

AWQAF

Refereed Biannual Journal Specialized in Waqf and Charitable activities

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

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

Objectives of AWQAF:

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

Publication Regulations

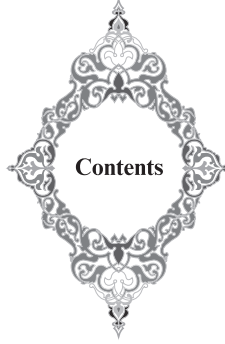
AWQAF journal publishes original Waqf-related researches in Arabic, English and French. It also accepts summaries of approved M.A's and Ph.D's reports on conferences, symposia, and seminars dealing with the field of Waqf.

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

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- ❖ They should abide by the academic conventions related to the attestation of references, along with the academic processing.
- ❖ An article must be 4000-10,000 words in length, to which a 150-word abstract is attached.
- ❖ Articles should be typed on A4 paper, preferably accompanied by a disc (word software).
- ❖ Material meant for publication should undergo a confidential refereeing.
- ❖ Coverage of seminars and conferences is acceptable.
- ❖ Material once sent for publication, whether published or not, is unreturnable.
- ❖ Awqaf is entitled to re-publish any material separately without checking with the relevant author.
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- ❖ All submissions should be sent to:

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Academic activities over waqf: What is to follow?

Many universities, research centers and waqf-related institutions are manifesting a growing interest in waqf as we indicated earlier. It is actually helpful and significant to raise a set of questions on how waqf can benefit from such activities, for example: To what extent are seminars and conferences on waqf issues helpful in serving the development of waqf and intensifying its experience? Does the accumulated knowledge resulting from such seminars and conferences constitute an academic repertoire subject to continued consideration and vetting? What have those in charge of seminars and conferences to do with waqf researchers? Is there a communication with the majority of them or that those things are left to personal discretion and attitudes and such a communication is reduced to a minimum?

Such questions and many others pop up on each academic occasion in which waqf constitutes the core issue. Admittedly, waqf academic activities result annually in a number of international seminars, apart from the other activities in which waqf comes second in importance. We can work out an idea about the above mentioned queries through practical examples on how far the waqf sector have benefited from the academic waqf-related work. During the first half of 2008, three seminars on waqf have been organized wherein issues of paramount importance in terms of innovation in axes and the experience of the participants were submitted.

- The first symposium was organized in the United Arab Emirates under the motto "Dubai International Conference for Waqf Investments" during the period from 4-6/2/2008⁽¹⁾. The symposium was interested in exploring

(1) For more information, please have access to http://www.amaf.gov.ae/endowments_con/abstract.htm

modern techniques which are consonant with the nature of waqf and in compliance with Islamic shari'a as well. The aim was to find a strategic investment plan to serve as a benchmark for any modern waqf institution.

- The second symposium was organized in April 2008 in Kuwait by Kuwait Awqaf Public Foundation in collaboration with the University of Zayed in the UAE and the Islamic Bank of Development. It was entitled "Waqf and Globalization: Prospects of Awqaf in the 21st Century".⁽²⁾
- The third symposium was organized in May 2008 by the Islamic Law Studies Program - Faculty of Law at Harvard, USA. The symposium was entitled: "Waqf from Birth to the Ottoman Rule -The Period of Strength".⁽³⁾

We are not now in a position to go into detail about the three mentioned symposiums in terms of their axes and topics (which are accessible on the web site), but rather we'd prefer to concentrate on the significance of these symposiums in connection with the following points which help us handle the queries we have already cited at the beginning:

1. Waqf Institutions and Academic Cooperation

Academic activities, no doubt, make great contributions which are uniquely attributed to the relevant institutions in charge of organizing such activities. We hardly feel that sense of cooperation among relevant waqf institutions because participation in such activities, if any, is confined to protocol formalities. Therefore, interaction among waqf institutions will suffer and keep them isolated. It important to differentiate between an effective and positive participation and what is nearer to formal or financial patronage. We cannot undervalue this sort of patronage but it does not rise to the required cooperation among waqf institutions. It is not the number of the patronages that concern us, but rather that academic cooperation and building a common strategy to reach mutual benefit and fulfilling the objectives of a specific event.

It is not a fault to find one specific institution making a remarkable academic achievement because this reflects administrative and organizational abilities and, quite often, a unilateral industry. Nevertheless, we might feel the lack of constructive interaction between the various waqf institutions and joint projects through which waqf institutions may expand to build a theoretical basis that draws on all activities, decisions and specialties. A collective work can never be a luxury carried out in our leisure time, but rather it is the basis of any

(2) A full coverage of the symposium is included herein. For more information on the schedule, please have access to: = 326

(3) Refer to <http://www.law.harvard.edu/prpgrams/ilsp/events/waqf.php>

successful work in the 21st century, with its global economy and mammoth political potentialities and international administrative and academic networks. The success of waqf work is contingent upon the cooperation among its components and developing environmental experiences, mainly in the academic domains.

2. Waqf Institutions and Waqf Researchers Relation

Reflecting on the strategy of academic interaction among waqf institutions, we hardly find a definite place for researchers. This may indicate that current policies do not view a specialized researcher as an effective component in the process of developing the waqf sector. Quite often, such a researcher is held as a show which soon loses its attraction with the conclusion of the event. This fact may underlie the stalled communication between researchers and waqf institutions so that cooperation has been reduced to occasional meetings. In the absence of an appropriate network which combines all researchers in a specific line, get them informed about the waqf-related activities and initiate a platform for discussions and exchange of opinions, interaction among researchers will undergo a serious damage⁽⁴⁾.

Who should come first? Wherefrom?

