using cash *waqf* as their underlying structure will accept deposit from their customers as they will be operating various accounts such as saving account, current account, fix deposit account, and cash *waqf* account as well.
- ***Financing facilities:*** The Islamic banks using cash *waqf* as their underlying structure will also be offering financing products in order to finance the customer's needs by offering different product structures, some of which are as follows:
  - ⇒ ***Personal financing:*** In this structure the banks accommodate the liquidity needs of the client while commodity *murabahah* is used as the underlying contract in this structure.
  - ⇒ ***Debt financing:*** In this structure, the bank finances both the customers and corporate needs such as housing, cars, working capital financing, business needs, micro, small and medium enterprises (SME's). Different models are used in this structure such as *murabahah* to the purchase order (*murabahah lil amir bi shira'*), financial leasing (*ijarah*), *istisna* and parallel *istisna*, *salam*, and parallel *salam*, and





others. The debt portfolio in the banking sector will represent the bulk of the business activities of the banks using cash *waqf* as their underlying structure during the initial stage of their operation in order to preserve the capital derived from *waqf*. The debt financing is a secure business transaction that helps in preserving the capital of cash *waqf* from depletion or exhaustion.

- ⇒ **Equity financing:** The Islamic banks using cash *waqf* as their underlying structure can also finance their customers through the offering of products that are based on equity structure such as *mudarabah* and *musharakah*. These products and other equity based products are risky contract in nature which makes Islamic banks using cash *waqf* as their underlying structure to avoid offering it at the beginning of their operation in order to preserve the capital derived from the *waqf* liquidity system. However, the equity based structure can be offered once the reserve is built for that purpose. At the initial stage the equity based product can be offered in the deposit side and not in the financing side.
- ⇒ **Trade financing:** In this facility, the Islamic banks using cash *waqf* as their underlying structure offer various products to finance businesses and trades in the economy. There are different products that are offered in this section such as letters of credit, letters of guarantee, and others.
- ⇒ **Wealth management:** The banks also offer wealth management product to their clients such as structure product and others.

#### **4.1.2. Cash Waqf as Banking Deposit Product in Commercial Banks**

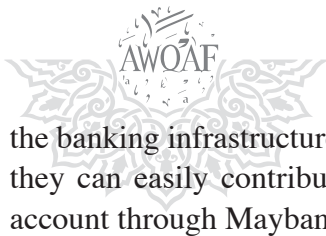
In a commercial bank, cash *waqf* can be used as a banking product which will be in the form of a banking account. In this case, the cash *waqf* account will co-exist with other banking accounts such as saving account, current account, investment account and fixed deposit account. The customer will have the option to open account based on *waqf* to serve their needs and objectives. This deposit account should have three sub-



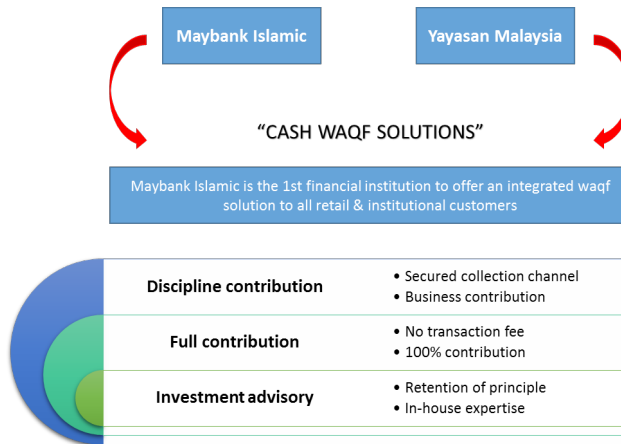
accounts, namely: private account<sup>(1)</sup> (this account will be governed by the rules of *waqf thurri/ahli*, where the return of the account will be channelled to the family of the account holder according to the terms and conditions agreed upon<sup>(2)</sup>), public account where the return will be channelled to the public according to agreed upon terms and conditions (this account will be governed by the rules of *waqf Aam*), and hybrid account or *mushtarak* account where the return will be shared by the family of the account holder and the public according to agreed upon terms and conditions (this account will be governed by hybrid rules of *Waqf mushtarak*). It should also be noted that the cash *waqf* deposit account should be classified as an investment account and not saving account). Within the knowledge of the author, this mode is not yet implemented in the commercial banking. Hence, the Islamic banks may look at this proposal to add value to their banking activities. This account is now classified from the banking activities as social corporate responsibility (CSR) because the account is driven by profit and return where the bank can share from the return accrued from the cash *waqf* account based on profit sharing ratio. Therefore, there is business interest in this account where fund can be mobilized through this channel. There is another cash *waqf* deposit structure that can be used as a collecting channel and not as an investment account. Hence, as far as the bank is concerned, it will be a form of CRS activities where the cash *waqf* can be collected through the banking channel such as ATM machine, cheque, on-line banking, TT, and other means.

The last type of cash *waqf* mentioned above has been implemented by Yayasan Malaysia<sup>(3)</sup> and Maybank Islamic<sup>(4)</sup>, where the Yayasan rides on

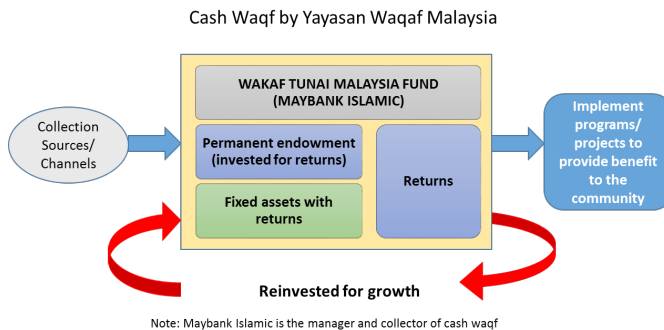
- 1 These products' terminologies are proposed by the author and have no existing names or products in the market.
- 2 To facilitate the process of the documentation, a template can be drafted to capture the common terms and condition which is generally within the benefit of both parties and also within the capacity, ability and convenience to everyone.
- 3 Yayasan Waqf Malaysia is a national charitable entity which was officially established on 23 July 2008 under the Trustee Act [incorporation] 1952 by the Department of Awqaf, Zakat and Hajj (JAWHAR).
- 4 Maybank Islamic Berhad, an acknowledged industry icon, the Islamic finance arm of Maybank Group and the largest Islamic Bank in ASEAN.



the banking infrastructure in accessing the wide range of customers where they can easily contribute to *waqf* by crediting any amount to Yayasan account through Maybank channel.



**Figure 1: Cash Waqf Solutions**



**Figure 2: Cash Waqf by Yayasan Waqaf Malaysia**

Collection channels offered by Maybank Islamic are:

- 1) Online banking, which allows customers to make secure online payment using current and savings account, and credit cards.
- 2) Self Service Terminals offering ATM, CDM and CQM with operating hours from 6am to 12 am.
- 3) Branches that assist customers with their transactions and queries.



### 4.2. The Cash Waqf in Takaful

Cash *waqf* in *takaful* has the same approach in banking. It can be used as underlying structure in the *takaful* operation, or it can also be used as a product offered in *takaful* based on *wakalah* or *mudarabah*.<sup>(1)</sup>

#### 4.2.1. The Cash Waqf as Underlying Structure of Takaful

As we know, there are different business models for *takaful*, cash *waqf*, *mudarabah* model and *wakalah* model. The chart below is a description of *takaful* based on cash *waqf* model.

