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**The Role of Awqaf in the 21st Century**  
An Update on the Development  
of Islamic Foundations

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**The Role of Awqaf in the 21st Century - An Update on the Development of Islamic Foundations**

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**I. Legal Issues Related To Endowment (Awqaf) Foundations**

Mohamad Hisham Dafterdar..... Page 4

**II. The New Waqf Law Prepared by IDB/IRTI and The Kuwait Public Foundation:  
A Critical Assessment**

Murat Cizakca ..... Page 23

**Legal Issues Related to Endowment (Awqaf) Foundations**

*Mohamad Hisham Dafterdar*

**Table of Contents**

- 1. Abstract.....5
- 2. Introduction .....5
- 3. The Third Sector .....6
- 4. Legal Status and Ownership of Awqaf.....7
- 5. Family Awqaf.....8
- 6. Regulating Awqaf – Historical Perspective .....9
- 7. Custody and Management of Awqaf.....11
- 8. Enabling Legal Environment.....12
- 9. Flexible and Efficient awqaf Law .....13
- 10. Corporate Governance.....15
- 11. Issues of Sustainability and Profitability of Awqaf .....17
- 12. Policy Implication.....18
- 13. Concluding Remarks .....20
- 14. References.....21

## 1. Abstract

Awqaf is an important economic sector. Its importance is gleaned from the massive assets it controls, its substantial social expenditure, the large number of people it employs, and its significant contribution to the economy which adds between 10 to 14 per cent to the GDP of some countries.<sup>1</sup> With such a significant economic output, and growth in the number, size and diversity of organisations entrusted with awqaf properties, awqaf as a faith-based charitable institution has generated interest beyond philanthropists and *Shariah* scholars, and the sector is no longer seen as exclusively religious. With a broader business focus, it became clear that the sector is in fact an industry and is being subjected to increased scrutiny by governments and regulatory authorities.

The size of the sector and its growing economic importance qualify it for serious attention by legislators and standards setters of the Islamic financial industry. In order to rejuvenate the institution of waqf and reverse the trend of neglect and to enhance its role in social and economic development, a number of issues must be addressed: How should the regulatory framework operate? Would the regulations help or hinder the development of awqaf and the creation of new waqfs? Is uniformity needed? And how will this help? What is an ideal model for corporate governance? Is that model workable within the parameters imposed by other features of the business and political environment? What about sustainability and profitability and shouldn't awqaf be profitable in order to be sustainable? Do we see a conflict between awqaf as a not-for profit sector and the pursuit of growth and profitability? Is it acceptable to combine awqaf and business? Is this ethical, and how would it affect stakeholders?

The awqaf sector and its management often remain not well understood. While a full answer to these questions is beyond the scope of this paper, there are a number of issues that appear important for our concern. The paper will focus on issues that are relevant for the integration of awqaf into the mainstream of the Islamic financial industry. It will also address matters that are of concern to regulatory authorities, awqaf foundations and to all awqaf stakeholders.

## 2. Introduction

The institution of waqf is a *sunna* established by the Prophet (pbuh) that became the base upon which the Islamic socio-economic development model was built. As a feature of the

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<sup>1</sup> Khan, Fahim "Integrating faith-based institutions (Zakat and Awqaf) in poverty reduction strategies" Islamic Research and Training Institute (IRTI/IDB) P.14  
See also news release by John Hopkins University "Nonprofit contribution to GDP enormous"  
<http://www.jhu.edu/news/home07/sep07/gdp.html>

Islamic civilisation, the history of awqaf is rich with impressive achievements in the field of social services ranging from education to healthcare and to non-medical welfare. Awqaf served the poor in particular and society in general. Awqaf also contributed to the protection of the environment and the preservation of the flora and fauna. Mosques and shrines, major hospitals and universities, libraries and museums, animal shelters and sanctuaries were established as waqf. However, despite these achievements, the history of awqaf is rife with turbulent events. For centuries, governments considered awqaf as public property and part of the national wealth and exercised different degrees of control over this institution. The control by governments had several negative impacts on the waqf system that led not only to much fewer new awqaf being established, but also to the expropriation of large areas of awqaf land.<sup>2</sup> In addition, financial chicanery and the corruption of some waqf managers (*mutawallis/nazirs*) has led to the loss and deterioration of properties that left many undeveloped or in a state of disrepair and the latent wealth of awqaf continues to be largely untapped.

Awqaf in many Muslim countries today has not fulfilled its purpose as a driver of economic growth. One of the major impediments to growth is the lack of proper legal environment. Legislative reforms and the implementation of a modernised Shariah-based model and a governance framework are needed to remove obstacles that hinder the development of awqaf and generate productive growth for the country.

### 3. The Third Sector

Awqaf (singular, waqf) is an Arabic word meaning assets that are donated, bequeathed, or purchased for the purpose of being held in perpetual trust as ongoing charity (*sadaka jariya*), or for a cause that Islam regards as socially beneficial.<sup>3</sup> This condition of perpetuity has led over the years to a considerable accumulation of societal wealth that played an important role in improving the lot of the Muslim community. As a reflection of its increasing contribution to the economy, awqaf as a non-profit institution has come to be known as the third sector, as distinct from the government sector also known as the first sector, and the private sector sometimes called the second sector.<sup>4</sup>

Awqaf organisations are Islamic not-for-profit entities with a wide diversity of structures and purposes. Their operations dovetail into all sectors of the economy and include a wide range of industries including real estate, education, healthcare, social services and recreation. They

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2 Cizakca, Murat "Awqaf in history and its implication for modern Islamic economies" Islamic Studies, Vol 6 No. 1 Nov 1998, P2

3 Sheikh Mohammad Abu Zahra awqaf lectures "Muhadarat fi l-waqf" p5, 2nd edition, Dar-ul Fikr Al-Arabi

4 Ahmad, Habib, "Legal Environment and nonprofit sector: Implications for growth of awqaf institutions" IRTI/IDB P.3

undertake a broad range of social, cultural and economic activities. They play a significant role especially in areas where public services are insufficient and where the private sector does not find it profitable to invest.

Awqaf organizations are not part of government although many perform a public service. They ease the pressure on the public purse and can stimulate the economy in times of economic downturn. Being an awqaf foundation does not necessarily mean being small. A considerable number of them are large-scale organisations with cross-border operations, controlling substantial assets, and employing significant number of people.

#### **4. Legal Status and Ownership of Awqaf**

The concept of ownership in awqaf can be quite complex and somewhat confused. There are differences among the four schools of Islamic jurisprudence (*mazhabs*) on who owns the waqf assets. The *Shafeis*, argue that ownership of awqaf belongs to God and what appears to be human ownership is in fact a matter of trusteeship. The *Hanafis* and *Hanbalis* view that the waqf belongs to the beneficiaries although their ownership is not complete in the sense that they 'own' only the benefit or usufruct of the property but cannot dispose of it or use it in any way different from what was decreed by the *waqif* (founder of the waqf). *Maliki* jurists are of the view that a waqf remains in the ownership of the *waqif* and is inherited by his/her legal heirs.<sup>5</sup> Thus the *Malikis* do not insist on the perpetuity of the waqf like the *Shafeis*, *Hanafis* and *Hanbalis*. Ibn Arafah, a *Maliki* scholar defines perpetuity "as long as the property lasts" to include such perishable assets as orchards, livestock, items of furniture and mobile assets.<sup>6</sup>

In Shia Islam, the *Ja'fari* school, also known as "*Imami Shi'ites*" and "*Twelver Shi'ites*" which comprises the overwhelming majority of Shi'ites today, has similar views as the *Shafeis* in respect of the ownership of awqaf, upholding the general rule of "alienating the asset and expending the usufruct". However, the *Ja'fari* school uses '*aqil*' "intellect" instead of '*qiyas*' (deductive analogy) in the Sunni schools, which gives Shi'ite jurists more flexibility when establishing Islamic laws.