We believe that there is a dire need for cooperation among waqf institutions to push forward the joint projects in the academic domains to provide the favourable atmosphere for interaction and exchange of experiences. Creating such an atmosphere is expected to optimally utilize the academic waqf-related activities worldwide. Despite the poor interaction among waqf institutions and the absence of definite economic, legal and scientific strategy, there are some projects and models which have taken important steps in the way of gathering waqf experiences and heightening interbenefits among its multiple sectors. Consequently, all models and tendencies towards corroborating collective work based on consultations must be promoted in the interest of the Umma. The three symposia indicated above are regarded as assets to such sought partnership, particularly when we find three institutions with different specialties (waqf institution, university and Islamic bank) involved in organizing the symposium. This is a great achievement in itself and a great credit for the organizers. This tendency is a part of vital process which helps to keep the waqf institution in

(4) It noteworthy to mention in this context the Waqf Info Bank conducted by Kuwait Awqaf Public Foundation which gives due attention to this question through establishing an international waqf database made available to waqf experts.

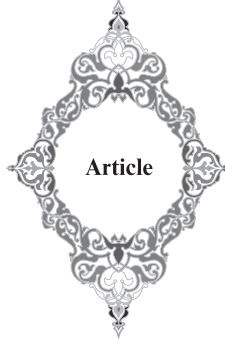
touch with modern developments and not to be content with its own experience. It is in need of getting enriched by other experiences and ideas. Lack of collective academic work is the bane of the Islamic world as far as methodology is concerned. We do not exempt any waqf sector, including waqifs (dedicators), waqf researchers and waqf institutions, both governmental and non-governmental, from the responsibility. The interaction among those parties could create an integrated cooperation model to endorse the following steps:

- 1 - Propagating a multilateral cooperation project to organize international academic events in which more than one waqf institution would be involved.
- 2 - Boosting partnerships between waqf institutions on the one hand and universities and research centers on the other.
- 3 - Accumulating academic experiences through linking the topics of the various seminars and creating channels among the various academic activities to avoid duplicity.
- 4 - Strengthening ties among researchers with an aim to identify waqf specialists, introduce their innovative works and establish bridges of cooperation with them.

A Special Issue:

Issue # 14 centers on "Waqf and Globalization" symposium which was organized in April 2008. It includes the researches which were submitted during the symposium and seeks to develop mechanisms for raising the profile of waqf worldwide, promoting its role in finding solutions for many of the problems and responding to the unfair offensives which attack Islam and Islamic civilization from inside and outside the Islamic world.

Editing Staff



The Western Experience in Developing Awqaf

Dr. Waleed Al-Ansari^(*)

Abstract:

This paper illustrates the Western experience in developing *awqāf*, or endowment resources, focusing on the United States where charitable trusts and foundations play a larger social and economic role than in Europe. Although the private sector in the West has often been supportive of a broad range of private endowments, governments frequently have not, even in the United States before the end of the nineteenth century. Therefore, the current relationship between government, the private sector, and charitable trusts and foundations in the United States has not evolved in a continuous manner, but has been marked by discontinuity based on a complex set of social, economic, and political factors. The paper also suggests how government policies towards this sector have become increasingly consistent with Islamic principles, and points out the role of technological change and financial innovations in the development of endowment resources.

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The first endowment in the Western hemisphere was established for Harvard College in 1638, just 18 years after the arrival of the Pilgrims at Plymouth, to train ministers for Puritan congregations throughout New England. Harvard University today boasts the largest endowment of any university in the world, standing at over 30 billion dollars. The Bill and Melinda Gates Foundation, the world's largest charitable foundation, was more recently established in the United States in 2000, with current assets also valued at over 30 billion dollars (on top of which Warren Buffet recently committed approximately 31 billion dollars in support). Such enormous endowments in the United States dating from the earliest to the most recent periods of American history suggest that the country's legal system has continuously fostered private charitable trusts and non-profit corporations, gradually optimizing the law of charity to respect donor intent on one hand and maximize efficiency on the other.

However, a cursory look at American history reveals that this is not the case. In fact, the relationship between government, the private sector, and charitable trusts or corporations may be divided into five periods involving significant discontinuity. The first is from the colonial era to the American Revolution, during which state legislatures did not grant courts equity jurisdiction to enforce trusts, often resulting in their failure. Similarly, because every corporate charter required an act of the legislature, and private and public domains were not yet distinct, endowed institutions like Harvard College were essentially public rather than private non-profit corporations. The second period is from the American Revolution to 1800, during which the legal environment remained hostile to the formation of charitable trusts, but became friendlier to the formation of charitable corporations, which often no longer required a special act of legislature. However, these corporations were strictly limited in terms of the amount of land and other assets they could hold. The third period from 1800 to 1860 represents a relaxing of these constraints on charitable trusts and corporations in New England and the Upper Midwest, but not in the South or the West, whereas the fourth period from 1860 to the Great Depression and World War II witnesses the rise of highly favorable laws of charity throughout the United States. The fifth period from World War II till today witnesses the rise of the welfare state complementing such favorable laws of charity, as well as careful analyses of their economic and social consequences, and the academic study of the non-profit sector as a whole.

Unlike some countries in Europe, such as France, the United States has never combined an extensive welfare state on one hand with a hostile law of charity on the other. This is one of several reasons why charitable trusts and

corporations play a less important economic and social role in much of Europe than in the United States. Of course, a spectrum of European public policies exists on these issues, ranging from France at one end of the spectrum to England at the other. But because European countries are increasingly attempting to emulate the American model, this paper examines the development of charitable trusts and corporations in the United States before briefly turning to Europe.

The discontinuity of the American law of charity is also highly significant from an Islamic point of view, because United States law has been converging towards the Islamic law of charitable (as opposed to family) trusts and endowments (*awqāf*) over this period. Although the legal concept of the trust entered Europe via the Islamic world during the medieval period according to many scholars, its application was widely disrupted during the eighteenth and nineteenth centuries, and is now being reapplied through contemporary European attempts to emulate the American approach. The development of charitable trusts and corporations in the United States will therefore be the primary focus of the paper.

