

*** Historical Formation of the Waqf Function in the Arab Societies**

By: Dr. Ibrahim El -Bayoumi Ghanim

The aim underlying the legalization of waqf is to remove the barriers between the intent to do good and the actual practice of this good. Many foreign laws and legislations, the French law in particular, failed to reach this degree of freedom. In advocating this Sunnah in our religion, the aim was to enumerate the channels of well-doing and to diffuse the benefits to the Islamic world. I do believe that a waqf, once put in the hand of a government, will be of no value for the nation.

*Qasem Amin*¹

Introduction:

Around the second half of the 20th century, many intellectuals, reformers, revolutionary leaders and military juntas in our countries believed that the history of waqf has ceased to be in modern Arab societies. This aggressive moral and material attitude manifested itself clearly during that epoch to the extent that one Arab country obliterated it altogether and the rest maintained a negative image of it. Consequently, many people shunned it and its role receded remarkably. On the same lines, the waqf

¹ Qasem Amin: the Complete works of Qasem Amin, Edited by Dr. Mohammad Imara: Arab Institution for Studies and Publication, PP 182,184.

*This study was introduced within the context of the 'Waqf and Civil Society in the Arab World' seminar organized by the Arab Unity Center in collaboration with KAPF, Beirut, 2001.

material resources, for example agricultural land, real estate property and civil institutions built of its proceeds came to nothing.

The political, social and economic conditions which prevailed in the Arab world throughout the last half century encouraged some people to re-explore the inherited institutional social structures and examine their historical value in order to analyze their components and subject them to *ijtihad*. This process was carried out through a contemporary methodology which sought to confront the challenges and depict a better image of the future. The waqf system got the lion's share in this process amid the wave of the worldwide interest in the civil society institutions, non-governmental work and NGO's. Ever since the share of waqf has become on the rise in the Islamic Arab societies so that this increase was noteworthy, as it is the case in this seminar being attended by such an elite of researchers and thinkers.

In this research our aim is to identify the general rules and the major axes through which the historical formation of waqf got this format in the Arab society, together with the problems it confronted, in order to benefit from history in reviving the modern Arab civil society and to activate its legacy in a way that serves its progress and advancement.

It should be noted here that the 'historical formation of waqf ' in this context means all what the Holy Quran and the Prophetic tradition (through express sayings, deeds or hidden approval) had said in connection with the 'ongoing charity' taken by scholars as waqf, including practices, social practices, both positive and negative, jurisprudential *ijtihad*, shari'a Fatawa (dispensations or religious edicts), judicial awards, institutional structures, waqf funds and properties, administrative regulations, legal legislations and functional formalities, all of which constitute the historical legacy of the waqf system.

Several historical studies were made about the waqf system but most of them were restricted to one specific country at a certain time or epoch, for example the Mamluki Age and the Ottoman Era. Such studies have special significance in connection with the historical knowledge and analyses which can be helpful in other studies, including this study which aims to intensify the 'general historical vision' of the waqf system in the Arabic society in a comprehensive way.

First: Historical Progress of Waqf Regulations in the Arab Societies: From Fiqh to Law

The epistemological formation of waqf depended mainly on the concept of the ongoing charity being the solid epistemological nucleus of the waqf system as a whole. It is likely that this 'ongoingness of a charity' is the element which urged scholars to take it as waqf because charities other than waqf are not of an ongoing nature².

With the elapse of the Prophetic era, the process of the historical formation of the jurisprudential waqf regulations started and brought with it with it a range of information and a set of professional and administrative skills associated with waqf or revolving round it, **ahead** of which was the ability to formulate, authenticate and maintain waqf deeds. Thus, the jurisprudential side found its way in writing as early as the age of recording in the second century A.H. The chapters of awqaf and charity appeared in the books of the Prophet's tradition and in the books of fiqh and Fatawa³.

² See the Attitude of Shari'a in Charitable and Ahli waqf: A declaration made by scholars (Cairo, Salafi Printing Press, 1346H/1927, P 10. See also Mohammad Abu Zahra: Lectures on Waqf, Cairo, Dar El Fikr el Arabi, 1971, PP 9-10.

³ See Mohammad bun Abdul Aziz bin Abdullah: 'Efforts of jurists in recording and codifying waqf' Dawlatul Haq (Ministry of Awqaf and Islamic Affairs – Rabat, Morocco), Issue 232/Nov 1983, PP78-81

Other independent jurisprudential works on waqf issues soon appeared, ahead of which was 'Ahkam ul Awqaf' by Imam Hilal bin Yahia al Basri, known as Hilal al Rai (D 245H)⁴. It was followed by another book by Imam Abu Bakr el Khassaf (D 261H)⁵ in the middle of the third century A.H⁶.

As early as the age of recording, waqf has become one of the fixed chapters in the Islamic fiqh books with all its schools of thought, both Sunni and Shiite, which spread differently all over the Arab societies⁷. The result was that this chapter swelled and *ijtihad* pervaded it and there were many different attitudes taken by the scholars which led to many complications in the social, economic and political life.

Reflecting on the historical epistemological progress of the waqf fiqh, we find that it benefited from the multiplicity of religious sects since their appearance and got enriched with their prevalence in the various parts of the Arab countries. It also benefited from the general economic, political and civilizational developments encountered by this society throughout its history. Moreover, the process of advocating a specific attitude towards those schools of thought remained available to the various social classes (citizens and rulers) until the time of the Ottoman conquests which brought with it the Hanafi school of thought and gave it a unique status in the territories belonging to it⁸. This state of affairs put some

⁴ The book Ahkam el Waqf was published for the first time by the Ottoman Dar el Maaref in Haidar Abad in 1355H/ 1904. the book did not receive that popularity of Al Khassaf book.

⁵ The book of Al Khassaf was printed for the first time by the printing press of Umoom el Awqaf al Misriyya in 1322H/1904 without editing. Kuwait Awqaf public Foundation will shortly publish an edited issue. See also Mustafa bin Hagi Khalifa: Kash el Zunoon ann Asami el Kutub wel Funoon, Beirut, Dar el Kutub el Ilmia, 1992, P1, Column 21.

⁶ Dr. Ibrahim Bayoumi Ghanim: Awqaf and politics in Egypt, Cairo, Dar el Shorouq, 1998, P46.

⁷ We could not find a book which clarifies the social background and historical developments behind the spread of the fiqhi schools of thought, or at least to show why the Maliki school of thought spread in the Arab North African countries, or the Hanafi sect in the east.

⁸ See the Fiqhi Encyclopedia, Edition 4: Kuwait, Ministry of Awqaf and Islamic Affairs, 1986-19998, Part 1, PP39-40.

pressures on the freedom of adopting a specific sect. Later the authorities of the Arab and territorial state in the post-colonial period in most of the Arab countries adopted a methodology based on integrating the multisectarian option in one harmonized and binding law. This was the case in Egypt when the government issued the law # 48/1946⁹ and then this spread to many Arab countries, for example Syria, Jordan, Lebanon and Iraq during the forties and fifties of the 20th century, followed by Sudan, Libya and Algeria.

Before reaching this stage, the epistemological fiqhi formation of waqf had witnessed many major stages in its historical development, which can be put down as follows:

First Stage: This stage started after the death of the Prophet (PBUH) in the tenth year A.H and continued till the end of the third century A.H and the beginnings of the fourth century. This stage was characterized by *Ijtihad* and the main features of fiqh crystallized within the framework of the major schools of thought (Sunni and Shiite) over the second and third centuries A.H.

It should be noted that the process of the establishing fiqh in general and the fiqh of waqf in particular came in tandem with the expansion of the Islamic conquests and the spreading of Islam among the population of those countries, including Arab countries. By the end of the first century, all Arab countries have been part of the Wise Caliphate, then to the Umayyad caliphate and then to the Abbasid caliphate. It was natural that the waqf systems should move to those countries with the other Islamic systems and concepts. Historical resources indicate that this system was wholeheartedly appreciated by the population of the conquered

⁹ To get an idea about the background of the law 48/1946 in Egypt, See Ghanim, the same source. PP444-457

territories¹⁰. The scope of waqf expanded and it acquired different social functions. Consequently, the process of practicing waqf helped the emergence of several problems and challenges prompted by the conditions of those countries and the customs and norms of the people there. There was also the civilizational progress which those countries witnessed after embracing Islam.