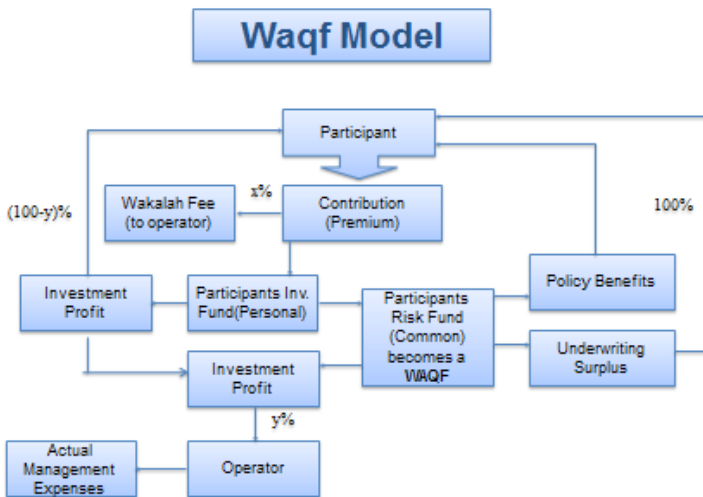


Figure 3: Waqf Model in Takaful

#### 4.2.2. The Cash Waqf as Product in Takaful Business

Cash *waqf* in this case is offered as product in *takaful* business to serve different purposes. *Takaful* operators who are using *wakalah* or *mudarabah* model will open up an account based on cash *waqf* as an addition to the *takaful* products offered in the market. The *takaful* product should have three sub-products, namely: *Ahli* (Family) product<sup>(2)</sup> (this product will be governed by the rules of *waqf thurri/ahli*, where the return of the product

(1) See also (Wahab, 2006)

(2) These products' terminologies are proposed by the author and have no existing names or products in the market.

will be channelled to the family of the premium holder according to the terms and conditions agreed upon); *Aam* (public) product (this account will be governed by the rules of *waqf Aam* where the profit from the product will be distributed to the public); the *mushtarak* (hybrid) product (this product is the combination of the features of *waqf ahli* (family product) and the features of *waqf Aam* (general product) where both share the return on the product. This product will be governed by the rules of *waqf mushtarak* (hybrid product).

#### **4.3. Cash waqf in Re-takaful**

Sula (2004) defined re-*takaful* as a mutual process between a bear session (ceding company) or *takaful* operator with re-insurer (re-insurer or re-*takaful* company) where there is mutual consent process (mutually agreed) risks and requirements set forth in contract.<sup>(1)</sup> Through this definition, we can easily see that re-*takaful* is a tool used for minimizing the risk to be faced by a *takaful* company. In *takaful* operation, *takaful* operator may not have any claim for a very long time, but its savings may not be sufficient to accommodate an incident happening. An example of this is the Malaysian Airline incidents that occurred recently where the company has to face the challenge of two airline crashes within the range of a very short time. This may bring a large financial cost to the *takaful* company if they don't have any re-*takaful* company that can share the risk with. Since *waqf* is used in *takaful*, cash waqf also has a potential to be used in re-*takaful*.

#### **4.4. Cash waqf in mirco-takaful**

Micro-*takaful* is a mechanism to provide *Shari'ah* based protection to the blue collared, under-privileged individuals at an affordable cost.<sup>(2)</sup> This opportunity has almost not been tapped by *takaful* companies as it is evidence in the current scenario. It has been shown that only six companies provide *takaful* – micro-*takaful* in Indonesia even though they have the largest Muslim population in the world. In comparison, Malaysia

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(1) See (Gunardi, Deuraseh, Tahir, & Ahmad, 2013)

(2) See also "Market Assessment on Microtakaful in Indonesia: The Executive Summary," 2014

has thirteen and Saudi-Arabia has forty *takaful* providers. Insurance penetration for Saudi-Arabia and other Gulf countries is still as low as 0.8 percent. Herewith, it is agreeable that 20 out of 41 countries with lowest human development are Muslim countries and more than 60% of Muslim populations are not insured.<sup>(1)</sup>

Some of the challenges reported facing this initiative are: Lack of proper regulatory framework, shortage of expertise, challenges of appropriate internal control and risk management, rising competition and re-insurance

If this opportunity is tapped, it is going to be of great benefit to the Muslim and the entire community in the world. Some of the benefits of micro-*takaful* are: Financing guarantee for finance providers, reduction of insurance cost, reduced economic waste, help in poverty alleviation and a method of co-operation between participants

Cash *waqf* is very convenient to promote micro-*takaful*, where the cash *waqf* fund can lower the underwriting requirements to widen the penetration of the participants, and include wider population who are not qualified according the normal standards of *takaful* underwriting.

#### **4.5. Cash waqf and Investment**

A *waqf* asset can be further developed in Islamic finance to become an important asset investment class that generates a consistent income. *Waqf* and endowments typically focus on long term *Shari'ah* compliant real estate and cash holdings. University endowments have become more prominent, with the main aim of achieving long term capital growth (Lahsasna, 2013). Several *waqf* funds have been structured as endowment funds, with the principal aim of developing academic institutions, such as the International Islamic University Malaysia (IIUM). An Endowment Fund aims to raise funds to help students in their studies. The King Abdullah University of Science and Technology (KAUST) Endowment Fund has an endowment fund of US\$10 billion, considered to be the 6th largest endowment fund in

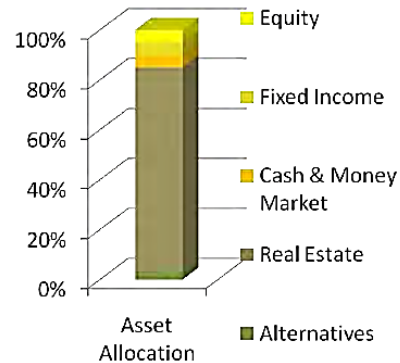
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(1) Ibid.

the world. Bahrain's *waqf* Fund for Research, Education and Training in Islamic Finance. The fund was established in March 2008 with capital of US\$5.8 million.<sup>(1)</sup>

### Investment Management Trends in *Waqf*

- Shariah sensitive investments
- Long term assets holdings
- Hold large amounts of real estate used for religious & philanthropic purposes
- Long term capital growth rather than active investment policy
- Asset allocation not so affected by market movements



Source: Ernst & Young Islamic Funds & Investment Report 2009-2010

**Figure 4: Investment Management Trends in *Waqf***

Area of investment includes:

- ***Waqf Properties Investment Fund:*** This is a very prominent area for investment locally and internationally. It includes the lease fund of properties specifically used in *ijarah* where the owner of the *waqf* property will control the management of the project. The beneficiary of the *waqf* property will issue a permit for a specific year to the financier of the property to make use of the property for the given agreed upon years only. Then the beneficiary of the *waqf* property leases it during the time the *waqf* property is with the financier and uses it for the objective of the *waqf*. The owner runs the management and then pays the periodical rent to the financier. After the end of the rent, the financier will have realized its investment and profit, and the financier will no longer have any claim on the *waqf* property again after the elapse of the agreement.

(1) Source: 3rd annual edition of the Ernst & Young Islamic Funds & Investments Report (IFIR 2009-2010)



- **BOT: (Built-Operate-Transfer):** This is another prominent area for cash *waqf* investment; the structure of BOT can be used in project financing or *sukuk* issuance based on *waqf*. Example of BOT that is used in *sukuk* is *Sukuk al Intifa'a* in the project of Zamzam Towers in Makkah. *Waqf* Land leased to Bin Ladin Group for 28 years on BOT to build complexes (4 towers, mall & hotel). Bin Laden leased the project to Munshaat Real Estate Projects for 28 years. Manshaat raised \$390 million issuing *Sukuk al Intifa'a* (time-share bond) for 24 years by selling usufruct rights. Similar structure or innovative structure can be duplicated.

#### ***4.6. Cash waqf and Islamic Capital Market***

Islamic capital market is prominent area where *waqf* can penetrate actively. *Sukuk* can be issued based on *waqf* concept where the certificate is not tradable but it generates income to be channelled for different purposes.

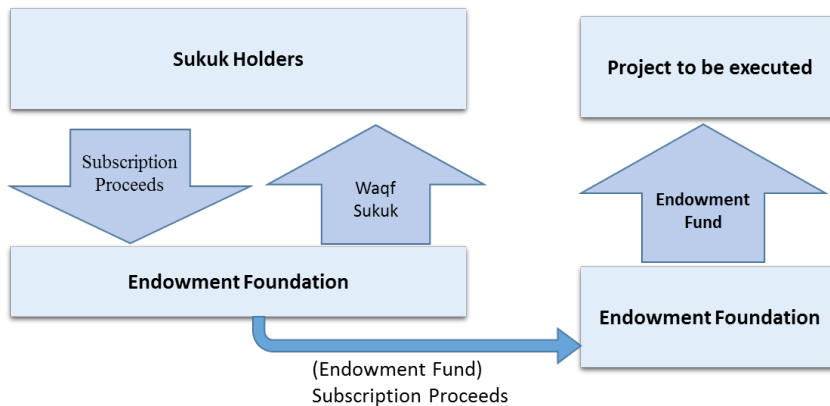
##### ***4.6.1. Process of Issuing Sukuk Waqf***

*Sukuk waqf* can be issued by any organization such as an endowment entity; it can also be issued by a bank that is specialized in a similar kind of *sukuk*. The proceedings of the *sukuk* is always used either for humanitarian needs which won't have any return, or for investments which usually yield returns and can help in developing the endowment organizations on their special projects. The following steps and processes have to be followed in the issuance of such *sukuk*:

1. Specifying the amount that is needed for executing the endowment project.
2. The endowment foundation will establish a special purpose vehicle (SPV) which will be used to issue the *sukuk* and secure the proceeds of the *sukuk* and also the endowment project.
3. The Executor or issuer (company) will issue *waqf sukuk* that is equivalent to the amount they need for investment.