Turning first to colonial America, “legislatures generally refused to grant equity jurisdiction to colonial courts, and without them, trusts - charitable and testamentary - were unenforceable, resulting in the misdirection or failure of early charitable trusts.”⁽¹⁾ The only way endowments could enjoy legal protection was through corporations, which were under the strict control of state legislatures and required a special act to form. For example, Harvard College was chartered by legislative act in 1620 and received its first endowment in 1638. Moreover, “such institutions as Harvard, William and Mary, and Yale were regarded as public corporations, subject to legislative oversight and supported significantly in the form of legislative grants of money, real estate, and ‘privileges’ (which could range from the levying of special taxes to a monopoly on the operation of ferries).”⁽²⁾ In this sense, government was more likely than any private body to receive private charitable contributions.

The lack of equity jurisdiction for colonial courts proved particularly problematic for Catholics and Jews (and even minority Protestant denominations), which were unable to incorporate in states sponsoring a particular

(1) Peter Dobkin Hall, “A Historical Overview of Philanthropy, Voluntary Associations, and Nonprofit Organizations in the United States, 1600-2000,” in Walter W. Powell and Richard Steinberg (eds.), *The Nonprofit Sector: A Research Handbook* (New Haven: Yale University Press, 2006), p. 34.

(2) Ibid.

denomination. In fact, on the eve of the American Revolution, nine of the thirteen colonies recognized established churches. Catholics and Jews therefore had to hold church and other property in trusts rather than corporations, the provisions of which could not be enforced, making them vulnerable to unscrupulous trustees.⁽³⁾

From the American Revolution to 1800, states continued earlier policies preventing courts equity jurisdiction over trusts, but generalized incorporation procedures for religious and certain other charitable organizations (consonant with the constitutional provision of freedom of religion).⁽⁴⁾ Although this eliminated the need for these institutions to lobby state legislatures for charters of incorporation, states also placed strict limits on the ability of citizens to give property to religious and charitable organizations out of fear of their potential political and economic power. Some states even confiscated the assets of formerly sponsored churches in the process of disestablishment. For example, Virginia, home of the Jeffersonians who led the charge against “un-republican” institutions, confiscated the assets of the Anglican Church, prompting the rest of the South to follow suit.⁽⁵⁾

Only after 1800 did states in New England adopt more favorable laws for the founding of charitable trusts while also relaxing constraints on donations to private charitable corporations.⁽⁶⁾ Indeed, merchants found that capital endowments for schools were not lost to their commercial interests, for these funds had to be invested to yield income, “giving merchants an added incentive to become involved in institutions as trustees - who, of course, were in a position to control the investment of these funds.”⁽⁷⁾ The intimate connection between business interests and endowment resources in New England in the early nineteenth century is remarkably illustrated by bank failure patterns during the depression of 1837-42: “of the forty-three commercial banks operating in Boston in 1836, only twenty-four survived the crisis; of these, twenty-one were linked to

(3) See for instance James Lowell Underwood and W. Lewis Burke (eds.), *The Dawn of Religious Freedom in South Carolina* (Columbia, South Carolina: University of South Carolina Press, 2007).

(4) See for instance James J. Fishman, “The Development of Nonprofit Corporation Law and an Agenda for Reform,” *Emory Law Journal*, volume 34 (1985), pp. 617-683.

(5) Peter Dobkin Hall, “A Historical Overview of Philanthropy, Voluntary Associations, and Nonprofit Organizations in the United States, 1600-2000,” p. 35.

(6) Although Massachusetts did not impose such constraints, other states such as Connecticut did.

(7) Peter Dobkin Hall, *Inventing the Nonprofit Sector and Other Essays on Philanthropy, Voluntarism, and Nonprofit Organizations* (Baltimore: The Johns Hopkins University Press, 1992), p. 174.

endowed charitable organizations through directors and trustees. Of the ten banks that failed, nine had no such connections.”⁽⁸⁾

The legal battle over the status of colleges and their endowments raged during this period, with many states attempting to rewrite “college charters to transform formerly ‘private’ schools into state universities... prompted by legislative interests in supporting a progressive republican secular institution as opposed to one with religious affiliation.”⁽⁹⁾ The battle came to a head with the U.S. Supreme Court’s famous decision in *Trustees of Dartmouth College v. William H. Woodward* 1819. Jeffersonians, who had won the governorship and legislature in New Hampshire, argued for full state control of the college despite the fact that its endowment was in part from private donations. The state maintained that the college’s charter, like that of any corporation, was an act of government, and that on-going public contributions made the college a public rather than private corporation. The Supreme Court rejected this position, however, ruling in favor of the trustees against the state on the grounds that private donations to Dartmouth represented a contract between “the donors, trustees, and the Crown (to whose rights and obligations New Hampshire succeeds),” and that the charter could not be altered by the legislature without violating Article I, Section 10 of the United States Constitution forbidding any state “law impairing the obligation of contracts.”⁽¹⁰⁾

But this victory for private charitable corporations did not preclude the possibility of state legislatures interfering with the ability of donors to make charitable donations in the first place. In fact, that same year, the Supreme Court ruled in the famous Hart case that the bequest of a man from Virginia to the Philadelphia Baptist Association was invalid because of a technicality in Virginia law ultimately restricting the powers of corporations to receive charitable trusts, effectively making charity “hostage to state legislatures.”⁽¹¹⁾ The state quickly

(8) Ibid, p. 176.

(9) Mark D. McGarvie, “The *Dartmouth College* Case and the Legal Design of Civil Society,” in Lawrence J. Friedman and Mark D. McGarvie (eds.), *Charity, Philanthropy, and Civility in American History* (Cambridge: Cambridge University Press, 2003), p. 94. In fact, the privatization of Harvard did not occur until 1814 as a result of a compromise with the state legislature. See for instance Peter Dobkin Hall, *Inventing the Nonprofit Sector*, p. 173.

(10) Ibid.