Scholars and jurists who lived that epoch, and as a result of those problems and challenges, had to rack their brains and find solutions for those challenges and had to work out practical solutions for the emerging waqf-related questions. Such problems had not existed before when Islam was confined to the Arabian Peninsula, for example the question of waqf on ports and mobilizing warriors (mujaheddin) in the way of Allah¹¹, and the validity of considering as waqf the property of the conquered countries, especially in Iraq, Syria and Egypt. There was a lengthy debate in which political, social and economic considerations were reflected. Jurists differed over dedicating those lands¹². Consequently the movement of waqf was affected positively and negatively in this type of land according to the attitude which prevailed in this or that country.

Among the issues was the seizure of awqaf buildings and lands or exposing them to damage and the possibility of replacing them, the attitude towards the waqf of a Zemmi¹³ and other similar questions and problems which we would encounter in the books of Islamic schools of thought. With the expansion and stability of the Islamic state and the

¹⁰ See the same source, P 79. About the feeling of approval of the Egyptians of the waqf system soon after the conquest, see Mohammad Amin: *Al awqaf and Social Life in Egypt*, 648-923 H / 1250-1517 :A documentary study – Cairo. , Dar Al Nahda Al Arabia, 1980) PP 33-35.

¹¹ See what al Khassaf said in this respect: *Ahkam el Awqaf*, Diwan Umoom el Awqaf Printing Press, 1323H /1904, p 319. See also Malik Ibn Ana :*Al Mudawana el Kubra*, Dar el Fikr, Beirut, 1978) Part 4, P342

¹² For more details see Zain Eddin Abul Faraj : *Al Istikhraj Li Ahkam el Awqaf*, Kuwait Industrial Bank, PP5,7.56,61, 78

¹³ Concerning the Hanafi Fiqh, See *Abwabul Waqf in Malik Ibn Anas; Abu Mohammad Al Maqdesi; Al Mughni* by Imam Mohammad Ibn Idris Al Shafii; *Al Umm Abu Bakr Al Sarkhasi; Al Mabsoot Concerning the Waqf of a Zemmi*; See also Al Khassaf the same resource, PP335-344.

growing interest in waqf and its various purposes, the Fiqh of waqf gained ground and linked waqf with the concept of the 'civil politics' which meant managing the social affairs to bring about benefit and evading injury as recommended by the shari'a¹⁴. This link showed itself clearly in the discussions about dedication (waqf) to private and public charitable channels and the means of managing those awqaf, besides the control on those institutions funded by their proceeds.

Second Stage:

This stage covers the period from fourth century to the thirteenth century A.H and witnessed a steady growth in the epistemological formation of the waqf system. This period may be known as the 'period of branching and elaboration', coupled with little *Ijtihad* in the waqf-related rules and regulations. This epistemological growth based on recording and elaboration was part of the general jurisprudential movement throughout that relatively lengthy epoch. It was also a reflection of the development of social life, the intermingling of the various aspects and the intensified complications of the civil issues starting from the Abbasid period. This is made clear through pursuing the waqf issues handled by the jurists of the period who used to move from one country to another. No single work on fiqh was without a chapter or part on waqf¹⁵. In the end there had been a

¹⁴ About the role of fiqh in authenticating civil politics affairs in the Islamic society, see Mohammad Abed Al Jaber: *Al Fiqh wal Aql in Politics – Al Fikr Al Arabi Al Mu'asser*, Beirut, Issue 24, Feb 1983

¹⁵ We can refer to a part or chapter about waqf in the following references which are arranged chronologically : Al Mawardi (D 450 H) ; Al Hawi al Kabeer , Al Sarkhasi (D483 H);Al Azdi (D 606H) ; Al Mufid Lil Hukkam By Al Harrani (D 728 H) ; : Al Fatawa Al Kubra by Abdullah Bin Jama'a (D 741 H) ;; Tahrir al A.Hkam fi Tadbeer A.Hlul Islam by Al Kalbi (741 H0; Al Qawaneen al Fiqhia by Ibn Rajab (D 795 H) ;Al Istikhraj Li A.Hkam el Kharaj by Al Tarabulsi(D 922 H); Al Isaaf fi Ahkam el Awqaf by Takieddin Al Shafii (936 H) ; TA.Hrir el Maqal and Baitul Mal by Zain el Abeddien Nujaim (D 970 H); Al Maleki Al Dusooki (D 1230H); Hashiat al dusooki wal Tabtabaie Al Jaafari (1231 H), Kitab el Waqf wal Sadakat.

tendency to give some waqf questions independent works¹⁶, especially with the end of the Mamluki age and the beginning of the Ottoman rule. The end of the first and the beginning of the second witnessed a state of instability which left its impact on the everyday life of the individuals and groups. This also affected the means of approaching such problems, including waqf problems, which cropped out during the period. There is not enough room here to cite the contributions of the jurists in the fiqhi building of waqf during those seven centuries (fourth to tenth A.H), and here we settle for the following points:

1. The multiplicity of waqf jurisprudence works which spread all over the Arab countries at that time shows the expanding role of waqf in the life of the Arab society. It also shows the ability of the jurists to assimilate the new social developments as shown in reviewing the type of questions in this chapter, for example the judgment on waqf movables, cash waqf, waqf on students, waqf on the followers of an order or community, etc.. .

2. The development of the fiqhi formation of waqf during that period which got nearer to the concept of comparative fiqh among the various schools of thought and over consecutive periods of time. There were many example of that, specifically the content of Al Mughni by Al Hanbali (D 620 A.H) and Fath el Qaqeer by Al Humam Al Hanafi (D 861 A.H).The comparative mechanism in dealing with awqaf unveiled a great deal of variation and *ijtihad*, in addition to a great flexibility and freedom of choice in civil affairs. This is a question of high importance if we want to view waqf from a social and functional perspective.

¹⁶ For example Al Burhan al Tarabulsi, the same reference; Ibn Nujaim : the same source; Abu Abdullah al Hattab, Sharh Alfaz el waqifeen ; Hamed al Emadi: a Thesis about the difference among editors ; Zain el Abedien Al Minawi:Tayseer al Wukoof ala Ghawamidh Ahkam el wokoof ;

3. The waqf fiqhi formation during that period witnessed the 'hard line fiqh' related to some waqf issues, especially the 'Istibdal' or replacement¹⁷. The jurists of most of the schools of thought tended to shut the door in this respect in order to halt corruption and to stop the whims of the rulers and sultans who neither observed the sanctity of the awqaf nor respected the private property. This state of affairs was on the rise during the Mamluki age and during the unstable Ottoman period. Vis-à-vis this constraint targeting the rulers and sultans, we find most of the jurists during the same periods tend to granting more freedom to the waqifs and their conditions and conferring a holy touch on these conditions in order to safeguard waqf and fend off any seizure or encroachment on it. This attitude showed itself clearly in the 'Ten Conditions'¹⁸ and the saying that ' a waqif's condition is as valid and binding as the law-maker's condition'¹⁹, though this statement was much criticized by some scholars²⁰. Nevertheless it remained valid and effective in the social behaviour towards awqaf in general to the extent that it was taken into consideration at different levels when setting the modern codifications of waqf issues during the 14th century A.H / 20th century AD.

Third Stage:

This period covers the 14th century A.H and the beginnings of the 15th century during which a historical turn in the progress of waqf

¹⁷ See the Lectures of Abu Zahra, PP171-183 in which he reviews the four schools' attitude towards istibdal. See also Amin: Awqaf and the Social Life in Egypt, 648-923 H / 1250-1517 AD, PP 314-354 in which he deals with the issue of seizing awqaf under the guise of Istibdal during the Mamluki age. Among those hard line jurists is Ibn Nujaim: Tahrir el Maqal fi Masalet al Istibdal.

¹⁸ See Ghanim: Awqaf and Politics in Egypt, PP121-122.

¹⁹ Most fiqh books refer to this rule. See for example Mohammad A. Abdien ; Radd el Mukhtar, Beirut, Ihya'a el Turath El Arabi, Vol 3, P361

²⁰ See Mohammad Rashid Redha: Waqf and its Famous Judgments, Al Manar, V 29, April 1928, PP134-136.

jurisprudence took place. This is exemplified in the codification of the shari'a and administrative regulations of waqf in most of the Arab countries. This change had occurred at different rates either in speediness or slowness, comprehensiveness or severability. Generally speaking, it was linked to the general context of the modernization processes and the building of the modern state which came with the introduction of modern civil codification and the variety of the arbitration systems (shari'a, Civil or Ahli and Mixed), especially in Egypt²¹. The same thing happened in Tunisia and Algeria²², and Bilad El Sham (Syria)²³. From a historical perspective, we can say that the transformation process from the jurisprudential framework of waqf with its traditional state to the modern one started partially within the context of the Ottoman reforms during the reign of the Sultans Abdul Hamid and Abdul Majeed during the period from 1839 – 1880.