The term "waqf" implies a distinct legal entity that usually has an indefinite life span. The fact that a waqf outlives the *waqif*, the *mutawalli* and the beneficiary, it has a separate and independent personality "*thimmah*" of its own. This is akin to the concept of the continuing legal entity which was developed in the west over the last three centuries. The waqf, however, differs

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5 Al Dardir, Al Sharh al Kabir, Al Dusuki Vol 4, p79

6 Kahf, Monzer, "Towards the revival of awqaf: A few fiqhi issues to reconsider" 1999, P 1-4

from the corporate entity by virtue of its moral responsibility. While there is general agreement on the legal status of a corporation, there is no such agreement about its moral status. Corporations do not have a body or a soul; people act on their behalf, and may not be held personally responsible for actions on behalf of a corporation. On the other hand, in an awqaf organization, a more holistic integration of all stakeholders and a strong ethical doctrine of “personal supervision” guide people’s behavior. The waqf is perceived as a sacred trust and there is no separation between its legality and morality. While a corporate entity can dispose of its assets and can be imminently terminated by its shareholders, the waqf is protected by a series of Shariah rulings which ensure its irrevocability, unalienability and perpetuity. Even if the original purpose of the waqf ceases to exist, the benefit can be assigned to another charitable purpose and the property remains in the domain of the waqf.

The dispute among jurists on the principle of perpetuity versus temporality of the waqf is mainly a matter of *ijtihad* [legal interpretation] and is incidental to the noble objective of ‘*birr*’ (donating for a benevolent purpose). There are, however, mechanisms by which some perishable or short-lived assets can be held in perpetuity. For example, biological assets such as farm animals, crops and orchards are self-generating and regenerating assets. There are also methods by which inanimate assets can be renewed or replaced by proper provisioning. According to Sheikh Zarqa “everything in waqf is subject to *ijtihad* and there is no single ruling in it that gained unanimity except that the waqf purpose must be benevolent (*birr*)”.<sup>7</sup>

## 5. Family Awqaf

Some of the earliest awqaf were founded for the benefit of the poor members of the family.<sup>8</sup> Later on, family waqfs (*waqf ahli*) were established for mundane reasons such as to protect a property from falling into the wrong hands or to reduce its exposure to risks such as confiscation by the state or claims by intransigent creditors and rapacious predators.<sup>9</sup> The waqf was also used as an instrument to protect the property from the owners themselves in matters arising – in some cases - from their personal affairs. As a waqf, the property is inalienable and therefore cannot be sold or pledged as collateral. From a legal point of view, the beneficiaries of the family waqf are family members who are regarded as ‘objects’ having only a ‘contingent’ interest in relation to the waqf property.

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7 Zarqa, Sheikh Mustafa "Ahkam Al Waqf" University of Damascus Press (1947) P10-15

8 The creation of family waqfs was encouraged by the Prophet (pbuh) in many hadiths. For examples of family waqfs by the companions of the Prophet (pbuh) see Al-Khassaf "Ahkam Al-Awqaf" p 8-17

9 Cizakca, M (1998), "Awqaf in history and its implication for modern Islamic economies" Islamic economic studies Vol 6 P51

The family waqf lost its innocence in the early 16<sup>th</sup> century as many family awqaf were created as testamentary trusts, arising upon the death of the founder. Some of these waqfs were designed to circumvent Islamic inheritance rules, by favouring the sons and depriving the daughters or disentiitling them upon marriage, or by distributing equally between males and females in a way that would be prohibited under the Islamic laws of inheritance.<sup>10</sup> These testaments had a particularly negative impact on the family unity and cast a shadow over the waqf's utility as a family wealth management tool, as they gave rise to disputes that brought them under heavy attack in several Muslim countries. Some countries enacted laws that dissolved existing family awqaf and prevented establishing new ones as happened in Egypt, Syria and Lebanon where family awqaf properties were quarantined as inherited assets and then liquidated and/or distributed to the beneficiaries according to Shariah inheritance rules or the intestacy laws of the country.<sup>11</sup>

The dissolution of family awqaf in some countries is attributed to many factors including the exponential increase in the number of beneficiaries after few generations to the point where the benefit accruing to an individual becomes insignificant; breakdown of the relationships among family members; disputes arising between the beneficiaries and the *mutawallis*; and the conflicts of interest arising from *mutawallis* who are also beneficiaries of the waqf they control, and consider their role as a right that can be passed on to heirs as part of their estate.

## 6. Regulating Awqaf – Historical Perspective

Throughout Islamic history, governments considered awqaf as a national resource and tried to bring it under state control. The first attempt by the state to control awqaf took place in Egypt during the period of Mamluk rulers (1250 -1517). This was so strongly objected to by Muslim scholars that it was quickly withdrawn. The change came with the Ottomans (1281-1918) who in the early nineteenth century enacted laws for awqaf and established a special ministry to oversee awqaf affairs. The most important of these laws was the waqf law of 1863 which regulated the registration, control and management of waqf properties. This law came as a sweeping reform to the prevailing chaos and rogue behaviour of some *mutawallis* in managing awqaf.

During the first half of the twentieth century many Muslim countries issued awqaf laws which were based on the Ottoman laws; and by the second half of the twentieth century, most Arab

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10 Wynen, Thomas, *Supra* note (43) at 165

11 Egyptian Law No. 180 September 1952 amending existing Law of Waqf Article 3; Syrian Legislative Decree No. 76 amended by Leg. Decree No. 97 of Nov. 26, 1949; Lebanese Law of Dhurri Waqf, March 1947, Article 13.

and Muslim countries had gained their independence and enacted new laws that put awqaf under government control.<sup>12</sup> They established ministries and directorates as government agencies to manage awqaf as a public sector instrumentality. Thus awqaf fell into the hands of the state which covered its administrative expenses from the general budget which gave the government the right of control. However, the degree of control varied from one country to another.<sup>13</sup>

In Egypt, awqaf land accounted for one quarter of the agricultural area of the country when Mohammad Ali Pasha (1805-1848), in the process of building the modern state brought awqaf under state control.<sup>14</sup> The state's control of awqaf land continued until Nasser in 1952 nationalised them as part of the policy of land reform. Large areas of awqaf land were also nationalised in Algeria, Syria, Tunisia, Turkey and Palestine. The nationalisation of awqaf land and the transfer of responsibility from private *mutawallis* to ministries of awqaf meant the demise of the independent identity of the waqf institution and endorsed the waqf as an instrument of government policy.<sup>15</sup>

The government's control of awqaf has led to a significant decline of the sector to the point where awqaf's role as a welfare mechanism was reduced to the point that it became a burden on the public purse. In recent years, many Muslim countries embarked on reforming the administration of awqaf by separating the custody function from awqaf asset management by establishing separate entities to develop and manage awqaf properties. They recognised that the waqf has a separate personality '*thimmah*' and that awqaf funds are not to be commingled with public funds. Egypt in 1971 established the "Egyptian Awqaf Authority" to take over the management of awqaf properties from the Ministry of Awqaf. In Sudan, the "Federal Corporation of Awqaf" was established in 1987. Kuwait in 1993, founded "Awqaf Public Foundation". In Jordan, the Ministry of Awqaf, Islamic Affairs and Holy Places established "Awqaf Properties Investment Corporation". In Malaysia, at the federal level, the Prime Minister's Department in March 2004 established the Department for Awqaf, Zakat and Hajj (JAWHAR) to coordinate the activities of the states' religious councils in matters relating to awqaf development. The latest is the establishment of "Qatar Awqaf Authority" in 2007 to take over the activities of the former Awqaf Department at Ministry of Awqaf and Islamic Affairs.

In Iran, the 'Waqf and Charity Organisation' (WCO) was established in 1984 as the official body under the Ministry of Culture and Islamic Guidance to oversee, promote, manage and carry

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12Awqaf laws were enacted in: Egypt and Jordan in 1946, Lebanon in 1947, India in 1954, Tunisia in 1956, Malaysia in 1956, Iraq in 1959, Pakistan in 1979

13 Lane, Jan-Erik and Redissi, Hamadi : "Religion and Politics: Islam and Muslim Civilisation" Second edition, Ashgate Publishing Co. P 101-102

14 Kahf, Monzer: "The role of waqf in improving the Ummah welfare" P 8

15 Ibid P 14

out activities and projects that are founded as awqaf. The investment and operating arm of WCO is Iran's Endowment Fund (IEF), whose objectives are to develop, revive, expand, reconstruct and rehabilitate awqaf properties, and provide social assistance as directed by the Waqf and Charity Organisation.<sup>16</sup>

In non-Muslim countries, Muslim communities administer their awqaf properties in accordance with the trust and foundations laws of the country. Many of these laws were inspired from the Islamic waqf system. Muslim communities in these countries establish their awqaf foundations as non-profit organisations that hold titles to waqf properties.