(11) For a classic discussion of this case, see Howard S. Miller, *The Legal Foundations of American Philanthropy 1776-1844* (Madison: Historical Society of Wisconsin, 1961).

seized on the ruling to invalidate a bequest to the Roman Catholic Church in Richmond, and the precedent was quickly followed by many other states.⁽¹²⁾ A prominent Jeffersonian politician rationalized this movement, revealing its anti-clerical motivation, by claiming, “The church, if made capable to take,... never can part with anything,” and “advances with a step that never retrogrades.”⁽¹³⁾

The Supreme Court did not reverse the Hart decision until 1844 with the Girard case, which involved a multimillionaire Philadelphia merchant who left much of his estate to establish a school for orphans, finally upholding the ability of individuals to create charitable trusts.⁽¹⁴⁾ Nevertheless, this decision did not affect states which chose to limit the activities of charitable trust, and many states “still refused to enforce charitable trusts.”⁽¹⁵⁾

In any case, the fact that New England was the first region in the United States to adopt favorable laws of charity explains why it is today home to more charitable foundations than any other part of the country.⁽¹⁶⁾ By 1874, Massachusetts not only enforced donor intent through strong charity laws, but encouraged charitable foundations through property tax exemptions for a broad range of charitable purposes, giving trustees who managed these funds broad authority in financial management and protecting them from claims by donors and beneficiaries.⁽¹⁷⁾ Upper Midwestern states, particularly Ohio, were also early to embrace the New England model, explaining why great numbers of colleges, schools, and charities were founded there as well.

Favorable laws of charity began to spread to other areas of the United States after the Civil War given the failure of Reconstruction. Indeed, “by the 1880s, the federal government had abandoned its attempt to integrate freed

(12) Ibid.

(13) Cited in Evelyn Brody, “Charitable Endowments and the Democratization of Dynasty,” *Arizona Law Review*, volume 39 (1997), pp. 907.

(14) Howard S. Miller, *The Legal Foundations of American Philanthropy 1776-1844*.

(15) James J. Fishman, “The Development of Nonprofit Corporation Law and an Agenda for Reform,” p. 627.

(16) David C. Hammack, “American Debates on the Legitimacy of Foundations,” in Kenneth Prewitt, Mattei Dogan, Steven Heydemann, and Stefan Toepler (eds.), *The Legitimacy of Philanthropic Foundations: United States and European Perspectives* (New York: Russell Sage Foundation, 2006), pp. 49-98.

(17) Peter Dobkin Hall, “A Historical Overview of Philanthropy, Voluntary Associations, and Nonprofit Organizations in the United States, 1600-2000,” p. 37.

African Americans into a reconstructed South.”⁽¹⁸⁾ The government thereby abdicated this responsibility to the first substantial grant-making (as opposed to operating) foundations in the United States, including the Slater Fund, which was established by Connecticut industrialist John Fox Slater as “the first philanthropic foundation to work solely in the area of African American education.”⁽¹⁹⁾

An even greater impetus to the rise of favorable charity laws throughout the United States was the combination of tremendous increases in population from waves of immigration, vast fortunes from the post-war industrial boom, and the fear of social chaos from an extremely uneven distribution of income.⁽²⁰⁾ The tremendous social and economic problems of industrialization called forth a greater role for the nonprofit sector, since American political and business leaders desired an alternative to the welfare state on one hand and socialism on the other.

Legal obstacles to charitable trusts and corporations were finally removed in most states by the end of the nineteenth century, particularly after New York courts invalidated a multimillion dollar bequest to charitable purposes by former presidential candidate Samuel Tilden on the technical grounds that he left the purposes to be determined by trustees.⁽²¹⁾ The public uproar over the case caused the state legislature to reorganize charity laws to welcome charitable trusts and corporations, legalizing the first general purpose trust (allowing trustees to determine charitable purposes), which did not exist in Boston at that time.⁽²²⁾ It is also significant to note that the public relations campaign to achieve this legal

(18) Roy E. Finkenbine, “Law, Reconstruction, and African American Education in the Post-Emancipation South,” in Lawrence J. Friedman and Mark D. McGarvie (eds.), *Charity, Philanthropy, and Civility in American History* (Cambridge: Cambridge University Press, 2003), p. 162.

(19) Ibid, p. 167. But the agenda of the Slater Fund was nothing less than controversial, as it was based on the notion that, “the wrong kind of education [liberal arts as opposed to industrial arts]... would destroy black docility and loose black savagery upon the South.” Ibid, p. 171.

(20) Judith Sealander, “Curing Evils at Their Source: The Arrival of Scientific Giving,” in Lawrence J. Friedman and Mark D. McGarvie (eds.), *Charity, Philanthropy, and Civility in American History* (Cambridge: Cambridge University Press, 2003), pp. 217-239.

(21) David C. Hammack, “American Debates on the Legitimacy of Foundations,” p. 63. Hammack notes that, “At about the same time, New York State officials successfully prevented Cornell University from accepting a gift of more than \$1 million, on the ground that the university’s charter limited its assets to \$3 million, a figure already reached.” Ibid.

(22) Ibid, p. 185.

outcome was orchestrated by J. P. Morgan and James Bar Ames, dean of Harvard Law School, to export the Bostonian model to New York.⁽²³⁾

The state's newfound hospitality towards charitable trusts and corporations combined with New York City's position at the center of North America's investment and publishing markets quickly made the city a prominent center for foundations. Indeed, Carnegie from Pittsburgh, Rockefeller from Cleveland, Ford from Detroit, Duke from the Carolinas, and Hearst from California all based their foundations in Manhattan.⁽²⁴⁾ This led other states to adopt hospitable laws, as Hammack explains:

Competition for charitable funds, as well as competition for some of the businesses managing them, led other states not to restrict foundations, but to encourage them. A 1925 Texas law, to take a striking example, imposed an inheritance tax of up to 20 percent on property left to charities outside the state, but exempted property left for "any religious, educational, or charitable organization, when such bequests were to be used within the state of Texas."⁽²⁵⁾

Although some claim that the big foundations carefully avoided controversial projects, this is not true. For example, "when Andrew Carnegie created a large fund to provide pensions to college professors, the fund's administrators operated under requirements that forced several church-related colleges to abandon denominational ties."⁽²⁶⁾ The foundations also played a critical role in the rise of private research universities, such as the University of Chicago founded by Rockefeller, with certain research and educational agendas.

