

**THE ROLE OF WAQF IN IMPROVING THE
UMMAH WELFARE**

MONZER KAHF

(First Draft)

Presented to the International Seminar on "Waqf as a Private Legal Body" organized by
the Islamic University of north Sumatra, Medan, Indonesia Jan. 6-7, 2003

THE ROLE OF WAQF IN IMPROVING THE UMMAH WELFARE

Monzer Kahf

Introduction

Waqf, in Arabic, is hold, confinement or prohibition. In North and West Africa, Waqf (pl. Awqaf) is also called Habs (pl. Ahabas or Hubus). The word Waqf is used in the Islamic Law in the meaning of holding certain property and preserving it for the confined benefit of certain philanthropy and prohibiting any use or disposition of it outside its specific objective. This definition accords perpetuity to Waqf, i.e., it applies to non-perishable properties whose benefit and usufruct can be extracted without consuming the property itself. Therefore Waqf widely relates to land and buildings. However, there are Awqaf of books, agricultural machinery, livestock, shares and stocks and cash money. Although the general idea of Waqf is as old as humanity, Muslim jurists argue that the first Waqf ever existed is the sacred building of ka'bah in Makkah since the Qur'an (III: 96) mentions that it is the first house of worshipping God set for people.

The real innovations in the idea of Waqf came in the early Islamic Period in Madinah. It started with the Prophet, pbuh, , pbuh, when he asked for some one to buy the well of Bayruha' and designate it as free public utility for drinking water. This brought about a wide range of Awqaf that serve the welfare of the society in all and their different aspects. Then the Prophet, pbuh, advised 'Umar to assign his land in Khaibar as a Waqf for the poor and needy, then came the third innovation when the companions, during the reign of 'Umar, added the family Waqf.

These three innovations in the idea of Awqaf shall make the first section of this paper. The second section shall take a quick glance at the historical application of these three innovations and the third section shall discuss what went wrong that Awqaf idea lost its fervor and many of the Awqaf properties went lost. This will be discussed from two angles a managerial angle and a juristic or legislative angle.

Section One

Beginning, kinds and objectives of the Islamic Waqf

In this section I will discuss how the Islamic Waqf began, expanded and what forms and objectives it emphasized.

Beginning and kinds of Waqf

In the history of Islam, the first known Waqf is the mosque of Quba' in Madinah, a city 400 kilometer north of Makkah, which was built upon the arrival of the Prophet, pbuh, Muhammad in 622 C.E. It stands now on the same lot with a new and enlarged structure. Six months later, Quba' was followed by the mosque of the Prophet, pbuh, in the center of Madinah. Mosques and real estates confined for providing revenues to spend on mosques' maintenance and running expenses are in the category of **religious Waqf**. Religious Waqf, in any society and for any religion, adds to the social welfare of any community because it helps satisfy the religious needs of people and reduces the direct cost of providing religious services for any future generation. What is interesting in the Islamic religious Waqf is that the Shari'ah did not give an religious bodies, persons or leaders managerial privileges or beneficiary's rights on any religious grounds. An Imam or preacher may be entitled to certain benefit from the revenues of a religious Waqf on one ground only, that is, if the name or position is assigned such benefits by the Waqf founder.

Philanthropic Waqf is the second kind of Waqf. It aims at supporting the poor segment of the society and all activities that are of interest to people at large such as public utilities, the poor and needy, libraries, scientific research, education, health services, care of animals and environment, lending to small businessmen, parks, roads, bridges, dams, etc. Philanthropic Waqf began by the Prophet Muhammad, pbuh, too. Drinking water used to be sold in Madinah at a high price. With the continuous inflow of migrants who fled their lands and towns to escape religious-based persecution it became difficult for the poor to pay for water; the Prophet, pbuh, called on people to buy the well and make it into a Waqf free to whoever takes water, 'Uthman bought it,

made it into a Waqf and asked the Prophet, pbuh, that his pitcher must be considered also free like any other person who gets water. Later, in the year 4 of the Hijrah calendar, the Prophet, pbuh, took hold of the orchards left for him by Mukhairiq and made them a remainder charitable Waqf. After paying for his household expenses, the rest of their revenue would be spent to certain categories of the poor and needy. This practice was followed by  Umar, who asked the Prophet, pbuh, what to do with a palm orchard he owned in the city of Khaibar and the Prophet, pbuh, said "If you like, you may hold the property as Waqf and give its fruits as charity." By the time when the Prophet, pbuh, died in 632, many other charitable Waqf were made by several of his companions.

A third kind of Waqf started shortly after the death of the Prophet, pbuh, during the reign of  Umar (635-645), the second successor. When  Umar decided to document in writing his Waqf in Khaibar, he invited some of the companions of the Prophet, pbuh, to attest this document. Jaber, another companion, says that when the news broke out every real estate owner made certain Waqf. Some of those put a condition that the fruits and revenues of their Waqf must first be given to their own children and descendants and only the surplus, if any, should be given to the poor. This kind of Waqf is called **posterity or family Waqf**. Therefore, unlike foundations in America that are restricted to religious or philanthropic purposes, Waqf in Islamic society may also be for one's own family and descendants. Along the lines adopted by classical Fuqaha', we argue that the family Waqf is charitable in essence because it gives income/usufruct to persons free of charges and improve the welfare of future generations. The matter that reduces the future social welfare burden of philanthropies/governments.