## 7. Custody and Management of Awqaf

In principle, the *waqif* through a deed determines the objectives of the waqf and its management and succession processes. The waqf manager or trustee (*mutawalli/nazir*) holds the title of the waqf property, exercises legal control and is bound by fiduciary responsibility and moral obligation to protect and administer the waqf for the benefit of the beneficiaries in accordance with the terms of the waqf deed. *Mutawallis* are expected to comply with both the letter and spirit of the waqf condition. The importance of the conditions of the *waqif* is indicated by the often quoted maxim: "The conditions of the *waqif* have the same legal weight as the edicts of the legislator". However, some flexibility is afforded through the differences of the schools of jurisprudence. Abu Hanifah, for example, allows changing the conditions of the *waqif* if there is an overriding public benefit (*maslaha amma*), or when the beneficiaries or the purpose of the waqf come to an end.<sup>17</sup>

The authority of *mutawallis* to act and make decisions on behalf of the waqf carries an immense responsibility and their duties are wider and more onerous than they were assumed to be. As trustees, *mutawallis* have the primary responsibility for prudent management of assets in their custody. As such, *mutawallis* are expected to have a certain level of business skills and investment knowledge to support their role in monitoring the safety and performance of assets under their control. However, because of the nature of awqaf, its religious message and social application, it seems logical that those who are entrusted with the custody and management of awqaf properties are more religiously conscious and therefore employ their faith when managing. But the operating environment is rapidly changing and as a consequence the role of the *mutawallis* is also changing. *Mutawallis* are not only required to act in good faith for the

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16 Kilani, Amjad "An overview on Awqaf and the Waqf laws in the Islamic Republic of Iran" (In Arabic), Published by 'Waqf and Charity Organisation of Iran' 1383H, P 33-42

17 Zaki, Eissa "A summary of waqf regulations" Kuwait Awqaf Public Foundation, Department of Studies & external Relations 2006AD-1427AH, P 7-9

best outcomes for the waqf, but also to be seen acting diligently and ethically, and build trust among those they deal with. Due to the unscrupulous behaviour of some *mutawallis* awqaf had lost much of the respect and trust of the community. *Mutawallis* have to overcome image problems. They need to develop behavioural characteristics and bring awqaf management into line with community expectation, in order to change the traditional image as persons who insular, ignorant, sceptical and as much a business risk as being concerned only with the social aspects of the waqf. *Mutawallis* have the responsibility to safeguard and grow assets in their custody and produce returns rendering it harder to act solely on their beliefs.

## 8. Enabling Legal Environment

One of the major impediments for the development and growth of awqaf is the lack of constructive legal and regulatory environment. Without a good sustainable environment, it is difficult to develop an industry. Awqaf is an economic sector built on voluntary contribution of assets and on mostly voluntary contribution of services. Therefore, the regulatory environment should foster public confidence in the waqf, encourage donors, and promote ethical and proactive behaviour of employees, volunteers and *mutawallis*. Donors usually are generous and feel more comfortable with organisations whose operations are governed by clear and applicable standards of accountability and transparency. Also, financiers are more willing to provide capital for projects of organisations that adopt best practices of corporate governance.<sup>18</sup>

Unlike commercial corporations, the services delivered by awqaf may often be intangible and difficult to measure. Companies have clear delineations about shareholders, with all reporting geared towards profits. The position is not so simple for awqaf organisations. Regulated mainly by Shariah and restricted by *waqif* conditions, many awqaf foundations consider regulatory and compliance issues of corporate governance as costly and unnecessary administrative burdens. Unlike commercial corporations, staff in an awqaf foundation is comprised of low-paid professionals or volunteers who have chosen to work in awqaf for less tangible rewards. Their loyalty is more to the cause of the waqf than to the organisational entity. They are mainly concerned with the social aspects and pay little attention to financial efficiency or accountability. They claim that by legislating what is effectively an issue of faith, the very fabric of awqaf will be undermined.

Strategy formulation in an awqaf foundation can be subject to a unique and complex set of influences. What is deemed to be appropriate strategy will be conditioned by concern not to

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18 O'Halloran, Kerry "Creating an Enabling Environment for Private Philanthropy: the Role of Charity Law in Northern Ireland" The International Journal of Not-for-Profit Law Volume 1, Issue 3, March 1999

violate the conditions of the *waqif*, the wishes of the donors and the legal environment. The concerns of non-beneficiary stakeholders should also form part of awqaf foundations' responsibilities and as such *mutawallis* should have the duty to act in the interest of the entire community. These days no organisation is immune to public scrutiny, not even a shelter or an orphanage that does not have a blemish to its name. Therefore the impact of awqaf's performance on the community must be positive and the organisation must be seen to be operating in compliance with community standards and expectations.

The major challenge faced by awqaf is ensuring that the massive treasure of awqaf is preserved, developed, continues to grow and contribute to the social and economic development of the *Ummah*. This can be met only by creating an enabling legal environment – one that creates a level playing field for awqaf managers and causes them to be transparent and accountable and enables them to strengthen their operational undertakings in order to fulfill their obligations to donors, beneficiaries and all other stakeholders.

## **9. Flexible and Efficient Awqaf Law**

Awqaf is a global sector and many awqaf organisations have international presence acting as trustees and custodians (*mutawallis*) of a plethora of assets, cash flows and cross-border investments, operating across multiple jurisdictions with different legal systems, regulatory requirements and cultural norms. It is not rare to find a waqf property in one country and the beneficiaries in another while the waqf organizational entity is based in a third country.<sup>19</sup> Thus, a waqf may fall under different jurisdictions depending upon the type of connection to the jurisdiction: the connection of the awqaf organisation to the jurisdiction, i.e., where the foundation was established; the connection of the waqf asset to the jurisdiction, i.e., where the asset is located; and the connection of the beneficiaries to the jurisdiction, i.e. where the beneficiaries reside.

In a globalised environment, a waqf has a much broader exposure than it does domestically. The same waqf may be subject to different laws depending upon the type and degree of connection to the jurisdiction. Awqaf are regulated by the country's local awqaf law, if there is one, or are subject to laws which are designed for other sectors. In general, the existing awqaf laws are not written to operational requirements. They mainly define the rules of overseeing the waqf and the relationships among stakeholders, but fall short of addressing the

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<sup>19</sup> Awqaf organisations with cross-border investments and beneficiaries include World Assembly of Muslim Youth (WAMY), OIC Solidarity Fund, Islamic Daawa Organisation, Sharjah Awqaf General Trust and Kuwait Awqaf Public Foundation.

developmental needs of the sector. On the other hand, regulating awqaf by applying other laws puts the sector at a disadvantage inasmuch as the sector's specific requirements may not be served by such laws. The harmonisation of awqaf laws across national boundaries is essential for the development and growth of the sector. What is needed is a unified awqaf law that applies across countries. However, there is no unanimous agreement on developing awqaf laws with global application. The states have powers, rights and privileges to enact their laws. Many jurisdictions consider that their existing waqf laws are adequate for regulating their awqaf; and what may be applicable to one country may not be to the next.

To be acceptable internationally, the global awqaf law should provide only the conceptual framework and should be broadly stated to allow individual governments to modify it taking into account the legal code, the social structure, the ethnic composition and the particular needs and circumstances of the country. The global ideal awqaf law should be a principle-based framework that provides an authoritative benchmark for awqaf organisations across jurisdictions. The intention is not to substitute a local law by another or to morph all the different national awqaf laws into one global law. A model international awqaf law should give a strong but flexible legislative framework to facilitate its worldwide use. If it is too strict or too detailed, then it will be met with less satisfaction and more resistance. It should be designed to appropriately regulate the sector and create incentives for it to expand. Like the 'corporations act' in common law countries, the awqaf law should have a system of replaceable rules, so that awqaf organisations can design their by-laws to fit their needs and circumstances more closely. Hence, the content of the legal rules should not be determined simply by the wording of a text, but ultimately by legal practice and coherence guided by the principles of Shariah. From a juridical point of view, the awqaf law should be interpreted less strictly than other laws and more attention should be given to the intent of the law than its formal expression.