This transformation started to gain ground in a methodological way following the arrival of the European codification systems to the Ottoman Empire and the Arab territories under its rule. Within that context, the magazine of Al Ahkam Al Adliyah (Legal Regulation Magazine) appeared and undertook the process of formulating the regulations systematically to facilitate reference to them on litigation. Other magazines at an individual level appeared and carried the same mission, especially the attempt of Mohammad Qadri Pasha which was twofold: the first was related to real estate issues and proceedings which appeared in his book

²¹ See The Plurality of the Judiciary System in Egypt on the awqaf: See Ghanim: Awqaf and Politics in Egypt, PP435-444

²² See Mohammad Kamel El Ghamrawi: Researches in Waqf , Economic and Law Magazine, Issue 1 / Jan 1932, PP35-36, 42-43

²³ Awqaf in Syria and Lebanon were under the control of the French colonial authority and the French High Commissioner used to interfere with the Shari'a courts affairs in respect of awqaf. See Real Estate texts by Dawood Al Tikriti, Edition 3, Damascus, Arab Publishing Office, 1387 A.H / 1967 AD, Part 3 , Waqf PP95-101. See also Jurist, "waqf," Moslem World, Vol 4, No2, April, 1914, P 187. The writer refers to the intervention of the Court of Cassation in Paris in the affairs of the Algerian and Tunisian waqf during the colonial period.

'Murshid Al Hairan'; the second was related to waqf issues and appeared in Qanun Al Adl Wal Insaf lil Qadha'a ala Mushkilat el Awqaf (The law of Justice and Equity to settle waqf Disputes)²⁴.

At the beginning of the 14th century A.H, a little time Ahead of the 20th century AD, to the middle of both centuries waqf and its system came under those subjects of heated intellectual and political discussion, then the legal discussion between the 'advocates of the old' and the , 'advocates of the new' or the 'advocates of originality' and the 'advocates of modernity'. Several waqf-related questions were tabled for discussion and debate, starting with its legality and if it originally belongs to religion. Then they discussed the issue of Al Thurri waqf and the attitudes towards abrogating or keeping it. Then discussion extended to observing the waqifs' conditions²⁵ and the necessity for setting a new legislation for organizing waqf.

That discussion did not spread in all parts of the Arab world, but it concentrated in Syria and Lebanon and reached its culmination during the period which followed the fall of the Ottoman Empire after the WW I and continued till the WW II. For the first time the waqf fiqh went out of the scholars' domain to a more expanded circle which included also intellectuals, cultured people, politicians, pressmen, members of parliament, law makers and even artists who participated through their ²⁶

²⁴ The book of Qanun Al Adl Wal Insaf lil Qadha'a ala Mushkilat el Awqaf appeared in more than one edition through Boulaq Printing Press. The fifth edition was presumably implemented by Al Ahran Printing Press in 1938. it is the last edition. Egyptian courts of law depended on it until the issuance of the waqf law # 48/1946.

²⁵ For more examples see Ghanim's Awqaf and Politics in Egypt, PP 423- 434. See also Mohammad Ali Ulwiyya: Is waqf from Religion? The Effects of Ahli waqf on the general good, Al Muhamah. year 7, Jan 1927, PP309-320. See also the pro waqf attitude Mohammad Bakheet al Muteeie: Lecture on Waqf, Cairo, Al Salafi Printing Press, 1346H / 1927AD. Al Muteeie comments on Ulwiyya.

²⁶ The well-known comedian Najeeb Al Raihani used a popular cliché 'Luzoom al Shai'e (the necessity for fabricating something).

sharp criticisms and concentrated on exposing the negative sides during the first half of the 20th century

This state of affairs continued for more than a quarter of a century and in 1356 A.H/ 1946 AD²⁷ the first waqf law in the Arab world came into existence under # 48/1946 in Egypt. This law had a far reaching impact in other countries. A waqf law under No.25/1947 was issued in Jordan; a law for the Thurri waqf on March 10th was issued in Lebanon; In Syria two legislative decrees were issued, the first carries the No.76 on 11/6/1949 related to the abrogation of the Thurri and Mushtarak (joint) waqf and dissolving them; the second carried the No.128 on 11/9/1949 related to the Islamic charitable waqf. In Kuwait, an Amiri Decree related to the 'shari'a regulations of awqaf' was issued on 15/3/1951. Other waqf laws followed in succession in some Arab countries, for example Oman as a Sultani Decree were issued under No. 65/2000. The number of Arab countries which have waqf law has reached 12 up to 2001, six of which issued their laws during the last decade, including Algeria (1991), Yemen (1992), Qatar (1996), Mauritania (1997), United Arab Emirates (1999), and Oman (2000).

The point here is that the waqf fiqh in the Arab countries had retreated since the middle of the last century and this retreat came in the context of the great transformations which swept the political and social life in general. On the legislative level, there had been a practical and academic retreat in the traditional fiqhi approach to waqf. At the same time, there had been a great movement of codification which embraced a number of shari'a regulations, including inheritance, bequest and waqf²⁸, along with

²⁷ See Ghanim the same source, PP423-457

²⁸ To identify the general context through which these codifications were issued, see Tareq Al Bishri: Contemporary Waqf Status between Islamic Shari'a and Positive Law, Cairo, Beirut, Dar El Shorooq, 1996, PP43-46.

the issuance of the civil law legislations (modern) in a great number of Arab countries²⁹.

The stagnation of waqf fiqh (jurisprudence) was indicative of the weakness of the waqf system at the structural and functional levels as far as the Arab social status are concerned. New legislations had come to replace those inherited legislations and institutions in the those countries which codified waqf regulations and switched waqf from the civil policy domain established by fiqh³⁰ to the governmental domain through issuing regulations as the case was in Egypt, Syria, Lebanon and Jordan, or those countries which left those laws unchanged such as Algeria and Iraq (before the issuance of waqf law in 1991), and in Yemen before the issuance of the Waqf Law in 1992.

Though we confirmed the negative indicators of the waqf stagnation in the Arab society and how this affected its civil establishments, especially during the last half century, we maintain that this stagnation started to a standstill since the last decade of the last century. A new surge of waqf fiqh and attempts to renew it were on the rise, though at a slow rate. Indicators of this tendency can be found in the project of developing waqf legislations adopted by Kuwait Awqaf Public Foundation. This attempt is getting underway, in addition to the six waqf legislations which appeared in six countries during the last decade as we mentioned earlier.

Second: Economic and Social Formation of Waqf and its Problems

²⁹ Dr. Abdul Razzaq al Sanhoury made great contributions in preparing and formulating the civil law in many Arab countries, For more details see the same source.

³⁰ Regarding the call for reading Waqf fiqh through the concept of civil policy, see Ghanim, the same source.

The social and economic formation of waqf in the Arab society started with a limited number of waqifs and beneficiaries. The economic value of the waqf assets, such as a small number of buildings, lands, water wells and some movables approved by the faqihs were of little economic value. This was natural for waqf in the early stages during the Prophetic era and the wise Caliphate³¹.

With the expansion of the Islamic conquests in the east and the west, awqaf expanded, and so did their social circle. The value of their assets had appreciated during the Umayyad period, especially in Syria and Egypt. During the Abbasid age the number and value of the assets increased and witnessed a leap in terms of quality and quantity during the Mamluki and Ottoman periods to the extent that 'waqf was about to cover the land of the Arab town'³². Waqf at that time accounted for a great deal of the lands, buildings and riches of the Ottoman Empire and the Arab territories. Statistics show that 30% - 50% of the immovable real estate property in the Arab countries has entered into the waqf circle during the Ottoman period³³ nearly at the turn of the 13th century A.H/ 19th century AD. During the last century (14th century A.H / 20th century AD), waqf system was subject to several attempts of demolition and dissolution in most of the Arab countries before winning their independence. There were also some attempts to renew its economic structure and reform its social performance. The result was a limited percentage of success. The

³¹ Sources do not give the accurate numbers of waqifs or the size of their awqaf during those early stages. There are however some indications as narrated by Jaber bin Abdullah. when he said: " No wealthy companion of the Prophet but made a waqf". .See Ibn Qudama Al Maqdesi, Al Mughni, V 5, P598. Imam Al Shafii also said, " I have been informed the 80 of the Prophet's companions made awqaf. See also Ghalib Al Qurashi: Al Awqaf and the Bequests between the Yemeni Law and Shari'a (Sana'a, Dar el Shookani, 1998,P5.