4. The Executor or issuer (company) will float the *sukuk* in the market for subscription.
5. The money raised through the subscription from the subscribers which includes the endowers and the money gathered from the subscribers.

This is the graph for these steps:



**Figure 5: Sukuk Waqf**

One of the examples of *sukuk* is Singapore *Musharakah sukuk* which is used to raise \$60 million to develop two projects. *Waqf* provided the land, the investors (*sukuk* holders) provided the funds for investment, and Warees managed the project. Another example of *sukuk waqf* is where a new mosque was built with attached commercial property earning \$200,000 annually.

#### **4.7. Cash waqf and Shares**

*Waqf* shares is another prominent area for *waqf* activities where the shares purchased or issued will be given as *waqf* held by the SPV or the trustee. Shares generate a good income depending on the performance of the company or the underlying project. Few countries have embarked on this scheme, including Indonesia and Malaysia. More active role in this regard is needed to enhance the diversity of the portfolio of *waqf*. The

fundamental understanding of this is that for cash to be accepted as *waqf* from public and then converted to a share in a fixed asset. This can only be compared to cash *waqf*, as this method is ultimately related to *waqf* donation to fixed asset and that means that it is not liquidity as it is only used for the purpose to develop new properties. For this to be applicable and *Shari'ah* compliant, it must comply with *Shari'ah* requirements.

#### **4.8. Cash waqf in Micro Financing**

Micro financing is an important area which is in line with the objectives of *waqf* because it aims to help the non-bankable people and bring welfare and prosperity, the micro business entities need financial support. Hence cash *waqf* can play this role by being a source of fund, where the cash *waqf* can be structured to meet the demand of the micro financing market.<sup>(1)</sup>

#### **4.9. Cash waqf and Islamic Finance Business**

Business Services and consultancy can be provided and managed by *waqf* in different forms of business entities, either separately, or in the form of a holding company that offers different business activities under different subsidiaries. Below are some examples of business portfolios that can be offered under cash *waqf* structure. They are as follows:

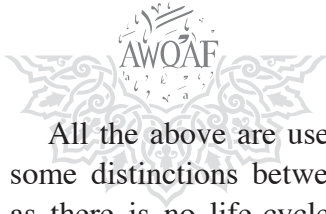
##### **4.9.1. Financial Planning Services**

Financial planning is defined as a process where individual financial goals are met. Financial planning is set to involve six steps:<sup>(2)</sup> Establishing of the goals and objective of the financial planner, gathering of information and data on the financial planning, compilation and analyzing of the information and data, developing of the solution and presentation of the plan, implementation of the plan and Monitoring and review of the plan periodically. In order to present a good financial planning, there are some financial areas that have to be considered: Cash flow planning, tax planning, investment management, risk management, retirement planning, estate planning, special circumstances planning, employee benefits and educational planning.

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(1) See also: (Ahmed, 2007)

(2) See <https://www.fpsb.org/index.php>



All the above are used for conventional planning, however, there are some distinctions between Islamic and conventional financial planning as there is no life-cycle for them to begin their financial planning. In accordance with the ***Hadith narrated by al-Hakim and al-Baihaqi***: “*Grab five things before another five come: when you are young before you get old, when you are healthy before you fall ill, when you are rich before you become poor, when you are free before you get busy, when you are still alive before you die*”. Therefore, there is need for every Islamic planner to understand all this to be able to give the right advice to their clients on planning their future. *Waqf* is part of the estate planning, however the entire financial advisory as service can run based cash *waqf* portfolio.

#### ***4.9.2. Asset Management Services***

The Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) defines funds as: “Investment vehicles which are financially independent of the institutions that establish them.” These funds are managed either by way of *mudarabah* or *wakalah* contract. The portfolio of asset management can be designed on cash *waqf* structure.

#### ***4.9.3. Islamic Fund Management Structure***

In *mudarabah* contract, the investor is known as the *rabb al mal* (capital provider or the financier), the business manager is the *mudarib* who will manage the fund and the overall business. However, if the fund is based on *wakalah*, he will either be the *wakil* or an agent. With regard to the investment process, the fund manager takes the role of the *rabb al mal* on behalf of the fund unit holders. All the conditions of both *mudarabah* and *wakalah* apply, either in the execution of the work or in sharing of profit. The above mentioned portfolio can be designed and structure based on cash *waqf* model.

#### ***4.9.4. Estate Management Services***

Real estate management and planning represent an important aspect in the financial advisory and financial planning. In running estate management according to *Shari'ah*, there are some components that should be observed.



The main components of estates management and planning include, the following: *Inheritance*<sup>(1)</sup> which is a legislation of *Faraid* enacted by *Shari'ah*, *wasiyyah*<sup>(2)</sup> or bequest which is an act of giving away property during lifetime of a person, but its effect will be upon the death of the giver, *hibah*<sup>(3)</sup> or gift which is an act of giving away one's property without any return, *waqf* which is the discussion of this paper. All these components required some *Shari'ah* rules and principles in order to be in compliance with *Shari'ah*. These estate management services can be used based on cash *waqf* structure.

#### **4.9.5. Shari'ah Advisory Services**

*Shari'ah* advisory play a major role in Islamic finance industry; it includes wide range of services for the Islamic financial institutions. This includes *Shari'ah* review and *Shari'ah* audit and other services.<sup>(4)</sup> For example *Shari'ah* review is defined as an examination of the extent of IFIs' compliance in all its activities with the *Shari'ah* requirement. This examination includes contracts, agreements, policies, products, transactions, memorandum and articles of association, financial statements, reports (especially internal audit and central bank inspection), circulars, etc. The objective of a *Shari'ah* review is to ensure that the activities carried out by IFIs do not contravene the *Shari'ah*. (AOIFI, 2016). The above activities of *Shari'ah* advisory can be designed and offered as business under the cash *waqf* portfolio.

#### **5. Conclusion & Recommendations**

To conclude, *waqf* is always regarded as innovative structure that can accommodate many features. This flexibility that exists in *waqf* enables it to venture into Islamic finance space where many products and services can be structured based on the features of cash *waqf*. The integration of *waqf* portfolio into Islamic finance can contribute significantly to the

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(1) See also: (Fadzrina & S Hamzah, 2014)

(2) See also: (Ghul, Yahya, & Abdullah, 2015)

(3) See also: (Ibrahim, 2009)

(4) For more input on *Shari'ah* advisory, see (Shafii, Abidin, Salleh, Kamaruzaman, & Nawal, 2013)



expansion of *waqf* and contribute respectively to the development of the Islamic finance industry.

As for the recommendations, the research recommends the following:

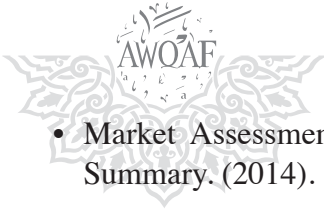
- The policy maker should look at the cash *waqf* as potential aspect in the future of Islamic finance in the area of products, instrument, market and other services.
- The IFI should incorporate cash *waqf* in different Islamic finance proposal.
- Cash *waqf* should be incorporated in designing new products and services in Islamic Capita Market.
- Cash *waqf* should be incorporated in designing new products and services in Islamic Banking.
- Cash *waqf* should be incorporated in designing new products and services in Takaful.
- Enhancing the social activities and the financial inclusion by promoting more cash *waqf* products and services.
- Integrating cash *waqf* in Islamic wealth management and financial planning.
- Selecting cash *waqf* as innovative way for products and services offering to the financial market.
- Implementing the features of banking governance and operation technique in cash *waqf* operations
- Providing more guidelines and standards for cash *waqf* management and operations. This task can be undertaken by regulators, such as Central Banks and Securities Commission and international setting bodies such as AAOIFI



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## **L'investissement intégré des fonds waqf: une approche sociale.**

Dr.Tarak Abdallah\*

### **Résumé**

Cet article s'intéresse aux stratégies d'investissements des fonds Waqf. Il s'agit de dépasser une vision bipolaire de ces stratégies qui pourrait se résumer en deux extrêmes apparemment contradictoires : soit maximiser les profits ou tabler sur un apport totalement social de la dotation. Dans cette direction l'auteur essaye de revoir cette question en partant de la philosophie même des dotations waqf, pour ainsi repenser l'interaction entre ses composantes économiques et sociales, et enfin dégager la stratégie la plus appropriée au développement des actifs financiers des awqaf pour assurer le caractère durable de l'institution waqf tout en exerçant ses rôles sociaux et assurer ses impacts sur les diverses couches sociales.