A number of mechanisms exist to deal with these challenges, including a global code for ethical behaviour, international treaties and multilateral agreements. However, the main difficulty is that there is no "global sovereignty" to push along such a process. Self-regulation is another possible solution. The sector shows great concern for ethics based on fundamental values such as honesty, integrity, fairness, trust, commitment, compassion and responsibility. These values are especially important for awqaf as it is through this sector where social impacts are more visible. While standard regulations serve as a model of how awqaf organisations should operate, in these areas awqaf organisations are better placed to regulate their own activities, and can produce more social cooperation and better economic outcomes than any government-mandated rules.

## 10. Corporate Governance

A key issue to awqaf is the need to maintain trust between the waqf organization and its stakeholders. In awqaf, good corporate governance involves more than compliance with standards of transparency and reporting. It is the assurance that assets and resources are managed in the interests not only of the beneficiary groups but of all stakeholders.

The lack of uniformity in reporting and the failure of many awqaf organisations to produce financial reports, limits their accountability to the *waqifs*, to beneficiaries, and other stakeholders. Most awqaf organisations design their annual reports to be used as public relations tools to present themselves to as an attractive entity for donors' funds. This type of reporting is largely unregulated leading to problems of comparability and reliability. Confusion, uncertainty and sometimes unscrupulousness are perceived in the texture of awqaf organisations. Therefore, in order to correct this image and to bridge awqaf culture of philanthropy and issues of organisational management, a suite of internationally recognised standards of corporate governance must be established.

The establishment of sector-specific standards requires time to evolve, and for awqaf the setting of standards faces higher hurdles. Based on fundamental social values, awqaf governance standards should consider the legal, ethical and human issues and deal with how awqaf organisations should act to be transparent and accountable in their program operations, asset and resource management, fund raising, financial management, and non-financial performance.

Contrary to popular belief, awqaf organisations have many similarities to private sector corporations. In some ways, it seems like there is very little difference to the corporate world – assets need to be managed, revenues to be earned, bills to be paid and reports to be made. They also undertake a wide range of activities such as investment, project management, fund raising and maintenance of key banking relationships. The private sector offers a very effective model of corporate governance, and there is greater recognition for the accountability tools used in the corporate world. The private sector is better regulated, leading to more discipline, risk-awareness, and sustainability assurance. Awqaf may adopt some of the private sector concepts of corporate governance and apply some of its commercial principles and benchmarks. For example, awqaf, as an endeavour that looks beyond profit motives to social good, can use result-based accountability as its evaluation framework to measure the impact

of its social programs on beneficiaries and communities.<sup>20</sup> Awqaf may also proclaim the guiding principles of the 'Donor Bill of Rights' which was created by the Association of Fund Raising Professionals (AFP) and endorsed by numerous charity and non-profit organisations throughout the world.

Corporate governance standards may initially be introduced as a '*good practice guide*' for awqaf. The 'Guide' can be designed as a working tool for *mutawallis* to improve accountability, transparency and waqf management. It might include provisions covering qualifications, appointment and responsibilities of awqaf *mutawallis*, such as administering *waqf deeds* and the conditions of the *waqif*, remuneration and management fees and procedures to be followed for allocating contributions and procedures that help ensure that awqaf assets are invested with due care, skill and diligence. To be effective, these standards should be given the force of law, such that breaching the standards is a breach of the law.

The perpetuity of the waqf creates issues of trusteeship succession and highlights the need for the corporate *mutawalli*. A waqf foundation, as an incorporated entity, has an indefinite life and a distinct patrimony independent of its founders. While a waqf can be managed by an individual, a corporate structure has obvious advantages. The foundation structure allows the segregation of duties and allocation of responsibilities according to areas of specialisation. A board of directors overseeing the waqf would be more able to enhance welfare of the target groups.<sup>21</sup>

The corporate structure underlines the need for licensing regulations where *mutawallis* or waqf administrators need to be certified and licensed. The certification of *mutawallis* sets a process that will see standards of appropriate qualification and personal competence to ensure that awqaf *mutawallis* possess the highest level of transparency, accountability and professionalism. Just as company law provides that listed companies appoint an auditor, awqaf governance laws should also make it mandatory for awqaf organizations to be audited. Such audits should ensure compliance with Shariah, the rulings (*fatawi*) of the *Fiqh Academy*, AAOIFI auditing standards<sup>22</sup>, the conditions of the *waqif* and all matters relating to the waqf. A perceived conflict between the *mutawalli* and his obligations to the waqf or non-compliance with any of the regulations should lead to revoking of the *mutawalli's* license.<sup>23</sup>

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20 Mark Friedman "Results-based Accountability Framework" [http://www.unitedwaydm.org/UserDocs/28-\\_RBA\\_description.pdf](http://www.unitedwaydm.org/UserDocs/28-_RBA_description.pdf)

21 Habib Ahmad "Role of Zakah and Awqaf in Poverty Alleviation" Occasional Paper 8, p.17 IDB/Islamic Research & Training Institute 2004

22 Accounting and Auditing Organisation for Islamic Banks and Financial Institution – Auditing Standards for Islamic financial institutions.

23 Al Dardir, Al Sharh al Kabir, Ali Khalil Vol 4, p88 - An awqaf mutawalli can be removed by a judge if he is disqualified for any of these reasons.

## 11. Issues of Sustainability and Profitability of Awqaf

Sustainability is not anything new for awqaf. It's a term that pools together a number of activities that awqaf has been practicing for the last 1400 years. Like all organizations, awqaf have to generate revenues to fund their operations. Foundations need to generate sufficient cash from the assets in custody, or appeal to donors who may have their own particular view of what objectives and services that the organisation should be providing. Nevertheless, donations are uncertain and unpredictable and as a result of lingering financial crises and the mounting pressure on charities to declare their funding sources, corporations and individuals are now giving less. Many awqaf foundations have reported that there has been noticeable reduction in donor funds and are having difficulty in achieving financial sustainability. Many are finding it necessary to expand their revenue base to include steadier forms of income from commercial activity and investments. Their social work is getting more intimately enmeshed with the pursuit of business interests. This spills over into the increasingly competitive environment where awqaf have to compete in the marketplace with the commercial sector. These endeavours raise concerns about the impact of such activities on the social mission of the foundation.

There is a fundamental difference between awqaf and the commercial world in calculating the consequences of business decisions. In companies, decisions are justified in terms of their short term effect on profitability and shareholder value. While in awqaf, business decisions are commonly considered good if they achieve long term benefits for their beneficiaries.

Awqaf organisations have different purposes and processes for generating revenues. Their commercial activities are usually complementary pertaining mainly to the maintenance and utilization of the awqaf properties as well as other economic activities to generate income that may be utilised for the achievement of their goals. Profitability is not their main credo and their ultimate goal is not financial. Their obligation for asset protection and custody emphasises ongoing viability rather than the pursuit of short-term profit maximisation.

Awqaf stakeholders include donors, *waqifs*, *mutawallis*, beneficiaries, clients, employees, volunteers and government. Each of these groups consists of individuals of diverse nationality, culture, age, education and socio-economic status. Such groups will have different values, interests, goals and perceptions of acceptable performance. In responding to this list of stakeholders, awqaf organisations may face a problem of balancing financing and operational objectives. The financial objectives can be readily expressed in quantitative terms, while

operational objectives are more conventionally expressed in qualitative terms. There is the risk of overemphasising the financial objectives at the expense of the operational objectives, thereby inducing a form of role-reversal where operational objectives support financial objectives, rather than the financial objectives support the organisation's operational objectives. Thus awqaf foundations must seek a balance between being financially efficient and socially effective. There is little use in being a highly cost efficient operation if the foundation is proving to be ineffective in delivering successful outcomes in operational terms. Likewise, an awqaf foundation that is highly effective in meeting its operational objectives, but which is inefficient financially soon finds itself unable to continue delivering services as its resources drain to critical levels.