³² See Hasan Al Dhaifa: Monarchy and Taxation in the Ottoman Empire, Al Ijtihad Magazine, Year 9, Issue 36, 1997. See also Mohammad Bahrul Uloum: Waqf in Iraq submitted to a seminar organized in London in 1996. See also leaflets of the Royal Academy for Civilization Researches, No. 185

³³ Orientalist Clavel estimated the number of awqaf in Syria at 30%; in Algeria at 50% at the beginning of the 19th century.

best of those attempts so far is the experience of Kuwait Awqaf Public Foundation which started in 1993.

Regardless of the status of the current waqf system in the Arab countries, the process of its social and economic formation has never been regular throughout the past centuries. Moreover, there were lots of problems, negative aspects, corruption and mismanagement at certain times though this formation contributed remarkably to the building of many civil, religious and military institutions. It also extended support to a lot of non-governmental activities in many Arab countries throughout its development starting from the early Islamic period³⁴. This will be clarified in the following:

1. Social Formation

The waqf system attracted great numbers from the various classes. Some of these were waqifs (dedicators) and others were beneficiaries (Mawqoof Alaihi), managing staff and supervisors from genders, Moslems and non-Moslems. These classes covered poor categories and needy people, followed by middle class category including farmers, craftsmen, merchants and last wealthy people from among the merchants, top management people, some scholars, army leaders, princes, sultans, governors, ministers and others³⁵.

³⁴ There are no specialized studies dealing with the contribution of waqf in establishing these institutions in the Arab world. See Mohammad Al Habib Bal Khoja: an Outline of Waqf and Development- Past and Present. This paper was submitted to a seminar organized in London in 1996, PP140-166.

³⁵ The waqf of rulers, sultans, princes and ministers has never stopped in the Arab countries except in modern times, starting from the 20th century. This coincided with the recession wave in waqf and the rise of the authoritarian state. For more see Ghanim Awqaf and Politics in Egypt.

Among the remarkable findings of the historical practice of waqf by those categories is that the waqf system remained open to all and had never been shut to any specific category. Its jurisprudential regulations allowed for embracing the various categories, even from among the non-Moslems (Jews and Christians³⁶). This, we think, may be attributed to the Islamic tolerance and the flexibility of the shari'a regulations on which waqf was based.

In addition to this idea, there had been several motives revealed through the historical practices of waqf in the Arab societies, most important of which were the interest to maintain the property of the families (the extended family or the tribe) and the wish to keep the consistency of the members of a family by connecting them together via wealth or part thereof, together with setting a condition for being a beneficiary in order to maintain the social behaviour of the beneficiaries or family members in a way that keeps the dignity of the family within the social surrounding³⁷.

The motive to maintain the entity of a family had gained ground in the various Arab societies and especially since the Mamluki sultans and the Ottoman rule until the mid of the 14th century A.H (mid 20th century). In view of the great sentiment for this sort of waqf and the formalities linked to it, and with the growing intervention of the modern state, the distinction between three types of waqf (Charitable or Khairy, Ahli or Thurri and Mushtarak or joint) was made clear.

There are no accurate statistics to show the percentage of the pure Ahli Khairy or Mushtarak waqf. There is a difficulty in separating these three types at the practical level, but there are still some indicators which show

³⁶ Some books dealt with the waqf for a Zemmi (Jew or Christian) and the legality of establishing a waqf in his behalf as it is the case in the Egyptian law 48/1946. Jews and Christians often resorted to Moslem Mufti to get advise in respect of Awqaf. See some cases in Mohammad Abdu et al, Magazine of Fatawa Islamia, Sheikh Jadul Haq Ali Jadul Haq et al, 14 parts, 1980-1991. Part 11

³⁷ See Ghanim: the same source, PP350-352

that the share of the Ahli waqf is the biggest of the three types in general. In all parts of the Arab world without exception up to the last century, and from social and political perspectives , this can be imputed to two main reasons: the solidity of the Arab traditions connected with the consistency of a family being regarded at the Islamic level as the main unit in building a society; the second in the state of political instability which characterized the Arab society in most of its historical epochs, especially during the Mamluki era and the oppression and encroachment and seizure of lands³⁸. All these factors made the waqf system a haven for protecting families and the long term utilization of them, though this could be temporary, by the members of the family and their descendants. The exaggeration in transforming waqf property into Ahli waqf and the relevant disputes which ensued between the beneficiaries of those awqaf, the diminution of their share with the passage of time, the corruption of nazirs in most cases, the waqifs arbitrary measures in respect of the beneficiaries' share in the proceeds, the low productivity of the waqf assets³⁹ , the greediness of the sultans and rulers and their inconsistent policies towards waqf triggered a set of strict measures against the Ahli waqf for reformation's sake sometimes or dissolving it often as the case was in Syria, Egypt, Tunisia and Libya⁴⁰ during the second half of the 20th century.

³⁸ See Al Bayoumi Ismael Al Sherbini: Confiscation of Lands in the Islamic State, Mamluki Age, History of Egyptians, PP110-111, Cairo, Egyptian Book Public Authority, 1997, Part 2, PP12-17.

³⁹ For more details on the negative aspects of waqf see Abu Zahra: Lectures on Waqf <PP34-35. See also Mustafa Sabri: The necessity for Abrogating the Ahli Waqf. Al Muhamah, Year 7, Issue7, April 1937, PP751-754

⁴⁰ Al Waqf AL Thurri was cancelled in Syria in 1949; in Egypt in 1952; in Tunisia in 1956; and in Libya in 1973.

Despite the criticisms against the Ahli Waqf and the weightiness of those criticisms sometimes⁴¹, this waqf played a positive role side by side with the charitable waqf in supporting the institutions and activities of the Arab non-governmental community which often included a charitable share. It also inured, though after a lengthy period of time, to the poor and the needy, or to a school, a clinic, an orphanage, a fresh water facility, building a road or a bridge and other activities which contributed to the social solidarity through support extended to families, mosques, followers of religious orders and the whole society as manifested through the historical practice of waqf during the late Ottoman rule in Algeria⁴². What was said about Algeria would apply to Arab societies.

2. Economic Formation:

Waqf, in terms of its historical economic formation in the Arab Islamic society, had built itself on the most stable assets exemplified in the agricultural lands, erected buildings and some immovables approved by jurists as waqf. It had been long time before they approved the cash waqf during the Ottoman era. Late jurists approved the waqf shares once they are invested in shari'a-compliant projects. This attitude was approved by some Arab countries' legislations, for example the Egyptian law 48/1946 Art. 8, the Lebanese law issued in 1947, Art. 15, the Sudanese law # 116/1970, Art. 5, the Libyan law for 1972, Art.7 and the Qatari law # 8/1996, Art.4⁴³.

⁴¹ Especially those arbitrary conditions which waqifs put to deprive the females of the waqf proceeds. See Abu Zahra: The Termination of Ahli Waqf and the Stages it went through, Magazine of Law and Economics, Year 23, Issues1,2, June 1953, PP66-67. See also Jurist Waqf, P179

⁴² See Ahmad Mawrid: An Outline of the Historical Aspect related to Waqf Property in Algeria, PP 2-13(Unpublished research).

⁴³ Perhaps the Qatari law is the more comprehensive for the different types of awqaf such as money and securities. This law was issued in 1996 and the article provides that ' cash waqf, whether it is a property or movables, including shares , bonds and securities as long as they are invested in sharia

Waqf assets during the Prophetic era consisted of limited areas of orchards, buildings and some water wells. During the Umayyad period, waqf assets expanded and comprised shops and the like⁴⁴. As for the agricultural lands in the Arab conquered countries such as Iraq, Bilad El Sham, Egypt and Yemen there had been heated discussion about the possibilities of dedicating them among the various schools of thought. Some advocated the dedication of Kharaj lands in those conquered countries, whereas others stood against this trend. The lands of Iraq had the lion's share in this controversy⁴⁵. Following a series of administrative measures and political and economic transformation, controversy narrowed down and the attitude in favour of dedicating those lands prevailed. Some sources cited that the caliph Al Muqtader Al Abbasi (D 320 A.H) had dedicated the lands surrounding Baghdad and apportioned their annual proceeds (amounting to 100,000 Dinars) to spending on the Haramayn and Islamic ports⁴⁶. In Egypt, few agricultural awqaf came into existence during the Ikhshidi rule and expanded later⁴⁷.

During the later period of the Abbasid rule and throughout the Mamluki and Ottoman rule, awqaf covered vast areas of agricultural lands in most of the Arab countries, in addition to the other awqaf including buildings, movables, and cash waqf which started to appear in Bilad El Sham after it had become part of the Ottoman Empire at the beginning of the 16th century AD⁴⁸. It is quite likely that cash waqf appeared in the North

compliant projects. Cash waqf is approved also for advancing loans or depositing it in an Islamic bank and spending the proceeds on the beneficiaries.