Cette recherche passe en revue un modèle de stratégie d'investissement des awqaf contemporaines, précisément l'expérience américaine qui se distingue par la compatibilité entre les volets sociaux et financiers en maintenant trois valeurs clés : la requête de la qualité, l'exigence du professionnalisme, et enfin l'exigence d'une responsabilité sociale.

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La dernière section de cet article traite des conditions objectives pour construire une stratégie d'investissement des awqaf au monde musulman à priorités sociales bien définies, et sur la base d'une symbiose entre ces investissements d'une part, et les besoins réels du monde musulman d'autre part. La finalité d'un tel processus c'est de maximiser l'impact socioéconomique des fondations waqf sur le développement humain du monde islamique, et l'utilisation durable et sage de ces richesses.

### **Introduction**

Il est d'une importance majeure de rappeler que les awqaf faisaient partie des structures socioéconomiques essentielles dans le fonctionnement et le développement des sociétés musulmanes durant plusieurs siècles. Entant que sous structure endogène, le système awqaf avait rempli des fonctions relatives à la construction et la stabilisation du social à travers la formation des chaînes de solidarité individuelles et communautaires dans les régions et les cités Musulmanes. Ces chaînes ont contribué de façon palpable à bâtir des liens transrégionaux<sup>(1)</sup> et ont par conséquent affirmé une unité socioculturelle entre divers ethnies, langues, et même religions au sein d'un très vaste empire. D'autre part, ces mêmes chaînes ont joué aussi un rôle décisif dans la prolongation de la longévité de la civilisation musulmane puisqu'ils ont assumé des responsabilités socioéconomiques et se sont constitué en tant que sphère publique qui a permis à des hommes et des femmes un engagement civique très actif.

Il est nécessaire aujourd'hui de revoir la genèse de l'institution waqf sur la base d'une perspective holiste qui reconstitue ce processus historique non dans ses détails mais plutôt en tant que sous système ou sous structure sociale et de saisir sa fonctionnalité et le processus auquel s'articulent ses fonctions à l'ensemble du social.

Nous assistons depuis les quatre dernières décennies à un vivification des awqaf, en témoigne le nombre de plus en plus élevé des institutions waqf publiques et civiles qui s'érigent à travers les pays musulmans.

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(1) CF. Miriam Hoexter (1998) *Endowments, Rulers, and Community: Waqf Al-Haramayn in Ottoman Algiers*, Brill, Leiden, The Netherlands.



Nonobstant, cette évolution quantitative souffre d'une absence de vision stratégique qui devrait considérer le waqf tant que sous structure sociale distincte, et en même temps connectée aux autres sous-structures par des liens bien définis aussi bien dans leurs natures que dans leurs portés. Dans ce contexte, il est difficile d'imaginer par exemple les awqaf en dehors d'une société civile active qui dispose d'une marge de manœuvre lui permettant de promouvoir un ensemble d'activités socioéconomiques.

Nous estimons que l'expérience contemporaine reliée à l'établissement des institutions waqf est loin d'être réussie, et par conséquent elle nécessite une reconsidération profonde au niveau de sa perception du phénomène waqf, et des méthodes d'approches particulièrement concernant les fonds financiers dont ces institutions disposent.

### **1. Le waqf en tant que sous structure sociale**

L'analyse sociale s'attache à la recherche de modèles d'actions formant un ensemble cohérent et complexe d'institutions et de législations qui participent à la régulation du social dans ses divers niveaux. Dans ce cadre analytique, la société est appréhendée comme un ensemble d'éléments en relation dynamique, animés par le biais d'actions visant à atteindre des objectifs communs.

L'analyse des structures sociale se concentre autour des tendances qui se reproduisent régulièrement dans la société vers des objectifs spécifiques, et de cette façon un état de la régulation du comportement social est adapté aux besoins de l'individu et des communautés. Cette vision essaye de comprendre les sociétés humaines à travers une suivie analytique de «modèles» pour fournir une vision intégrée et holistique des activités culturelles, sociales et économiques. L'ensemble de ces activités sociales et leurs fonctions sont façonnés dans des schémas et des sous-modèles qui sont interconnectés à travers les relations réciproques qui se produisent entre tous les phénomènes pour subvenir aux différents besoins humains. Ces modèles ont des règles régissant leurs relations, et ainsi affectent ce qui en résulte de manière cohérente ou contradictoire, selon le degré d'interaction dans la société et le degré de cohérence ou de divergence entre eux.



En tant que sous-systèmes, les institutions waqf se sont érigées sous forme d'entités sociales. Ils amènent l'harmonie, et l'équilibre au sein de l'entité globale ; les normes correspondantes aux *awqaf* seront ajustées autour d'une valeur centrale, l'altruisme qui devrait contribuer à la détermination des conduites individuelles et collectives, elles-mêmes résolues par cette intégration qui sous-tend le système d'action sociale. Nonobstant, les contours d'action des institutions waqf sont diffuses, et ne se limitent pas au maintien des valeurs et des normes, mais se connectent aussi aux autres sous-systèmes économiques pour résoudre les problèmes d'adaptation, et politiques pour définir les objectifs nécessaires à toute existence communautaire. C'est à travers ce processus complexe que les awqaf ont acquis un pouvoir, une force sociale, et une place importante dans le processus de socialisation<sup>(1)</sup>.

A l'instar des autres civilisations, les sociétés musulmanes avaient produit des outils (sous-système) leur permettant de garantir la continuité des normes et valeurs qui conduisent à une meilleure solidarité et conduite de leurs communautés, et de résoudre les questions relatives aux contraintes externes afin d'assumer les tâches communes. Dans cette optique, les awqaf avaient contribué à coordonner une importante partie des actions individuelles, et ainsi participer à réaliser la stabilité du groupe et la continuité de son action sociale. L'apport sociologique des awqaf avait touché en amont les domaines de participation civile, et avait ainsi facilité la création de sphères publiques et le développement de capacités socioéconomiques endogène. Affirmer la relation entre les awqaf et la société civile est méthodologiquement primordiale non seulement pour confirmer sa philosophie altruiste, mais aussi pour mettre en valeur les possibilités qu'avaient offert les institutions waqf aux individus pour exercer un ensemble diversifié et de grande valeur sociale.

Nous sommes en présence d'une conception particulière de la régulation et la gestion des sociétés où différents types d'actions privées et publiques seront coordonnées pour une utilisation sociale et en même

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(1) Voir notamment Les fondations pieuses (waqf) en Méditerranée : enjeux de société, enjeux de pouvoirs ; Fondation publique des Awqaf du Koweït, 2004,

temps rationnelle des ressources en question. Ce processus met en évidence l'un des moyens les plus manifestes de la gestion « civile » des sociétés musulmanes avant l'émergence du mode capitaliste. Les awqaf et les confréries professionnelles<sup>(1)</sup> ont atténuée de façon considérable toute tendance dominatrice sur la société, qu'elle émane de l'Etat ou du secteur privé. Au sein de ces sociétés, les mécanismes civils ont atteint un degré très avancé pour créer une approche économique adaptée au développement des capacités financières dirigées particulièrement à servir le bien-être de la communauté. Par conséquent, nous ne pouvons plus limiter la discussion sur l'investissement des fonds Waqf à sa nature juridique ou technique, mais il est également nécessaire de le considérer en rapport avec la nature civile des awqaf. En conséquence, une vision globale de la question relative à l'investissement des dotations waqf, repose sur l'harmonie entre l'augmentation des rendements financiers et la nature sociale de ces investissements.