Large foundations also gave new urgency to the question of the "dead hand - the problem of assuring that future needs would be met by such perpetual trusts."⁽²⁷⁾ Two different models arose to deal with the problem: the Northeastern model, which sought to retain a private monopoly on these foundations, and the Midwestern model, which sought a more collaborative effort between government and the private sector in allocating and overseeing distribution of funds.⁽²⁸⁾ For example, the Cleveland Community Trust founded in 1913 brought together many individual contributions to create one large endowment

(23) Peter Dobkin Hall, *Inventing the Nonprofit Sector*, p. 186.

(24) David C. Hammack, "American Debates on the Legitimacy of Foundations," p. 76.

(25) Ibid.

(26) Ibid, p. 69.

(27) Peter Dobkin Hall, *Inventing the Nonprofit Sector*, p. 164.

(28) Ibid, p. 168.

distributed according to donor intent and overseen by the mayor of Cleveland, two senior judges, and two directors of the Cleveland Trust Company.⁽²⁹⁾

This period also saw the emergence of “welfare capitalism” via corporate philanthropy and the establishment of corporate endowments, such as the Ford Foundation. Despite a court ruling in 1919 forbidding companies from diverting profits for philanthropic purposes, business leaders successfully lobbied Congress to make corporate contributions tax-deductible by the 1930s.⁽³⁰⁾ Until well into the Great Depression, many American leaders believed that private contributions could address the social and economic problems of industrial capitalism without the need for a welfare state, particularly “the kind of social democratic regimes being embraced by Western European nations.”⁽³¹⁾

But as the Great Depression wore on, the growing realization that the private sector could not handle these problems alone set the stage for the rise of the welfare state after World War II, albeit far less encompassing than most European models. Indeed, the United States required new capacities as leader of the free world for military and economic mobilization, as well as maintaining “domestic economic and political stability.”⁽³²⁾ To realize these goals, universal income taxation was necessary, which provided new tax incentives for foundations and endowments, since such taxes were either negligible or non-existent in earlier periods of American history.⁽³³⁾ By 1954, Congress completed

(29) Ibid. The same applied to bringing together charities that were not based on endowments, e.g. the Cleveland Federation for Charity and Philanthropy established the same year with a governing board of business and government leaders. The different New England and Midwestern models also applied to universities. Private money poured into Harvard and other private universities in New England during this period, whereas no comprehensive state-financed universities existed in Massachusetts, Connecticut, and New York until the 1960s. In the Upper Midwest, universities that were initially public often needed private funds, and vice-versa, making all universities in the region more community-based.

(30) Peter Dobkin Hall, “A Historical Overview of Philanthropy, Voluntary Associations, and Nonprofit Organizations in the United States, 1600-2000,” p. 48. Legal barriers to corporate philanthropy were finally removed “in a 1952 test case involving a stockholder suit against a company’s donation to Princeton University,” which the New Jersey Supreme Court ruled in favor of the company. Ibid.

(31) Ibid, p. 50.

(32) Ibid, p. 51.

(33) When Rockefeller gave his wealth in 1913, for example, there was no financial benefit. The large foundations also proved instrumental in providing government with models “for gathering and interpreting economic and social data that gave planners and policy makers a basis for developing fiscal practices consistent with government’s enlarged role.” Ibid.

its efforts to introduce “some order” into the tax system, including tax breaks for charitable foundations and their donors.

But by the late 1950s, journalists and politicians were pointing out loopholes in the tax code and apparent abuses by foundations, leading to the 1961 hearings by Texas congressman Wright Patman. Although most charitable foundations did not abuse these privileges, inflation and tax increases heightened tax sensitivities of the public, and the subsequent Tax Reform Act of 1969 required foundations to pay out at least six percent of their endowments each year (later reduced to five percent), among other provisions.⁽³⁴⁾

To respond to accusations that perpetual charitable trusts and foundations generated more costs than benefits for society, John D. Rockefeller III responded by forming the Filer Commission, a group operating under Department of the Treasury, to investigate all these charges, and even espoused a permanent “bureau of philanthropy.” Although such aspirations were dashed by the Carter administration, this led to the establishment of a unified organization to serve all elements of the non-profit sector, Independent Sector (IS). Rockefeller also provided initial funding for “the first academic research center devoted to the study of philanthropy and nonprofits, Yale’s Program on Non-Profit Organizations (PONPO).”⁽³⁵⁾ As a result of these and other efforts, a tremendous literature on charitable trusts and corporations in the United States has emerged during the last thirty years.

One of the key debates in the literature concerns the question of the economic efficiency of donor constraints, particularly when the original conditions at the time of the bequest have significantly changed (much of the literature highlights famous contemporary examples to illustrate the problem of the “dead hand,” such as the Buck Trust case in Orange County, California, and the Barnes Trust case in Philadelphia). Thus far, most U.S. courts have been reluctant to modify donor constraints through *cy pres*, the principle of selecting what is “closest” to the donor’s original intent given the new circumstances, without clear necessity. But exhaustive case studies suggest that the problem of the “dead hand” is manageable, and that the benefits of perpetual endowments far exceed their costs for three reasons: 1) long-term timeframes are lacking everywhere in a democracy, and there is a need for perpetual foundations and trusts to provide long-term vision and commitment in education and research, 2) the values of the past cannot provide a counterweight to the values of the present

(34) Ibid, p. 54. Similarly, limits on the percentage of income that was tax deductible led to rise of planned giving to maximize tax breaks.

(35) Ibid, p. 55.

without perpetual, endowed non-market institutions, and 3) such foundations can better challenge politicians than short-term organizations.⁽³⁶⁾ Moreover, donor constraints appear to help foundations focus their energy for greater strategic impact. Both of these findings in light of the history of the law of charity in the United States suggest that it has, in a sense, become increasingly consistent with Islamic law.