⁴⁴ See Abu Zahra: Problems of Waqf, Magazine of Law and Economics, Issues 1,2, 1935, P561.

⁴⁵ For more details see Ghaidaa Katebi: Al Kharaj since the Islamic Conquests till the Mid third century A.H, Practices and Theory, PhD series, Beirut, Center of Arab Unity Studies, 1994, PP335-349. See also Ibn Rajab: Al Istikhraj li Ahkam el Awqaf, PP 56-61 and 77-80.

⁴⁶ See Bahr El Uloum: Waqf in Iraq, Historically and Administratively, P 385.

⁴⁷ For more details see Amin: Awqaf and Social Life in Egypt, PP38 and 47.

⁴⁸ See Mohammad Arnaut: Cash Waqf and its Development during the Ottoman Era, Studies in Cash Waqf, Zaghwan, Tunisia, Al Tamimi Est. for Academic Research and Information, (2001)P 82

African Arab countries, especially with the prevalence of the Abadhi school of thought which posed no obstacles to the cash waqf⁴⁹ as it was the case with the Hanafi clerics during the Ottoman era.

In short, we can say that the economic formation of waqf in the Arab countries had three characteristics, as follows:

a. The total accumulative size of the awqaf assets which took the form of set-up buildings and agricultural lands. This can be attributed to implementing the concept of perpetuating a waqf and the impossibility of dissolving it after its consummation as assumed by the majority of jurists⁵⁰, especially the Hanafi jurists' attitude in vogue in most of the Arab countries under the Ottoman rule, including Arab Maghrebi countries in which the Maliki order prevailed. They wanted to get rid of the restrictions of the Malikis in the domain of waqf, especially those areas related to Heyaza (acquisition) and Quboul (consent)⁵¹.

The historical state of affairs of the waqf system indicates that this accumulative growth had had witnessed periods of ups and downs when the Arab society faced communal turmoil and political instability. This was quite clear during the Mamluki period and occurred at a lower rate during other periods. Some sultans, rulers and princes used to confiscate awqaf for personal interests or to fund their military projects. Consequently awqaf diminished and lost their luminescence. During times of prosperity and progress, other rulers sought to reform them and restore what had been looted during past epochs as a means to stabilize their rule. This caused awqaf to prosper. This happened before the

⁴⁹ See Abdullah bin Hameed Al Salemi, *Al Aqd al Thameen: Examples of Fatawa Noor Eddin*, Cairo, Dar Al Shaab, 1332 A.H/1913 Ad, P 329.

⁵⁰ See Abu Zahra, *Lectures on Waqf*, P 70.

⁵¹ See Ahmad Qasem: *Ahbas of the early Ottomans in Tunisia and the Society of Awqaf and Inzal*, *Al Tarikhia al Maghrebia Magazine (Tunisia) Issues 37-38, June 1985, P 243.*

European colonization over the 19th and 20th centuries. With the commencement of the colonial period, waqf was subject to a great deal of recession and degeneration, especially in the North African Arab countries, Syria and Lebanon which fell under the French colonization⁵² and in Palestine under the British Mandate and under the Zionist occupation⁵³.

b. Regardless of the variation in the means of utilizing waqf assets and irrespective of the nomenclatures from one Arab country to another, for example monopoly, khulu (purchase of the lease), muzara'a, mugharasa⁵⁴ and other means⁵⁵, they carry the same connotations. They do not differ from those terms used in non-awqaf property. There were many negative aspects which resulted from using those means, especially Hikr or monopoly⁵⁶ which caused waqf to suffer in many Arab countries, especially Egypt, and it is still a source of suffering till now⁵⁷. Similarly, Istibdal was often exploited for personal interests at the expense of awqaf⁵⁸. And last was the nominal lease implemented by some Arab governments and is still in vogue in Iraq⁵⁹ and Egypt as a means to exploit waqf assets. This brought about great damage to the economic formation of the awqaf and caused their proceeds to diminish steadily.

⁵² See Mohammad Al Maliki Al Naseri: Al Ahdas AL Islamia in Morocco, PP135-136 and Mawrid :An Outline of Historical Side Related to waqf Property in Algeria,PP13-18

⁵³ See Michael Dember: The Policy of Israel towards Islamic Awqaf in Palestine, 1948-1988, Beirut, Palestinian Studies Establishment, 1992.

⁵⁴ See Ibn el Khoja: An Outline on Waqf and Development- past and present, PP178 and 198. Mohammad Redha Afifi: Awqaf and the Economic Life in Egypt in the Ottoman Epoch, History of Egyptians, 44, Cairo, Egyptian Book Authority, 1991, PP 141-204.

⁵⁵ In Tunisia it was called Inzal, Mukasara, Nasba, Muftah, Hazqa etc.. .See :Qasem:' Ahdas of Early Ottomans and the Society of Awqaf and Inzal'. PP 252-270.

⁵⁶ The contract of Hikr was established by the Moslem jurists through which a monopolist controls and dominates the land as long as he pays the standard rent. See Abu Zahra : Al Hikr, Magazine of Law and Economics, Year 10, 6/May – June 1940),PP93-104.

⁵⁷ See Ghanim: Awqaf and Politics in Egypt, PP 157-159.

⁵⁸ See : Abu Zahra' Mushkilat el Awqaf', P326

⁵⁹ About Egypt, see the same source, P477. About Iraq , see Mohammad Mustafa El Mahi, 'A Report on the Awqaf of Iraq and Means of Repairing them', P26 (Unpublished report submitted to the Iraqi government in 1937):.

The result was the failure of waqf to carry out its mission and purposes envisaged by the waqifs (dedicators).

c. The economic growth of the waqf system on the historical level meant the growth of the socio-economic sector on the one hand and a restriction imposed on the expansion of the capital market in the Arab world on the other hand. Integrating some economic resources with waqf meant getting them out of the 'market system' at the same time and being detached from its known mechanisms, especially in the area of commodities and services where the main objective of the charitable (Khairy) waqf was to provide them free of charge or for a token price. This service was carried out by special provision societies and facilities which used to provide educational, health, recreational and security services, or what may be termed as 'public commodities' which were needed by the various social categories. There were also cash and in-kind aid to some specific categories. The history of waqf abounds in such examples in the various Arab countries up to the middle of the last century⁶⁰. This was the case before the modern Arab state seized the bulk of the waqf legacy, broke it up and merged it into the normal economic cycle⁶¹ and caused the material foundation of the waqf system to suffer, taking into due account that it was the waqf system which contributed to setting up a 'common area' between the society and the state in past epochs of the history of the Arab community.

⁶⁰ See Mohammad Sherif Ahmad: *The Institution of Waqf in Iraq and its Multidimensional Role*, PP 61-92. See also Mohammad Al Manouni: *The Role of Maghrebi Awqaf in Social Integration during the Era of Bani Marin, 657-869 H / 1259 – 1465 AD*: two papers submitted to the seminar of Waqf in The Arab and Islamic World, Baghdad, ISESCO, Arab Studies and Research Center, 1403 H / 1983 Ad.

⁶¹ We discussed in detail the measures taken the government of Egypt in this regard, especially by the mid of the last century in our book '*Awqaf and Politics in Egypt*'. What happened in Egypt is similar to what happened in other Arab countries such as Iraq, Syria, Algeria, and Tunisia flagrantly in 1956.

The point which remains pending is that the objective assessment of the economic formation of the waqf system and its effect on the Arab national economy will remain out of reach as long as the accurate statistics are absent in most of the Arab countries. Even when such statistics are available, though in very limited cases, they are not available to researchers. Thus it is rather difficult to adopt either of the attitudes connected with the controversy on waqf and its economic role during the first half of the 20th century, i.e., the opinion in favour of waqf and its economic role, highlighting its impact on individuals, families and the society as a whole vis-à-vis the other opinion which undervalued this role and its negative impact on both the social and economic levels⁶². It seems that the proponents of each attitude rely on intellectual visions rather than on real and accurate statistics.