## 2. Rendements sociaux et rendements économiques

Pour une majorité de juristes musulmans, l'investissement des fonds de waqf reste lié à la nature économique de chaque société. Dans une économie agraire, où la terre constitue une part importante des dotations, le contrat *Ijara* (location des terres waqf), est le modèle d'investissement par excellence pour préserver les avoirs du Waqf et contrer sa détérioration et même remédier à certaines crises économiques. Les juristes ont discuté la mise en place de ce contrat et ses conditions telles que la durée et la rémunération équitable. *L'Ijara* à long terme est également appliquée aux propriétés de waqf résidentielles ou commerciales qui sont abandonnées et nécessitent un entretien. Dans une économie industrielle et commerciale, on trouve les contrats classiques comme de *Al Musharakah* <sup>(2)</sup>(association),

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(1) Cf. à Pascale Ghazale (ed.) *Held in Trust: Waqf in the Islamic World* (Cairo and New York: The American University in Cairo Press, 2011).

(2) Dans le cadre de l'institution des waqf, *Al Musharakah tabita* (association permanente) peut prendre la forme d'un partenariat conclu avec un promoteur pour la mise en place de constructions résidentiels, commerciales ou de services. Les biens immobiliers constituent l'apport de l'institution alors que les frais de rénovation et de promotion représentent l'apport du promoteur.



le BOT « Construire, exploiter et transférer »<sup>(1)</sup> pour l'investissement à long terme, et l'émission de souscription waqf (Sukuks)<sup>(2)</sup>.

Les juristes et économistes musulmans s'accordent sur ces techniques, mais divergent sur les stratégies et les risques à prendre<sup>(3)</sup>. Une première tendance opte pour la minimisation des risques des investissements, et par conséquent préfère le choix des techniques et des secteurs économiques stables. Le risque devrait être maintenue à un niveau qui ne met pas en danger le capital principal des awqaf afin de protéger les intérêts et les droits des bénéficiaires. Dans ce contexte, le choix de techniques d'investissement sera restreint, l'utilisation de portefeuilles d'investissement spécialisés, et la diversification des secteurs économiques est encouragée pour maîtriser les situations de crises. La deuxième tendance s'appuie sur la faiblesse actuelle des fonds waqf et leur modeste impact dans les pays musulmans, pour proclamer la nécessité d'adopter une stratégie d'investissement agressive afin de développer l'actif financier. Selon les partisans de cette tendance, la maximisation du rendement de ces fonds affirmera la mission des awqaf et contribuera à développer un changement qualitatif dans leurs capacités tant au niveau social qu'économique.

Nonobstant, ces deux tendances restent attachées de point de vue analytique à la séparation entre d'une part l'investissement du capital principal du waqf, et d'autre part les services offerts pour les bénéficiaires. Ainsi, l'impact social des awqaf est exclusivement lié aux services qu'offrent ces awqaf en usant du rendement du capital principal, et par conséquent les modes d'investissements ne sont pas considérés comme générateurs par eux-mêmes d'utilité sociale. Nous estimons que cette vision apparait réductrice

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(1) Il s'agit d'une formule pratique qui permet à l'institution des awqaf de mettre à la disposition d'un entrepreneur qui a les compétences techniques et financières nécessaires, un bien à investir et à fructifier. L'institution des awqaf renonce aux revenus générés par le bien en faveur de l'entrepreneur pour une durée déterminée permettant à ce dernier de rentabiliser ces investissements.

(2) Les Sukuks émis peuvent être régis par un contrat de Musharakah ou de Mudharabah ou tout autre contrat jugé adéquat au waqf à investir.

(3) Cf à Abdelkader Bin Azouz, La jurisprudence de l'investissement du waqf en Islam (Fiqh Istithmar alwaqf fil Islam), La Fondation Générale des Awqaf du Koweït, Koweït, 2008.



et néglige en fait de voir les awqaf en tant que structures d'utilité sociale qui placent l'intérêt général au cœur de leurs actions pour produire un impact global. Ces structures cherchent en fait à apporter des réponses en amont c'est-à-dire en direction de leurs bénéficiaires, mais aussi en aval à travers les externalités positives qui touchent la société dans son ensemble.

L'impact social du waqf en tant qu'organisation civile, dépasse en fait les services directs pour toucher un ensemble d'activités mettant en rapport bénéficiaires et mouvements dirigés à l'extérieur de la sphère privée du waqf. A travers cette capacité à organiser et à connecter diverses variables cette structure offre une vision économique sociale et solidaire, et une anticipation de besoins pas ou mal satisfaits et à y répondre, via ses missions de prévention, réparation ou compensation. Ces actions se traduiront socialement en termes de bien-être individuel, de comportements, de capacités, de pratiques sectorielles, d'innovations sociales, et de décisions publiques.

Il est important de souligner ici que l'investissement socialement responsable (ISR) n'est pas à vrai dire une nouveauté conceptuelle<sup>(1)</sup> puisqu'elle est partie intégrante de toute philosophie altruiste dont celles des organisations waqf. Néanmoins, cette notion pourrait être de grand secours pour reconsidérer non seulement les services directs de ces organisations comme socialement responsable, mais surtout les retombées d'orientation de l'investissement des fonds de façon à concilier la performance économique de ces organisations et leur impact social et environnemental. En fait, il s'agit de savoir comment générer des gains sociaux par un emplacement adéquat des fonds à travers le choix ciblé de leurs moyens d'investissement, et un accroissement de leur responsabilité directe et indirecte dans les décisions et activités sur la société et l'environnement. Dans ce sens la responsabilité sociale de l'institution waqf repose sur le principe de l'inclusion des dimensions sociales, environnementales et économiques dans sa stratégie pour orienter ses investissements vers des projets eux-mêmes englobant des normes telles que la durabilité,

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(1) Ce concept apparaît dans la littérature économique occidentale à partir des années soixante du XXe siècle.



la concertation civile, et la prise en compte des attentes des différentes couches sociales et les intérêts des communautés locales.

### **3. Waqf et stratégies d'investissement dans les expériences occidentales contemporaines : cas de l'enseignement supérieur aux États-Unis d'Amérique**

Depuis les années soixante-dix du vingtième siècle, le secteur philanthropique dans les pays occidentaux bénéficiera de l'approche stratégique dans la gestion des entreprises et organisations économiques. Les fondations caritatives ont été à vrai dire révolutionnées par cette institutionnalisation qui tranche avec les actions spontanées et d'improvisation, pour intégrer la planification des activités en fonction des schémas du développement économique et social du pays en question.

Les données actuelles montrent que les politiques qui sous-tendent le secteur bénévole et communautaire en Occident, s'intègrent au sein d'un large partenariat entre les différents acteurs sociaux pour la construction des stratégies relatives aux des futures générations. Ce n'est pas un hasard si le projet de Constitution européenne accordait une place importante pour le bénévolat et les activités des organisations non gouvernementales. Ceci exprime une ferme conviction au sein de ces pays qui placent les activités entreprises par la société civile comme un secteur distinct qui devrait assumer une partie de la responsabilité sociale. Si l'Europe a pris des mesures importantes dans ce sens, l'expérience des États-Unis d'Amérique en matière des fondations caritatives et notamment celles dédiées à l'éducation, offre un modèle unique qui nécessite une analyse particulière afin de distinguer ses caractéristiques les plus importantes.

Ce qui est frappant dans le cas des États-Unis, c'est les niveaux record des donations charitables et du secteur non gouvernemental en général. Le nombre des associations à but non lucratif, dépasse un million et demi d'institutions religieuses, culturelles, communautaires, et civile. En 2016, l'ensemble des dons des citoyens américains ont dépassé 390 milliard de dollars ce qui représente 2% du PIB américain <sup>(1)</sup>!

(1) <https://givingusa.org/see-the-numbers-giving-usa-2017-infographic/>





Ces statistiques reflètent la place et l'importance du troisième secteur dans la structure sociale et économique américaine, et la responsabilité des administrateurs de ses diverses organisations à gérer des actifs financiers si important. Dans ce contexte, le financement de plusieurs universités américaines, à l'instar de Harvard<sup>(1)</sup>, se base essentiellement sur les dons, et par conséquent adoptent des politiques d'investissement particulières pour garantir leur durabilité et défendre la qualité académique de leur enseignement et recherche.