The dichotomy between sustainability and profitability is false. There is a misconception among some that because an organisation is a waqf, it should not seek profits. Some stakeholders believe that awqaf foundations should break even or distribute the surplus if there is one. Thus, the waqf is seen as a flow-through entity that is a conduit of income to beneficiaries and not a receptacle to accumulate it.<sup>24</sup> Responsible awqaf organisations take a long term view when investing. They make investments that may not necessarily yield short-term profit but that stand them in good stead to realise their mission well into the future. The main difference between awqaf and the private sector is that in the corporate world, surplus is used to create individual wealth. In awqaf, the surplus is used to accomplish a mission. Achieving financial sustainability is a goal that all awqaf organisations should strive for. Imagine, for example, an orphanage operated by a waqf foundation. If it does not have any surplus funds to meet ongoing operating and future capital costs, the orphanage may be forced to close down. The inability to access any surplus funds from its own reserves may result in the withdrawal of much needed community service.

## **12. Policy Implication**

With the rise of popular movements like “human rights” and “economic equality”, governments in Muslim countries assumed direct responsibility for the welfare of their citizens and the role of awqaf was marginalised. However, in spite of government's control, awqaf remained more firmly tied to society than to the state. Government's welfare programs have been unable to serve efficiently all of the social needs, especially the delivery of speedy aid and humanitarian support to vulnerable groups who perceived government's actions with a lot of dissatisfaction and suspicion. On the other hand, faith-based charity institutions such as waqf and zakah enjoy

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<sup>24</sup> Flow-through entities, also known as pass-through entities or ‘fiscally transparent entities’, are legal entities where income ‘flows through’ to beneficiaries

a higher degree of popular trust having grassroots knowledge and much better access to people in need of support than any government agency. Being an act of worship, the practice of waqf as a voluntary act of benevolence gave the sector public support that contributed to a large degree in shaping its independence.<sup>25</sup>

Given the apparent support for awqaf at the local and national levels, the sector need not operate at the periphery of socio-economic activity, but should rather be mainstreamed within the state's legal, social and economic systems. The waqf has relations with all areas of social and economic development such as housing, employment, social amenities, investment and commercial activity at zero cost to the state. Therefore, a great deal of thought should go into government policies which impact on the awqaf as it intersects with other sectors of the economy. It is imperative that the impact of any policy of government on awqaf should not hinder the sector's investment and its capacity to grow. Policies which restrict free cash flow could affect awqaf's capacity to be of service to its beneficiaries and ultimately to government.

Awqaf is a business sector, albeit not-for-profit, and despite its role as a welfare mechanism, or perhaps because of it, the awqaf sector appears to have an edge over other sectors. The sector is regarded as relatively resilient and recession proof. Awqaf organisations are resistant to market forces because their assets are donated and have access to free funds and services. They have low overheads and enjoy tax concessions. They can turn social projects into cash-flow projects, and exercise considerable discretion in their operations. Yet, because of awqaf's private and usually esoteric nature, and lack of certainty about how they are governed and regulated, the sector appears to work in isolation from other sectors.

Historically, awqaf development has been a contention between open market competition and protectionism. Lately, awqaf is getting more attention from both the public and the private sectors. Awqaf organisations are now competing commercially in a wide range of business activities such as real estate, healthcare, trade, industry and agriculture. As awqaf organisations are entering into various types of partnerships with the private sector, disputes are likely to arise and frustrate such arrangements. Awqaf's investments are more about social and cultural values than about financial returns. There were also reports of some for-profit enterprises being established as charitable waqfs in order to benefit from the privileges and tax concessions granted to foundations, doing some charity work to cover up their objectives.

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<sup>25</sup>Bello, Dogarawa Ahmad: "Poverty alleviation through zakah and waqf institutions, A case study for the Muslim Umma in Ghana". MPRA Paper No. 23191, posted 10. June 2010 13:38 UTC

With such dubious actions, the result is often confusion, uncertainty, dissension, and in some cases conflict particularly in the area of “business versus charity”.

Legal reforms concerning awqaf have loomed large in comparative studies of law and society. Enacting an awqaf law will invariably involve striking a balance between protecting awqaf assets, developing the sector, maintaining equitable relationship with other sectors and examining the effect of other laws on awqaf. In an economic, social and governance context, the law should assist in restoring faith in awqaf and in creating a more efficient sector.

There are concerns about extending regulatory control across countries. Applying the same rules to control foundations under different jurisdictions is always a challenge from an enforcement point of view. One set of international standards for awqaf, such as the International Reporting Financial standards (IFRS) for accounting or Basel II for banking, is for the most part a good thing, ultimately creating more efficient sector. But it must be recognised that different circumstances and disparate cultures exist in different countries and that each country may have to do its own thing in terms of the form of its awqaf standards. As the international standards gain acceptance, governments will be motivated to adopt them as their national standards in regulating awqaf organisations operating in and from their territories.

### **13. Concluding Remarks**

Awqaf institutions are effective organisations for the socio-economic, cultural and religious development of a country. They have no direct political involvement, although they exercise considerable influence on the country’s political and social life. The development of the awqaf sector is on the national agenda of many Muslim countries as a strategy to boost the economy and complement government’s social programs.

One of the most critical problems facing the efforts to develop the awqaf sector is the widespread lack of regulations prescribing acceptable norms of corporate governance. As charitable institutions, awqaf foundations are perceived to lack the organisational discipline of for-profit corporations. This has resulted in a very slow pace of developing awqaf properties, hence the reason we see many awqaf properties often in prime locations remaining vacant, under-developed, or under-utilised. Some were even lost due to squatting, encroachment or sheer neglect.

The issue of corporate governance is central to the idea of ‘sustainable development’. Awqaf must be transparent and accountable in respect of their funding and operations. Today, awqaf foundations have a broad business focus. They are taking responsibility for a wider range of activities in the commercial, industrial, agricultural and services sectors. Areas where guidance

is required include institutional, legal and regulatory disciplines. This entails the skilling and empowerment of *mutawallis* and managers to be effective gate keepers and responsible stewards of the assets under their control, and to enable them to charter the continued growth of their organisations.

The renewed interest in awqaf offers an opportunity to learn from the mistakes of the past and to construct a modern legal and regulatory framework. There will be a lot of footwork in putting an international awqaf law into practice. There needs to be cooperation among regulators to develop a global awqaf law that rationalises legislation among jurisdictions. Islamic regulatory and standards setting bodies of the Islamic financing industry should embark on a comprehensive study of awqaf. The collaboration of institutions like the Islamic Fiqh Academy, Islamic Financial Services Board (IFSB) and Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI), together with the Islamic Development Bank (IDB) and Islamic Research and Training Institute (IRTI) and other related parties, will make it possible for an international awqaf law to evolve in a responsive and uncontroversial manner. Recognising that awqaf foundations are non-profit entities holding valuable assets and providing essential social services, the law should offer adequate protection for awqaf assets and to donors and beneficiaries. The real reform agenda for awqaf is to have succinct, relevant, understandable and implementable standards that optimise efficiency and effectiveness of the sector and the knowledge, expertise and leadership of awqaf professionals.

With the right transparency, stability, long term planning and guidance, the prospects for awqaf are great and the more we delay this important concept, the more the awqaf sector is placed at disadvantage progress-wise.

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# The New Waqf Law Prepared by IDB/IRTI and The Kuwait Public Foundation: A Critical Assessment<sup>26</sup>

*Murat Cizakca*

## Table of Content

1. Introduction .....	24
2. Establishment.....	24
3. Ownership Of The Corpus.....	25
4. Types Of Waqfs .....	26
5. The Nature Of The <i>Corpus</i> .....	28
6. Legal Personality.....	29
7. Tax Exemption .....	30
8. Sources Of Income.....	32
9. Waqf Duration And Revocability.....	32
10. Trustees.....	33
11. Investment.....	34
12. Conclusion: .....	34
13. Bibliography .....	35

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<sup>26</sup> Fourth Draft of the paper submitted at the World Foundations Conference, 23-24th September 2013, Istanbul, sponsored by the General Directorate of Waqfs, Turkey.

## 1. Introduction

There is a huge need in the Islamic world to revitalize the waqf system. The currently dilapidated state of waqfs in most countries should actually be considered as an opportunity to design a thorough reform taking into consideration not only the classical Islamic waqf law but also the latest practices and norms in the west. It is to be hoped that such a synthesis of the classical Islamic and modern western practices and norms in conformity with the *Shari`ah* will lead to an ideal waqf law that can be of vital importance for the restoration of this institution.

Looked from this perspective, the IDB/IRTI and the Kuwait Public Foundation should be congratulated for preparing a waqf law to be proposed to the entire Islamic world.<sup>27</sup> In what follows, I will try to assess this law from the above perspective.