Third: Institutional and Administrative Structure of the Waqf System and Problems of its Development

The institutional and administrative structure of the waqf system for the Arab society had gone through a chain of developments which unveiled two basic types. The first type is the individual management (familial type) which was characterized by extreme decentralization. This type was

⁶² For more details see Ali Al Khafif: *Al Waqf el Ahli, Its Origin, Legality, demerits, Dissolution and Reform*, Magazine of Law and Economy, Year 10, Issues 3&4, March – April 1940, PP 1-52. Regarding the case in Syria, See the Message of the Group of Scholars of Damascus in nullifying the message of Sheikh Ramiz el Mulk, Damascus, Al Tarakki Printing Press, 1375 H / 1955 AD. See also J N D Anderson, "Recent Developments in Shari'a Law IX," *The Moslem World*, Vol 62, Part 4., 1952, P257, and Jeffrey A. Schoenblum, "The Role of the Legal Doctrine in the Decline of the Islamic Waqf: A Comparison with the Trust." *Vanderbilt Journal of Transnational Law*, Vol 32,(1999), P 1208.

common throughout the historical stages. The second type was the governmental type with all its centralized bureaucratic complications which exists nowadays as embodied in the Ministries of Awqaf in most Arab countries. Though the two types are going side by side in some countries, especially those that still sanction the Thurri waqf, for example Saudi Arabia, Kuwait, Yemen, Lebanon, and Morocco, the type of the individual (or familial) management no longer exists in other countries which nullified the Thurri waqf, such as Egypt, Syria and Libya.

The administrative structure of waqf was simple during the early stages of its emergence in the Arab society during the first century A.H. Thereafter, it had been subject to many developments due to many reasons, Ahead of which were the increasing number and accumulation of awqaf with the passage of time, the expanding social practice in the operations of waqf and the fact that many social institutions and public utilities were linked to waqf. This gave rise to specific classifications of awqaf and the growth of institutional administrative structures for managing the affairs of each specific type. Historical resources show that the first 'Diwan for Ahbas was established by Hisham Ibn Abdul Malek. Another similar Diwan for Ahbas followed in Basra⁶³. Neither of them was detached from the judge's management. Since that time, awqaf had been subject to the general jurisdiction of the judge⁶⁴, even after the establishment of ad hoc diwans whose chiefs and employees were not from among the judges, starting from the first half of the 4th century A.H⁶⁵ to the beginnings of modern times. Here awqaf started to gradually get out of the judiciary jurisdiction as a result of the transformations in

⁶³ See Amin: Awqaf and the Social Life in Egypt, P 48, and Abdul Malek Al Seyed: Management of Awqaf in Islam' A paper submitted to Jeddah Seminar on Investing Waqf Property , 20/3/1404 to 2/4/1404 H / 24/12/1983 – 5/1/1984, Edited by Husain Abdullah Al Amin, Edition 2, Jeddah, IIRT, 1994, P315.

⁶⁴ See Ghanim's: Awqaf and Politics in Egypt, PP56-58.

⁶⁵ See Amin: the same source

law and legislation and the process of building the modern state during the 19th and 20th centuries.

It is a historical fact that Ahbas (Awqaf) Diwans were established in the Arab major cities as early as the Umayyad era up to the Ottoman era and till the last two centuries which witnessed the establishment of Awqaf Ministries, it should be said that such organizations were not of a permanent nature and they did not manage all awqaf but they were limited to specific types which were found more appropriate to be put under the control of some of these diwans. An example of this were the 'de jure awqaf' during the period from the Umayyad era to the Mamluki era whose management inured to the judiciary through a condition set by the waqif or for any other reason required by necessity. They included the awqaf whose proceeds were applied to the Holy Haramayn or to other charitable purposes⁶⁶. There were also the 'Awqaf al Sultania' (Sultan's Awqaf) which included the awqaf of the rulers and some of their entourage. A special Diwan for such awqaf remained in some Arab countries, like Egypt, for several decades after the end of the ottoman era. The greatest part of the awqaf remained under the control of individual nazirs where a nazir might take charge of several minor awqaf at a time. With respect to big awqaf, sometimes it was necessary to create a complete administrative staff to manage them under the supervision of the nazir or Mutawelli. This staff included many other supervisory, financial, legal and technical jobs⁶⁷. Consequently there were institutional

⁶⁶ Regarding this subject see Al Sherbini: Confiscation of Property in the Islamic State; Mamluki Sultans

⁶⁷ For more details about the administrative structure of awqaf during the Ottoman era, see Afifi: Awqaf and the Economic Life in Egypt during the Ottoman Rule, PP81-140. About Algeria, see Nacereddine Saidouni: Staff of Algerian waqf during the late Ottoman Rule. Magharibi Historical Magazine, Year 18, Issues 57-58, July 1990, PP 175-192.

non-governmental departments with their internal regulations, traditions and routine which were followed by the next generations.

Talking about the positive side of the individual or familial administration of awqaf and how they were adapted to the particularities of the socio-economic formation of awqaf as shown previously, we can talk about the negative sides of this sort of management and its stagnation for lengthy periods of time. Such a task requires specialized and deep researches. Nevertheless, we confirm here that the vast expansion of waqf in the various parts of the Arab world and the emergence of small, medium or big administrative structures - governmental or non-governmental - to attend to awqaf and represent their juridical personality have contributed, though to a limited range, to the popularity of the regular institutional work in the social domain on the one hand and at the same time assisted in establishing the principles of accountancy, though at a limited level, among vast sectors of the society engaged in waqf and its management. It also boosted the principle of self-management and local management. It had also checked the stretching of governmental bureaucracy to the minute details of the social life⁶⁸.

Before the rise of the governmental awqaf central departments in modern times (Ministries and authorities), the principle of self-management was the determinant in managing waqf in most of the Arab historical epochs. The basics of this principle were highlighted mainly in the distance spanning the waqif's conditions to the judge's powers⁶⁹.

Historically speaking, the efficiency of waqf management was contingent upon the adherence to the waqif's conditions and the unbiased and

⁶⁸ The principles of institutional work, accountancy and self-operation did not develop for many reasons which had nothing to do with the waqf system and mismanagement, but rather with the general backward state which hit the Arab society as a whole during the age of deterioration and imperialism.

⁶⁹ Regarding the powers of the judge in managing the awqaf, see Khalid Shuaib: *Nazara on Waqf*, A PhD thesis, University of Azhar, Faculty of Sharia and Law, 1421 A.H /2000 Ad, PP 70,72 and 272

autonomous judiciary in dealing with awqaf⁷⁰, the clarity of the waqf juridical personality and respecting its inviolability. Within this framework, the traditional management of awqaf was formed on the dominance of the decentralized (individual) familial type over the institutional (diwani) type which was linked to specific awqaf, with the judiciary supervising both types.

Reflecting on the state of affairs, we find that no radical changes have been introduced to that traditional formation of the waqf management in the Arab countries up to the beginnings of our modern times. The 19th century and the first half of the 20th century have witnessed sporadic (and incomplete) attempts to establish a governmental central department for waqf, including the diwani established by Mohammad Ali Pasha in 1835 and remained operative till 1838. It was re-established during the reign of Abbas I in 1851 and then it had gradually changed into a ministry starting from 1913. Another example is the Society of Ahbas (Awqaf) in Tunisia which was established by Khaireddine Al Tunisi in 1894 AD / 1291 A.H⁷¹, the Department (Bunaiqa) of Ahbas established by the Sultan of Morocco in 1912⁷², the Department of Awqaf established by the Imam of Yemen in 1919 AD⁷³, and the Department of Awqaf in Iraq which was established in 1921⁷⁴. The Arabian Peninsula countries and Bilad El Sham established departments or supreme authorities for Awqaf during the first half of the last century. These departments were mostly converted into ministries within the bureaucratic governmental system as the case was in

⁷⁰ Judges were known for their impartiality and autonomy throughout most of the historical periods> Nevertheless some judges of the Mamluki age acted in connivance with the oppressive princes who encroached on the sanctity of awqaf. A minister of Sultan Barquk was quoted as saying, " If I had lived, me and the judge Mohieddin Al Hanbali, there will be no waqf left in your country". See also Al Sherbini: Confiscation of the Islamic State Property: The Age of Mamluki Sultans, PP 2 & 23.

⁷¹ See: Qasem: Ahbas of Early Ottomans in Tunisia and the Society of Awqaf and Inzal, PP 251-252.

⁷² See Al Naseri: Islamic Ahbas in Morocco, P25.

⁷³ See the paper of Mohammad Al Maidani about the awqaf in Yemen which was submitted to Jeddah seminar (20/4/1404 A.H / 24/12/83 – 5/1/84) P408. -

⁷⁴ See Awqaf Leaflet for the year 1958, Baghdad: The General Department of Awqaf, P12.

most other Arab countries, with the exception of Tunisia which cancelled the waqf system altogether in 1956.