Depuis leurs fondations au 17<sup>em</sup> siècle, les universités américaines ont perpétué une tradition qui lie une importante part des dons au financement de l'activité académiques de ces institutions particulièrement les programmes de recherche scientifique où l'apport des entités privées est capital (personnes, sociétés, corporations). En 2016, soixante milliards de dollars américains ont été dédiés sous forme de dons aux institutions académiques américaines<sup>(2)</sup>. Cette liaison si étroite entre éducation et dons, explique en grande partie la continuité et la puissance de l'infrastructure scientifique aux États-Unis d'Amérique. Dans ce contexte, toutes les universités américaines, y compris celles du secteur public, allouent de grands efforts pour accaparer une partie de ces dons, à travers un marketing intensif autour de nouveaux programmes académiques (enseignement et recherche). Ainsi, la stratégie des institutions universitaires américaines en matière de développement de leurs actifs dépend principalement nouveaux dons<sup>(3)</sup>.

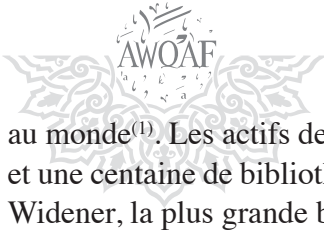
Qu'en est-il de l'investissement des actifs financiers ? Chaque institution académique possède une autorité compétente et indépendante pour la gestion et le développement de ces actifs financiers. A l'exemple de l'université Harvard, *The Harvard Management Company* est le seul responsable des stratégies d'investissement des 37.6 Milliards USD qui est forment le plus grand nombre de donations (10800) dédiées à une institution académique

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(1) <https://www.harvard.edu/about-harvard/harvard-glance/endowment>

(2) <https://givingusa.org/see-the-numbers-giving-usa-2017-infographic/>

(3) Fred Rogers and Glenn Strehle "Strategies for Increasing Endowment Giving at Colleges and Universities" Common fund Institute, USA, 2007



au monde<sup>(1)</sup>. Les actifs de Harvard comportent un nombre de musées d'arts et une centaine de bibliothèques, dont la plus importante est la bibliothèque Widener, la plus grande bibliothèque universitaire du monde<sup>(2)</sup>.

Il est important de noter que *The Harvard Management Company*, avait encaissé de grandes pertes en 2009 avec plus de 27.3% de réduction des actifs de Harvard totalisant 11 Milliards USD en une seule année. Des investissements à très haut risques ont été lancés et ont coïncidés avec les retombés néfastes de la crise qui a touché les marchés financiers et d'investissements. Nonobstant, cette lourde perte qui aurait dû mettre en faillite de solides cartels économiques, a été dépassée par Harvard qui a pu absorber les résultats financiers pourtant désastreux de cette année 2009, en tablant essentiellement sur l'apport de nouveaux dons, qui traduit une stratégie à long terme lancé depuis sa création (en 1630) et que les administrations successives de l'université, ont travaillé dans une même direction pour attirer les donateurs. Ce n'est pas un hasard si les présidents successifs de Harvard sont essentiellement évalués sur leur capacité à attirer de nouveaux fonds de dotation de l'Université<sup>(3)</sup>.

Ce qui a protégé Harvard en 2009, c'est sa stratégie globale dans le développement de ses actifs, qui est basé sur la trilogie suivante:

⇒ **Construire des programmes qualitatifs aptes à attirer de nouveaux donateurs.**

Cette orientation stratégique assure l'autofinancement des nouveaux projets, puisqu'ils seront basés sur une formule qui préserve leur capital initial (*endowment* ou waqf). Dans ce cadre, les institutions académiques américaines, dont Harvard, s'efforcent d'accroître leur compétitivité dans ce marché de dons (390 Milliards USD) à travers divers indicateurs quantitatifs et qualitatifs, tels que l'efficacité administrative, la qualité de leurs programmes et l'attrait des compétences managériales et financières.

(1) The Harvard Guide Finance (<http://www.hno.harvard.edu/guide/finance/index.html>)

(2) <https://www.harvard.edu/about-harvard/harvard-glance/endowment>

(3) Il est important de noter que la liste des présidents de Harvard, y figurent des économistes de renommés à l'instar de Lawrence Henry Summers ancien économiste de la Banque mondiale, et haut fonctionnaire du Département du Trésor des États-Unis.



Ces indicateurs sont utilisés pour déterminer la classification annuelle des institutions reposant sur les dons privés. Le but principal de ces institutions reste à fournir un service de qualité qui peut contribuer à l'avancement de la société. Le succès dans cet objectif est donc le principal moyen pour ces institutions de persuader les donateurs potentiels de soutenir leurs fondations. D'où l'intérêt de ces universités à développer des programmes d'enseignements et de recherches scientifiques de grande qualité académique et professionnelle qui pourraient être compétitifs, et ainsi persuader les donateurs à les choisir. L'une des formules les plus célèbres dans ce cadre est le financement par dons des « *Endowed Chairs* », qui sont des projets académiques, symbole de l'excellence scientifique, offrant des programmes universitaires d'enseignement ou de recherche clairement définies et à buts précis. Malgré leur budgets élevés (en moyenne 1.5 Million USD par *Endowed Chairs*), la majorité des Universités américaines accueillent un nombre de plus en plus important de ces programmes.

L'université de Columbia, par exemple, a alloué 200 millions de dollars de dons en 2009 pour créer 100 programmes scientifiques à un coût estimé à 750 000 dollars par programme. L'Université de Harvard compte 300 *endowed chairs*, dont 90 ont été établies depuis 1959. Même les universités publiques utilisent cette formule pour promouvoir de nouveaux programmes académiques. L'Université du Minnesota cherche actuellement à persuader les donateurs pour créer vingt programmes. L'Université du Wisconsin, qui a établi 64 chaires scientifiques au cours des quatre dernières décennies, planifie de créer des dizaines de nouveaux *endowed chairs*.<sup>(1)</sup>

A côté des dons internes, ces universités ont réussi à attirer des donateurs de l'extérieur des Etats Unis y compris du monde musulman. Harvard avait lancé dès le début du vingtième siècle le premier programme d'Etudes Arabes. En 1960 un don d'Aga Khan a financé « le programme Aga Khan pour l'architecture islamique »<sup>(2)</sup>.

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(1) Pierre Buhler, Paul C. Light, Francis Charhon « L'économie du don aux Etats-Unis, une source d'inspiration pour la France ? » Centre français sur les Etats-Unis, Institut Français des Relations Internationales (IFRI), Paris, 2003. p. 14

(2) <http://www.time.com/time/magazine/article/0,9171,837391,00.html#ixzz105M1mX5B>



## ➤ **Le recours à des spécialistes dans les domaines de la finance et de l'information.**

Les plans d'investissement des actifs de donation des institutions américaines, reposent sur deux volets complémentaires : l'expertise financière d'une part et l'expertise média d'autre part. Les programmes de collecte de fonds dans les universités américaines suivent des plans quinquennaux visant principalement à attirer de nouveaux donateurs. Les institutions et les organismes impliqués dans l'étude et l'évaluation des tendances des donations dédiées aux universités se basent sur des données et techniques objectives formulés à cet égard. En témoigne l'exemple de la mesure de la performance des universités à collecter les fonds (*Index of Higher Education Fundraising Performance*), qui comprend 66 universités privées et gouvernementales, y compris les grandes universités américaines telles que *Harvard* et le *Massachusetts Institute of Technology*. Cet indicateur analyse périodiquement les tendances des dons privées en faveur de l'enseignement supérieur.<sup>(1)</sup>

Pour affirmer une image médiatique attractive, ces universités appliquent une politique de transparence envers le public. Le recours à des bureaux comptables de renommés pour assurer la conformité de ces dons aux règles internes des autorités fiscales qui pratiquent de leur part un rigoureux contrôle fiscale. Chaque université publie un rapport annuel retraçant le mouvement des dons, les dépenses faites, et les nouvelles acquisitions qui seront médiatisées à travers les honneurs rendues chaque année aux donateurs. Toutes ses mesures favorisent un esprit de confiance entre les donateurs et les universités, et expliquent l'engrègement du don en tant que valeur sociale de la société américaine.

En 1994, l'Université de New York a reçu un don de 500 millions<sup>(2)</sup> en biens immobiliers ; en 1999, l'Université Vanderbilt a reçu 340 millions et, en 2001, Rensselaer Polytechnic Institute a reçu 590 millions. Ces chiffres

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(1) Index of Higher Education Fundraising Performance 2008, Target Analysis, April 2009. ([www.blackbaud.com/targetanalytics](http://www.blackbaud.com/targetanalytics).)