The law starts with an ambitious tone and states that it will be a superior law of waqfs and any existing law in contradiction to it will be abolished. This tone is then somewhat scaled down with the statement that the preface will be written subject to the constitution of each country. If an ideal law was prepared (and I am in agreement with most of the principles of this draft law) and the whole Islamic world embraced it, this would have obviously a very positive impact. But Islamic world is a huge place and there are myriad of vested interests. Consequently, while many items of the law might be embraced, I doubt if it would be applied *in toto*. With this *caveat*, let us now look at the details.

## 2. Establishment

According to the classical Islamic law, a waqf is born when a wealthy person goes to the local judge, *kadi*, and declares his intention to establish a waqf. The *kadi* then records the amount of the *corpus* being donated for the purpose, subject to the condition that the capital is the private property of the founder. Thus, according to the classical tradition, there are two conditions at this initial stage; that the capital must be privately owned and that it must be registered with a local court.

Concerning registration, the IRTI-KPF draft law demands that when a person wishes to establish a new waqf, the founder must inform the local court, which will register it. The founder is also obliged to report his decision to the Association of Awqaf (The decree, item 72).

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<sup>27</sup> I am grateful to Dr. Adnan Ertem, the General Director of Waqfs in Turkey, for having provided me with a Turkish translation of this important document.

This is the traditional and, in my opinion, the correct way to establish a waqf. While I am in favour of informing the local court, the traditional method, and the Awqaf Association, I must warn against informing a state agency. History informs us that informing the state of its establishment can be detrimental for a waqf. Waqfs should operate as decentralized autonomous institutions without state interference.

In the United States unincorporated associations and trusts do not have to register with any state authority at all. Only incorporated associations requesting tax exempt status, need to register. The huge advantage of the American system is that it allows groups of people to meet together to pursue common purposes without having to obtain official approval or even acknowledgement. The disadvantage is that it makes it difficult to gauge the size of this sector.<sup>28</sup>

The American approach is very similar to the original Islamic norm, that is the establishment with kadi's approval alone. The New IRTI/KPF draft waqf law, correctly, provides for this. But it is important that the information given to the courts and the Awqaf Association stay with these institutions and are not conveyed to a state agency. Historical experience informs us that registration is the first step for state interference in waqf affairs.

### 3. Ownership of the Corpus

Concerning the condition of private ownership of the waqf's corpus, the IRTI/KPF draft makes clear that the endowed property must be the private property, *mulk*, of the founder (Item 6).

During the last century this condition has been relaxed when Iran confiscated the late Shah's property and established new waqfs with it. In Turkey and Malaysia also the state became an active waqf founder.<sup>29</sup> There is nothing wrong with this, providing the state established waqf has complete independence from the very state that has established it. On this issue, I would like to point out to the establishment of the Stiftung Volkswagenwerke in Germany. After the Second World War, two states, the state of Niedersachsen and the federal one, agreed to establish with the capital of the Volkswagenwerke, which they owned, a Stiftung, foundation, for promoting scientific research. Although established with state money, the complete independence of the foundation from state interference was planned with great care. In short, establishment of a foundation with state money might be acceptable providing the foundation is granted complete independence from the very state that establishes it. If this is not provided,

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<sup>28</sup> Salamon, *A primer*, p. 21.

<sup>29</sup> To name just a few; in Iran, *Bunyad-i Mustaz'afan*, and *Bunyad-e Panzdah-e Khordad*, in Turkey *Diyanet Vakfi*, in Malaysia the *Johor Foundation* as well as *Yayasan Waqaf Malaysia* were all established by state funds.

the foundation can be impeded by bureaucratic inertia, even, corruption. The draft, correctly, allowed the endowment of only privately owned property. But this may create problems with the waqfs whose capital are state owned. While the law makers might allow for such waqfs, it is imperative that the law also insists on their independent and autonomous management.

#### 4. Types Of Waqfs

The IRTI/KPF draft law recognizes primarily the following three waqf types (Item 2):

- a) waqf khayri, charitable waqfs
- b) waqf ahli, family waqfs and
- c) hybrid waqfs.

Thus, family waqfs abolished in much of the Islamic world under the pressure of the colonial powers during the 19<sup>th</sup> and 20<sup>th</sup> centuries are now being re-established.<sup>30</sup> This is clearly an important development. While this is so, the draft needs to take into consideration the following types as well.

- d) Incorporated waqfs: These are waqfs that enjoy full incorporate status. Thus they can sue and be sued. They also provide full owner and entity shielding to their trustees. In the United States, such foundations enjoy full tax-exemption.
- e) There are six types of waqfs that are officially recognized by the latest waqf regulation of 2008 in Turkey.<sup>31</sup> Referring only to the most important ones;
  - 1) *Mazbut vakıflar* are those that survived from Ottoman era. Not having their original founders or their descendants as their trustees, they are managed by the General Directorate of Waqfs. The IRTI/KPF draft should recognize such waqfs. Indeed, what happens when the founders and their descendants disappear? Since waqfs are essentially perpetual institutions, such a possibility must be seriously considered. Such waqfs need a central authority to manage them. Within the framework of the IRTI/KPF draft, it is the Association of Awqaf which should provide this.
  - 2) *Mülhak Vakıflar* are those that are still managed by their original founders or their descendants. As mentioned above, such waqfs should enjoy full incorporation with owner/entity shielding as well as full tax-exemption. The third and fourth categories represent Ottoman practice being reflected in modern republican norms.
  - 3) *Mukataali Vakıflar* pertain to properties built upon waqf lands. Originally accepted by the Hanbelis, this waqf type also known as *Hukr*, has been eventually accepted by all schools. The Lebanese law of Real Estate Ownership refers to this as *muqata`a ijarah tavilah*.<sup>32</sup> The *modus operandi* of these waqfs is as follows: the land is the property of the waqf and a developer rents this waqf land on the basis of *ijarah tavilah*, long term rent. Leasing waqf property for the long term is usually not permitted, but *Hukr* constitutes an exception. The developer rents the land on long term basis and builds upon it. The building belongs to the developer and as long as he pays his rent for the

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<sup>30</sup> Procedural Appendix, items 3 and 31.

<sup>31</sup> MEB Mevzuat Bankası, *Vakıflar Yönetmeliği*, pp. 1-2.

<sup>32</sup> Akgunduz, *Vakif Muessesesi*, p. 392.

land regularly, he enjoys full ownership rights over the building he has built. The developer enjoys this right for as long as he lives and he can even transfer it to his descendants.<sup>33</sup>

Concerning the level of rent, two factors are important. First, the rent paid by the developer should not be lower than the prevailing rent, *ajr misl*, paid by other tenants in the neighbourhood. Second, if the neighbourhood of the leased property develops, the original rent agreed upon can be increased.

This classical arrangement has recently been somewhat changed in Turkey so as to enable the land owner (waqf) to enjoy greater income. When a developer wishes to build upon waqf land, the ownership of these properties are split between the waqf, owner of the land, and the developer who built and developed this land usually into residences or shopping centers or a combination of both. The exact ratio of ownership of the developed property, i.e., number of flats, is determined as a result of bargaining and the waqf receives annual rent from the units it owns.

The new draft law should take into consideration both the classical *Hukr* and its modern version, flat sharing, described above. This is because, the latter provides higher revenue for the waqf than the former, whereby the waqf receives rent from the developed property instead of the undeveloped land.

*Mukataalı Vakıflar* may well be highly relevant for contemporary Malaysia, where waqf assets with development potential are estimated to be about 40 billion RMs (12.5 billion USD), which may well dwarf most other asset forms managed by the Islamic finance industry.

- 4) *Icareteynli Vakıflar* are defined by the Turkish Waqf Law of 2008 as those waqf properties rented out on long term basis, without any fixed term. This category was invented by Ottomans when waqf properties were destroyed by earthquakes or fires. Faced with such disasters, tenants were asked to make a large lump sum payment, which the waqf used for rebuilding the premises. The tenants were then given long term rent contracts and continued paying their usual rents. What the tenants gained in this process was a status of quasi ownership, which allowed them to continue using the premises for the long term subject to the payment of annual rents, while the waqf was enabled to rebuild its premises.<sup>34</sup>

There are number of serious objections to the *ijaratayn* arrangement. First, the exact period of the long term rent is unclear. Second, the annual rent tenants continued paying often tended to become less than the prevailing rent in the neighbourhood, *ajr misl*. Third, the fact that the descendants of the tenant can take over the property, thus diluting the property right of the waqf even further. In view of these serious objections, it is difficult to recommend that this lease form be included in the new draft law. But on the other hand, the problem of what happens to the waqf property in case of a natural disaster needs to be taken into consideration. One possible way out of this problem can be the modern *takaful*, or Islamic insurance.