The current status of awqaf in the Arab countries reveals the retreat of the traditional management (Ahli) of waqf and the prevalence of the governmental management. The following table shows the major differences between both types, citing some exceptions in those properties in some countries:

Table 2/1
The Main Properties of the Traditional Management
and the Modern Management

Type	Traditional: Individual – Nazir	Modern: Ministry – Authority – Trust Department
Major characteristics	<ul style="list-style-type: none"> -Individual (Familial (Ahli) - Hereditary jobs - Organized through waqif's conditions -Decentralized Self-operation -Having no unified accountancy system -Supervised by the judge 	<ul style="list-style-type: none"> - Governmental (institutional) -Public jobs -Organized by Governmental by laws -Bureaucratic central operation -Having a unified accountancy system Subject to many supervisory agencies

The process of switching from the extreme decentralized system to the traditional type exemplified in a nazir to the extreme decentralized system of the modern type exemplified in the governmental ministries and authorities took place without passing through an intermediary system, for example boards of NGOs or private institutions. However, there were some exceptions in Egypt since the end of the 19th century and during the first half of the 20th century. There were some awqaf which were run by the boards of some NGOs, for example the Islamic Charitable Society, The

Society of Al Urwatul Wuthqa, the Society of Al Masa'ie al Mashkooa⁷⁵, or by boards formed as per the waqif's recommendations. These boards did not differ from the board of a company or society except in few things. This development was led by a number the social elite from among the politicians and major landlords such as Ali Pasha Sharaawi⁷⁶ (member of the Legislative Council and member of the Egyptian delegate of the 1919 revolution). This development, however, came to an end after the July 23, 1952 Revolution. The state seized the waqf system completely and this action brought the state's intervention to its culmination when the waqf was merged into the governmental bureaucracy.

There are other reasons which pushed the Arab modern state (in the pre – colonial and post-colonial periods) to intervene with the awqaf, namely:

- The pressures of the colonial authority during the pre-colonial period and the interest in breaking up the waqf system which they claimed to have been suffering from confusion and negligence⁷⁷. This caused the governmental authorities in Egypt, Morocco, Syria to establish governmental departments to oversee the waqf, repair it and protect it from any foreign intervention.
- The strong central trend of the Arab modern state towards controlling the various activities of the civil society and regulating its bureaucratic governmental institutions. The enormous size of the awqaf and the multiplicity of the institutions linked to them fuelled the state's interest to control them as it was the case in Egypt, Iraq and Algeria.
- The prevalence of the nazirs' corruption in general, and the Ahli waqf in particular, the numerous grievances filed by the beneficiaries and their accumulation for lengthy period of time and the disputes among the

⁷⁵ See Ghanim: Awqaf and Politics in Egypt, PP240-242, 251-263.

⁷⁶ See the same source.

⁷⁷ See Mohammad Zahed al Kawthari: Kawthary articles (Cairo ,Al Azharyya Turath bookshop, 1994, PP 204 &210.

beneficiaries of the same waqf affected the non-governmental management and overburdened the judicial system.

- Some members of the ruling junta who adopted the revolutionary socialist attitudes in some countries believed that keeping awqaf outside the state dominance would disrupt the social and economic reform programmes. Consequently they resorted to the seizure of awqaf and subjugating them to agrarian reform and nationalization laws⁷⁸. This state of affairs had many replicas, though at different levels, in Syria, Egypt, Iraq and Algeria. The waqf sector, following all these developments, was re-structured and became part of the governmental sector.

With this intervention of the modern state in running the awqaf which did not follow a harmonized format in mind, the objective result of such an intervention could be the same in all cases. The major parts of waqf were subjugated to a central governmental department (ministry, authority, supreme council or public foundation). In other countries, these agencies may bear different names, for example the National Awqaf Institution in Mauritania and the Department of Awqaf at the Ministry of Justice in Djibouti.

In order for the modern Arab state to consolidate its hold on the management of awqaf, some laws provided that the supreme chairman of those agencies should be appointed the head of the state. In some cases, the chairman could be the head of the state himself as it is the case in Iraq since 1970⁷⁹.

A long time which may exceed a century in some cases after this intervention, the results which have been realized are still very poor

⁷⁸ About Egypt See Ghanim's *Awqaf and Politics in Egypt*, PP 460-475. About Algeria see Mawrid: *An Outline of the Historical Side of Waqf Property in Algeria*, P 17.

⁷⁹ Article 1 of the Iraqi Waqf Diwan 44/1970 stipulates that the president of the Republic is the supreme Chairman of the Waqf Diwan. See *Instructions related to awqaf: Baghdad, Local Administration Printing Press, 1972, P 67*

because there had been no tangible improvement in the productivity of awqaf or in maintaining them⁸⁰ with the exception of Kuwait Awqaf Public Foundation's experience since its establishment in 1993. The waqf sector in most countries is still regarded as the lowest one and its ability to attract efficiencies is limited. The ministries of awqaf are not among the esteemed ministries in any Arab cabinet formation. Moreover, this sector is still suffering from many other problems more than any other governmental department. The problems may be put down as follows:

- **Weak Performance**

This problem is quite clear in the slumping proceeds of the waqf assets if compared to similar non-waqf properties⁸¹. This is a chronic problem inherited from the traditional management of awqaf and may account for the state's intervention to modernize awqaf in the hope of overcoming this problem. Nevertheless, the problem is existing and if we try to analyze it from an administrative perspective, we find that there are no specific criteria for holding a job in the waqf sector which is prevalent in the various governmental departments. Training and rehabilitating courses are poor. With the prevalence of this negative image, it could be a means to punish undesired employees or taken as an opportunity to get a job there when it is difficult to find this job anywhere else.

- **Corruption**

It is the old and modern problem in the waqf sector. It accounts for the failure of the waqf system to perform its social functions, distorted its image and attenuated its financial structure due to the thefts,

⁸⁰ See Fuad A. Al Omar: The Contribution of Waqf to the Non-Governmental Work and Social Development, Series of Winners of KAPF International Waqf Contest, KAPF, 2000, P 70.

⁸¹ This is not attributed to weak performance only but there are other reasons, some of which are legal , for example the fact that lease contracts should not be reviewed though they were concluded long time ago though the rent is very low. See an interview with Mr. Mohammad Habash in Al Mustaqilla, 23/3/1998

embezzlement, assault, and injustice in distributing the proceeds and the breach of trust.

The corruption of the waqf nazirs was the main cause of the waqf suffering and those who advocated its dissolution took this as a pretext for such dissolution to get rid of the nazir's dishonesty and corruption⁸². In many cases, corruption continued to exist, and worse it was converted into an institutional corruption⁸³ which is more rampant and more detrimental than the individual corruption of the nazir. Waqf had always been regarded as 'a money having no owner', taking into account the weak control and the inadequate accountancy systems of the Arab governmental departments in general.

We believe that the theory of jurists which lasted for several centuries in favour of the honesty of a nazir⁸⁴ and which they built on pure morals provided an ample chance the outbreak of corruption. In questioning a nazir, they limited this questioning to what a nazir has submitted in terms of documents and reports and were content with swear that the deeds and words were all true and valid. A nazir was never taken to task unless in extenuating circumstances. This naturally led to immoral acts which left their impact on the waqf system. Modern techniques and by-laws set by the government failed to bridge that gap. There were often legal loopholes which made the process of addressing corruption even more difficult than in the past, and made corruption to survive longer and stretched its negative aspects. Sometimes it took the relevant department

⁸² See Ahmad Hasan Al Baqouri: Remainder of Memories, Al Ahram Translation Center 1988 , PP121-122. There are other studies which indicated this subject, for example Schoenbum,;The Role of the Legal Doctrine of the Islamic Waqf: A Comparison with the Trust,PP1222 and 1227.

⁸³ Regarding the analysis of the institutional corruption if compared to the individual corruption of the nazir, see Ghanim's Awqaf and Politics in Egypt, PP 494,495,509-511. See also Hamilton Jibb and Harold Borin: Islamic Community and the West: Translated by Ahmad Abdul Rahim Mustafa; History of the Egyptians, Part 2,PP 327-332

⁸⁴ See Al Emadi: A thesis on the different attitudes towards the right of Resort granted to the nazir on the Beneficiaries. See also Ahmad Ibrahim: Waqf , its Regulations, Cairo, Wahba Bookshop, 1944, P 181

ten years to decide on one single case of corruption, for example the Hassir Deal (Mats Deal)) which took place in Egypt at the beginning of the eighties⁸⁵ .

c. Backward Information, communications and Archiving Systems

Systems are still primitive in most of the Arab countries. They rely mainly on manual work and often subject to old laws and regulations which were issued long time ago which no longer cope with the modern life developments utilizing fast modern technological means. The waqf sector has been integrated into the modern state's administrative system about half a century ago in most countries, yet it is still the most backward system in terms of reform and administrative modernization. Stacks of files and documents are still left to the rodents which cause great damage to them in stead of providing a modern system for storage and retrieval⁸⁶ . It is true that some countries have modernized their awqaf through the introduction of Information Technology, such as Kuwait and some other Gulf countries⁸⁷ . Other countries are attempting to catch up with such modernization process, for example Egypt⁸⁸ and Algeria⁸⁹ . These efforts are still insufficient at the Arab countries level in general and the governmental management of waqf is still confronting many intricate problems, for example the absence of comprehensive

⁸⁵ See Ghanim: the same source., P 497

⁸⁶ We have seen part of the said scene at the Diwan of the Ministry of Awqaf in Egypt just before few years. The same occurs in other Arab countries. Regarding Iraq, see Al Mahi: Awqaf of Iraq and Reforming them. P 7.