With respect to innovations and the use of new financial instruments to maximize returns on endowments, Harvard provides a particularly interesting case study. According to Forbes magazine, Harvard Management Company “decided to use Harvard’s in-house trading talent and its impeccable credit rating to leverage the return with derivatives.”⁽³⁷⁾ In 1995, for example, Harvard went “long” \$21.5 billion in various securities and “short” \$13.8 billion, although its endowment assets were only worth \$7.7 billion.⁽³⁸⁾ Similarly, Harvard bought “a blend of 10.75% Treasuries and zero coupon Treasuries... (to replicate) that of an eight-year Treasury bond.” Since the latter was selling at a slightly higher price, Harvard “sold short the real eight-year bond while staying long the blended bond equivalent.” Using such hedging techniques, Harvard was able to extract arbitrage profits on a large scale, adding 370 basis points annually to its bond portfolio, and over 30% to its domestic stocks relative to the Standard and Poor’s 500 index.⁽³⁹⁾ (Of course, the debate over whether or not Islamic funds can legitimately synthesize Islamic equivalents is on-going.⁽⁴⁰⁾

Turning very briefly to an overview of the development of private endowment resources in Europe, it has generally been much less favorable than in the United States. Indeed, the experience arguably ranges from France at one end of the spectrum to England at the other.⁽⁴¹⁾ The French Revolution, for example, outlawed private charitable foundations, abolishing any institutions that “separated the state from the people.” The subsequent development of an enormous welfare state sought to minimize any role for private charitable institutions in society.

(36) See for instance Joel Fleishman, *The Foundation: A Great American Secret* (New York: PublicAffairs, 2007).

(37) As cited in Evelyn Brody, “Charitable Endowments and the Democratization of Dynasty,” p. 889.

(38) Ibid.

(39) Ibid.

(40) See for instance Mahmoud El-Gamal, *Islamic Finance: Law, Economics, and Practice* (Cambridge: Cambridge University Press, 2007).

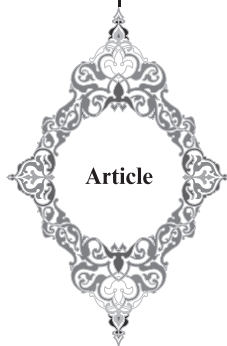
(41) For an overview, see for instance Helmut K. Anheier and Stefan Toepler (eds.), *Private Funds, Public Purpose: Philanthropic Foundations in International Perspective* (New York: Kluwer Academic, 1999); and Andreas Schluter, Volker Then, and Peter Walkenhorst (eds.), *Foundations in Europe: Society, Management, and Law* (London: The Directory of Social Change, 2001).

At the other end of the spectrum is England, from which most American colonists hailed. But the Crown also had a mixed history with regard to private charitable trusts, passing mortmain legislation for political and economic reasons at various times, including a 1736 statute barring devises of land for any charitable purpose.⁽⁴²⁾ (Needless to say, this came in addition to the confiscation of all Church lands in the sixteenth century by Henry VIII.) Nevertheless, the Elizabethan Law of Charitable Uses in 1601 established a clear basis for private charitable trusts despite subsequent policies and concerns. The rise of democratic socialism and an extensive welfare state in nineteenth and twentieth century England, however, limited the full potential role of charitable trusts in society.

Other European countries are arguably in between this spectrum, with Austria and Italy closer to the French side, and Denmark and Sweden on the English side. Of course, such generalizations abstract from profound differences between these countries despite their usefulness as a first-order approximation. Germany represents a particularly interesting intermediate case, since decentralization during the eighteenth century favored the establishment of private charitable foundations, most of whose assets evaporated with the hyperinflation after World War I. Indeed, many foundations invested in government bonds in the aftermath of the war as a patriotic duty. The subsequent rise of the Nazi regime obviously created an extremely hostile environment for the renewal of charitable foundations. In any case, it is significant that many European countries are now encouraging a more profound role for private charitable foundations, seeking to establish policies based on elements of the American model.

In conclusion, there has been great discontinuity in the law of charity in the West, even in the United States which has enjoyed the most favorable environment for the development of endowment resources. The convergence of the American law of charity to the Islamic law of *awqāf* (for the charitable type) is most interesting from an Islamic point of view. It is also significant that both Muslim and American scholars share the same concerns regarding the economic efficiency, management, and oversight of perpetual endowments. In light of this convergence, it appears that standard criticisms of Islamic and American law allowing donor constraints and perpetual endowments as inherently inefficient and necessarily creating more costs than benefits in the long-term are demonstrably false. Because the academic study of charitable trusts and endowments has advanced rapidly in recent years in the United States, it is an area of mutual concern and benefit for both Muslim and American scholars.

(42) See for instance Evelyn Brody, "Charitable Endowments and the Democratization of Dynasty," pp. 899-906.



The First International Seminar of Awqaf Journal Waqf and Globalization: Prospects of Awqaf in the 21th Century Kuwait 13-15 April 2008

Riham Ahmed Khafagy^(*)

As part of its continuous efforts to develop the scientific infrastructure of waqf studies, Awqaf Journal organized its first international seminar on “Waqf and Globalization: Prospects of Awqaf in the 21th Century,” in Kuwait between 13 and 15 April 2008, with the cooperation of the Islamic Institute for Research and Training (Saudi Arabia), and Zayed University (United Arab Emirates). The seminar’s five sessions focused on the status of the art of Waqf studies inside and outside the Muslim world, the balance between practical and scientific dimensions of the Islamic Waqf experience, and how waqf studies responded to current social and economic issues in the Islamic societies. The seminar also recommended certain roles of waqf studies in developing practical waqf models that fit the Muslim world now.

The first session addressed philosophical and theoretical dimensions of waqf, including its epistemological and civilizational outcomes. Nasr Arif, Professor of Islamic Studies at Zayed University, analyzes the concept of waqf and the role of waqf institutions in sustaining the civilizational activities of the

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Muslim Ummah. The concept of waqf has various meanings and great potentials of explanation and implementation. The waqf institution is therefore qualified to balance the social and economical differences in subsequent historical eras. In addition, it is a creative instrument to demonstrate values in action, and preserve them when they are liable to deterioration.