Main Characteristics of the Islamic Waqf

As a special kind of benevolence Waqf has the following two characteristics:

I- Perpetuity

It means that once a property, often a real estate, is dedicated as Waqf it remains Waqf for ever. Elimination of the Waqf character off a property requires difficult

and lengthy procedure. It requires a process of exchanging the Waqf property for another property of equivalent value with approval of a local court. Upon completion of such an exchange the new property must be dedicated a Waqf for the same purpose and beneficiaries as the former property. Theoretically at least, perpetuity implies that Waqf properties should not decrease.

II- Permanence of Stipulations of the Waqf Founder

Since Waqf is a voluntary act of benevolence, conditions specified by the founder must be fulfilled to their letter as long as they do not contradict or violate any of the Shari'ah rulings. This implies that revenues of Waqf should exclusively be used for the objectives stipulated by its founder. Furthermore, the conditions of the founders may not be changed by management or supervisory court as long as they are still feasible to execute. If a Waqf purpose becomes infeasible, the revenue of this Waqf should be spent on a closest purpose available and if not it goes to the poor and needy. Permanence covers all the founder's stipulations whether they relate to purpose, distribution of revenues, management, supervisory authority, etc.

Management of the Waqf Property

The Waqf founder determines the type of management of his\her Waqf. The Waqf manager is usually called Mutawalli, Nazir or Qayyim and his\her responsibility is to administer the Waqf property to the best interest of the beneficiaries. The first duty of mutawalli is to preserve the property; this is followed by maximization of the revenues of the beneficiaries. The Waqf document usually mentions how the mutawalli is compensated for this effort and if the document does not mention a compensation for the mutawalli, he\she either volunteers the work or seeks assignment of a compensation from the court. Founder appointment of the Waqf managers obviously implies that every piece of Waqf would have its own autonomous management. This is what I call the atomic management of Waqf. This is also coupled by another natural and obvious characteristic of the Waqf management that is localism which means that a founder would appoint a manager from the locality of the Waqf property. Both the property and the manager would normally be known to the local community.

These two characteristics, atomism and localism, of the Waqf management are of extremely great importance in the success of the Waqf management because they allow for competition and control that are the two keys of efficiency especially if we keep in mind that Waqf management normally lacks the private profit motive. Every Mutawalli shall be able to compare her/his performance with any other Mutawalli in the area and (s)he shall always remain under the eyes of the local community of which the beneficiaries are only a subset.

Two junctures took place in our Islamic history that destroyed these two characteristics and deprived the Waqf from the fruits of competition and local control. First came the expansion of the role of judiciary from a dispute solving agency to a supervision agency with regard to Waqf. In the early part of the eighth century of Hijra, a judge in Egypt established a special register and office to record and supervise Awqaf in his area. This culminated in the establishment of an Awqaf office for registration and control which was linked to the supreme judge who used to be called the "judge of judges." A shift in control from the local community to an agency that is not qualified for managerial supervision.

The second juncture came in the late thirteenth century of Hijra (1863 C.E.) when the ottoman empire established a ministry of Awqaf and enacted laws that put virtually all Awqaf properties under the supervision and very often management of the government. Awqaf practically became part of the public sector, with all the known evils of waste of resources, lack of accountability, lack of motivation to improve performance and efficiency, slow and irresponsive decision making, favoritism and political interference in management. This final straw drowned the Awqaf properties and opened them to wasteful uses that ended in eliminating the family Waqf and annexing other Awqaf to government properties in many Muslim countries especially most Arab countries.

While historians tell us that more than one third of the agricultural land and sometimes about one half of the buildings in major cities in Syria, Turkey, Egypt, Morocco, Algeria, Iraq and Palestine were Awqaf properties, today's revenues of Awqaf

are not even sufficient to pay for maintenance of mosques that the general budget always subsidizes the ministry of Awqaf in most of these countries.

The Classical Fiqh of Waqf

The Fiqh of Waqf is mainly analogy-based as we have very few texts that deal with the details of Awqaf. The late Shaikh Mustafa al Zarka used to argue that only one thing is undisputed in Awqaf that its objective must be an act of benevolence “Birr”.¹ In spite of this classical Fuqaha often take stiff positions on several issues to an extent that hinders the development of a progressive Shari’ah-based legal framework of Awqaf.

I will take a few examples from the principles of perpetuity, in contrast to temporality, the Waqf of Usufructs and financial rights, the Waqf of a flow of product, etc.

Although the principle of perpetuity is of high importance for Waqf because it assure the historical accumulation of the Waqf properties, it is sometimes carried too far to an extent that restricts certain acts of benevolence. If a community needs a mosque for a few years until a permanent mosque is built, the Fuqaha, and unfortunately several contemporary laws of Awqaf, tell us that once you pronounce a property a Waqf as a Mosque it remains so until the Day of Judgment. In today’s world, some Muslim communities are mobile to an extent that the mosque itself is only needed temporarily. Temporality of Waqf is also needed in all cases where the need is temporary such as maintaining an orphan until maturity, an aged person until expiry or a student until graduation. Several contemporary laws on Awqaf adopted the principle of perpetuity as a blanket of all Awqaf without providing adequate venues for such temporary needs. This is done in spite of the fact that the Maliki School strongly argues for the coexistence of temporality and perpetuity side by side.