⁸⁷ Dr. Fuad Al Omar thinks that the small area of the Gulf countries, Saudi Arabia excepted, have minimized the problem of counting those awqaf and registering them. See Fuad Al Omar; The Institutional Structure of Waqf in the Arab Peninsula countries, Chapter 14, P 583. KAPF had already developed a comprehensive IT system which will soon start operating.

⁸⁸ The Egyptian Ministry of Awqaf has been working on a project for up keeping the waqf documents on the microfilm in conjunction with Al Ahram for about 10 years and it is about to be finished.

⁸⁹ In 1988 The Awqaf Directorate in Algeria contracted with a private company to count the waqf property. The cost of the project is about 120,956,530 Algerian pounds. See the Counting of Waqf Property prepared by Al Manar, 1988, P 10 9(Unpublished research).

counting of waqf assets and documents, the lengthy periods which law courts usually take to decide on a waqf case

D. Politicizing the Upper Waqf Management:

This problem is embodied in more than one aspect, for example we find the Minister of Awqaf either in Egypt, Syria or Morocco embraces, by virtue of his job, political powers as a member in the Council of Ministers, and at the same time holds administrative powers exemplified in being the nazir of the awqaf belonging to his ministry. He is forced to adopt the policies of the government in connection with his ministry. In many Arab countries, the minister puts the full symbolic and material potentials of waqf at the disposal of the political authority⁹⁰ even if this sometimes goes beyond the shari'a regulations of waqf or changing the channels of spending contrary to what the waqifs provided.

On the other level, we find that the problem of politicization impinges with the idea of waqf due to the state of instability to which many Arab countries are subject and what it brings about in terms of reshuffles. Quite often the Minister of Awqaf is removed and with the new minister all the projects and plans would be reviewed. Some of them would be amended or cancelled and here a state of confusion takes place. Then the minister is changed and the state of confusion crops up again and so forth⁹¹. The intervention of the modern Arab state in the management of waqf shows that the abuses of such an intervention are heavier than its benefits as far

⁹⁰ See Ghanim's *Awqaf and Politics in Egypt*, PP 475-476. The Syrian Minister of Awqaf once said' the aim behind the existence of the ministry is to support the process of modernization of the state and to perform its duties under the patronage of the President. *Ministry of Awqaf – Syria: Awqaf Past and Present (Syria)*, P 23

⁹¹ This has been the case of awqaf in all Arab countries for more than half a century.

as the waqf system is concerned, but we share Dr. Fuad Al Omar⁹² his attitude that we cannot shun the role of the state in the organization of the awqaf. This question needs deep reflection and consideration to come up with the accurate restrictions which govern the state in this sector and the boundaries of this role. Here we may raise the question about the criteria which govern the appointment and dismissal of the Minister of Awqaf, the body in charge of assuming such a responsibility and if it is fair to subjugate the Minister of Awqaf to the same restrictions being observed in the case of other ministers.

The point here is that the current status quo of the waqf system in the Arab world has become in need of a lot of reformation and development programmes in order to rid it of its problems, either those inherited from the past practices or those which emerged during the last decades. Once such steps are taken, there would be an ample chance for carrying out its effective role in establishing the Arab civil society institutions and resume its historical role in supporting the common areas shared by the state and community.

Conclusion

The historical formation of waqf from its legal, jurisprudential, social, economic, administrative and institutional sides confirm that this system, as early as its establishment, has occupied a key location in the heart of the Arabic and Islamic socio-political make-up. The continued social practice of the 'ongoing charity' reputed in history as 'waqf' or 'Habs' has been converted into a subsidiary civil social system with condensed relations with the rest of the general social system in the Arab society.

⁹² See Fuad Al Omar: 'Contribution of Waqf to non-Governmental Work and Community Development'.

Within the framework of such a status, the historical function of waqf, during its heyday, was to contribute to the creation of a common area between the nation and the state or between the community and the authority of the government deemed in the interest of both together. Its performance would never have failed to assume that role had it not fallen

victim to squalor and turpitude, greed of the authority or a combination of corruption and avarice.

When the Arab country during the last century managed to merge waqf into the governmental bureaucracy, and shifted it from its original domain to the political domain in the modern sense, the result was a failure in performing that historical mission. It was distorted by being put under a flabby governmental control which failed in activating its role and breaking the stalemate in most of the Arab countries.

There are other aspects which stand in need of study and analysis to identify the cases of this system in the Arab world, in addition to its future prospects. The historical studies in this context should not be a means to recall the past glories but to acquire lessons and utilize them in planning for the future. We do not claim that we have given this side enough attention in this research. If it was our aim to cast one look at the past, this was because we wanted to cast two looks at reality and many other looks into the future.

A Look into the Past

The essence of the historical legacy of waqf shows that its solid nucleus is the ongoing charity out of which the jurists, with their different schools of thought, authenticated this concept and expatiated upon its relevant

rules and regulations which prevailed throughout the history of Arab societies. The major factors for the activation of this system is represented in the 'observance of the waqif's intent', 'the jurisdiction of the judiciary system', and the 'juridical personality of waqf'. Social practice had caused three main highlights to emerge in case of its activity: *institutionalism, autonomy of funding and management and administrative and functional decentralization.*

Two Looks into Reality

- The first look is directed to the current status of the waqf system from the various sides to identify what is actually existent. This means, inter alia, conducting statistical surveys of the waqf assets, with all their relevant data, together with gathering all documents, classifying and archiving them, establishing a data base through a computerized means so that they could be easily accessible to students, researchers and academic centers. Such measures will be helpful in organizing waqf issues and questions in a scientific and academic way as a top priority for such agencies.

- The second look aims to open the door for jurisprudential and social debate and encourage jurisprudential and legal *ijtihad* concerning the various social, economic and organizational aspects of waqf, and its network with the general social system and the governmental bureaucracy in particular in the Arab world. This is to be carried out in conformance with a list of the issues to be prepared in each country by a group waqf-interested people and other waqf, civil society and social work specialists and experts. It is high time to see an annual report on awqaf released in the Arab world, laying emphasis on their reality, diffusing waqf culture and casting light on successful experiences, developing new waqf

models, providing a weighty material which urges governmental and non-governmental agencies, even individuals, to observe and activate them.

A look into the Future

Reflecting on the relation of the society with the state in the Arab world on the backdrop of the political and economic reform and with the surge of interest in the non-governmental and civil society activities, we expect to see the waqf system receiving more support than ever to go Ahead with its contributions through innovative and developed formulas in order to fulfill the emerging social needs. Thus, it is important to view the near future with more thoughtfulness in connection with what may be carried out at the local or Arab levels. Following are some of these ideas:

- There is a dire need to remove the legal hindrances which impinge on the efficacy of waqf in performing its function not only due to the current waqf laws, but also to other relevant laws (for example the non-governmental societies and NGO's), together with exerting the efforts to recover the assets which were seized in the past. There should be media campaigns to encourage people to establish new awqaf, along with introducing programmes of institutional development to waqf cadres and adopting new technology in their management. A subject dealing with waqf and non-governmental work should be integrated into to the various stages of education.
- Businessmen and rich benefactors may establish collective governmental and non-governmental awqaf in each country or among several countries whose main objective is to improve relations between waqf and the non-

governmental work institutions, besides extending support to them to establish projects connected with educational, health, services, etc.. This is expected to check the foreign infiltration in the Arab world which usually attacks those countries under the guise of funding those institutions.

- It is improper for many Arab governmental waqf authorities to remain as they are now amid this bureaucratic and flabby management and to fail in issuing a respectable annual report to document their achievements in the area of waqf and to circulate the same to the public, urging them to take positive initiatives to activate their social role in serving the state and the society.
- There are numerous indicators that the waqf system in the Arab world is a viable system which still carries the seeds for any future survival and development