Nagi bin Al-Haj Taher, lecturer in Sociology in Chicago University, dealt with waqf in the Islamic experience by tracing the different concepts of charity in the Holy Quran and their relations to the civilizational trends in Al-Medina during the life of Prophet Muhammed (pbuh). He argued that charity was not an ultimate target, although it was a dynamic concept, strongly tied to the civilizational trends of the society. Thus, the true application of waqf in current circumstances requires a coherent civilizational vision defining the Muslim role in materializing God's Will on earth. That vision should also determine the role of waqf institution in this civilizational model.

Fernand Vandamm, professor at Gent University in Belgium, considered waqf as a dynamic epistemological process related to the continuous interaction between two overlapping factors: localization and globalization. While the success of waqf is directly relevant to global dimensions, it necessarily requires adaptation to local cultures, customs and procedures. In order to assess the structure of waqf, he noted, the effects of waqf on epistemological dynamics and static dimensions; environmental and economic issues; and social, cultural and spiritual factors, must be observed regularly.

The first keynote speech, "Waqf and the Civilizational Fundamentals of Jurisprudence," by Dr. Ali Gom'ah, the Grand Mufti of Egypt, highlighted the methodology of employing the civilizational fundamentals of jurisprudence to renovate the jurisprudence of contemporary waqf, as several waqf issues urgently need a critical review of the legal rules on waqf. For instance, there are current debates on the waqf's goals, mechanisms, methods, and consequent social relations. Moreover, an enlightened civilizational review of the foundations and rules of waqf jurisprudence entails a serious consideration of the priorities of Sharia's ultimate goals, and the changing times, circumstances, peoples, and places. In this context, Shaikh Ali Gom'ah called for new legal sciences, methods and instruments to understand the continually changing realities.

The second session moved us from the waqf's epistemological foundations to its state of art in academia. It reviewed the main trends of contemporary waqf studies inside and outside the Muslim world, questioning their theoretical-legal and social-political balances, and responses to current social and economic issues. Furthermore, the session aimed at predicting the horizon of waqf studies

in developing practical models more appropriate for the role of waqf in establishing a civilization.

Randi Deguilhem, professor at Marseilles University, studied the European literature on Waqf issues in the Arab and Islamic world during the last 150 years. She observed that waqf studies were directly impacted by the international political situation during the colonial era; then, the main factor was the availability of primary resources and the participation of European researchers in international research teams. Thus, there has been a notable shift in waqf studies from a focus on legal dimensions to social, economic, and political approaches in the last few decades.

As for the Muslim world, Syed Khaled Rashid, Professor of Law at the Islamic University in Malaysia, surveyed the waqf literature in five Asian countries: India, Pakistan, Bangladesh, Malaysia, and Indonesia. The survey showed a significant interest in researching historical and contemporary laws and rules of waqf, and a clear shortage of studies of waqf development and management. Furthermore, no studies have surveyed the Shi'i waqf, although it is very common in India and Pakistan. Methodologically, there has been a change from using theoretical approaches toward conducting more empirical studies during the last years.

Mohammed al-Omari, lecturer at Yarmok University in Jordon, studied the main trends of the contemporary Arabic waqf studies. These trends include the continuous focus on legal and theoretical dimensions of the waqf system at the expense of political and social dimensions. Moreover, the indices and surveys are still more concerned with categorizing than analyzing the waqf studies. Also, the Arabic waqf literature has been poorly responsive to the urgent social and economic issues in the contemporary Muslim societies, focusing on theorizing the importance and effectiveness of waqf in historical experiences. It ignores significant differences between current and historical social and economic contexts of waqf. Indeed, most waqf studies include only theoretical propositions, generally irrelevant to contemporary contexts.

The third session, "institutional dimensions of waqf in the globalization era," addressed issues of waqf management, its responsiveness to the reform plans of waqf ministries to overcome management obstacles, and how waqf institutions benefit from the new management systems.

In this session, Yasser Horani, professor of Islamic economy, mapped the institutional issues that have faced waqf in Muslim history. He reviewed the relations between waqf and state, Islamic jurisprudence, economy, information, and globalization. The historical experiences of waqf showed that its effectiveness

in society depends mainly on its cooperation with the state, the continuous renovation of fiqh, and the growth of economy and social solidarity in local societies. Although waqf has been mostly a locally oriented institution, it has contributed to the global spread of knowledge through supporting several libraries of old manuscripts around the world. Finally, the waqf institutions in this globalization era have gradually move toward the big institution style, contrary to the traditional small institution in the Arab world. This institutional trend requires improvement of waqf management systems in order to meet the standards of professionalism, specialty, and scientific style.

Badr Mutairi, Ph.D. candidate at London University, studied institutional issues in the development of Kuwaiti waqf, especially the establishment of the General Foundation of Waqf in 1993 as a great milestone of waqf history in Kuwait. Establishing Kuwait Awaqf Public Foundation (KAPF) was the third stage of waqf management in Kuwait, following the General Authority of Waqf (1949-1962) and the Department of Waqf Affairs (1963-1993). The Foundation was led efficiently by Dr. Ali Al-Zumai', former Minister of Waqf, who welcomed renovations and combined scientific methods and practical activism in managing waqf. As a result, the Kuwait Awaqf Public Foundation (KAPF) experienced a unique founding period (1994-1996). Since then, it has been working mainly to preserve the achievements of that period and review its financial and legal systems. Nevertheless, it faces legal and institutional difficulties such as the shortage of qualified governmental cadres, and the delay of issuing a new waqf law addressing the contemporary practices.

The fourth session dealt with the economic dimensions of waqf in this globalization era. The participants observed the obstacles of investing waqf resources, reviewed contemporary experiences of investing waqf resources in Muslim countries, and studied the mechanism of waqf economics in the Western experience.

In this context, Dr. Fouad Al-Omar, a Kuwaiti economist, discussed the main challenges of the modern waqf economics and their effects on waqf institutions and resources. These challenges have several dimensions. The political challenges concern the retreating role of state compared to the expanding role of civil society organizations. The legal challenge concerns the urgent need to renovate such waqf rules as those of the assets that can be invested as waqf, and expanding the freedom of dealing with waqf assets and resources. The economic challenges concern the necessity of institutionalism in managing the waqf institutions and their local and international investments.