To go one step further, let us survey the classical Fiqh chapters on Waqf, to see if the Waqf of a flow of commodity is accommodated! An immediate example is a Waqf

¹ In fact, even this point is disputed because some classical Fuqaha consider the Awqaf on churches, synagogues and places of worship of other religions outside the limits of benevolence because God, Ta’ala is disobeyed in these places.

of weekly magazine on a public library that can be bought from the producer for a number of years as well as on a continuous basis. Similar to this is a Waqf of 10% of the output of a brick factory for schools construction, the Waqf of a toll road company of free passage for handicapped, old persons or school buses and the Waqf of an otherwise a private parking lot for two hours only at the Friday prayers.

Add to this a Waqf of financial rights such as a Waqf of a percentage of a company's net profit without making any part or percentage of its asset or ownership into a Waqf property or a Waqf of a percentage of one's salary or professional income.

Section Two

A Glance at the Social Role of Waqf in the Islamic History

The permanent nature of Waqf resulted in the accumulation of Waqf properties all over the Muslim lands and the variety of its objectives provides support for widespread religious and philanthropic activities. This huge size of Waqf plays an important role in the social life of Muslim societies and communities.

Information extracted from the registers of Awqaf in Istanbul, Jerusalem, Cairo and other cities indicates that lands of Awqaf cover considerable proportion of total cultivated area. For instance, in the years 1812 and 1813 a survey of land in Egypt showed that Waqf represents 600,000 feddan (= 0.95 Acre) out of a total of 2.5 million feddan (Ramadan, p. 128); in Algeria the number of deeds of Awqaf of the grand mosque in the capital Algiers was 543 in the year 1841 (Ajfan, p. 326); in Turkey about one third of land was Awqaf (Armagan, p. 339); and finally in Palestine the number of Waqf deeds recorded up to middle of the sixteen century is 233 containing 890 properties in comparison with 92 deeds of private ownership containing 108 properties (IRCICA, p. L).

With regards to use of Waqf revenues, the most frequent purpose is spending on mosques. This usually includes salaries of imams, teachers and preachers in addition to carpeting, cleaning, water supply, and oil for the lights. With the help of this independent source of financing, religious leaders and teachers have always been able to take social

and political positions independent of that of the ruling class. For instance, upon the French occupation of Algeria in 1831, the colonial authority took control of the Awqaf properties in order to suppress religious leaders who fought against occupation (Ajfan, p. 325).

Although religious education is usually covered by Waqf on mosques, education in general has been the second largest recipient of Waqf revenues. Since the beginning of Islam, in the early seventh century, education has been financed by Waqf and voluntary contributions. Even government financing of education used to take the form of constructing a school and assigning certain property as Waqf of the school. Awqaf of the Ayubites (1171-1249) and the Mamalik (1249-1517) in Palestine and Egypt are good examples. According to historical sources, Jerusalem had 64 schools at the beginning of the twentieth century all of them are Waqf and supported by Awqaf properties in Palestine, Turkey and Syria. Of these schools 40 were made Awqaf by Ayubites and Mamalik rulers and governors (Al °Asali, pp. 95-111). The University of al Azhar is another example. It was founded in Cairo in 972 and was financed by its Waqf revenues until the government of Muhammad Ali in Egypt took control over the Awqaf in 1812 (Ramadan, p. 135).

Waqf financing of education usually covers libraries, books, salaries of teachers and other staff and stipends for students. Financing was not restricted to religious studies especially at the stage of the rise of Islam. In addition to freedom of education this approach of financing helped creating a learned class not derived from the rich and ruling classes. At times, majority of Muslim scholars used to come from poor and slave segments of the society and very often they strongly stood in defence of the public masses and opposed the policies of the rulers (al Syed, pp. 237-258).

The third big beneficiary of Waqf is the category of the poor, needy, orphans, persons in prisons, etc. Other users of Waqf revenues include health services which cover construction of Hospitals and spending on physicians, apprentices and patients. One of the examples of the health Waqf is the Shishli Children Hospital in Istanbul which was founded in 1898 (al Syed, p. 287). There is also Waqf on animals whose

example is the Waqf on cats and the Waqf on unwanted domestic animals both are in Damascus (al Siba^{ci}). There are Awqaf for helping people go to Makkah for pilgrimage and for helping girls getting married, and for many other and all philanthropic purposes one can think of.

Waqf in the Twentieth Century

During the colonial period of the nineteenth and good part of the twentieth centuries, the colonial powers found it to their advantage to continue following the inherited patterns of central control of Awqaf in most Muslim countries and communities that were subjected to the colonial system. The general atmosphere of underdevelopment and backwardness which was prevailing in the Muslim world also enveloped the Awqaf properties and the western system of education which was introduced by the colonial authorities and supported by newly created economic opportunities gave a strong blow to the traditional education which was financed by an already underdeveloped Awqaf.

The independence of many Islamic countries created national states and the new leadership often took a negative stand towards Awqaf. For instance, many Waqf properties in Syria, Egypt, Turkey, Tunis and Algeria were added to the public property of the government or the army or were distributed through land reforms and other means and methods while governments in those countries took responsibilities of spending on mosques and left-over religious schools including al Azhar university in Cairo. For this Purpose many Muslim countries established a branch of the government for Awqaf and religious affairs. After stripping it of the developmental and productive content, the term "Islamic Awqaf" is now mostly used to refer to mosques only.