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<sup>33</sup> Akgunduz, *ibid.*, p. 396.

<sup>34</sup> This lease form was controversial among classical jurists. For details of the controversy the reader is referred to Akgunduz, *Vakif Muessesesi*, pp. 356-363.

## 5. The Nature Of The Corpus

The next question concerns the nature of the capital, *corpus*, with which the waqf is established. Classical Islamic law recognizes primarily real estate waqfs. Waqfs established with cash were discussed and permitted by Imam Zufar back in the eighth century, subject to the condition that the cash capital of the waqf should be invested in *mudaraba* partnerships and the returns spent for the purpose of the waqf. Wide spread application, however, and then not exactly remaining true to Imam Zufar's *mudaraba* formula, was observed first in the Ottoman empire during the fifteenth century as an informal practice. These waqfs then became very popular, which triggered a long lasting debate.<sup>35</sup> Finally, they were formally permitted during the late sixteenth century by a sultanic decree, thus becoming a norm. Initially limited to the Ottoman Empire, they were eventually approved in Egypt, Iran as well as in the Indian sub-continent with a long delay at the beginning of the 20<sup>th</sup> century. Moreover, this approval covered not only cash, pure and simple, but also shares of joint stock companies.<sup>36</sup> Such waqfs are now known as waqf of stocks.

The importance of the waqf of stocks should not be underestimated. The Ottoman cash waqfs invested their *corpus* with a financial method known as *istiglal*. This was a legal trick designed to disguise the rate of interest embodied. Modern waqfs of stocks, however, operate with shares of various companies, a method very similar to the *mudaraba* partnership practiced by the Prophet and demanded by Imam Zufar. Put differently, waqfs of stocks are truly profit and loss sharing partnerships, practiced and recommended by the Prophet himself.

Items 20, 21 and 22 of the procedural appendix, correctly, permit the establishment of a waqf with cash or company shares. Company shares can be endowed as the corpus of a waqf. The procedural appendix makes it clear that stocks are not for speculation but for the keeping.<sup>37</sup> The trustee is not permitted to sell the stocks unless he is authorized to perform *istibdal*. Waqf of stocks is now granted definitive legitimacy. Thus the centuries old debate on the legitimacy of cash waqfs is now brought to an end thanks to the waqf of stocks. To my knowledge, the earliest approval of establishing a waqf with company shares as well as European perpetual bonds (*rente*) had been granted back in 1907 when the "Mujtahid of Karbala" granted his approval for the waqf of stocks established with such instruments. This was followed in 1908 by the fatwa of the Mufti of Egypt based on the condition that such waqfs should be divided into shares which should be handed over to the trustee.<sup>38</sup> Thus, following the footsteps of these

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<sup>35</sup> Mandaville, "Usurious Piety".

<sup>36</sup> Çizakça, *Philanthropic Foundations*, ch. 3.

<sup>37</sup> *Ibid.*, item 21.

<sup>38</sup> Çizakça, *Philanthropic Foundations*, pp. 35-36, 40-41.

early 20<sup>th</sup> century fetvas, with the new draft law we have the definitive approval of waqf of stocks for the entire Islamic world.

In Turkey, in an effort to curb waqf founding, a paid in capital condition of at least 500,000 USD was imposed by a hostile government to anyone desiring to establish a waqf. Founders reacted to this by capital pooling. Recent research has shown that on average 35 persons founded a waqf, pooling among themselves the necessary capital.<sup>39</sup> Most recently, in 2009, this requirement has been reduced to 50,000TLs by the newly established Board of Waqfs. Remarkably, after this ruling an improvement in the number of waqfs established has not been observed in Turkey, indicating that other more important factors, such as inadequate tax exemption, continue to play a negative role in this process.

Item 71 of the IDB/IRTI and the KPF Draft Law permits the establishment of a waqf by a group of founders. In view of above, I am in complete agreement with this. At this point the question comes to mind whether the law should impose any minimum capital condition to avoid the emergence of too small waqfs and to encourage capital pooling among the founders.

Currently, in Europe, there is a bewildering variety of rules regarding minimum capital needed to establish a foundation. European Union member countries demand from € 240 Euros (in Malta) to € 70,000 in Austria. In France, though there is no legal obligation, in reality, authorities insist on the ridiculously high amount of € 1,000,000.<sup>40</sup> In the forthcoming *European Law of Foundations*, the founding assets must be equivalent to at least 25,000 euros, allowing the *corpus* in the form of real estate, cash, shares or a combination of all.

As the French example given above should demonstrate, imposition of any minimum capital condition can be exploited by a hostile state by pulling the amount to ridiculous heights. Moreover, the exact amount should depend on the general conditions and GNP/capita of the country in question! The authors of the law have therefore wisely refrained from imposing any such condition.

## 6. Legal Personality

Although the classical Islamic law does not clearly define this concept, jurists have long considered waqfs as entities with legal personality. Modern Muslim jurists like Zahraa, Zarqa and Sanusi are unanimous that the classical Islamic law, in fact, recognizes the concept.<sup>41</sup>

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<sup>39</sup> Çarkoğlu, "Bireysel Bağışlar", p. 139.

<sup>40</sup> TÜSEV, *Vakıf ve Derneklere İlişkin*, pp. 4-5.

<sup>41</sup> Çizakça, "Long-term Causes".

While this may well be so, it is not clear to what extent the classical Islamic law provides owner/entity shielding, both very important characteristics of the modern corporation. The most recent Turkish law of waqfs clearly grant legal personality to waqfs.<sup>42</sup>

All western laws also grant this status to foundations.

With the new IDB/IRTI-KPF draft law, waqfs are now granted legal personality. The new law, however, does not make it clear whether “owner and entity shielding” are provided. More work on this is needed.

## 7. Tax Exemption

In modern times, all American public serving foundations are tax exempt, while member serving ones are not. The former also receive tax deductible gifts from individuals and corporations. To be eligible for this privilege, they have to serve recognized public purposes. In 1996, Americans contributed 139 billion USDs and 85 percent of these donations and gifts came from individuals, while only six percent came from corporations. The remaining nine percent came from other foundations. About half of these donations and gifts went to religious organizations while about 12.7 billions went to education.<sup>43</sup>

In the Islamic world, waqfs are, by definition, public serving. Even family waqfs become public serving entities when the family becomes extinct. Therefore, all waqfs, including the family waqfs, must be tax exempt. Because, thanks to their perpetuity, they represent sustained capital accumulation for serving the public.

In Turkey, however, tax exemption is only rarely granted. Only 2.7 to 4.5 percent of the waqfs established during the republican era have been granted tax exempt status and 24 percent of the such privileged ones are public waqfs.<sup>44</sup> Recent research has revealed the very negative role of this situation on waqf founding. Asked whether the current state imposed rules and regulations impede waqf activities, 65 per cent of the trustees said, “yes”. Difficulties encountered in obtaining tax exempt status were the most cited impediment.<sup>45</sup>

In the European Union, each country has its own practices and norms regarding tax exemption leading to a bewildering variety. Even the most recent, forthcoming, *European Foundation*

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<sup>42</sup> Vakıflar Kanunu, No. 5737, Accepted on Feb. 20<sup>th</sup>, 2008, Madde 4.

<sup>43</sup> Salamon, *A Primer*, p. 25.

<sup>44</sup> Aydın, “Cumhuriyet Dönemi Vakıfları”, pp. 38-40.

<sup>45</sup> Çarkoğlu, “Türkiye’de Bireysel”, pp. 154-55.