Walid Al-Ansari, Professor of Islamic Studies in Southern Carolina University in the U.S., studied the Western experience of managing waqf institutions and investing their assets, especially in the United States. The social and economic roles of the American foundations and trusts, funded by the private sector, have historically been more profound than their European counterparts. These foundations have contributed to developing social relations, legal contexts, and economic formulas to institutionalize waqf and invest its assets. Al-Ansari stressed that the Muslim world could benefit from the Western waqf experience, which is remarkably conforming with the Islamic principles. Besides, the Western financial tools could be adjusted and used in investing the Islamic waqf assets.

Muhammed Al-Arnaout, professor of Modern History in Aal Al-Bait University in Jordon, reviewed Jordon's experience in legalizing waqf and investing the waqf assets inherited from the Ottoman period. He focused mainly on the Institution of Developing Waqf Assets (2003-2007), as a successful example in its field. Nevertheless, Al-Arnaout criticized the lack of flexible management and independent financial resources, which limited its expected achievements.

The second keynote speaker, Dr. Ali Al-Zumai', former Minster of Waqf and Islamic Affaires in Kuwait, expressed his opinion on the waqf as tool to energize the society, stressing the close relationship between waqf and development. As an institution based on the ultimate goals of Shari'a, the waqf provides real chances for enhancing the solidarity of Muslim society. It guarantees the minimum standard of financial stability for social development. Al-Zumai focused on Kuwait's waqf experience as a model for studying the waqf as a tool to energize the society. The Kuwaiti experience is indeed rich in its intellectual and institutional aspects and has many positive points. The social and Islamic activism in the country has produced a variety of official and popular visions to activate the role of waqf in society by developing its institutions and investments, expending its fields, and spreading its culture.

Al-Zumai observed the change of Kuwait Awqaf Public Foundation from an initiation to enhance the waqf "as an effective developmental formula in the institutional structure of the society, and managing the waqf assets," into an institution "pioneering in developing and preserving the waqf, and managing the efficient spending of its revenues in accordance with the ultimate goals of the Shari'i." According to Al-Zumai, this indicates an absence of intellectual insights in orienting the activities of the Foundation towards a developmental role of waqf. This practice therefore restricts itself to the institutional rules, and does not

reflect the societal and developmental role of waqf. He insisted that the Foundation must aim mainly at catalyzing the waqf movement in society through more legal and institutional reforms, spreading the culture of waqf, and building coalitions with the governmental, familial, and mixed waqf institutions. These coalitions should become a civil financial power, working according to a clear strategy to harmonize the policies of related governmental sectors dealing with local and international voluntary and charitable works.

The seminar concluded with the fifth session which highlighted the potential impact of waqf on sustainable development in this globalization era. The participants discussed the potential contributions of waqf in solving some critical problems in the twenty-first century, such as poverty, localizing technology and scientific research, and the negative cultural impacts of globalization.

Tarak Abullah, professor at Zayed University, aimed at developing a global agenda for waqf that globalizes charity. This is a hardly needed development of waqf that would move it from local to global arenas. He stressed the urgent necessity to benefit from the philosophy of waqf, which is based on the global principles of Quran, in order to emphasize waqf as a global and humanitarian institution, as Muslims and others in this globalization era face many problems such as, poverty, illness, and the widening gap of technology and knowledge. He reviewed some contemporary ambitious attempts to revive waqf globally, and assessed their successes and failures.

Othman Shenshin, expert at the National Science Foundation in the United States, drew attention to the importance of scientific research in the Arab world, and its contribution to developing new technology, especially if it has the human qualifications and financial resources. In this regard, waqf could be considered as an important nongovernmental resource to support the scientific development at many levels, such as establishing the infrastructure of scientific research, funding the research and development units in various institutions, developing human resources, and spreading the culture of interest in science in the Arab societies.

Khadiga Mufied, professor of Islamic Studies in Muhammad V University in Morocco, underscored the role of waqf as a defense tool against the attacks of cultural globalization, which spreads Western culture and values, but marginalizes and excludes non-Western cultures. As an authentic Islamic institution embodying the main principles and values of religion, waqf is capable of playing two integrated roles. Firstly, it can defend the main principles and values of Islam against attacks of Western culture. Secondly, it can develop several mechanisms to spread the Islamic values among different cultures around the world as part of the movement of ideas celebrated by cultural globalists.

In conclusion, the conference papers and discussions show clearly that the difficulties of managing waqf institutions, investing waqf assets, and energizing societies through waqf activities are by no means an essential problem of the concept, philosophy, or epistemology of waqf. Rather, they reflect the shortcomings of theorizing and institutionalizing waqf, as well as some current unfavorable conditions. As a concept and an institution, waqf can be used only as part of a comprehensive civilizational scheme that considers the conditions of Muslims in the world and their relations with others, and defines their expected role in materializing God's Will on earth. Waqf can be employed as one mechanism of implementing such a scheme.

In addition, theorizing waqf is still unbalanced, thus hindering using it to the maximum. This imbalance is manifest in the overemphasis on the legal and juristic aspects of waqf, usually at the expense of the sociopolitical analysis of different waqf issues. Another imbalance in waqf studies is evident in the overemphasis on the theoretical analysis of waqf, based on its historical applications, usually at the expense of the empirical study of contemporary cases.

Finally, the current applications of waqf institutions face a number of obstacles arising from the lack of comprehensive visions, clear strategic goals, powerful mechanisms, and uncompromising professionalism, as well as the pressures of its sociopolitical environment.

Renewal is obviously the key to solve the problems of waqf. Targets of renewal must include the civilizational perspective of waqf, which frames its concept and purposes; the juristic and theoretical treatment of the realities and institutions of waqf; the beneficiaries of waqf in our modern world; and the management of waqf, which must become more professional and transparent, especially as far as investing its assets is concerned. As a societal institution, waqf suffers from the current malaise of the Muslim world, confronts its challenges and dangers, and must look forward to awakening and renewing its ideas and practices.