(2) Tous les chiffres sont exprimés en dollar américain.



aussi importants qu'ils soient restent inférieures à ceux réalisés par les grandes universités. Harvard a été en mesure de recueillir 2,1 milliards de dollars sur cinq ans (1994-1999). L'université de Princeton a collecté 1.4 milliard entre 1995 et 2000. Au milieu des années 1990 (entre 1990 et 2000), l'université de Columbia a réussi à attirer des fonds de 2.75 milliards. Johns Hopkins a également reçu 1.8 milliard de dons au cours d'une campagne de six ans (2001-2007).

⇒ **Prendre part à la responsabilité sociale**

Les chiffres concernant les stratégies d'investissement des fonds de donation, confirment l'orientation d'au moins une partie de ces investissements, dans des secteurs aux rendements sociaux élevés, soit par la sélection des projets d'investissement ou en attirant de nouveaux fonds de dotation conçus spécialement pour des finalités non lucratives. D'un côté, les universités américaines investissent dans la mise en place de programmes académiques liés au volontariat, à la société civile et à la participation des citoyens à la gestion communautaire. Ces programmes ont des retombées sociales importantes, quoique à long terme, et intangibles. Ils offriront des spécialistes dans le domaine de la finance et la gestion des dotations, augmentant ainsi l'efficacité du secteur non lucratif dans le moyen et le long terme. D'autre part, une partie des investissements financiers des actifs s'oriente dans la direction des questions clés telles que les petites et moyennes entreprises, la lutte contre la pauvreté, la santé, et les techniques énergétiques alternatives.

**4. Pour une approche stratégique des investissent des awqaf au monde musulman**

Bien que le concept de planification stratégique ait vu le jour au milieu des années soixante-dix du siècle dernier<sup>(1)</sup>, il s'est propagé ensuite pour devenir l'approche par excellence dans prise de décisions concernant les orientations futures des institutions économiques,

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(1) Mintzberg, Henry, Rise and Fall of Strategic Planning, in Harvard Business Review, 1994, January-February, p.107

politiques et sociales. Certaines institutions Waqf dans quelques pays islamiques ont pris conscience de l'importance de cette approche et ont commencé à développer des stratégies qui définissent les domaines d'actions, les objectifs et le choix des moyens qui aident à les atteindre. Cependant, ces tentatives ont été dominées par une vision procédurale qui réduit le processus de planification en un ensemble d'instructions au détriment de la vision d'ensemble. C'est précisément cette tendance qui a été critiquée en Occident depuis le milieu des années 1990, lorsque les insuffisances des processus de planification stratégique ont été soulignées. L'écrivain américain Henry Mintzberg résume cette critique : « La planification stratégique n'est pas la pensée stratégique, la première est l'analyse (par un usage procédural de l'information), la seconde est la synthèse »<sup>(1)</sup>. Le procédé de synthèse nécessite un travail d'organisation des priorités, et une connaissance profonde des multiples dimensions de l'institution, et la détermination de la qualité de ses relations aux autres sous-systèmes sociaux, ainsi que sa capacité à identifier les dispositions, les faiblesses et les tendances générales au détriment des détails. C'est une maîtrise à un niveau macrosocial de la complexité des rapports entre les environnements interne et externe à l'organisation.

Les administrateurs des institutions waqf gouvernementales ou civiles, ont la responsabilité d'apporter des changements stratégiques au niveau des aspects administratifs, juridiques et financiers de leurs organisations, afin de dépasser la planification procédurale et mécanique, et structurer une vision globale qui renforce la performance du secteur des awqaf et assure sa synchronisation avec les schémas de développement au niveau de chaque pays. Nous estimons que les principales caractéristiques de ce changement stratégique pour gérer les investissements waqf sont liées aux éléments suivants :

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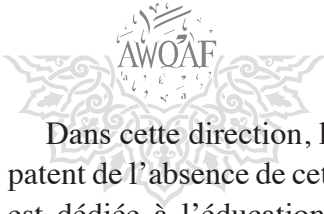
(1) Mintzberg, Henry, Rise and Fall of Strategic Planning, in Harvard Business Review, 1994, January-February, p.107

**(a) Renforcer l'investissement a rendement social : cas de l'éducation.**

L'approche sociale concernant l'orientation des investissements est directement liée aux rôles fondamentaux des awqaf en tant qu'élément de régulation sociale, et aux possibilités qu'il génère dans la vie socioéconomique. L'investissement est un élément essentiel du développement et permet aux communautés de bien gérer leurs ressources humaines et financières. C'est l'un des outils pour réduire les disparités sociales et jeter les bases d'un bien-être durable. Cependant, la réalité actuelle dans la plupart des pays du monde musulman, indique clairement que les principales tendances d'investissement sont liées à des projets aux profits rapides témoignant d'une absence quasi totale de rendements sociaux et d'un faible degré de coordination avec les autres sous-structures sociales.

Si cette tendance se justifie au niveau du secteur privé (qui cherche à maximiser son profit), elle n'est pas conforme à la philosophie des awqaf. D'une part, les expériences contemporaines relatives aux dons ont affirmé l'importance d'investir dans des projets à rendement social élevé, et la création d'un environnement et une culture très favorable au secteur non lucratif.

D'autre part, c'est grâce à l'ancrage social de l'institution Waqf qu'elle a été capable durant long siècles d'élaborer un auto-dynamisme lui procurant un impact direct sur la vie quotidienne des gens. Cette forte pesanteur sociologique a consolidé certainement le rôle d'intermédiaire social qu'avait joué le Waqf. Il s'agit en fait d'un rôle composé. Non seulement les awqaf répondaient à des besoins socio-économiques immédiats, mais ils formaient aussi un secteur très caractéristique destiné à redonner à l'économie un aspect plus humain. C'est sans doute l'expérience musulmane la plus avancée dans la conception d'une économie solidaire. Aujourd'hui, il est fondamental de point de vue stratégique de synchroniser les services offerts par les awqaf avec l'investissement de leurs actifs, et ainsi accroître les possibilités d'implications sociales.



Dans cette direction, le secteur de l'éducation offre encore un exemple patent de l'absence de cette coordination, pourtant une large part des awqaf est dédiée à l'éducation sous formes d'aides financières aux étudiants, bourses d'études, achat de livres et d'ordinateurs, etc. Stratégiquement, la priorité pour les awqaf serait de contribuer à reconstruire un système d'éducation en difficulté plutôt que cibler une assistance individuelle avec un impact social faible.

À l'exemple des pays arabes, on assiste depuis les deux dernières décennies à une baisse impressionnante des budgets alloués à d'éducation de la part des pouvoirs publics. L'impact sur la qualité de l'éducation est immédiat. Selon les rapports des organisations internationales<sup>(1)</sup>, le monde Arabe souffre d'une chronique inadéquation entre son système d'éducation et les plans de développement. Il s'avère que les jeunes en général et les diplômés en particulier connaissent des difficultés croissantes pour s'insérer dans le marché de l'emploi. Le chômage des diplômés est devenu partie intégrante du taux de chômage national. D'autre part, le taux d'analphabétisme dans le monde Arabe, reste deux fois plus élevé qu'en Asie de l'Est et en Amérique latine !

Une des conséquences de la faiblesse des institutions d'éducatons publiques, les établissements d'enseignement privés nationaux et internationaux ont fortement évolué en nombre dans la plusieurs pays Arabes. Malheureusement, et pour plusieurs raisons dont l'absence de contrôle et de suivi, la majorité des institutions privées restent régies par des considérations purement commerciales, et de ce fait ils attirent les élèves et étudiants issues des couches sociales aisées. Les pays musulmans et arabes en particulier ont besoin d'autres alternatives urgentes dans le domaine de l'éducation qui préservent son caractère civique, la qualité de ses programmes, et ses aspirations en fonction des priorités sociétales. Nous croyons que la présence Waqf dans le domaine de l'éducation n'a pas jusqu'à présent été considérée comme une alternative sérieuse qui pourrait contribuer profondément à une éducation de qualité en symbiose avec les besoins réels de leurs sociétés.