*Proposal* has not remedied this situation as it has allowed each country to apply its own norms.<sup>46</sup> About half of the European countries tax their foundations.<sup>47</sup>

Donations constitute another important source of income for waqfs in Turkey. Of the 237 waqfs questioned in 2002, while 45 per cent received less than USD 12,000, some 33 per cent received between 12,000 and 48,000.<sup>48</sup> Waqfs receiving these donations do not pay income as well as inheritance taxes in Turkey. This is the same in all European countries with the exception of Denmark, where only some reductions are allowed.<sup>49</sup> For donors, however, a different situation prevails. In Turkey, a donor can deduct his donation, merely upto 5 per cent, off his taxable income.

When receiving donations, waqfs should not pay any taxes. This is the European norm. Equally important, donors should be permitted to deduct the whole of their donation from their taxable income.

Since the overall purpose of the IDB/IRTI and KPF draft law is to encourage waqfs in the Islamic world, tax exemption appears to be a very important concern. This is confirmed by the Turkish situation explained above.

Item 62 of the draft law exempts all charitable waqfs (khayri) from all taxation. This is a necessary but insufficient condition. Since waqfs are nonprofit organizations channelling all of their earnings, minus expenses, to charitable purposes, any tax imposed on them simply reduces the funds that could have been spent for these purposes. Tax exemption needs to be considered at three different levels: taxes imposed directly on the revenues generated by waqfs, taxes imposed on donors and finally, those imposed upon the profits generated by companies associated with waqfs. The draft law should recognize the need for all of these and provide tax exemption at all three levels.

Moreover, while the draft law exempts charitable waqfs from taxation, it is silent about family waqfs. Since family waqfs are potential charitable waqfs in that they will convert into charitable waqfs when the family they are designed to support becomes extinct, they should be granted the same tax status as charitable waqfs.

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<sup>46</sup> European Commission, *Statute for a European Foundation*, p. 36.

<sup>47</sup> TÜSEV, *Vakıf ve Derneklere İlişkin*, p. 17/65, table 8.

<sup>48</sup> *Ibid.*, p. 145.

<sup>49</sup> TÜSEV, *Vakıf ve Derneklere İlişkin*, p. 19/65.

## 8. Sources Of Income

As mentioned above, while Ottoman cash waqfs earned their income by lending their original capital with *istiglal*, quasi interest<sup>50</sup>, modern waqfs of stocks obtain shares of joint-stock companies and thus become true partners of professionally managed firms ultimately sharing risks, profits and losses.

With the exception of the Czech Republic, all the members of the European Union allow their foundations to establish associated companies. So, this is the European norm.

Modern waqfs of stocks can also establish their own firms. Indeed, Turkish waqfs were allowed to establish associated companies already back in 1967. Currently, 24 per cent of Turkish waqfs possess commercial firms. A small group of these waqfs earned on average exceptionally high USD 400,000 annual revenue. Most, 70 per cent, however, earned less than USD 48,000 per annum. On the whole, 81 per cent of Turkish waqfs are reported to enjoy profits, which they either distribute as charity or add to their capital. Commercial revenue constitutes 42 per cent of Turkish waqfs' annual income, and is taxed.<sup>51</sup>

While the IDB/IRTI and KPF draft law allows waqfs to obtain shares of various companies (procedural appendix, item 208), the draft is silent about waqfs actually establishing their own firms. This should be permitted just as companies establishing their own waqfs should also be permitted. Such flexibility enriches the waqf sector.

## 9. Waqf Duration And Revocability

Waqfs are generally known as perpetual institutions. Indeed, it is possible to find waqfs that have survived for centuries all over the Islamic world. The new IDB/IRTI and KPF draft law, however, has permitted establishment of fixed duration waqfs. Family waqfs are considered to be temporary waqfs (Draft Law item: 70/3; Appendix item 64). Although, the purpose is to make waqf establishment attractive, the word of the law is ambiguous here.

In the same context, revocability is also permitted subject to certain conditions. Indeed, the founder can change his mind and revoke his waqf. This rule settles another debate in classical waqf law which had led to a cumbersome procedure for waqf establishment in Ottoman era.

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<sup>50</sup> *Istiglal* obeyed the letter of the Islamic law but violated its spirit. It was not based upon risk/profit/loss sharing but was a mere legal trick disguising interest.

<sup>51</sup> Çarkoğlu, "Türkiye'de Bireysel", p. 145.

## 10. Trustees

The law (24/2, appendix item 111) makes it clear that the trustee(s) are to be appointed by the founder. This condition is well known and reflects the classical law as well as centuries' long tradition. Yet, it challenges the current situation in Malaysia where the state religious councils are the sole trustees of all the waqfs in a given state. If this law is accepted in Malaysia, it can make the previous law null and void per item one above.

One of the novel items of the new draft law is that it permits the determination of the trustee's wage by the founder as a certain percentage of the waqf's profit or revenue (appendix, #137). Linking the trustee's wage to the profitability of the waqf rather than making it a fixed monthly sum, this item makes the trustee strongly interested in the performance of the waqf. I consider this as a very important development in view of many critiques of waqfs in history, whereby this institution was labelled as the dead hand. Linking the trustees' income to the performance of the waqf should no doubt make these institutions more dynamic.

There is concrete evidence to support this view. Sadr and Sourì have studied the rental income generated by waqf owned stores in the grand bazaar of Teheran.<sup>52</sup> Their conclusion is startling: Of the three categories of waqfs they consider: those whose trustees are selected directly by the founder; those appointed according to the will of the founder and those directly administered by the Awqaf Organization, the average rental income of the stores in the bazaar administered by trustees appointed by the founder is 99.3, by the trustees appointed according to the founder's will is 101.5 and administered by the Awqaf Organization is 34.7 thousand Rials respectively. The income of the first two categories, both run independently of the AO is almost three times of those run directly by the AO. This is despite the fact that the wages of the trustees of the first two categories are only indirectly linked to the performance of the waqfs they manage.

A policy suggestion can be drawn from this, centralised awqaf organizations are necessary, particularly in view of waqfs whose founders have perished. But they should not be involved in direct day to day management. Instead they should quickly hand over the waqfs under their management to selected trustees whose income are directly linked to the performance of the waqfs they manage. Looked from this perspective, appendix number 137's importance becomes obvious.

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<sup>52</sup> Sadr and Sourì, "The Role of Management", pp. 22, 24.

## 11. Investment

The following Islamic partnership forms are considered by the law (Appendix #208) as appropriate methods of investment of the *corpus*:

a) *Mudaraba*.

The draft law allows even the risky *mudaraba* thus confirming Imam Zufar's original ruling back in the eighth century that was hardly ever practiced. This is a revolutionary permission and should be applauded. It combines *mudaraba* with *waqf* – two powerful institutions. This constitutes the ultimate support given to entrepreneurship as *waqf* funds constitute long term funds, exactly what entrepreneurs need. This is a revolutionary step. Indeed, permitting *waqf* funds to be invested in *mudaraba* partnerships opens the way for venture capital type of investments thus facilitating the birth of this important sector in the Islamic world.

b) *Musharakah mutanakisa*

c) Leasing

d) *Ijaratayn*, thus confirming the centuries' long Ottoman practice

e) Joint-stock company shares, confirming the 1907 and 1908 fatwas. But these fatwas had also permitted perpetual bonds as *waqf corpus*. Islamic perpetual bonds, *esham*, should also be accepted as *waqf corpus* as they are Shari'ah based and are not involved in *riba*.

f) Islamic investment funds

g) Investment accounts in Islamic banks

h) *Mudaraba* accounts with Islamic banks

i) *Istisna'a*

j) *Mudaraba* within *Istisna'a*

k) *Murabaha*

l) *Muzara'a*

Finally, a suggestion: Although the classical law demands so, the amount a donor wishes to donate should not be limited to one third of his wealth. After all, Shari'ah permits *hiba* without any limit. Put differently, a person while healthy, can give his entire wealth as a gift to any person. The only condition being that the beneficiary actually receives it. Thus the one-third limit can and should be exceeded with the new law. After all, in the United States, Bill Gates and Warren Buffet donated 90 per cent of their wealth. Are Muslims less altruistic than these Americans?

## 12. Conclusion:

Within the time limit I was given, I have been able to pinpoint only to some of the salient points of the IDB/IRTI and KPF draft law. Subject to the caveats and suggestions I have made, my

overall impression of this draft law is highly positive. If the draft, indeed, becomes a universal law of waqfs, its authors would have done a great service to the Islamic world.

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