However, a few countries such as Lebanon, Turkey, Jordan and recently Sudan, Kuwait and Algeria took a few steps to revive and develop the properties of Waqf. They enacted new laws of Awqaf which helped in recovering, preserving and developing several Awqaf properties. Sudan and Kuwait went a step further to enact laws that provide a legal framework to encourage people to create new Waqf properties. Under the names of Awqaf projects in Sudan and Awqaf Funds in Kuwait, both countries

provided a mechanism for community-financed new Awqaf enterprises that serve major social objectives such as helping the poor, building hospitals, schools and youth centers and providing them with revenues to finance their running expenses.

Section Three

Necessary Reforms to Enable the Islamic Waqf to Play its Role

This recent interest in Awqaf represents a reversal of a trend of neglect and even attacks that continued for almost a century in most Muslim countries. It is, in fact, one facet of the Islamic revival in Muslim countries and communities. Rediscovering Awqaf and attempting to enhance their role in the social welfare of the Ummah and in its economic development require us to pay attention to a few important issues that are prerequisites for any effective reform of Awqaf.

The required reforms center in two main areas managerial and legislative.

Reforming the management of Awqaf

It does not take a gifted genius to ascertain that the perception of Islamic Awqaf as a part of the public sector is completely incorrect. The creation of Awqaf is certainly not an invitation to government authority to dominate the area of benevolent activities in the society. Studying the history and Fiqh of Awqaf as developed throughout centuries and looking into the Shari'ah rulings and *Fatawa* issued in various Muslim cities and countries indicate exactly opposite. From its beginning, the establishment of Awqaf was a clear representation of creating a third and philanthropic sector that is kept away from both the profit-motivated behavior of individuals and the authority-dominated domain of the government. 'Umar Bin Al-Khattab, during his reign as a khalifa, wrote the document of his famous Waqf, which is considered the main source of Fiqh on the issue. He appointed himself a manager, and after him a person from his family not his successor in *khilafa*. The

other Waqf which was done at the time of the prophet (pbuh) by 'Uthman, the Waqf of the well of "*Bayruha*" which supplies drinking water to Madinah was not also put under the command of the government. It was managed virtually by the community with no government interference. The late Abu Zahrah mentions that many rulers and rich persons used to make Awqaf in order to have their wealth escape potential persecution and confiscation by new comers to power, and there was no mention in any book of Fatawa and *Nawazil* of any single event of a Waqf in which the founder nominates the government as a manager of his/her Waqf.

It seems that the first attempt by the government to manipulate Awqaf took place during the period of *Mamalik*, at the time of al Zahir Bebars in Cairo. This attempt was received with extreme negativity and opposition by Fuqaha' and other Muslim scholars. It was withdrawn! The miraculous change came in our era where we find Awqaf properties in almost every Muslim country run and managed by a branch of the central government. Hence, instead of having a strong third sector, independent of both the profit-making motivation and the power of the government, we ended up with an Awqaf that works under the shadow of a corrupt and inefficient public sector! This change began with the Ottoman Awqaf law in the mid nineteenth century as an over-reactionary response to the prevalent corruption, neglect abuse and mistrust that enveloped a great majority of Awqaf managers.

Yet, the Ottoman Awqaf law was only a first step because it did not transfer all Awqaf management to the hands of government nor did it eliminate the private Awqaf. During the first half of the twentieth century Awqaf laws were issued in almost all Muslim countries and several communities. These laws established a branch of government, called "Ministry of Awqaf" or "General Directorate of Awqaf" to manage Awqaf properties the same way other branches of the public sector are managed.

Everybody knows that government is a bad manager of economic enterprises; it is also a worst manager of benevolent projects. Awqaf properties, whether used directly for their own objective or invested and their revenues are spent to promote

their objectives, are merely properties that belong to economic/benevolent activities in the society that must be managed by a benevolent sector not a government.

Attempts are taking place in some Muslim countries to reform the management of Awqaf. In Sudan, 1987, Awqaf were reorganized under a new "Public Corporation of Awqaf". This was followed by Kuwait that created in 1993 a "General Secretariat of Awqaf" as an autonomous, but governmental, body to manage the Awqaf. Qatar also remodeled its ministry of Awqaf along similar lines. Unfortunately, all these reforms could not touch the real problem; hence, solutions suggested were only cosmetics and represent mere change of hands, a kind of intergeneration struggle, rather than a change in the concept of management.

In the Islamic legal system, Awqaf makes an early version of the concept of a modern corporation. While economic corporations are no more than funds utilized to generate profits to their owners, Awqaf properties are funds utilized for the benefit of their beneficiaries. There are numerous indications, at least from existing or surviving Awqaf documents, that founders tended to always nominate a manager for their Awqaf from their own vicinity or the vicinity of the property. Once we decide to respect the conditions of founders and avoid the government as a Nazir, it can be established on the basis of all existing documents, that the intention of founders has always been in the direction of appointing local private managers rather than central governments or their local branches.

Hence, in fulfillment of the will of founders, and in respect of the distinctive nature of the third sector, the non-profit sector of Awqaf, and in recognition of the outrageous failure of governments in managing economic and benevolent enterprises, and in realization of the need for distinguishing the style of management of Awqaf from that of profit-motivated private-interest-seeking enterprises, the Awqaf management should be run by local people who relate to the beneficiaries of Awqaf as well as to the community in which the Awqaf properties represent an infrastructure capital for social welfare work and interests.