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(1) Voir notamment le rapport de l'UNDP 2016 (Arab Human Development Report 2016: Youth and the prospects for human development in changing reality, UNDP, 2016)





L'approche actuelle soutenues par les awqaf, ne constitue pas à vrai dire une solution durable mais plutôt une aide momentanée. La majorité des institutions waqf ont un fond spécialement dédié à l'éducation (*masraf al-taalim*). Néanmoins son action se limite à fournir des aides aux étudiants ou aux écoles. Cette action bien généreuse est en fait réductrice, en terme stratégique, de la portée du waqf puisqu'elle se traduit en charité temporaire et non durable. Une telle pratique, bien qu'elle soit de point de vue procédural conforme à la nature du waqf, ne met pas en considération les besoins essentielles des sociétés musulmanes en matière d'éducation qui ne se limitent pas aux fournitures scolaires et bourses d'études, mais se concentre fondamentalement autour de l'existence d'une éducation de qualité et accessible à travers des partenaires viables capables d'investir dans une éducation qui serve les intérêts sociaux. En d'autres termes le besoin actuel du monde Arabe par exemple n'est pas de financer une bourse d'étude à *Harvard University* mais plutôt d'avoir des universités de la qualité de Harvard au monde musulman. Pour aller plus loin, on pourrait même s'attarder sur le nombre alarmant des étudiants du monde Arabe que le waqf ou les gouvernements ont financé leurs études en occident, et qui choisissent de continuer leur carrière professionnelle dans les pays d'accueil ! N'est-ce pas une ironie que le waqf appuie l'exode des cerveaux !

La relation entre l'éducation et le waqf ne se limite pas à une aide financière, mais elle est liée à une vision de l'éducation en tant que domaine « stratégique » par le rôle qu'il joue dans le progrès des nations. Pour être ainsi, cette relation exige une intervention au sein du système éducatif lui-même pour construire une alternative institutionnelle de haute qualité. Le waqf de Fatima Al Fihriya dédié à l'année 859 était stratégique en ce sens qu'il inaugurerait l'établissement de l'université en tant que lieu académique d'études spécialisée et approfondie inconnue avant cette date. L'université Al-Qarawiyyin était un modèle à suivre non seulement au monde musulman, mais ailleurs aussi. Il faut attendre quelques siècles, pour voir John Harvard un jeune pasteur puritain qui en 1638 légua sa bibliothèque et la moitié de ses biens à la jeune institution qui portera son nom *Harvard University*, et qui sera aussi un autre modèle d'enseignement supérieur.



## **(b) Créer des alliances stratégiques entre le waqf et les autres acteurs sociaux**

Discuter aujourd'hui d'une vision stratégique des investissements waqf renvoie en fait aux besoins et aux priorités du monde islamique dans sa quête à se construire en nations développées et créatrices de valeurs humaines. Sur cette base, la question de l'avenir des institutions du waqf peut être abordée à travers un rééquilibrage de l'équation État / société, et encourager toutes actions qui affirment cette orientation. Une relation complémentaire et dynamique entre le secteur des awqaf et l'Etat serait le principal moteur de l'efficacité de ces institutions. L'efficacité des awqaf s'est accompagnée historiquement avec une mise en place d'alternatives sociales et économiques qui ont permis à différents secteurs et groupes sociaux d'atteindre leurs objectifs.

Nous pensons qu'une partie de l'activité du secteur waqf devrait être orienté vers des projets ciblés dans des domaines clés d'infrastructure socioéconomique, Il s'agit de repenser la méthodologie actuelle (ciblant les individus) dans un cadre plus large et plus cohérent, afin que les programmes waqf soient restructurés selon une stratégie intégrée répondant à des objectifs globaux spécifiques en relation explicite et directe avec les besoins essentiels des pays islamiques.

Dans ce contexte, il est impossible que chaque institution à part puisse, à partir de ses propres ressources, réussir une telle entreprise, mais plutôt en établissant un partenariat avec les secteurs public et privé. Les circonstances actuelles, qu'elles soient économiques ou législatives, offrent aux institutions du Waqf une possibilité de construire des alliances avec les secteurs privé et public pour produire des alternatives socioéconomiques distinctes. L'entrée du Waqf en tant que partenaire actif sur la scène économique et sociale nécessite aussi une coordination entre les divers institutions waqf qui souffrent d'isolement d'où résulte un dédoublement des programmes et une perte d'efforts faute de synchronisation.



### **(c) Chercher la qualité et la continuité**

La philosophie du waqf est essentiellement basée sur la recherche de la qualité, puisque dès le départ le donateur sélectionne « le meilleur » pour en faire un don. C'est le fondement de toute charité selon le verset 93 de la troisième sourate (la famille Imran) « Vous n'atteindrez la (vraie) piété, que si vous faites largesses de ce que vous chérissez. Tout ce dont vous faites largesses, Allah le sait certainement bien. » (3 :93). De leurs parts, les documents waqf témoignent de cet esprit de perfectionnement qui animent les donateurs et leur awqaf, en assurant une grande qualité des services fournis par leurs waqf à travers une minutieuse description et clarification.

Le problème de financement des projets de développement est l'un des obstacles les plus difficiles à surmonter par les autorités publiques. Dans la plupart des pays du monde musulman, le manque de ressources financières va de pair avec une baisse de la qualité des projets liés au développement socioéconomique, tels que la santé et l'éducation. L'expérience du secteur privé par la poursuite frénétique du profit sans trop d'effort dans le développement des infrastructures et son financement requis, il suit toujours l'argument selon lequel « le capital est lâche » car il n'investit que là où le risque est minime. La relation de ce secteur avec des projets à rendements sociaux ne repose pas sur des bases solides et stables, mais est fortement influencée par l'utilitarisme situationnel, même si c'est au détriment de la qualité ou de bien-être social. De là vient la nécessité de la contribution des awqaf pour offrir une source de financement durable partenaire d'une vision globale cherchant à relever les défis sociaux et trouver des solutions à des questions sensibles telles que l'éducation, la santé et l'environnement.

### **Conclusion**

L'expérience contemporaine des awqaf a dévoilé les possibilités dont jouissent les fondations Waqf. Ces organisations sont capables de se développer, de croître et de faire évoluer non seulement leur capacité financière, mais aussi un environnement propice à des formes variées de volontarisme où participent différents groupes sociaux. Cependant, ces



awqaf souffrent d'un manque de coordination, et d'une relative dispersion de leurs efforts. Dans ce contexte leur stratégie d'action tant au niveau de la distribution des revenus que des investissements des actifs, nécessite une révision et une synchronisation afin de répondre aux priorités sociales de leur sociétés. Il est important que les organisations waqf s'ouvrent sur leur environnement en formant des partenariats avec les secteurs public et privé, afin de stimuler des alternatives socioéconomiques à forte teneur humaine et durable. Nous estimons que la réussite de ce changement stratégique relève principalement de l'aptitude des institutions waqf à innover et à faire évoluer leurs méthodes d'action. L'état et le secteur privé ont aussi une responsabilité à assumer à travers leurs facultés juridique, organisationnelle, et financière. Un développement humain et durable ne pourrait être que le résultat de long terme, où chaque composante sociale apporte son soutien et ses ressources.



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## **AWQAF Journal Waqf**

In recognition of the Waqf thought and philosophy in establishing the social projects and extending services in the framework of sustainable and self-supported system, KAPF established AWQAF Journal Waqf. Therefore, this periodical publication will not rely on the sales revenue of its issues; rather it seeks to realize the aims and objectives for which it was created. It will endeavour to provide the Journal free of charge to all those who are interested in Waqf as well as researchers, research centers and organizations related to Waqf.

On the other hand, KAPF will continue to develop the financing of AWQAF Journal Waqf through inviting contributions, whether in the form of subscriptions, deductions or any amounts for the account of the journal in an attempt towards supporting the journal and enabling it to assume a share of the society burdens in extending vital developmental services.

### **Deed Purposes:**

- Contributing to upgrading Waqf research effort so that the journal ranks with the prestigious refereed periodical journals.
- Emphasizing the typical dimension of Waqf, together with identifying its characteristics and the role entrusted to it.
- Addressing the related issues in a methodology that links vision to the reality and therefore encourage thought in practical findings.
- Linking the topics of Waqf to its concerns in the entire Islamic world.
- Delivering the largest number of issues of AWQAF Journal maximum audience of researches, universities and research centers free of charge.
- Encouraging efficient experts to consider specializing in Waqf related issues.
- Establishing a network for all those interested in Islamic and particularly Waqf thought, and facilitating communications and interaction among them.

### **AWQAF Journal Superintendent:**

- KAPF is the Superintendent of AWQAF Journal Waqf.
- KAPF strives to develop AWQAF Journal Waqf and invites contributions to participate in it.
- KAPF monitors the periodical journal works and entrusts specialist scientific experts with operating its affairs in line with the strategy to promoting the Waqf sector and as per the standards applicable for refereed journals.