The management that is needed for Awqaf is one which is similar to that of economic corporations provided we can find a way to motivate this management to relate to the interests of beneficiaries and local community. This can be achieved by the following scheme:

1. Creating boards of supervision that consists of representatives of the beneficiaries, the working staff in Awqaf projects and properties and local community and NGOs;
2. Establishing criteria and measures of managerial efficiency in non profit corporations that are applicable to the variety of properties and objectives of Awqaf;
3. Auctioning the management of Awqaf on competitive ground for a definite period of time, say 3-5 years;
4. Creating a government supportive body that may provide technical assistance, facilitate financing, and establish necessary regulations.

Reconstructing the Fiqh of Awqaf

The Islamic Fiqh is very rich and we have many precedents and supporting texts from the Hadith for a considerable lift in the Fiqh of Waqf. To begin with the very concept of running charity “Sadaqah Jariyah” is accommodative to a great variety in the acts of benevolence. In addition to the basic concept of the running charity, the Qur’an mentions cooperation in good deeds and lending personal and household properties; the Sunnah also mentions grants of usufructs for life “al ‘Umra” and grants of the flow of milk “al Manihah” and temporary grants of land for cultivation and farming. Furthermore, there are examples in the Sunnah of making temporary property as Waqf such as a sword or a horse ; and a reference that a reward shall be given by God for a running charity “as long as it remains running” which implies that a running charity may come to an end.

Perpetual and Contemporary Waqf:

What is needed is a revision of the Fiqh of Waqf to accommodate two types of Waqf: perpetual and temporal. In perpetual Waqf, three conditions must simultaneously be satisfied:

1) A property made into perpetual Waqf must be suitable for perpetuity either by its nature, its legal status, or its accounting treatment. Land is the only property that is perpetual by its nature. Perpetuity of a property is acquired by the legal organization or legal status through the concept of equity in common stock perpetual companies. Accounting procedures may turn a given property perpetual through the application of a provision for capital consumption or amortization.

2) There must be a clear will for perpetuity on the part of the Waqf founder. A perpetual Waqf requires an explicit or implicit expression of will by the founder. Even Malikites, who are usually liberal on temporality, rule that a founder's will for temporality is discarded in the Waqf for mosques except when the building itself is rented by the founder and (s)he makes the Waqf for the period of the lease.² This seems to grossly infringe on the conditions and property rights of the founder without any legal or Shari'ah support. Apparently, all schools of Fiqh, including the Malikites (with respect to temporality in mosque Waqf), did not anticipate cases in which there are real needs for temporal Waqf in general as well as in mosques in particular³.

3) The objective of Waqf must be perpetual. Here also, jurists overlook the temporal nature of certain objectives and divert any Waqf whose objective is temporal to other objectives. They talk about non-existence of assigned beneficiaries at the beginning, in the middle, or at the end of a Waqf and they treat these cases in ways that finally fall under either annulling the Waqf that has a non-existent objective or transforming it into the general objective of supporting the poor and needy on the assumption that there is always need for such an objective.

² It must be noted here that temporality in a Waqf by a lessee is caused by the nature of the property not by the will of the founder.

³ All Muslim communities today may, one way or another, need a temporary mosque for certain period of time either because of mobility of Muslim communities in Europe and the Americas or because of the long period needed for building mosques, for collection of donations or for construction.

The importance of the principle of perpetuity in Shari'ah should be looked at in the light of the need, in all societies, to establish revenues/services generating permanent assets devoted to social objectives. In other words, the perpetuity in Waqf provides for capital accumulation in the third sector that, over time, builds necessary infrastructure for providing social services on a non-for-profit basis. Hence, perpetuity in Waqf accounts for the accumulation of assets in the non-profit sector which is a first and necessary step for the growth of this sector in contrast with the profit-motivated sector and the government sector that is built on authority and law enforcement.

Hence, it must be noted that perpetuity in Waqf remains the rule and temporality the exception. We go along with the majority of jurists who consider the Waqf essentially perpetual, and we believe that temporality in Waqf requires an explicit expression in the founder's will, the nature of the property or the definition of the objective.

The principle of perpetuity is protected in Shari'ah by a series of rulings including the prohibition of disposition of the Waqf asset through sale and other contracts and the transfer of Waqf revenues from one objective to another, should the assigned objective ceases to exist, so that the property remains in the domain of Waqf.

However, adequate attention must also be given to the importance of temporality. In this regard, we must notice that all jurists, with no exception, approve of temporality of Waqf if it comes from the nature of certain assets. Regardless of the justification given in different schools of jurists, Waqf of buildings, trees, horses, books, swords, etc. is accepted. They did not consider this Waqf as non-perpetual on the claim that this is a Waqf for the lifetime of the asset itself, i.e., in such kinds of property, perpetuity is given a non-perpetual meaning! The Malikites accept temporal Waqf by the will of the founder. They also accept the Waqf of usufructs, which may very often be temporal too. Contemporary experiences of Muslim societies and communities indicate that temporality by will of the founder and by

nature of objectives is part of social life as all societies need it as much as they need perpetuity.

Muslim jurists should reconsider this principle in terms of the basic distinction between Waqf and ordinary *Sadaqah*. If one looks at the sayings of the Prophet (pbuh) about Waqf, one important characteristic can be derived. This is the characteristic of repetitiveness; that is, a Waqf is distinct from ordinary *Sadaqah* by its repetitiveness, i.e., the repeatability of the benefits that come out of it. Therefore, any form of *Sadaqah* that makes repeated payments to service its objective is a *Sadaqah Jariah* (running charity): a Waqf.

This “running” feature of Waqf can be manifested in different forms. It may be shown in terms of pledging the income/usufruct of an asset for a period of time at the end of which the asset and its income/usufruct return to the founder, in terms of distributing both its income and parts of its asset over repeated installments to the beneficiaries, hence temporality comes from depletion of the asset, in terms of a perpetual asset that produces a repetitive flow of income or services, or in terms of a right granted to the beneficiary to receive periodically, at repeated intervals or when needed, a flow of mobile objects/usufructs. All are Waqf and there is no need for excluding any of them from being a Waqf without valid rationale or support from an original Texts⁴.

Waqf of Usufruct and Financial Rights

Waqf of usufruct is known only in the Maliki School; other schools discard it. Contemporary life has many forms of usufructs that can be made into Waqf such as driving a car on a toll way, passing through a toll tunnel or bridge or using a parking lot for two hours for the Eid prayers twice a year. These kinds of Waqf need to be recognized by the contemporary Fiqh as well as by the laws of Awqaf in the Muslim countries and communities.

⁴ In a similar case with regards to *Ijarah*, Ibn Taymiah considers as a valid *Ijarah* renting an asset that produces repeated mobile objects rather than usufruct. The example he gives is renting a well for its water and hiring a nursing woman for the milk she provides to a newborn baby.

Most laws of Awqaf, including those in Algeria, Jordan, Sudan and India do not make any reference to the Waqf of *Manafi'* (usufructs). The recently proposed law of Waqf in Kuwait recognizes both temporality and usufruct in Waqf. It is still lingering between the government and parliamentary committees.

Financial rights are also not usually recognized in Waqf by jurists and laws. Modern life has many kinds of these rights, some of them were known in the past but were not of much value. For instance, although authorship rights are non-transferable (because transferring them makes a lie) the right to publish and financially exploit the product of an author has become an important business in our days. Patents and other talent rights are also an important new dimension in contemporary life. These rights are not dealt with in our classical Fiqh, so is the Waqf of objects that have a repetitive character such as newspapers, magazines, and other periodicals. Similarly are the products of film companies, educational software programs, and many other intangible properties. All such rights and objects must be covered in the Awqaf principle.

Under the existing Fiqh and laws of Awqaf in the Muslim countries, one cannot, for instance, make a Waqf of a ten-year subscription to the *American Economic Review* to the benefit of a university library. It's true that civil laws in all these countries consider such an act as a donation but the laws of Awqaf must give it privileges similar to those granted to other types of Awqaf.

Public and Private Waqf

Public Waqf is that which serves an objective of interest to the whole society or a part of it. Its examples are Awqaf for mosques, schools, orphanages, scientific research, the poor and needy, travelers, etc. Private Waqf is a Waqf in which the beneficiaries are either specific persons or persons characterized by certain relations to the founder or any other specific person. The most common type of this Waqf is Waqf for the descendants of the founder. That is why this kind of Waqf is usually called family or posterity Waqf.

Posterity Waqf is a pure invention of Muslims. As mentioned earlier, it was created when the companions of the Prophet (pbuh), en masse, started making Awqaf following the footsteps of the second *khalifa*, 'Umar Bin Al-Khattab, and they added clauses in their Waqf documents to the effect that the first or major beneficiary of the Waqf should be the descendants of the founder.

The private Waqf always has a spillover to public Waqf since all private Waqf always have a clause assigning either a fraction of the revenues to a public cause or converting the private Waqf, all of it, to a public cause in case the assigned beneficiaries cease to exist. Al-Shafi'i in his "*Al-Umm*" gave two empirical examples of private Waqf, one of them was for his own son Abu al-Hassan, who was born to him in Egypt. In both, the Waqf becomes to the poor and needy after its private objective ceases to exist.

In several Muslim countries, private Waqf came under heavy attack from some disciples of Western orientalist who criticized this type of Waqf in the late 1800s. Several Muslim countries enacted laws that liquidate existing private Waqf and prevented establishing new ones as it happened in both Egypt and Syria. Lebanon limited the private Waqf to two generations only, after which a private Waqf is liquidated. These attacks were rightly justified by the huge amount of corruption that dominated handling Awqaf all over the Muslim world but there was no reason for any discrimination between private and public Awqaf on the basis of corruption. The fact was that the management of both types of Awqaf was corrupt and most Awqaf properties were either already stolen or very much abused. The solution to the corruption problem is not in eliminating such a benevolent institution but in redesigning its approaches of management, as we discussed in the preceding section.

The private Waqf in fact serves an important social objective. Properties left to posterity help provide additional income to descendants of the founder. They also help keep them off social welfare and Zakah recipient lists while, at the same time, such properties provide for a mechanism of capital accumulation through

generations which is an important way for growth and development: a fact that was only recognized in the west, especially in the United States, over the past few decades where the use of family trusts under different variants became very common and these trusts were granted several tax privileges. Moreover, it is known in Islamic Fiqh that any Waqf whose beneficiaries cease to exist turns into a Waqf for the poor and needy as this is considered a primary objective of the institution of Awqaf itself.

Hence, both Fiqh and laws in Muslim countries should have dealt with the problems of corruption, fragmentation of beneficiaries and cost of locating beneficiaries in relation to the revenues in a more dynamic way that allows for the promotion of private Waqf and for turning it into a Waqf for the poor and needy over time instead of looking at it in a negative way.

The Ownership of Awqaf and its Legal Entity

The differences of opinions among Muslim scholars on who owns Awqaf property are well known. An interesting fact is dictated by these differences, that is: ownership of Awqaf was really puzzling Muslim scholars at a time when the concept of legal entity or legal personality, outside natural persons, was not yet developed. Contemporary Awqaf laws in Muslim countries and communities quickly assign a legal personality to Awqaf and consider Awqaf properties owned by that legal entity.

In fact, there are many Awqaf-type properties that fall outside the Awqaf laws in all Muslim countries, simply because they come under the acts of non-profit organizations, be they educational, charitable, social, or otherwise. The laws of non profit organizations in the Muslim countries assign to an organization a legal entity that allows it to own both mobile and immobile properties. Many of these properties are certainly given to the organization on the basis of forming permanent capital to be used for servicing the objective of the organization, say a school building, or as a permanent source of income to the organization, as investments that generate revenues. These properties are no more than Awqaf.

The concept of legal entity, the corporation, is a Western one which was developed in East Europe and the United States over the last three centuries or a little more. A legal entity has its independent financial status. It also has the right to litigate and to be represented as well as to represent others. There are many voices among law scholars that also call for a legal entity to be covered by criminal laws so that it can be put under guardianship, fined, and even eliminated. Contemporary Muslim jurists usually accept this new concept of legal entity or corporation and include it in their studies and rulings.

It has always been argued that the concept of Waqf comes very close to a manifestation of a legal entity, as it has separate and independent financial personality (Thimmah) of its own, completely not intermingled with that of its manager. The manager (Nazir) is only a representative of the Waqf and the relationships between them are very well elaborated in Fiqh.

It is rarely questioned whether the concept of corporation and its legal entity does really suit the exact size of Awqaf. While the management of a corporation, with proper authorization from its constituency, the general assembly, can dispose of the assets of the corporation through sale, gift, and other ownership transferring transactions; it can also liquidate the corporation and do away with all of its properties, the managers of Awqaf are very restricted. In Awqaf, properties are not considered owned by any human entity, individually or in groups, be it natural or judiciary. They cannot even give any of the Waqf income to any philanthropic objective outside the assigned one. Many classical scholars consider Allah the owner of Awqaf, and obviously no one dares attribute to Him such kinds of transactions.

The important conclusion is that Awqaf properties require a special kind of judiciary person, or an amended legal entity in which, unlike other corporations, the properties are not to be disposed of by the corporation; or somehow the legal entity of Awqaf should be allowed only to do certain contracts and legal actions; those which relate to investment of assets and distribution of income and usufructs; but it

should not be allowed to take up other kinds of contracts and legal actions that infringe on the principle of perpetuity, continuous growth and accumulation and the distribution as prescribed by the founder.

The managers of Awqaf are thus not similar to the managers of corporations in the scope of their authority. The dilemma, referred to above, of Awqaf properties under the authority of judiciary entities that take the names of non-profit organizations, is exemplary. Awqaf under non-profit organizations can be liquidated, sold, and disposed of by actions within the scope of the proper authority of the management of these organizations.

As a result of this confusion between Awqaf, corporations, and judiciary entities, the Awqaf properties of Muslim communities in many countries exist under continuous threat of mishandling the property itself, not only its usufruct or income. Properties of Awqaf, including mosques, schools, and other properties assigned for the Muslim community use in the United States, Canada, most European countries, Australia and South Africa are subject to all kinds of ownership-transferring contracts by the management, as well as to litigation by others for actions, or lack of actions, of the corporation's managers. The management of such properties can mortgage them or use them as a lien for borrowing which exposes these properties to be repossessed by lenders. Managers can sell these properties and make other disposal transactions with them. These properties can be liquidated by legal action against them that is merely a result of neglect of the managers. The corporations, in whose form the organizations that own these properties appear, are always vulnerable to litigation that threaten the public character of Awqaf itself in all those countries.

Special Conditions of the Waqf Founder

Our classical Fiqh adopted a slogan, which over time became very famous: "the conditions of the Waqif are similar to the texts of the Legislator." This indicates the great value attached to the conditions of the Waqf founder in our Fiqh.

Yet we find that Fuqaha' very often deviate from the spirit of this slogan and impose violations and disrespect of some of the conditions of the Waqif. For instance, the prevailing view in our classical Fiqh, especially the Maliki and the Hanbali, is that the Waqif is not permitted to make himself a beneficiary of the Waqf. This is on the presumption that making one's own self a beneficiary contradicts the benevolent character of Waqf, as if the Prophet (Pbuh) did not consider making Birr to one's own self a priority in the actions of Birr! Another area where the conditions of the Waqif are not respected is the Waqif's right to terminate the Waqf and retrieve its property to her/himself if (s)he found that such a reversal is needed. This right is not accepted by all jurists except Abu Hanifah, provided that the Waqf did not, in the meanwhile, gain perpetuity through a judicial action.

A third example where the conditions of the Waqf founder are not respected is where the objective of the Waqf comes to an end at a certain point of time and at the same time the Waqif makes her/his Waqf in such a way that its principal ceases to exist. An easy example of that is supporting an orphan until maturity.

In contemporary life, which is full with uncertainty and unpredictability about the future as well as with laxity of family and tribal mutual financial solidarity, these three types of conditions become of great importance to the Waqf founder. A Waqif would be very encouraged to make a Waqf if (s)he is assured that should (s)he need the Waqf funds at the time of retirement, old age, sickness or otherwise, (s)he can be a prime beneficiary of her own Waqf, or (s)he can rehearse the action and come back to own and use the Waqf assets and/or income. Additionally, allowing a Waqf to end after fulfilling its objective encourages making Waqf because it has a lower sacrifice to the Waqif. For instance, a one Thousand Dinar ten-year annuity with the depletion of its principal requires half the amount of principal needed at a seven percent expected rate of return, should the principal remain perpetual.

Contemporary Fiqh and laws of Awqaf in Muslim countries and communities must re-address the issue of the special conditions of the Waqf founder in order to recognize the implications of the new reality of uncertainty and unpredictability about

future income and future financial needs, especially in three areas of: the condition of benefiting the Waqif from her/his Waqf and its income, the right to reverse the decision of making Waqf, and the right to make a Waqf that lapses with the lapse of its objective. It is noted that practices in some Muslim countries accept the condition of self-beneficiary as I found in actual new Waqf documents created in Jordan and Saudi Arabia. The proposed new Act of Awqaf in Kuwait allows for the Waqif to reverse her/his decision on creating a Waqf.

CONCLUSION

The Islamic system of Awqaf revolutionizes the non profit sector and its role in social welfare. It creates a permanent, cumulative and ever-increasing capital base and infrastructure for benevolent activities (notice: this is in addition to Zakah that provides for current expenses of the non profit sector). It expands the scope of benevolence to cover all areas of social welfare even sectors many contemporary economists and political sociologists consider as part of the domain and responsibility of governments such as health, education and defense.

To activate and vitalize the Awqaf system in the Muslim societies and communities there is a dire need for reform in its management formulas and to revise our classical Fiqh in areas that help promote the establishment of new Awqaf and improving the benefits derived from existing ones. It should be noted that the Muslim societies and communities in many areas of the world are rich in their inherited Awqaf properties, if we can only improve their capital benefit ratios.

Publications benefited from in writing this paper

1. Abu al Ajfan, Muhammad, "al Waqf ^{ala} al masjid fi al Maghrib wa al Andalus" [Waqf on mosques in North West Africa and Andaluthia], in Studies in Islamic Economics, International Center for Research in Islamic Economics, King Abd al Aziz University, Jeddah, 1985, pp. 315-342.
2. Armagan, Servet, "Lamhah ^{an} halat al Awqaf fi Turkia" [a glance at the state of

- Awqaf in Turkey], in al Amin, Hasan °Abd Allah, ed. Idarat wa Tathmir Mumtalakat al Awqaf, Islamic Research and Training Institute (IRTI) of the Islamic Development Bank, Jeddah 1989, pp. 335-344.
3. Al °Asali, Kamil Jamil, "Mu'assat al Awqaf wa madaris Bait al Maqdis, [Awqaf institution and the schools of Jerusalem], in the Proceedings of the Symposium of Awqaf Institution in the Arab and Islamic World, Institute of the Arab Research and Studies, Baghdad 1983, pp. 93-112.
 4. Basar, Hasmat, ed. Management and development of Awqaf Properties, IRTI, Jeddah 1987.
 5. Islamic Research Center for History, Culture and Arts (IRCICA), The Muslim Pious Foundations [Awqaf] and Real Estates in Palestine, Istanbul 1982.
 6. Bu Jalal, Muhammad 'Nahwa syiaghah muassasiyyah li al Dawr hg Tanmawi li al Waqf' [Toward an Institutional Formulation of the Developmental Role of Waqf], unpublished paper, General Secretariat of Awqaf in Kuwait, September 1996.
 7. Ramadan, Mustafa Muhammad, "dawr al Awqaf fi da°m al Azhar", in Proceeding of the Symposium of Awqaf Institution, op. cit., pp.125-148.
 8. Kahf, Monzer, Al Nusus al Iqtisadiyyah fi al Qur'an wa al Sunnah [Economic Texts in the Qur'an and Sunnah], Scientific Publication Center, King Abdulaziz University, Jeddah 1995.
 9. -----, " Waqf and its application in North America, presented at the First International Conference on Fiqh, Dallas Tx, USA 1998.
 10. Al Kubaisi Ahmad, "Mashru'iyat al Waqf al 'Ahli wa Mada al Maslahah fih" [legitimacy of family Waqf and its benefits], in the Proceedings of the Symposium of Awqaf Institution in the Arab and Islamic World, op. cit.
 11. Al Siba°i, Mustafa, Min rawa'i° hadaratina, al Maktab al Islami, Beirut 1969.
 12. Al Syed, °Abd al Malik, "al Waqf al Islami wa al dawr al ladhi la°ibahu fi al numuw al Ijtima°i fi al Islam," [Islamic Waqf and the role it played in social development in

Islam], in Idarat wa Tathmir Mumtalakat al Awqaf, op.cit., pp. 225-304.

13. Zarqa, Mustafa, Ahkam al Awqaf [Shari'ah rules of Awqaf], Damascus University Press, Damascus 1947.
14. Abu Zahra, Muhammad, Muhadarat fi al Waqf [lectures on Waqf], dat al Fikr al 'Arabi, Cairo 1971.
15. Yagan, Zuhdi, al Waqf fi al Shari'ah al Islamiyyahwa al Qanun, Dar al Nahdah al 'Arabiyyah, Beirut 1388 H.
16. Encyclopedia Americana , 1994, V 7, 8 and 27.
17. The New Encyclopedia Britanica, 1995, V 3.

DO NOT COPY